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UNITED STATES
v.
BURR. [FN1]

FN1 For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron Burr, see footnote to Case No. 14,692a.

Circuit Court, D. Virginia.

June 13, 1807.

At law. Motion for a subpoena duces tecum directed to the president of the United States.

Tuesday, June 9, 1807. The grand jury were adjourned to the following Thursday.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

1. Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

2. A subpoena may issue to the president of the United States to compel his attendance as a witness, and an accused person is entitled to it of course.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

3. A subpoena duces tecum may issue to the president of the United States, directing him to bring any paper of which the party praying it has a right to avail himself as testimony.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

4. In Virginia, a motion for a subpoena duces tecum is to the discretion of the court; and as a legal means of obtaining testimony it cannot be regularly opposed by the opposite party in his character as such.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

5. A motion to the discretion of a court is a motion not to its inclination, but to its judgment, which is to be guided by sound legal principles.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

6. The court has no right to refuse its aid to motions for papers to which the accused by be entitled, and which may be material to his defense.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

7. An accused person has the right, before indictment found, to compel, by way of precaution, the production of letters containing statements of his conduct written by the person who is declared to be the essential witness against him.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

8. And in such case he is entitled to the production of the original letter, a copy not being sufficient.

CRIMINAL LAW--SUBPOENA DUCES TECUM--TIME OF ISSUE--TO PRESIDENT--RIGHT TO--MATERIALITY OF EVIDENCE.

9. Where it does not affirmatively appear that letters and executive orders in the hands of the president of the United States which may be material to the defense of an accused contain any matter which it would be imprudent to disclose, a subpoena duces tecum will issue. The fact that such letters and orders may contain matter not essential to the defense, and which ought not to be disclosed, will appear on the return.

***30** Mr. Burr then addressed the court. There was a proposition which he wished to submit to them. In the president's communication to congress, he speaks of a letter and other papers which he had received from Mr. Wilkinson, under date of 21st of October. Circumstances had now rendered it material that the whole of this letter should be produced in court; and further, it has already appeared to the court, in the course of different examinations, that the government have attempted to infer certain intentions on my part from certain transactions. It becomes necessary, therefore, that these transactions should be accurately stated. It was, therefore material to show in what circumstances I was placed in the Mississippi territory; and of course, to obtain certain orders of the army and the navy which were issued respecting me. I have seen the order of the navy in print; and one of the officers of the navy had assured me that this transcript was correct. The instructions in this order were, to destroy my person and my property in descending the Mississippi. Now I wish, if possible, to authenticate this statement; and it was for this purpose, when I passed through Washington lately, that I addressed myself to Mr. Robert Smith. That gentleman seemed to admit the propriety of my application, but objected to my course. He informed me that if I would apply to him through one of my counsel, there could be no difficulty in granting the object of my application. I have since applied in this manner to Mr. Smith, but without success. Hence I feel it necessary to resort to the authority of this court to call upon them to issue a subpoena to the president of the United States, with a clause, requiring him to produce certain papers; or, in other words, to issue the subpoena duces tecum. The attorney for the United States will, however, save the time of this court, if he will consent to produce the letter of the 21st October, with the accompanying papers, and also authentic orders of the navy and war departments.

Mr. Hay declared that he knew not for what this information could be wanted; to what purpose such evidence could relate; and whether it was to be used on the motion for commitment or on the trial in chief.

Mr. Burr, Mr. Wickham, and Mr. Martin *31 observed that perhaps it would be used on both, according as circumstances might require.

Mr. Hay declared that all delay was unnecessary; but he pledged himself, if possible, to obtain the papers which were wanted; and not only those, but every paper which might be necessary to the elucidation of the case.

After considerable of conversation between counsel as to the objects of applying for the subpoena, and the probability of obtaining the papers without it, Mr. Wickham remarked that as to the order from the navy department, a copy might be sufficient, but as to Wilkinson's letter, 'We wish to see itself here; and surely it may be trusted in the hands of the attorney for the United States.'

Mr. Hay then said: It seems, then, that copies of papers from the government of the United States will not be received! After such an observation, sir, I retract everything that I have promised; let gentlemen, sir, take their own course.

Mr. Wickham explained, disavowing any insinuation against the fairness of the conduct of the government. But he wanted the highest possible degree of evidence, and to confront General Wilkinson with his own letter.

Mr. Hay was satisfied with the explanation, and renewed his promise to apply for the papers if the court deemed them material.

After some further conversation which did not result in any arrangement satisfactory to Mr. Burr's counsel----

The CHIEF JUSTICE said: If the attorney for the United States is satisfied that the court has a right to issue the subpoena duces tecum, I will grant the motion.

Mr. Hay. I am not, sir.

CHIEF JUSTICE. I am not prepared to give an opinion on this point, and therefore I must call for argument.

After some further conversation, the court adjourned.

Wednesday, June 10, 1807.

The court met according to adjournment. The

subject of the subpoena duces tecum was resumed.

The following affidavit, drawn up and sworn to by Mr. Burr, was read in support of the motion for the subpoena.

'Aaron Burr maketh oath, that he hath great reason to believe that a letter from General Wilkinson to the president of the United States, dated 21st October, 1806, as mentioned in the president's message of the 22d January, 1807, to both houses of congress, together with the documents accompanying the said letter, and copy of the answer of said Thomas Jefferson, or of any one by his authority, to the said letter, may be material in his defence, in the prosecution against him. And further, that he hath reason to believe the military and naval orders given by the president of the United States, through the departments of war and of the navy, to the officers of the army and navy, at or near the New Orleans stations, touching or concerning the said Burr, or his property, will also be material in his defence.

'Aaron Burr.

'Sworn to in open court, 10th June, 1807.'

Upon this motion a protracted debate arose, occupying two entire days, and extending into the third, in which the motion was supported by Messrs. Wickham, Botts, Randolph, Martin, and Burr, and opposed by Messrs. Hay, MacRae, and Wirt. Much ability and eloquence were displayed on both sides. But few points of law were contested in the argument, and these are all clearly stated in the opinion of the court, which is here given in full. The arguments turned more upon the propriety of granting the motion, than upon any strictly legal question; although the right of the accused to apply to the court for process to obtain any testimony whatever, at this stage of the case, was denied by the counsel for the United States. The discussion took a wide range, and the course of the government towards Col. Burr, and the conduct of Gen. Wilkinson in respect to him, were animadverted upon with much severity by counsel for the defence, and zealously defended by the counsel for the United States.

On the part of the prosecution it was insisted that the subpoena was unnecessary, because certified copies of any documents in the executive departments could be obtained by a proper application. It was said to be improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national safety. It was argued that the documents demanded could not be material to the defence, and objected that the affidavit did not even state, in positive terms, that they would be material.

On the part of the defence it was denied that any affidavit whatever was necessary to support the motion. The proposition that the president could withhold a paper material to the defence, merely because it contained confidential communications, was denied, and pronounced wholly untenable in law. If the letter contained state secrets which it would be inconsistent with the public safety to disclose, the president could say so in the return to the subpoena; but it was not to be assumed until he did say so. Or, if the letter contained anything of a confidential character, not relating to the case, the president could point out such parts as he did not wish to have exposed, and they need not be read in court. A copy of the letter, it was said, would not answer the purposes of the defence. Gen. Wilkinson was admitted to be the witness upon whom the prosecution mainly depended. His relation to the prosecution ***32** was such, that he had the strongest possible motive for bolstering it up; and if he failed in it, he would himself sink into irreparable disgrace. When he should come upon the stand to sustain a prosecution in which he had so much at stake, it might be of the utmost importance to confront him with his letter in his own handwriting. A copy would not do, because he might deny it; and no confidence was reposed by the defence in his integrity. The contents of the letter were only known to the defence in so far as they had been divulged by the president in a communication to congress. In that communication the president had stated that he had received a letter from Gen. Wilkinson in relation to the transactions of Mr. Burr, 'of whose guilt,' he says, 'there can be no doubt.' The president was severely censured (by Mr. Randolph) for thus assuming the functions of a judge, and pronouncing judgment against Mr. Burr in transacting his executive duties. The president

had stated in said communication that Gen. Wilkinson had written at large to him respecting Mr. Burr. The defence wanted this letter, and had no doubt that in some of those things which Gen. Wilkinson had stated to the president, they would be able to trip him up.

As to the orders of the war and navy departments, it was said that certified copies would answer. But the secretary of the navy had already refused to furnish copies to one of Mr. Burr's counsel, on an application to him therefor, and they could not run the risk of another refusal. One of these orders (or what purported to be one) had been published in the Natchez Gazette, and it amounted to an order calling forth a military force to attack Mr. Burr and his associates, and destroy their property. It was contended that the president had no legal or constitutional power to issue such an order as this was represented to be; if an unconstitutional and illegal order had been issued to destroy and man and his property, that man was justified in resisting it. Authenticated copies of these orders, therefore, might be necessary to defend Mr. Burr against any attempt to prove that he had resisted, or made any preparation to resist, the military forces called forth against him. If no orders had been issued calling forth a military force to attack him, then he had a right to resist any such force as being a mere unauthorized mob. On these grounds it was of the utmost importance to the defence to know exactly what orders had been issued in relation to Col. Burr.

At the close of the discussion Mr. Hay said he had in his possession a copy of the very paper which had been so denounced by the counsel for cruelty and severity; the order issued by the secretary of the navy, which he proposed to read in order to show that there was no such thing in it. The opposite counsel desired to look at the paper, to ascertain whether it was the same they had seen in the Natchez Gazette; but Mr. Hay refused to let them take it. He finally put it up again, declaring that he believed it to be the same, but gentlemen did not want it to be read.

Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

MARSHALL, Chief Justice.

The object of the motion now to be decided is to obtain copies of certain orders, understood to have been issued to the land and naval officers of the United States for the apprehension of the accused, and an original letter from General Wilkinson to the president in relation to the accused, with the answer of the president to that letter, which papers are supposed to be material to the defence. As the legal mode of effecting this object, a motion is made for a subpoena duces tecum, to be directed to the president of the United States. In opposition to this motion, a preliminary point has been made by the counsel for the prosecution. It has been insisted by them that, until the grand jury shall have found a true bill, the party accused is not entitled to subpoenas nor to the aid of the court to obtain his testimony. It will not be said that this opinion is now, for the first time, advanced in the United States; but certainly it is now, for the first time, advanced in Virginia. So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive. That would be the inevitable consequence of withholding from a prisoner the process of the court, until the indictment against him was found by the grand jury. The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. It is not doubted that a person who appears before a court under a recognizance, must expect that a bill will be preferred against him, or that a question concerning the continuance of the recognizance will be brought before the court. In the first event, he has the right, and it is perhaps his duty, to prepare for his defence at the trial. In the second event, it will not be denied that he possesses the right to examine witnesses on the question of continuing his recognizance. In either case it would seem reasonable that he should be entitled to the process of the court to procure the attendance of his witnesses. The genius and character of our ***33** laws and usages are friendly, not to condemnation at all

events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial. The objection that the attorney may refuse to proceed at this time, and that no day is fixed for the trial, if he should proceed, presents no real difficulty. It would be a very insufficient excuse to a prisoner, who had failed to prepare for his trial, to say that he was not certain the attorney would proceed against him. Had the indictment been found at the first term, it would have been in some measure uncertain whether there would have been a trial at this, and still more uncertain on what day that trial would take place; yet subpoenas would have issued returnable to the first day of the term; and if after its commencement other subpoenas had been required, they would have issued, returnable as the court might direct. In fact, all process to which the law has affixed no certain return day is made returnable at the discretion of the court. General principles, then, and general practice are in favor of the right of every accused person, so soon as his case is in court, to prepare for his defence, and to receive the aid of the process of the court to compel the attendance of his witnesses.

The constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The eighth amendment to the constitution gives to the accused, 'in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor.' The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court. This observation derives additional force from a consideration of the manner in which this subject has been contemplated by congress. It is obviously the intention of the national legislature, that in all capital cases the accused shall be entitled to process before indictment found. The words of the law are, 'and every such person or persons accused or indicted of the crimes aforesaid, (that is, of treason or any other capital offence,) shall be allowed and admitted in his said defence to make any proof that he or they can produce by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial as is usually granted to compel witnesses to appear on the prosecution against them.' This provision is made for persons accused or indicted. From the imperfection of human language, it frequently happens that sentences which ought to be the most explicit are of doubtful construction; and in this case the words 'accused or indicted' may construed to be synonymous, to describe a person in the same situation, or to apply to different stages of the prosecution. The word 'or' may be taken in a conjunctive or a disjunctive sense. A reason for understanding them in the latter sense is furnished by the section itself. It commences with declaring that any person who shall be accused and indicted of treason shall have a copy of the indictment, and at least three days before his trial. This right is obviously to be enjoyed after an indictment, and therefore the words are, 'accused and indicted.' So with respect to the subsequent clause, which authorizes a party to make his defence, and directs the court, on his application, to assign him counsel. The words relate to any person accused and indicted. But, when the section proceeds to authorize the compulsory process for witnesses, the phraseology is changed. The words are, 'and every such person or persons accused or indicted,' &c., thereby adapting the expression to the situation of an accused person both before and after indictment. It is to be remarked, too, that the person so accused or indicted is to have 'the like process to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against him.' The fair construction of this clause would seem to be, that with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and defence are placed by the law on equal ground. The right of the prosecutor to take out subpoenas, or to avail himself of the aid of the court, in any stage of the proceedings previous to the indictment, is not controverted. This act of congress, it is true, applies only to capital cases; but persons charged with offences not capital have a constitutional and a legal right to examine their testimony; and this act ought to be considered as declaratory of the common law in cases where this constitutional right exists.

Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief, which is perceived, can be produced by it. The process would only issue when, according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpoena is made returnable; so that it becomes incumbent ***34** on the accused to be ready for his trial at that term.

This point being disposed of, it remains to inquire whether a subpoena duces tecum can be directed to the president of the United States, and whether it ought to be directed in this case? This question originally consisted of two parts. It was at first doubted whether a subpoena could issue, in any case, to the chief magistrate of the nation; and if it could, whether that subpoena could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gist of his testimony. While the argument was opening, the attorney for the United States avowed his opinion that a general subpoena might issue to the president; but not a subpoena duces tecum. This terminated the argument on that part of the question. The court, however, has thought it necessary to state briefly the foundation of its opinion, that such a subpoena may issue. In the provisions of the constitution, and of the statute, which give to the accused a right to the compulsory process of the court, there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness. At any rate, if an exception to the general principle exist, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence, (with one only reservation,) so far as they are personal, are of those only whose testimony could not be received. The single reservation alluded to is the case of the king. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum. If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the president, that decision is unknown to this court.

If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute of reason for not obeying the process of the court than a reason against its being issued. In point of fact it cannot be doubted that the people of England have the same interest in the service of the executive government, that is, of the cabinet counsel, that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting. Yet it has never been alleged, that a subpoena might not be directed to them. It cannot be denied that to issue a subpoena to a person filling the exalted position of the chief magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the court can have no choice in the case. If, then, as is admitted by the counsel for the United

States, a subpoena may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued. If, in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to being any paper of which the party praying it has a right to avail ***35** himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper. When this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpoena to the chief magistrate, and some doubt also concerning the propriety of directing any paper in his possession not public in its nature, to be exhibited in court. The impression that the questions which might arise in consequence of such process, were more proper for discussion on the return of the process than of its issuing, was then strong on the mind of the judges; but the circumspection with which they would take any step which would in any manner relate to that high personage, prevented their yielding readily to those impressions, and induced the request that those points, if not admitted, might be argued. The result of that argument is a confirmation of the impression originally entertained. The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process. This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles. A subpoena duces tecum varies from an ordinary subpoena only in this; that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister states whose system of jurisprudence is erected on the same foundation with our own, this process, we learn, issues of course. In this state it issues, not absolutely of course, but with leave of the court. No case, however, exists as is believed, in which the motion has been founded on an affidavit, in which it has been denied, or in which it has been opposed. It has been truly observed that the opposite party can, regularly, take no more interest in the awarding a subpoena duces tecum than in the awarding an ordinary subpoena. In either case he may object to any delay, the grant of which may be implied in granting the subpoena; but he can no more object regularly to the legal means of obtaining testimony, which exists in the papers, than in the mind of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curiae, to prevent the court from making an improper order, or from burthening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation. If, then, the subpoena be issued without inquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material. In the one case the accused is made the absolute judge of the testimony to be summoned; if, in the other, he is not a judge, absolutely for himself, his judgment ought to be controlled only so far as it is apparent that he means to exercise his privileges not really in his own defence, but for purposes which the court ought to discountenance. The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its

aid to motions for papers to which the accused may be entitled, and which may be material in his defence. These observations are made to show the nature of the discretion which may be exercised. If it be apparent that the papers are irrelative to the case, or that for state reasons they cannot be introduced into the defence, the subpoena duces tecum would be useless. But, if this be not apparent, if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them? The counsel for the United States takes a very different view of the subject, and insist that a motion for process to obtain testimony should be supported by the same full and explicit proof of the nature and application of that testimony, which would be required on a motion, which would delay public justice, which would arrest the ordinary course of proceeding, or would in any other manner affect the rights of the opposite party. In favor of this position has been urged the opinion of one, whose loss as a friend and as a judge I sincerely deplore; whose worth I feel, and whose authority I shall at all times greatly respect. If his opinions were really opposed to mine, I should certainly revise, deliberately revise, the judgment I had formed; but I perceive no such opposition.

In the trials of Smith and Ogden [U. S. v. Smith, Case No. 16,342], the court in which Judge Patterson presided, required a special affidavit in support of a motion made by the counsel for the accused for a continuance and for an attachment against witnesses who had been subpoenaed and who had failed to attend. Had this requisition of a special affidavit been made as well a foundation for an attachment as for a continuance, the cases would not have been parallel, because the attachment was considered by the counsel for the prosecution merely as a means of punishing ***36** the contempt, and a court might certainly require stronger testimony to induce them to punish a contempt, than would be required to lend its aid to a party in order to procure evidence in a cause. But the proof furnished by the case is most conclusive that the special statements of the affidavit were required solely on account of the continuance. Although the counsel for the United States considered the motion for an attachment merely as a mode of punishing for contempt, the counsel for Smith and Ogden considered it as compulsory process to bring in a witness, and moved a continuance until they could have the benefit of this process. The continuance was to arrest the ordinary course of justice; and, therefore, the court required a special affidavit, showing the materiality of the testimony before this continuance could be granted. Prima facie the evidence could not apply to the case; and there was an additional reason for a special affidavit. The object of this special statement was expressly said to be for a continuance. Colden proceeded: 'The present application is to put off the cause on account of the absence of witnesses, whose testimony the defendant alleges is material for his defence, and who have disobeyed the ordinary process of the court. In compliance with the intimation from the bench yesterday, the defendant has disclosed by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify. If the court cannot or will not issue compulsory process to bring in the witnesses who are the object of this application, then the cause will not be postponed. Or, if it appears to the court, that the matter disclosed by the affidavit might not be given in evidence, if the witness were now here, then we cannot expect that our motion will be successful. For it would be absurd to suppose that the court will postpone the trial on account of the absence of witnesses whom they cannot compel to appear, and of whose voluntary attendance there is too much reason to despair; or, on account of the absence of witnesses who, if they were before the court, could not be heard on the trial.' See the trials of Smith and Ogden [supra]. This argument states, unequivocally, the purpose for which a special affidavit was required.

The counsel for the United States considered the subject in the same light. After exhibiting an affidavit for the purpose of showing that the witnesses could not probably possess any material information, Mr. Standford said: 'It was decided by the court yesterday that it was incumbent on the defendant, in order to entitle himself to a postponement of the trial on account of the absence of these witnesses, to show in what respect they are material for his defence. It was the opinion of the court that the general affidavit, in common form, would not be sufficient for this purpose, but that the particular facts expected from the witnesses must be disclosed in order that the court might, upon those facts, judge of the propriety of granting the

postponement.'

The court frequently treated the subject so as to show the opinion that the special affidavit was required only on account of the continuance; but what is conclusive on this point is, that after deciding the testimony of the witnesses to be such as could not be offered to the jury. Judge Patterson was of opinion that a rule, to show cause why an attachment should not issue, ought to be granted. He could not have required the materiality of the witness to be shown on a motion, the success of which did not, in his opinion, in any degree depend on that materiality; and which he granted after deciding the testimony to be such as the jury ought not to hear. It is, then, most apparent that the opinion of Judge Patterson has been misunderstood, and that no inference can possibly be drawn from it, opposed to the principle which has been laid down by the court. That principle will therefore be applied to the present motion.

The first paper required is the letter of General Wilkinson, which was referred on in the message of the president to congress. The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the accused made by the person who is declared to be the essential witnesses against him. The order for producing this letter is opposed:

First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial. It is with some surprise an argument was heard from the bar, insinuating that the award of a subpoena on this ground gave the countenance of the court to suspicions affecting the veracity of a witness who is to appear on the part of the United States. This observation could not have been considered. In contests of this description, the court takes no part; the court has no right to take a part. Every person may give in evidence, testimony such as is stated in this case. What would be the feelings of the prosecutor if, in this case, the accused should produce a witness completely exclupating himself, and the attorney for the United States should be arrested in his attempt to prove what the same witness had ***37** said upon a former occasion, by a declaration from the bench that such an attempt could not be permitted, because it would imply a suspicion in the court that the witness had not spoken the truth? Respecting so unjustifiable an interposition but one opinion would be formed.

The second objection is, that the letter contains matter which ought not to be disclosed. That there may be matter, the production of which the court would not require, is certain; but, in a capital case, that the accused ought, in some form, to have the benefit of it, if it were really essential to his defence, is a position which the court would very reluctantly deny. It ought not to be believed that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances present a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country. At present it need only be said that the question does not occur at this time. There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety. If it does contain such matter, the fact may appear before the disclosure is made. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive that so much of the letter as relates to the conduct of the accused can be a subject of delicacy with the president. Everything of this kind, however, will have its due consideration on the return of the subpoena.

Thirdly, it has been alleged that a copy may be received instead of the original, and the act of congress has been cited in support of this proposition. This argument presupposes that the letter required is a document filed in the department of state, the reverse of which may be and most probably is the fact. Letters addressed to the

president are most usually retained by himself. They do not belong to any of the departments. But, were the facts otherwise, a copy might not answer the purpose. The copy would not be superior to the original, and the original itself would not be admitted, if denied, without proof that it was in the handwriting of the witness. Suppose the case put at the bar of an indictment on this letter for a libel, and on its production it should appear not to be in the handwriting of the person indicted. Would its being deposited in the department of state make it his writing, or subject him to the consequence of having written it? Certainly not. For the purpose, then, of showing the letter to have been written by a particular person, the original must be produced, and a copy could not be admitted. On the confidential nature of this letter much has been said at the bar and authorities have been produced which appear to be conclusive. Had its contents been orally communicated, the person to whom the communications were made could not have excused himself from detailing them, so far as they might be deemed essential in the defence. Their being in writing gives no additional sanctity; the only difference produced by the circumstance is, that the contents of the paper must be proved by the paper itself, not by the recollection of the witness.

Much has been said about the disrespect to the chief magistrate, which is implied by this motion, and by such a decision of it as the law is believed to require. These observations will be very truly answered by the declaration that this court feels many, perhaps, peculiar motives for manifesting as guarded a respect for the chief magistrate of the Union as is compatible with its official duties. To go beyond these would exhibit a conduct which would deserve some other appellation than the term respect. It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential to his defence, which may, for aught that now appears, be essential, had been withheld from him. I will not say, that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.

The propriety of requiring the answer to this letter is more questionable. It is alleged that it most probably communicates orders showing the situation of this country with Spain, which will be important on the misdemeanor. If it contain matter not essential to the defence, and the disclosure be unpleasant to the executive, it certainly ought not to be disclosed. This is a point which will appear on the return. The demand of the orders which have been issued, and which have been, as is alleged, published in the Natchez Gazette, is by no means unusual. Such documents have often been produced in the courts of the United States and the courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return. If they do not, and are material, they may be exhibited. It is said they cannot be material, because they cannot justify any unlawful resistance which ***38** may have been employed or meditated by the accused. Were this admitted, and were it also admitted that such resistance would amount to treason, the orders might still be material; because they might tend to weaken the endeavor to connect such over act with any over act of which this court may take cognizance. The court, however, is rather inclined to the opinion that the subpoena in such case ought to be directed to the head of the department in whose custody the orders are. The court must suppose that the letter of the secretary of the navy, which has been stated by the attorney for the United States, to refer the counsel for the prisoner to his legal remedy for the copies he desired, alluded to such a motion as is now made.

The affidavit on which the motion is grounded has not been noticed. It is believed that such a subpoena, as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material, and ought to be admitted. It is only because the subpoena is to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was desired for the real purposes of defence, and not for such as this court will forever discountenance.

END OF DOCUMENT

Ohio. Ohio R Crim P 6(A).
New Mexico. NM Stat Ann § 31-6-1.
West Virginia. W Va Code § 52-2-43; W Va R Crim Pro 6(g).

§ 5:11. Model Oath for Grand Jurors.

The form of the oath taken by grand jurors in the feder system, which is similar to the oath prescribed by statute or ru in most states, reads as follows:

"Do you, and each of you, solemnly swear that you sh diligently inquire into and make true presentment or indictme of all such matters and things as shall be given you in charge otherwise come to your knowledge, touching your grand ju service; to keep secret the counsel of the United States, yo fellows and yourselves; not to present or indict any perso through hatred, malice or ill will; nor leave any person unpre sented or unindicted through fear, favor, or affection, nor fo any reward, or hope or promise thereof; but in all you presentments and indictments to present the truth, the whol truth, and nothing but the truth, to the best of your skill and understanding? If so, answer 'I do.'"

§ 5:12. Model Charge to Grand Jury.

The charge that is recommended for federal courts to use a the time of empanelling a grand jury is as follows:

"Ladies and gentlemen of the grand jury, you have no been empanelled and sworn as a grand jury. The duties wit which you are charged are of the highest importance to the proper administration of justice. In serving as grand jurors you will be performing an important civic duty and fulfilling an important obligation of citizenship.

"It is the court's responsibility to instruct you at this time as to the law which should govern your actions and your deliberations as grand jurors.

"The grand jury existed in England long before it was brought over to the American colonies. There was a conflict between the powers of the English kings and the rights of the citizen, and the grand jury often stood as a barrier against political and religious persecution. The grand jury developed as an entity independent of the king, so that the king could not charge a subject with a crime without first submitting the

evidence to a grand jury which could decide whether to return an indictment against the accused. The resolute independence of the grand jury came about only after considerable blood was shed and punishment meted out to our forbears.

"The framers of our federal Constitution deemed the grand jury so important an instrumentality in the administration of justice that they included it in the Bill of Rights. The Fifth Amendment to the United States Constitution provides in part that 'No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . .' An infamous crime is a serious crime which may be punished by imprisonment for more than one year.

"We have two kinds of juries in the federal courts. First, there is the trial jury, sometimes known as the petit jury. The trial jury, consisting of 12 members, determines whether a person accused of a crime is guilty or not guilty of the crime charged. Federal jury trials take place in the courtroom, in the presence of the judge, the jury, the attorneys, and the public, where the accused may confront the witnesses against him and may be convicted only when each juror is convinced beyond a reasonable doubt.

"The other type of jury is the grand jury. Its function is equally important but entirely different. It consists of from 16 to 23 persons whose functions are conducted in secrecy. The grand jury has the responsibility to investigate charges of crime committed against the laws of the United States and, if the result of the investigation so warrants, to make an accusation against a person by returning an indictment against him. The decision to indict is normally made solely on the basis of the government's evidence without the accused person's having the opportunity to present his side of the case.

"An indictment is the formal written accusation charging the accused person or persons with one or more crimes. In the event that an indictment is returned against an accused person, he becomes a defendant, and in due course he will be given the opportunity to plead not guilty or guilty to the indictment. If he pleads not guilty, he will be required to stand trial in open court before a trial jury. In short, the grand jury decides whether a person should be formally charged with a crime and brought to trial; it is the trial jury which then decides whether the accused

person is guilty or not guilty of the crime charged in
indictment.

"Thus, the purpose of the grand jury is to determi
whether there is sufficient evidence to justify a formal accus
tion against a person. If law enforcement officials were not fi
required to submit to an impartial grand jury proof of guilt as
a proposed charge against a person suspected of having comm
ted such crime, they would be free to arrest the suspect, an
bring him to trial no matter how little evidence existed
support the charge.

"As members of the grand jury, you, in a very real sen
stand between the government and the accused. A federal gra
jury shall never be made an instrument of private prejudic
vengeance or malice. It is your duty to see to it that indictmen
are returned against those who you find probable cause to
believe are guilty and not against the innocent. It is further you
duty to see to it that the innocent are not compelled to go t
trial before a trial jury. Only when you are satisfied that there
probable cause to believe that a crime has been committed by
specified person should you return an indictment against suc
person.

"In addition to the protection of life, liberty and th
property of the people, another important function of govern
ment is the administration of justice. The performance of thes
functions requires the vigorous, fearless and impartial enforce
ment of the criminal law, with due regard for the constitutiona
rights of the accused. The grand jury is one of the most forceful
and effective agencies through which the government perform
these functions and duties.

"As set forth in the oath which you have taken, it is no
the duty of each of you to inquire diligently, fully an
impartially into all of the offenses which come to your knowl
edge and of which this court has cognizance. You have solemnl
promised that you will charge no one from fear, favor, affection
reward or hope of reward. You are to keep secret the proceeding
before the grand jury and also the views expressed by the United
States Attorney, your fellow grand jurors, and your own. You ar
to perform all the duties imposed upon you as grand jurors to
the best of your ability.

"The grand jury is no place to shield or reward one's friends, nor to punish one's enemies. A member of the grand jury who finds himself or herself in a biased state of mind as to a person under investigation should not participate in that investigation or in the return of the indictment.

"Now this does not mean that, if you have an opinion, you should not participate in the investigation; but it does mean that if you form a fixed opinion before the matter comes up, that is before you hear any evidence, on a basis of friendship or hatred or some other similar motivation, you should not participate in that investigation and in the return or failure to return an indictment.

"It is a characteristic of our system of government to establish some checks against the unreasonable exercise of power. Your powers are extensive in many respects, but your powers are also limited in several important respects.

"You are empowered to investigate conduct which violates federal law. Criminal activity of a local nature is punished by state law. This latter type of criminal conduct falls outside your inquiry. The federal courts deal only with those matters over which they have authority under the Constitution and deal only with criminal activity which violates an act of Congress. Sometimes the same conduct violates both federal law and state law, and you may properly consider such conduct.

"As a grand jury, you are not concerned with the wisdom of the criminal laws enacted by Congress. Congress determines the policy in this field. It is every person's duty to conform his acts to the laws enacted by Congress. We are a government of laws and not of persons. All are equal under the law, and no one is above the law.

"Furthermore, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court and is not to be considered by the grand jury in its deliberations.

"There is also a geographical limitation imposed on the scope of your inquiries and the exercise of your powers. You may inquire only into offenses committed in this district.

"Finally, there are limits imposed on the exercise of your powers by your own common sense and sense of propriety. You have the power to call private citizens from their daily business

and affairs to testify before you, but you should remember th citizens are not to be harried or inconvenienced unless it public interest and justice require it.

"Just as it is hoped and expected that you will serve as th balance wheel between the power of the government and th interests of personal liberty, it is also expected that you wi achieve an appropriate balance in the exercise of your power Justice is not usually vindicated by excesses in the use of pow or undue haste. Justice is best served by a balanced an reasonable approach to the tasks that await you.

"As I have already explained to you, your function is determine whether a person shall be tried for a serious federa crime alleged to have been committed within this district. Th includes felonies and some misdemeanors. The cases whic come before you will arise in various ways. Frequently, suspect are arrested during or shortly after the commission of an alleged crime. They are taken before a magistrate of the district before you become involved in the case. The United States magistrate holds a preliminary hearing to determine whether there is probable cause to believe that a crime was committed and that the accused committed it. If the magistrate finds such probable cause, he will direct that the accused be held for the action of the grand jury, so that you can consider whether an indictment should be issued.

"Other cases will come to you before an arrest but after an investigation has been conducted by a governmental agency such as the Federal Bureau of Investigation, the Treasury Department, postal authorities or other federal law enforcement officials. These cases are then brought to your attention by the United States Attorney or an Assistant United States Attorney.

"In addition to the matters presented to you by the United States Attorney's office, you have the right and duty to investigate any other offenses committed in this district against the criminal laws of the United States of which you have knowledge or which come to your attention.

"The existence of such crimes may come to your attention in two ways. First, during the course of your inquiry about one offense, the testimony may disclose a different offense. Second, some of you may have personal knowledge of the commission of a federal crime not known to the federal authorities. However,

as you have no power to employ investigators or to draw on federal funds for such purpose, it is best to take up such matters with the United States Attorney. If he refuses to act or is unable to act impartially in the matter, you may then take it up with the court.

"By the terms of the Constitution, you may also make a 'presentment' directly to the court. A presentment is an accusation initiated by the grand jury itself without any formal charge or written indictment having been submitted by the government. To form the basis for a prosecution, it must be followed by an indictment. You have the power to make a presentment, even over the active opposition of the government attorneys, if you believe it is necessary in the interests of justice. I mention this power of presentment to you only to indicate the extent of your powers, and not to suggest that you are likely to find it wise or necessary to exercise this procedure.

"Sixteen of the 23 members of the grand jury constitute a quorum for the transaction of business. If fewer than this number are present, even for a moment, the proceedings of the grand jury must stop. This shows how important it is that each of you conscientiously attend the meetings. If an emergency prevents your personal attendance at a meeting, you must promptly advise the grand jury foreperson, who has the authority to excuse you from attendance. If your absence will prevent the grand jury from acting, you should, if humanly possible, attend the meeting. You have the right to regulate your sessions to accommodate the convenience of yourselves and the United States Attorney, but you have the overall obligation to be available for duty at all times during the term for which you have been selected. If you find it necessary to seek your discharge from all continued service as a member of the grand jury, such request must be presented to the judge.

"The United States Attorney represents the government in the prosecution of parties charged with the commission of public offenses against the laws of the United States. The United States Attorney or one of his assistants will present the accusations which the government desires to have considered by you. He will point out to you the laws which the government deems have been violated and will subpoena for you such witnesses as he may consider important and also such other

witnesses as you may request or direct to have presented to
in connection with matters under consideration or which
to your knowledge.

"The evidence that you will consider will normally con
of oral testimony of witnesses and written documents. E
witness will appear before you separately. When the wit
first appears before you, he will be sworn in by the grand
foreperson. After being sworn, the witness may be question
Ordinarily, the United States Attorney or one of his assista
questions the witness first. Next, the foreperson questions
witness, followed by the other members of the grand jury.

"In certain cases it may be necessary to have an interpre
brought into the grand jury room and sworn to assist the gra
jury in interpreting the testimony of someone who does
speak the English language. If this be the case, the grand ju
may arrange for an interpreter through the United Stat
Attorney or one of his assistants.

"Witnesses should be treated courteously when they appea
before you. Questions should be put to them in an orderl
fashion. If there is any doubt as to the propriety of an
questions asked, the advice of the United States Attorney or hi
assistants may be sought. If necessary, a ruling may be obtaine
from the court.

"As you listen to witnesses who are presented to you in the
grand jury room and hear their testimony as to matter
concerning a defendant or defendants, you are the judge of th
credibility of these witnesses. You decide the value of each and
every witness. You may believe the testimony of the witness, o
you may not believe such testimony. The determination of the
credibility of a witness involves a question of fact, and not a
question of law. It is for you to decide whether you believe the
testimony of a witness. It is not for the court, the prosecutors, or
any officer of the court to determine that for you.

"It will assist you in passing on the credibility of witnesses
to consider whether the witnesses are personally interested,
whether their testimony has been corroborated by other wit
nesses or circumstances in the case, what opportunity the
witnesses have had for observing or determining the matter
about which they testify, the reasonableness or probability of
the story which they narrate to you, and the manner and

demeanor of the witnesses in testifying before you. From these factors, you will determine whether you believe the witnesses who testify before you.

"Hearsay testimony, that is testimony as to facts not known by a witness of his own personal knowledge but told to him by others than the accused, may alone, if deemed by you to be persuasive, provide a basis for returning an indictment against an accused. You must be satisfied that there is evidence against the accused showing probable cause, even though such evidence is composed of hearsay testimony.

"You will receive all the evidence presented which may throw light upon the matter under consideration, but you should be cautious in accepting as true mere reports and suspicions, unless they tend to provide you with probable cause to believe in the guilt of the accused. If in the course of your inquiries you have reason to believe that there is other evidence, not presented to you but within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. You have the right to subpoena witnesses from anywhere in the country and may direct the United States Attorney to issue such subpoenas as you see fit. Your right to subpoena witnesses is a powerful one and should be exercised with careful discretion. Persons should not ordinarily be subjected to disruption of their daily lives nor should public funds be expended to bring in witnesses unless you believe they can provide meaningful evidence which will assist you in your investigations.

"You are the sole judges as to the number of witnesses you desire to hear. You are not required to summon witnesses which the accused person may wish to have examined unless you believe that an apparent violation may be explained by their testimony. Similarly, you may refuse to hear witnesses offered by the United States Attorney if you do not believe their testimony will assist you in your functions.

"Witnesses are not permitted to have counsel present with them in the grand jury room. However, the law permits witnesses to confer with their counsel outside of the grand jury room. You are to draw no adverse inference if a witness chooses to exercise this right to confer with counsel outside the grand jury room; an appearance before a grand jury may present

complex legal problems requiring the assistance of cou
There are also other rights possessed by every witness befo
grand jury. These include the right to refuse to answer
question if the answer thereto would tend to incriminate h
and the right to know that anything he says may be used aga
him.

"Frequently charges are made against more than
person. It will be your duty to examine the evidence as it rel
to each person and to make your finding as to each person in
relationship in which they may be joined in an indictm
against more than one person. In other words, where charges
made against more than one person, in accordance with
evidence as you find it, you may indict all of the persons or o
such persons whom you believe the evidence points to as be
properly deserving of indictment.

"Neither the accused nor any witnesses in his behal
normally will testify before the grand jury. Upon reques
preferably in writing, you may afford the accused an opportuni
to appear before you. If the accused is given this opportunit
and appears, he cannot be forced to testify because of th
provision in the federal Constitution against self-incriminatio
If you attempt to force him to testify, an indictment returne
against him may be nullified.

"Because the appearance of an accused before you may raise
complicated legal problems, if you decide to allow an accused to
appear, you should seek the United States Attorney's advic
and, if necessary, the court's ruling before his appearance is
permitted.

"Even if the accused is willing to testify voluntarily, it is
necessary that he first be warned of his right not to testify, and
he should be required to sign a formal waiver before his
testimony is received. You should be completely satisfied that he
understands what he is doing.

"If a witness exercises his Fifth Amendment right against
compulsory self-incrimination, the grand jurors should hold no
prejudice against him for that reason, and it should play no role
in the return of any indictment against such witness.

"After you have heard all the evidence you wish to hear in a
particular matter, you will then proceed to deliberate whether
the accused person should be indicted. No one, other than your

own members is to be present while you are deliberating or voting.

"After all persons other than the grand jury members have left the room, the foreperson will ask the grand jury members to discuss and vote upon the question whether the evidence persuades the grand jury that a crime has probably been committed by the person or persons accused and that an indictment should be returned.

"To return an indictment charging an individual with an offense, it is not necessary that you find that the accused is guilty beyond a reasonable doubt. You are not a trial jury, and your task is not to decide the guilt or innocence of the person charged. In your deliberative sessions, remember that the accused usually has had no opportunity to present a defense, so that ordinarily you hear only the government's side of the case. Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the accused is guilty of the offense charged against him—that is, whether the evidence presented to you is sufficiently strong to warrant a reasonable person's believing that the accused is probably guilty of the offense with which he is charged.

"Each grand juror has the right to express his view of the matter under consideration. Only after all grand jurors have been given full opportunity to be heard will the vote be taken. It should be remembered that at least 16 jurors must be present at all times, and 12 members must vote in favor of an indictment before one may be returned.

"The foreperson shall designate another juror to serve as secretary, and the latter shall keep a record of the number of jurors concurring in the finding of every indictment. The record shall be filed with the clerk of the court. The voting record for each indictment shall not include the names of the jurors but shall indicate the number of affirmative votes.

"You may decide, after deliberation among yourselves, that further evidence should be considered before a vote is taken. In such case, you may direct the United States Attorney to subpoena the additional documents or witnesses you desire to consider.

"If 12 or more members of the grand jury, after deli tion, believe that an indictment is warranted, then you request the United States Attorney to prepare the fo written indictment if a proposed indictment has not al been prepared. The indictment will be in the name of the U States, will designate the defendant or defendants, will set the date and place of the alleged offense, will asser circumstances making the alleged conduct criminal and identify the criminal statute violated. The foreperson endorse the indictment as a true bill and place his signatu the space followed by the word 'foreperson.' It is the duty o foreperson to endorse every indictment found with the con rence of at least 12 grand jurors, whether he voted for or aga the finding of the indictment. The grand jury will then re the indictment to the court for action. If less than 12 memb of the grand jury vote in favor of an indictment which has b submitted to you for your consideration, the foreperson w endorse the indictment 'not a true bill' and return it to t court, and the court will impound it.

"Indictments will be presented to a judge or magistrate open court by your foreperson at the conclusion of eac deliberative session.

"In the absence of the foreperson, the deputy foreper may act in all of the former's functions and duties.

"You will recall from my earlier remarks that the grand ju developed in England as an entity independent from the king protect a subject from an unwarranted prosecution. The kin could not charge a subject with a serious crime without fir submitting evidence and witnesses to a grand jury, which th decided whether to return an indictment against the accus person.

"Just as the English grand jury was independent of th king, the federal grand jury under the United States Constit tion is independent of the United States Attorney, the prosec torial agent of the executive branch of the federal governmen The grand jury is not an arm of the Federal Bureau o Investigation; it is not an arm of the Internal Revenue Servic just as it is not an arm of the United States Attorney's offic There has been some criticism of the institution of the gran jury for allegedly acting as a mere rubber stamp approvin

prosecutions that are brought before it by government representatives. You would desecrate your oath and the tradition of the grand jury if you were merely to rubber-stamp the contemplated prosecutions brought before you by the government representatives. Similarly, you would perform a disservice if you did not indict where the evidence warranted an indictment.

"As a practical matter, you must work closely with the government attorneys. The United States Attorney and his assistants will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance.

"However, you must remember that you are not the prosecutor's agent. Your role is related to but clearly distinct from that of the government attorneys who will assist you, and it is important that you keep the distinction between the roles clearly in mind. Although you must work closely with the government, you must not yield your powers nor forgo your independence of spirit.

"These comments are meant to be cautionary in nature. The government attorneys are sincere men and women, and you will develop ordinary human feelings as you work with them during your term of service. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith efforts in every matter presented by the government. However, it is because you may tend to expect such high quality from the government's agents that there is a potentially grave risk to your independence of thought and action, which may cause you to lapse into reliance when you should be dubious or questioning.

"You should also remember that the government attorneys are advocates for the government's interest. They are prosecutors; you are not. While they will usually balance fairly the government's interest against the interests of a citizen's personal liberty, it is your responsibility to ensure that the proper balance is achieved in every case brought to your attention. You must exercise your own judgment, and if the facts suggest a different balance than advocated by the government attorneys, then you must achieve the appropriate balance even in the face of their opposition or criticism.

"Further, in gauging your role and relationship wit
government, you should be aware of the pressures inhera
the development of criminal cases. Frequently, a governm
law enforcement agent is the first governmental represent
to detect some evidence or indication of a criminal offense
may occur long before the matter is brought to the attenti
the government attorney or the grand jury. Occasionally,
enforcement agent files an incomplete report with the go
ment attorneys, secure in his personal belief that he has a pr
case or that he will soon have a proper case. This may happe
complete good faith on the agent's part. Thus it may de
that a case will find its way to the grand jury before a fu
adequate investigation has been completed. The governm
attorneys may also believe that the investigation by
enforcement agents has been completed or they may be actin
reliance on the agent's good faith or personal reputation
expect the investigation to be shortly concluded and producti
of appropriate evidence to support an indictment. Such develo
ments are inherent in close working associations and oft
serious considerations for you.

"An inadequate or incomplete investigation is a loose
drawn net that may snare the innocent and allow the tr
offenders to elude the law. It is here that you must be alert
your duties. You may find pressures exerted on you to decide
an indictment after being presented with an inadequate
incomplete investigation. Your task in such a situation may b
further complicated by the realization that the governmen
request is made in complete good faith.

"Your duties require that you act only after receivi
evidence which shows probable cause. Thus, there is no room
you to act on the basis of the government's good faith. If yo
should encounter an incomplete investigation, then it is yo
responsibility to see that a full investigation is developed fo
your benefit before voting to return an indictment. As previou
ly stated, you have considerable powers to ensure that a prop
investigation is in fact accomplished. You must use your goo
judgment and be alert to those situations that either abstract
or concretely suggest some inadequacy. These considerations a
part of your responsibilities as a separate and independent gran
jury.

"Just as you must maintain your independent office throughout your dealings with the government attorneys, so should your dealings with the court be on a formal basis. If you should ever have a question for the court or desire to make a presentment or to return an indictment to the court, then you will assemble in the courtroom for these purposes. However, each juror is directed to report immediately to the court any attempt by any person who, under any pretense whatsoever, addresses such juror for the purpose of or with the intent to gain any information of any kind concerning the proceedings of the grand jury, or to influence a juror in any manner or for any purpose.

"Within your prescribed sphere, you occupy an important and independent office in the administration of justice. The government attorneys cannot dominate or command your actions. The court may guide, but cannot dominate or command your actions.

"In performing your duties, you are free to exercise your own judgment without fear or favor and shall not be deterred or influenced by the criticism of the public, the prosecutor, or the court. You are the defenders of the innocent as well as the accusers of the guilty, and in both respects you vindicate the integrity of the law. Ours is a government based on law, and there can be no more significant role in maintaining this precept than that assigned to the grand jury.

"Your proceedings are secret and must remain secret permanently unless and until the court determines that the proceedings or a portion of them should be revealed in the interests of justice.

"There are several important reasons for this secrecy requirement. A premature disclosure of grand jury action may frustrate the ends of justice by giving an opportunity to the accused to escape and become a fugitive or to destroy evidence. Also, if the testimony of a witness is disclosed, he may be subjected to intimidation, retaliation or other tampering before he testifies at trial. Further, the secrecy requirement protects an innocent person who may have come under investigation but who has been cleared by the action of the grand jury. In the eyes of some, investigation alone carries with it a suggestion of guilt. Thus, great injury and injustice can be done to the good name

and standing of a person, even though he is not indicted, a
it become known that there had ever been a question of hi
or innocence of a crime considered by the grand jury. Be
that person will not go to trial, he will have no opportuni
clear his name in the event of such an unfortunate disc
For all these reasons, the secrecy requirement is of the u
importance and must be regarded by you as practically s

"To ensure the secrecy of grand jury proceedings, th
provides that only authorized persons may be present
grand jury room while evidence is being presented. On
grand jury, the United States attorney or his assistan
witness under examination, the court reporter, and the
preter may be present. If an indictment should ultimate
voted, the presence of unauthorized persons in the grand
room could invalidate it.

"The law also provides that none of those author
persons whom I have just mentioned may disclose any ma
which occurs before you or them. You must be careful
preserve the secrecy of your proceedings by abstaining f
communicating with your families, friends, representative
the news media or any other persons concerning that wh
transpires in the grand jury room. Grand jurors may disc
these matters only among themselves and only in the grand j
room. You may disclose matters which occur before the gr
jury to attorneys for the government for use of such attorney
the performance of their duties. The content of your delib
tions and the vote of any juror may not, however, be disclo
even to the government attorneys.

"The performance of jury service is the discharge of on
the responsibilities of citizenship. You have taken a
comprehensive oath as grand jurors. Thousands of your forb
ers have taken that oath in years past. Their adherence to it
preserved for us to this time a system of law and a sens
justice. You are now the new link in this chain, and you mus
strong and faithful in the discharge of your office."

CHAPTER 6

CONDUCT OF PROCEEDINGS AND ISSUANCE OF THE INDICTMENT

I. INTRODUCTION AND OVERVIEW

§ 6:01. Grand Jury's Investigative Authority and Right to Evidence.
§ 6:02. Role of Prosecutor.
§ 6:03. Prosecutor's Duty To Present Exculpatory Evidence.
§ 6:04. Grand Jury's Authority and Duty To Hear Exculpatory Evidence.
§ 6:05. Right To Testify or Present Evidence.
§ 6:06. Limits on Kinds of Evidence That Can Be Presented.
§ 6:07. — Applicability of Evidentiary Rules.
§ 6:08. — Applicability of Constitutional Exclusionary Rules.

II. SUBPOENAS

§ 6:09. Use of Subpoenas To Obtain Evidence.
§ 6:10. — Role of Prosecutor and Grand Jurors in Subpoenaing Evidence.
§ 6:11. — Subpoenas for Purposes Other Than Compelling Testimony.
§ 6:12. — Forthwith Subpoenas.
§ 6:13. — Subpoena Ad Testificandum.
§ 6:14. — "Targets" and "Subjects" of Grand Jury's Investigation.
§ 6:15. — Advising Witnesses of Their Rights Before Grand Jury.
§ 6:16. Witness's Right to Counsel.
§ 6:17. — Constitutional Bases for Right to Counsel.
§ 6:18. Witness's Right To Have Counsel Present During Testimony.
§ 6:19. — Witness's Right To Consult with Counsel.
§ 6:20. Multiple Representation and Conflicts of Interest.
§ 6:21. Evidentiary Privileges.
§ 6:22. — Privilege Against Compulsory Self-Incrimination.
§ 6:23. — Attorney-Client Privilege.
§ 6:24. — First Amendment, Common Law, and Statutory Reporter's Privilege.
§ 6:25. — Grand Jury Inquiries Based on Allegedly Illegal Electronic Surveillance.
§ 6:26. Subpoena Duces Tecum—In General.
§ 6:27. — Objections Based on Fourth Amendment.

UNITED STATES
v.
COOPER,

Circuit Court, D. Pennsylvania.

April 30, 1880.

The libellous matter complained of was as follows: 'Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war. Mr. Adams had not yet projected his embassies to Prussia, Russia and the Sublime Porte, nor had he yet interfered, as president of the United States, to influence the decisions of a court of justice--a stretch of authority which the monarch of Great Britain would have shrunk from--an interference without precedent, against law and against mercy. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country; a case too little known, but of which the people ought to be fully apprised, before the election, and they shall be.' [FN1]

FN1 These passages were extracted from the following publication:

April 11, 1800. The bill was found upon the ex officio action of the district attorney, there having been no previous binding over. Some difficulty arose at the outset concerning the right of the defendant to compel the attendance, as witnesses, of several members of congress (congress being then in session), and of the president. An application was made to the court to address a letter to the speaker of the house, requesting him to have process served. This PETERS, District Judge, acceded to, as the proper course. It was refused, however, by CHASE, Circuit Justice, who ordered process to issue without such letter, saying, at the same time, that if it was necessary to compel the attendance of the members, the case would be continued until the session was over. The court at the same time refused to permit a subpoena to issue directed to the president of the United States. The cause was then continued to April 19, in order to enable the defendant to procure documentary and other evidence which he considered material.

April 19, 1800. After some difficulty in obtaining the attendance of the members of congress who were subpoenaed, which appears ultimately to have been given under a waiver of the supposed privilege; and after considerable altercation between Judge CHASE and the defendant with regard to the character of the evidence to be produced, the jury was sworn, and Mr. Rawle opened the case to the jury substantially as follows:

The defendant stands charged with attempts which the practice and policy of all civilized nations have thought it right at all times to punish with severity, with having published a false, scandalous and malicious attack on the character of the president of the United States, with an intent to excite the hatred and contempt of the people of this country against the man of their choice. It was much to be lamented that every person who had a tolerable facility at writing should think he had a right to attack and overset those authorities and officers whom the people of this country had thought fit to appoint. Nor was it to be endured that foul and infamous falsehoods should be uttered and published with impunity against the president of the United States, whom the people themselves had placed in that high office, and in which he has acted with so much credit to himself and benefit to them. Thomas Cooper stands charged in the indictment as follows: (Here Mr. Rawle read the indictment.) It was a sense of public duty that called for this prosecution. It was necessary that an example should be made to deter others from misleading the people by such false and defamatory publications. There was a peculiarity in the manner also of this publication: we generally observe that persons who take these liberties endeavour to avoid punishment by sheltering themselves under fictitious signatures, or by concealing their names; but the defendant acted very differently. Being of the profession of the law, a man of education and literature, he availed himself

of those advantage for the purpose of disseminating his dangerous productions in a remote part of the country where he had gained influence. Such conduct must have arisen from the basest motives. It would be proved to the jury that, at the time of this publication, the defendant went to a magistrate and acknowledged it to be his production, in the same formal manner as if it had been a deed. In conduct so grossly improper had occurred in no instance within his recollection, and the manner constituted no slight aggravation of the offence. Indeed, it was high time for the law to interfere and restrain the libellous spirit which had been so long permitted to extend itself against the highest and most deserving characters. To abuse the men with whom the public has entrusted the management of their national concerns, to withdraw from them the confidence of the people, so necessary for conducting the public business, was in direct opposition to the duties of a good citizen. Mischiefs of this kind were to be dreased in proportion as the country around is less informed, and a man of sense and education has it more in his power to extend the mischief which he is inclined to propagate. Government should not encourage the idea, that they would not prosecute such atrocious conduct; for if this conduct was allowed to pass over, the peace of the country would be endangered. Error leads to discontent, discontent to a fancied idea of oppression, and that to insurrection, of which the two instances which had already happened were alarming proofs, and well-known to the jury. That the jury, as citizens, must determine whether, from publications of this kind, the prosperity of the country was not endangered; and whether it was not their duty, when a case of this nature was laid before them and the law was applicable, to bring in such a verdict as the law and the evidence would warrant; and show, that these kinds of attacks on the government of the country were not to be suffered with impunity.

Mr. Rawle, after reading the section of the sedition act applicable to the case on trial, proceeded to call John Buyers, who testified as follows: 'I know this paper. Mr. Cooper brought it to me on the evening of the 6th of December, 1799, at my house at Sunbury. He came to me at the door of my house. Asked me to walk in. We walked in. This was between candle-light and day-light. He asked for a candle. He perused this paper which I have in my hand, pointed to his name, and said, 'This is my name, and I am the author of this piece.' There was nothing further passed, only he said, 'This may save you trouble another time.' I knew very well what he meant by it.'

Cross-examined by Mr. Cooper: 'Had not you and I been in the habit of frequently joking with each other upon political subjects? Ans. O yes--very often.'

Mr. Rawle here read that part of the publication which is included in the indictment, for which reason it is omitted here.

Mr. Cooper then addressed the jury as follows:

If it were true, as it is not true, that, in the language of the attorney general of the district, I have been guilty of publishing with the basest motives a foul and infamous libel on the character of the president; of exciting against him the hatred and contempt of the people of this country, by gross and malicious falsehoods--then, indeed, would it be his duty to bring me before this tribunal, it would be yours to convict, and the duty of the court to punish me. But I hope, in the course of this trial, I shall be enabled to prove to your satisfaction, that I have published nothing which truth will not justify. That the assertions for which I am indicted are free from malicious imputation, and that my motives have been honest and fair. You will observe, gentlemen of the jury, that the law requires it to be proved as a necessary part of the charge, that the passages for which I am indicted should be false and scandalous, and published from malicious motives: and before you will be able, consistently with your oaths, to convict upon this indictment, you must be thoroughly satisfied that both these parts of the charge are well founded. Nor does it appear to me that the expression of the act, to bring the president into contempt, can be fulfilled, if the accusation, as in the present instance, related to an examination of his public conduct, and no improper motives are imputed to him. And that I have carefully avoided imputing any impropriety of intention to the president, even in the very paper complained of; that the uniform tenor of my conduct and language has been to attribute honesty of motive even where I have strongly disapproved of the tendency of his measures, I can abundantly show. You, and all who hear me, well know that this country is divided, and almost equally divided, into two grand parties;

usually termed, whether properly or improperly, Federalists and Anti-Federalists: and that the governing powers of the country are ranked in public opinion under the former denomination--of these divisions, the one wishes to increase, the other to diminish, the powers of the executive; the one thinks that the people (the democracy of the country) has too much, the other too little, influence on the measures of government: the one is friendly, the other hostile, to a standing army and a permanent navy: the one thinks them necessary to repel invasions and aggressions from without, and commotions within; the other, that a well-organized militia is a sufficient safeguard for all that an army could protect, and that a navy is more dangerous and expensive than any benefit derived from it can compensate; the one thinks the liberties of our country endangered by the licentiousness, the other, by the restrictions of the press. Such are some among the leading features of these notorious divisions of political party. It is evident, gentlemen of the jury, that each will view with a jealous eye the positions of the other, and that there cannot but be a bias among the partisans of the one side, against the principles and doctrines inculcated by the other. In the present instance, I fear it cannot but have its effects; for, without impeaching the integrity of any person directly concerned in the progress of the present trial, I may fairly state that, under the sedition law, a defendant, such as I stand before you, is placed in a situation unknown in any other case. Directly or indirectly, the public, if not the private, character of the president of the United States is involved in the present trial. Who nominates the judges who are to preside, the juries who are to judge of the evidence, the marshal who has the summoning of the jury? The president. Suppose a case of arbitration concerning the property of any one of you, where the adverse party should claim the right of nominating the persons whose legal opinions are to decide the law of the question, and of the very man who shall have the appointment of the arbitrators--what would you say to such a trial? and yet in fact such is mine, and such is the trial of every man who has the misfortune to be indicted under this law. But although I have a right to presume something of political bias against my opinions, from the court who try me, to you who sit there as jurymen, I am still satisfied you will feel that you have some character to support and some character to lose; and whatever your opinions may be on the subjects alluded to in the indictment, you will reverence as you ought the sacred obligation of the oath you have taken. Gentlemen of the jury, I acknowledge, as freely as any of you can, the necessity of a certain degree of confidence in the executive government of the country. But this confidence ought not to be unlimited, and need not be paid up in advance; let it be earned before it be reposed; let it be claimed by the evidence of benefits conferred, of measures that compel approbation, of conduct irreproachable. It cannot be exacted by the guarded provisions of sedition laws, by attacks on the freedom of the press, by prosecutions, pains and penalties on those who boldly express the truth, or who may honestly and innocently err in their political sentiments. Let this required confidence be the meed of desert, and the public will not be backward to pay it. But in the present state of affairs, the press is open to those who will praise, while the threats of the law hang over those who blame the conduct of the men in power. Indiscriminate approbation of the measures of the executive is not only unattacked, but fostered, and received with the utmost avidity; while those who venture to express a sentiment of opposition must do it in fear and trembling, and run the hazard of being dragged like myself before the frowning tribunal, erected by the sedition law. Be it so; but surely this anxiety to protect public character must arise from fear of attack. That conduct which will not bear investigation will naturally shun it; and whether my opinions are right or wrong, as they are stated in the charge, I cannot help thinking they would have been better confuted by evidence and argument then by indictment. Fines and imprisonment will produce conviction neither in the mind of the sufferer nor of the public. Nor do I see how the people can exercise on rational grounds their elective franchise, if perfect freedom of discussion of public characters be not allowed. Electors are bound in conscience to reflect and decide who best deserves their suffrage; but how can they do it, if these prosecutions in terrorem close all the avenues of information, and throw a veil over the grossest misconduct of our periodical rulers? After having offered these preliminary remarks, I shall give an account of the paper on which I am accused, and then proceed to examine the charges of the indictment in the order in which they are laid: much that I intended to have advanced I must relinquish, that I may not trespass too long on your time, or weaken the effect of my own defence by fatiguing your attention. The scored paper now

handed to me by the attorney general, suggests an observation which, though trite, is material. Upon the plan usually adopted in these ex officio accusations, a good Christian might easily be proved an arrant atheist. 'The fool hath said in his heart, there is no God.' Take the four last words, and they are atheistical: take the sentence, and it is Scripture. So, take the marked passages in this paper, and they may, perhaps, be forced into something like improper imputation against the president: take the paper itself, and the very first paragraph is a plain and positive approbation of his intention. Though I must acknowledge that, however upright I might formerly have believed his motives of action, I cannot, upon reflection, pay that tribute to his conduct or his motives on the present occasion. The general circumstances that gave rise to the paper I now hold, are these: Dr. Priestley, a man whose name implies a greater combination of learning, science, and ability, of important discovery, or exertion for the benefit of mankind, and of private integrity, than any other man now living can boast--whose conduct towards me, in the instance detailed in this paper, is praise sufficient to bear up my mind against any consequences which the present trial can produce--had long been an acquaintance and an intimate acquaintance of Mr. Adams, in England and in this country. The letters of the latter to Dr. Priestley are full of strong expressions of friendship and esteem. Relying upon this long intercourse of cordiality between them, Dr. Priestley urged me to permit him to write to Mr. Adams on the subject of a vacancy mentioned in this paper, and which, as you will have it before you when you retire, I shall not read at length. This application was from one friend to another; upon the face of it a confidential communication; although containing nothing but what might do credit to all the parties concerned. Mr. Adams, however, did not think it so confidential; and from some disclosure on his part, has been founded the base and cowardly slander which dragged me in the first instance before the public in vindication of my moral and political character, and has at length dragged me before this tribunal, to protect, if I can, my personal liberty and my private fortune, against the legal attack of an ex officio information. Hence, it is evident, gentlemen of the jury, that this is not a voluntary, but an involuntary publication on my part: it has originated, not from motives of turbulence and malice, but from self-defence; not from a desire of attacking the character of the president, but of vindicating my own. And in what way have I done this? My motives, my private character, my public character, were the object of falsehood and calumny, apparently founded on information of high authority. In reply, I give credit to the intentions of the president: I say nothing of his private character; and I attack only the tendency of measures notorious to the world, which, having been known to disapprove publicly, I was charged with being ready, from motives of interest, to approve privately. I think, gentlemen, you cannot help feeling this contrast of behaviour, and if the president is satisfied with his side of the picture, I am mine.

The first article selected for accusation is, that, at the time I allude to, 'he was but in the infancy of political mistake.' Why this expression should have been fixed on as seditious, I know not, unless it be that 'quem deus vult perdere prius dementat'; for have we advanced so far on the road to despotism in this republican country, that we dare not say our president may be mistaken? Is a plain citizen encircled at once by the mysterious attribute of political infallibility the instant he mounts the presidential chair? If so, then indeed may it be seditious to say he is mistaken; but before you can condemn me for this kind of sedition, you must become catholic believers in this new-fangled doctrine of infallibility. I know that in England the king can do no wrong, but I did not know till now that the president of the United States had the same attribute. I have said (and I am accused for saying it) 'that even those who doubted his capacity thought well of his intentions.' Is it a crime to doubt the capacity of the president? Suppose I had said that there were some who did not give him credit for capacity sufficient for the office he holds, is that a crime? Or if in them, is it a crime in me, who have not said it? Nor can the word 'capacity' here be fairly construed into any other than a comparative meaning; for surely no one who has read his defence, as it is called, of the American constitution, or who reflects that he has had abilities enough to raise himself to his present situation, can say that he is devoid either of industry or talents. But those who voted for his opponent must have believed Mr. Adams of inferior capacity to that gentleman. Of that number was I; of that number was at least one-half of the people of the United States. If it be a crime thus to have thought and thus to have spoken, I fear I shall continue in this respect incorrigible.

But if of two constructions the one is absurd, improbable and unfavourable, surely it should be rejected in favour of that meaning which was most likely to have occurred, and which in its effects will do least injury to a defendant like myself. This is common, this is legal charity. 'Nor had we yet, under his auspices, been saddled with the expense of a permanent navy.' Gentlemen, is it true or not that we are saddled with the expense of a permanent navy? Is it necessary that I should enter into a detail of authorities to prove that the sun shines at noon-day? But farther, is it true that we incur this expense under his auspices and sanction? I have before me two publications: the one the Gazette of the United States, published by Mr. Fenno in this city; and another, in a form more portable and convenient, purporting to be a selection of addresses and answers to and from the president during the summer of 1798. Not having been able to procure office copies of the documents I wished to refer to, I must offer in evidence such publications as I can find; that class of publications, upon which in fact the mind of the public is usually made up; and upon whose authority the electors of this country determine the characters whom they honour with their suffrage. Indeed, if the opinion that fell from the court this morning be accurate, that no man should hazard an assertion but upon sufficient and legal evidence, and if documents from the public offices in proof of notorious facts are required as such evidence, then are the mouths of the people completely shut up on every question of public conduct or public character; but I cannot help thinking it a fair and reasonable position, that a defendant in such a case as this should be permitted to offer to the jury any evidence that appears to him a sufficient ground for his assertion, and let them decide on its credibility.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

1. In a prosecution under the sedition act of July 14, 1798 (1 Stat. 596), for the publication of a libel against the president of the United States, there must clearly appear an intent to defame him, to bring him into contempt and disrepute, and excite against him the hatred of the good people of the United States. If there be no such intent there can be no guilt.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

2. It is false, within the meaning of the sedition act, to publish that our credit is brought so low that we are obliged to borrow money at 8 per cent. 'in time of peace,' when, although there has been no declaration of war, there have been actual hostilities, captures of vessels, and a prohibition of intercourse.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

3. A murder committed on board a British ship of war is committed within the jurisdiction of Great Britain, within the meaning of article 27 of the treaty with that power, relating to the extradition of persons charged with murder and forgery.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

4. The executive is the party upon whom devolves the duty of surrendering a fugitive in case of extradition under the treaty, and, although he makes use of a judge of the United States as an instrument for ascertaining whether there is sufficient evidence of criminality to require the surrender, the court has no jurisdiction of the crime, and the president cannot truthfully be accused, in connection with such a transaction, of attempting to influence or interfere with a court of justice.

SEDITIOUS LIBEL--INTENT OF PUBLICATION--DEFAMATION OF PRESIDENT--CHARGES IN RELATION TO EXTRADITION OF FUGITIVES--STANDING ARMIES.

5. To publish, in respect to the president, that we are threatened, under his auspices, with the existence of a standing army, betrays either the most egregious ignorance or the most wilful intention to

deceive the public; for there are but two descriptions of armies in the country, one called the 'Western Army,' enlisted for five years only, and the other called the 'Provisional Army,' enlisted during the existence of war with France; and neither of these can with any propriety be called a standing army, especially as the constitution declares that no appropriations shall be made for the support of an army longer than two years.

'To the Public. 'To the Printer--Sir: I should not condescend to answer anonymous slander, but the information on which the falsehoods contained in the following paragraph are grounded, must have been originally derived from the president himself. I cannot believe him capable of such misrepresentation, for I still think well of his intentions, however I may disapprove of his conduct: but the following narrative will show that some of his underlings are capable of anything: 'From the Reading Weekly Advertiser of October 26, 1799: "Communication. Thomas Cooper's address to the readers of the Sunbury and

Northumberland Gazette, of which he was editor, having been republished in this state, with an introduction approbatory of the piece, a correspondent wishes to know if it be the same Thomas Cooper, an Englishman, of whom the following anecdote is related? If it is, every paper devoted to truth, honour, and decency, ought to give it a thorough circulation. Not many months ago, it is said, a Mr. Cooper, an Englishman, applied to the president of the United States, to be appointed 'agent for settling the respective claims of the citizens and subjects of this country and Great Britain.' In his letter, he informs the president, that although he (Thomas Cooper) had been called a Democrat, yet his real political sentiments are such as would be agreeable to the president and government of the United States, or expressions to that effect. This letter was accompanied with another from Dr. Joseph Priestley, who did not fail to assure the president of the pliability of his friend Cooper's Democratic principles. The president, it is said, rejected Cooper's application with disdain, and Priestley's with still stronger marks of surprise, saying, it is said, as he threw the letter on the table, does he think that I would appoint any Englishman to that important office in preference to an American? What was the consequence? When Thomas Cooper found his application for a lucrative office under our president rejected, he writes in revenge the address which appeared in print, and Dr. Priestley exerted his influence in dispersing this very address, which he must know was the offspring of disappointment and revenge! The address is as cunning and insidious a production as ever appeared in the Aurora or the old Chronicle, and as for impudence, it exceeds, or at least equals, Porcupine himself. Priestley and Cooper are both called upon to deny the above narrative. A recourse to the letters themselves, would establish the accuracy of this anecdote, even to a syllable.' 'Yes; I am the Thomas Cooper alluded to--luckily possessed of more accurate information than the malignant writer of that paragraph, from whatever source his intelligence was derived. About the time of the appointment of commissioners under the British treaty, Doctor Ross, who had sedulously brought about an intercourse of civility between Mr. Liston and myself, urged me to permit him to apply on my behalf to that gentleman, for one of the appointments that must then take place. He pressed on me the folly, as he termed it, of my confining myself to Northumberland, his earnest wish to see me settled in Philadelphia, and the duty I owed my family to better my situation by every means in my power. He stated that Mr. Liston, he knew, thought highly of me, and though the post of the fifth commissioner was probably then disposed of, there must be an agent for the British claimants; an office which, from my situation as a barrister in England, and my knowledge of mercantile transactions, I was peculiarly fitted to fill. I replied, that he probably overrated Mr. Liston's opinion and his own influence, and that, at all events, my known political opinions must render it equally improper for Mr. Liston to give, and for me to accept, any office whatever connected with the British interests. That Mr. Liston and I understood each other on this question, and had hitherto avoided all politics whatever. That, being an American, I should not object to any office under this government, if I could fairly obtain it; but that I would never consent to any application to Mr. Liston. Through Mr. Coleman's interest, Mr. Hall of Sunbury was complimented with the offer of being appointed agent of American claims. On mentioning to Dr. Priestley, one night at supper, that Mr. Hall had declined it, Dr. Ross's persuasions occurred to me, and I said that such an office as that would have suited me very well. Dr. Priestley replied, if that was the case, he thought he had some interest with

Mr. Adams, with whom he had long been acquainted, and who had always expressed himself in terms of the highest friendship: that, as he never intended to ask any favour of Mr. Adams for himself, I might as well let him try for once to ask one for me. On my objecting that Mr. Adams' politics and mine were probably very different, Dr. Priestley declared that this, so far from being an objection, might be an inducement in my favour; for if Mr. Adams meant to be the ruler of a nation, insteal of the leader of a party, he would be glad of an opportunity to exhibit such an instance of liberal conduct. At length I consented, expressly requesting Dr. Priestley to take care that Mr. Adams should not mistake my politics. In consequence of this conversation, Dr. Priestley wrote the following letter,--not a few months, but above two years ago: "August 12, 1797. Dear Sir: It was far from being my intention or wish to trouble you with the request of any favours, though it is now in your power to grant them; and it is not at all probable that I shall ever take a second liberty of the kind. But circumstances have arisen which I think call upon me to do it once, though not for myself, but a friend. The office of agent for American claims was offered, I understand, to Mr. Hall of Sunbury, and he has declined it. If this be the case, and no other person be yet fixed upon, I shall be very happy if I could serve Mr. Cooper, a man I doubt not of equal ability, and possessed of every other qualification for the office, by recommending him. It is true, that both he and myself fall, in the language of our calumniators, under the description of Democrats, who are studiously represented as enemies to what is called government, both in England and here. What I have done to deserve that character, you well know, and Mr. Cooper has done very little more. In fact, we have both been persecuted for being friends to American liberty, and our preference of the government of this country has brought us both hither. However, were the accusations true, I think the appointment of a man of unquestionable ability and fidelity to his trust, for which I would make myself answerable, would be truly such a mark of superiority to popular prejudice as I should expect from you I, therefore, think it no unfavourable circumstance in the recommendation. That you will act according to your best judgment, I have no doubt, with respect to this and

other affairs of infinitely more moment, through which I am persuaded you will bring the country with reputation to yourself, though in circumstances of such uncommon difficulty, perhaps with less ease and satisfaction than I could wish. With my earnest wishes for the honour and tranquillity of your presidency, I am, &c., Joseph Priestley.' 'This letter was accompanied by the following from myself: "Sir: On my expressing an inclination for the office which Mr. Hall has declined, Dr. Priestley was so good as to offer his services with you on my behalf. Probably the office will be filled ere this letter can reach you: probably there may be objections to nominating a person not a native of the country: probably the objection mentioned by Dr. Priestley, may reasonably be deemed of weight in my instance. Be all this as it may, I see no impropriety in the present application to be appointed agent of American claims, for it is still possible I may suppose more weight in the objections than they will be found to deserve. If it should so happen that I am nominated to that office, I shall endeavour to merit the character the Doctor has given me, and your esteem. I am, &c., Thomas Cooper.' 'Is this the letter of a man, or not? I do not appeal to the cowardly propagator of anonymous falsehoods, but to the public. What is there in it of vanity or servility? Do not these letters take for granted that I am a Democrat, though not a disturber of all government? and that what I am I shall remain, even though it be deemed a reasonable objection to my appointment? Is this, or is this not, adhering to my principle, whatever becomes of my interest? Nor is it true that my address originated from any motives of revenge. Two years elapsed from the date of those letters, before I wrote anything on the politics of this country. Nor did I recollect them at the time. Nor do I see the objection to taking any fair means of improving my situation. This is a duty incumbent on every prudent man who has a family to raise, and which I have already too much neglected from public motives: nor can any office to which I am eligible in this country, recompense me for the offers I rejected in its favour. But it is not in the power of promises or threats, of wealth or poverty, to extinguish the political enthusiasm which has actuated my conduct for these twenty years. The prudence of middle age and the claims of duty may make me cautious of sacrificing my interest, but they cannot induce me to sacrifice my principle. Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity

thought well of his intentions. He had not at that time given the public to understand that he would bestow no office but under implicit conformity to his political opinions. He had not declared that 'a republican government may mean anything.' He had not yet sanctioned the abolition of trial by jury in the alien law, or entrenched his public character behind the legal barriers of the sedition law. Nor were we yet saddled with the expense of a permanent navy, or threatened under his auspices with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war; nor had the political acrimony which still poisons the pleasures of private society, been fostered by those who call themselves his friends and adherents; nor had the eminent services of Mr. Humphreys at that time received their reward. Mr. Adams had not yet projected his embassies to Prussia, Russia, and the Sublime Porte; nor had he yet interfered, as president of the United States, to influence the decisions of a court of justice; a stretch of authority which the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy! This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court martial, had not yet astonished the republican citizens of this free country. A case too little known, but of which the people ought to be fully apprised before the election, and they shall be. Most assuredly, had these transactions taken place in August, 1797, the President Adams would not have been troubled by any request from 'Thomas Cooper. 'Northumberland, Nov. 2, 1797.'

CHASE, Circuit Justice.

What is it that you say, sir, fell from the court? They have not yet decided what was or what not proper evidence for you to adduce. The court said, if you thought the public documents at your service, you were mistaken. If you undertake to publish, without having proper evidence before you to justify your assertions, you do it at your own risk. Most assuredly, in common traverses, you could not offer the evidence you mention. But we acknowledge that, in such a case as this, greater latitude may be given. If you say the president did write a letter, you must prove it. We should incline to admit gazettes and acts of public authority and notoriety: you might read the speech of the president to both houses of congress in evidence. If you want to prove that the president advocated a navy, you may read the journals of congress or any authentic public document.

Mr. Cooper. If I am defeated in my endeavours to procure these documents, I must offer such evidence as I can procure; and where there is no reasonable suspicion or assignable motive why the publications I offer should misrepresent the transactions I allude to, the probability is in favour of their accuracy; especially when the printers of them are severely punishable for wilful misrepresentation or gross mistake in detailing the public acts of government.

PETERS, District Judge.

I admit a great many things from Mr. Cooper, who is without counsel, which I would not admit from others.

CHASE, Circuit Justice.

You may read anything and everything you please.

Mr. Cooper then went on to argue at great length, from a copious collection from the public documents of the day, that the policy of the president had been to saddle upon the country a permanent navy and army, and to keep down the liberties of the citizens by his arbitrary interference in the case of Jonathan Robbins. He then said:

Gentlemen, I have gone through all the charges, and I am satisfied that I have brought in support of my assertions the best evidence the nature of my case would admit of. It is true, by resorting to Danbury for depositions and to Charlestown for records, I might have made the evidence in the last charge more complete; but I did not and do not think them necessary to produce further conviction on your minds than you feel on the subject already. This is an important point under the law in question. If such strictness of testimony is required, there is an end at once of all political conversation in promiscuous society. The time, the labour, the difficulty, the expense, the harassment and fatigue of mind as well as of body, which such doctrine

would occasion to every citizen whom a corrupt administration might determine to ruin, would be an engine of oppression of itself sufficiently powerful to establish a perfect despotism over the press; and would be a punishment for innocence before trial, too severe to be inflicted on sedition itself. I think you must feel the truth of these remarks: the proceedings on this trial irresistibly suggest them. Gentlemen, if the assertions I have made are true, whatever the motives of them may be, you cannot find me guilty. But I think it impossible, if you consider the paper altogether, that you can asscribe the publication of it to malice: it is on the face of it not voluntary, but compelled. I have, in the very outset of the paper, spoken well of the president: I have been in the habit of thinking his intentions right, and his public conduct wrong: and that this has been the general tenor of my language and behaviour, I believe I can even now bring proof enough from among my friends and my neighbors.

CHASE, Circuit Justice. This is not necessary: it is your conduct, not your character, that is in question. If this prosecution were for a crime against the United States, you might give evidence to your character, and show that you have always been a good citizen; but this is an indictment for a libel against the president, where your general character is not in question. ***638**

Mr. Cooper. I am satisfied. I shall fatigue the jury no longer; but rest my defence here.

Mr. Rawle, in reply, said:

Gentlemen of the jury, the defence you have just heard is one of the most extraordinary and unexampled I ever remember to have witnessed in a court of justice. It is no less than to call into decision whether Thomas Cooper, the defendant, or the president of the United States, to whom this country has thought proper to confide its most important interests, is best qualified to judge whether the measures adopted by our government are calculated to preserve the peace and promote the happiness of America. This, however, does not seem to me the real point which you are to try; and I shall therefore (under direction of the court) proceed to state what I conceive to be the question which you, gentlemen of the jury, are now called upon to determine. Thomas Cooper is charged in the indictment with having published a false, scandalous and malicious libel, with intent to defame the president of the United States, and to bring him into contempt and disrepute, and to excite against him the hatred of the good people of this country. In the act which defines this offence and points out the punishment, a liberality of defence is given, unknown, I believe, in any other country where the party is tried for a libel on the government. Here the defendant is allowed, under the third section of that act, to give in evidence the truth of the matters charged as a libel in the publication, and the jury have a right to determine the law and the fact under the direction of the court. The true spirit of the law is that the defendant shall not be found guilty of publishing defamatory writings, unless they be false, nor, although they may be false, shall he be considered as guilty under the law, unless the intent of the publication appear to be malicious. That such publication has proceeded upon a knowledge of the truth, he is permitted to give as matter of evidence; and if true, it must be allowed to go far to satisfy the minds of the jury that the malicious motives imputed to him are not true. In private actions for slander, where a man seeks pecuniary redress for the injury his character has sustained, the defendant is entitled to give in evidence, as a defence to the action, the truth of the words spoken or the written libel; and if the truth of the assertions be proved, it will amount to a justification. There is no difference, then, between the defence that may be set up to an action of slander, or libel on a private person, and that which is permitted under the law whereon this indictment is grounded. The defendant has undertaken to satisfy the mind of the jury that, in this publication, he had no malicious intention against the president of the United States; I join issue with him on the point, and request your particular attention to it. He alleges that he did not impute improper motives to the president, and attempts to substantiate his allegation by referring you to his declaration in the outset, where he says that 'I cannot believe him (the president) capable of such gross misrepresentations, for I still think well of his intentions, however I may disapprove of his conduct.' But to this I shall add that he goes on and concludes with a paragraph, evincing in the clearest manner a settled design to persuade the public that the president of the United States is not fit for the high office he bears, and of this you must be fully convinced from the whole tenor of the expressions which have been read to you in the indictment. It is very far from my views to press hard upon any part

of his long address to you, or to make use against him of any unguarded expression, which, on more deliberate consideration, he might have omitted or corrected; yet, when I cannot but observe, from the whole tenor of his present argument, as well as from his publication, that his object is not so much to convince you, gentlemen of the jury, that his assertions are true, as to cast an unmerited reflection on the general character and conduct of the president, I cannot help suspecting him of the motives he disclaims, and I must do my duty by exposing the design as well as the fallacy of the justification he has set up. The defendant has used a little observation respecting the separating in the indictment the text from the context, as I believe he was pleased to term it; and argued that by this means the most upright intentions and laudable expressions might be perverted from their true and obvious meaning. Such an insinuation, however, is not calculated to influence your minds. In framing an indictment, it is my duty to leave out matters of little importance, and to introduce those circumstances only that are truly and legally reprehensible: and he well knows that he can read, if he pleases, the whole of the publication, and that you will have it with you when you consider of your verdict. You will judge, therefore, whether by this observation, it was his, or whether it is my design to confound and perplex the sense. Whether the reflections he has thrown upon the conduct of government, in so many instances throughout his defence as well as in his publication, evince the regard he professes to entertain for the intentions of the president, is to me, as it will be to you, extremely dubious; nor have those professions been confirmed by the singular manner in which he has cited and selected the passages on which his defence has been grounded. Throughout the quotations he has made, particularly from the addresses to the president, and the answers to them, there has been a series of misrepresentations, which it will be my duty to observe upon when I come to consider that part of the charge and his vindication of it. But it is fair to observe that if, from the perusal of partial extracts and passages selected from various publications, he has thought proper ***639** to publish a libel, such as that for which he is indicted, against the character of our president, there is no excuse for his conduct; if, on the other hand, he had the whole of the publications before him, and has extracted from them partially and unfairly, his conduct is still more reprehensible, and there is the less excuse, as it is evident, and as you, gentlemen of the jury, must have observed, that he is a man of talents and letters.

Mr. Rawle then proceeded to consider at great length the several points of justification started by Mr. Cooper, and then said:

Gentlemen, you have attended to the words of this charge in the indictment, and you cannot but be impressed that they convey on the face and in the very tenor of them, a conclusive proof of a mala mens, of a malicious and deliberate intention to injure the character of the president: no man can read them without receiving this impression from the perusal. I have not touched on the article respecting the embassies to Prussia, Russia, and the Porte; because I did not think it of importance sufficient to occupy much of your time. Indeed, I believe no embassy was ever sent to Russia. There is enough for your consideration against the defendant, without dwelling on these lesser articles of the indictment. Gentlemen, I have no personal animosity against Mr. Cooper; but I have instituted this prosecution because I thought it my duty so to do, and I must make those remarks which the same duty calls forth. The defendant has endeavoured to show that his publication was without malice; but his conduct with Buyers, and his expressions in that publication, prove otherwise: the nature of his defence, though he has stated his opinion of the good intentions of the president, evidently shows that he meant to justify his own conduct and language throughout. You, gentlemen of the jury, under the direction of the court, will decide whether he has presented to you such a justification as will entitle him to your verdict in his favour.

CHASE, Circuit Justice (charging jury). Gentlemen of the jury: When men are found rash enough to commit an offence such as the traverser is charged with, it becomes the duty of the government to take care that they should not pass with impunity. It is my duty to state to you the law on which this indictment is preferred, and the substance of the accusation and defence. Thomas Cooper, the traverser, stands charged with having published a false, scandalous and malicious libel against the president of the United States, in his official character as president. There is no civilized country that I know of, that does not punish such offences; and it is necessary to the peace and welfare of this

country, that these offences should meet with their proper punishment, since ours is a government founded on the opinions and confidence of the people. The representatives and the president are chosen by the people. It is a government made by themselves; and their officers are chosen by themselves; and, therefore, if any improper law is enacted, the people have it in their power to obtain the repeal of such law, or even of the constitution itself, if found defective, since provision is made for its amendment. Our government, therefore, is really republican; the people are truly represented, since all power is derived from them. It is a government of representation and responsibility. All officers of the government are liable to be displaced or removed, or their duration in office limited by elections at fixed periods. There is one department only, the judiciary, which is not subject to such removal; their offices being held 'during good behaviour,' and therefore they can only be removed for misbehaviour. All governments which I have ever read or heard of punish libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government. A republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press. This latter is the more slow, but most sure and certain, means of bringing about the destruction of the government. The legislature of this country, knowing this maxim, has thought proper to pass a law to check this licentiousness of the press: by a clause in that law it is enacted. (Judge CHASE here read the second section of the sedition law.) It must, therefore, be observed, gentlemen of the jury, that the intent must be plainly manifest. It is an important word in the law; for it there is no such intent to defame, &c., there is no offence created by that law. Thomas Cooper, then, stands indicted for having published a false, scandalous and malicious libel upon the president of the United States, with intent to defame the president, to bring him into contempt and disrepute, and to excite against him the hatred of the good people of the United States. This is the charge. The traverser has pleaded not guilty, and that he has not published, &c., with these views. He has also pleaded in justification (which the law provides for), that the matters asserted by him are true, and that he will give the same in evidence.

It is incumbent on the part of the prosecution to prove two facts: (1) That the traverser did publish the matters contained in the indictment. (2) That he did publish with intent to defame, &c. For the intent is as much a fact as the other, and must be proved in the same manner as other facts; and must be proved as stated in the law of congress--the mere publication is no offence; and in making up your verdict, though you consider them separately, you must take the whole tenor and import of the publication, since the offence is committed by the two coupled together. ***640**

First, then, as to the publication. The fact of writing and publishing is clearly proved; nay, in fact, it is not denied. It is proved to have taken place at Sunbury, a considerable distance from the seat of government. It appears from the evidence that the traverser went to the house of a justice of the peace with this paper, whom, of all others, he ought to have avoided; for he must know that it was the duty of the justice of the peace to deliver it immediately to those who administer the government. He did so. It was indecent to deliver such a paper to a justice of the peace, and the manner in which it was delivered was yet more outrageous--if it was done in joke, as the traverser would wish to imply, it was still very improper--but there was the same solemnity in his expression, 'This is my name, and I am the author of this handbill,' as if the traverser was going to part with an estate. This conduct showed that he intended to dare and defy the government, and to provoke them, and his subsequent conduct satisfies my mind that such was his disposition. For he justifies the publication in all its parts, and declares it to be founded in truth. It is proved most clearly to be his publication. It is your business to consider the intent as coupled with that, and view the whole together. You must take that publication, and compare it with the indictment. If there are doubts as to the motives of the traverser, he has removed them; for, though he states in his defence that he does not arraign the motives of the president, yet he has boldly avowed that his own motives in this publication were to censure the conduct of the president, which his conduct, as he thought, deserved. Now, gentlemen, the motives of the president, in his official capacity, are not a subject of inquiry with you. Shall we say to the president, you are not fit for the government of this country? It is no apology for a man to say, that he believes the president to be honest, but that he has done acts which prove him unworthy the

confidence of the people, incapable of executing the duties of his high station, and unfit for the important office to which the people have elected him: the motives and intent of the traverser, not of the president, are the subject to be inquired into by you.

Now we will consider this libel as published by the defendant, and observe what were his motives. You will find the traverser speaking of the president in the following words: 'Even those who doubted his capacity, thought well of his intentions.' This the traverser might suppose would be considered as a compliment as to the intentions of the president; but I have no doubt that it was meant to carry a sting with it which should be felt; for it was in substance saying of the president, 'You may have good intentions, but I doubt your capacity.' He then goes on to say: 'Nor were we yet saddled with the expense of a permanent navy, nor threatened, under his (the president's) auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent. in time of peace.' Now, gentlemen, if these things were true, can any one doubt what effect they would have on the public mind? If the people believed those things, what would be the consequence? What! the president of the United States saddle us with a permanent navy, encourage a standing army, and borrow money at a large premium? And are we told, too, that this is in time of peace? If you believe this to be true, what opinion can you, gentlemen, form of the president? One observation must strike you, viz.: That these charges are made not only against the president, but against yourselves who elect the house of representatives, for these acts cannot be done without first having been approved of by congress. Can a navy be built, can an army be raised, or money borrowed, without the consent of congress? The president is further charged for that 'the unnecessary violence of his official expressions might justly have provoked a war.' This is a very serious charge indeed. What, the president, by unnecessary violence, plunge this country into a war! and that a just war? It cannot be--I say, gentlemen, again, if you believe this, what opinion can you form of the president? Certainly the worst you can form: you would certainly consider him totally unfit for the high station which he has so honorably filled, and with such benefit to his country. The traverser states that, under the auspices of the president, 'our credit is so low that we are obliged to borrow money at eight per cent. in time of peace.' I cannot suppress my feelings at this gross attack upon the president. Can this be true? Can you believe it? Are we now in time of peace? Is there no war? No hostilities with France? Has she not captured our vessels and plundered us of our property to the amount of millions? Has not the intercourse been prohibited with her? Have we not armed our vessels to defend ourselves, and have we not captured several of her vessels of war? Although no formal declaration of war has been made, is it not notorious that actual hostilities have taken place? And is this, then, a time of peace? The very expense incurred, which rendered a loan necessary, was in consequence of the conduct of France. The traverser, therefore, has published an untruth, knowing it to be an untruth.

The other part of the publication is much more offensive. I do not allude to his assertions relating to the embassies to Prussia, Russia, and the Sublime Porte. They are matters of little consequence, and, therefore, I shall pass over them. The part to which I allude is that where the traverser charges the president with having influenced the judiciary department. I know of no charge which can be more injurious to the president than that of an attempt to influence a court of judicature; the judicature of the country is of the greatest consequence to the liberties and existence of a nation. If your constitution was destroyed, ***641** so long as the judiciary department remained free and uncontrolled, the liberties of the people would not be endangered. Suffer your courts of judicature to be destroyed; there is an end to your liberties. The traverser says that this interference was a stretch of authority that the monarch of Great Britain would have shrunk from; an interference without precedent, against law and against mercy. Is not this an attack, and a most serious attack on the character of the president? The traverser goes on thus: 'This melancholy case of Jonathan Robbins, a native of America, forcibly impressed by the British, and delivered, with the advice of Mr. Adams, to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country,--a case too little known, but of which the people ought to be fully apprised before the election, and they shall be.' Now, gentlemen, there are circumstances in this publication which greatly aggravate the offence. The traverser does not only tell you that the president interfered to influence a court of justice without precedent, against law and against mercy; but that he so interfered in order to

deliver up a native American citizen to be executed by a British court-martial under a mock trial, against law and against mercy. Another circumstance is adduced to complete the picture. He tells you that this Robbins was not only an American, but a native American, forcibly impressed by the British; and yet that the president of the United States, without precedent, against law and against mercy, interfered with a court of justice, and ordered this native American to be delivered up to a mock trial by a British court-martial. I can scarcely conceive a charge can be made against the president of so much consequence, or of a more heinous nature. But, says Mr. Cooper, he has done it. I will show you the case in which he has done it. It is the case of Jonathan Robbins. It appears then that this is a charge on the president, not only false and scandalous, but evidently made with intent to injure his character, and the manner in which it is made is well calculated to operate on the passions of Americans, and I fear such has been the effect. If this charge were true, there is not a man amongst you but would hate the president. I am sure I should hate him myself if I had thought he had done this. Upon the purity and independence of the judges depend the existence of your government and the preservation of your liberties. They should be under no influence--they are only accountable to God and their own consciences--your present judges are in that situation.

There is a little circumstance which the attorney-general, in his observations to you, omitted to state, but which I think it right to recall to your recollection, as it appears with what design the traverser made this publication. In this allusion to Jonathan Robbins he expressly tells you this is 'a case too little known, but of which the people ought to be fully apprised before the election, and they shall be.' Here, then, the evident design of the traverser was, to arouse the people against the president so as to influence their minds against him on the next election. I think it right to explain this to you, because it proves, that the traverser was actuated by improper motives to make this charge against the president. It is a very heavy charge, and made with intent to bring the president into contempt and disrepute, and excite against him the hatred of the people of the United States. The traverser has read in evidence a report made by the president to the house of representatives, and a letter written by the secretary of state, to show that the president had advised and directed this Robbins to be given up; but subsequent facts could not excuse the traverser for what he had written before. Now, gentlemen, with regard to this delivery of Jonathan Robbins, I am clearly of opinion that the president could not refuse to deliver him up. This same Jonathan Robbins, whose real name appears to have been Nash, was charged with murder committed on board the Hermione, British ship of war. This Nash being discovered in America, the British minister made a requisition to the president that he should be delivered up. Then we must inquire whether the president was obliged to give him up? By the twenty-seventh article of the treaty with Great Britain, it is stipulated, 'that either of the contracting parties will deliver up to justice all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided this shall be done only on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had been there committed.' If the president, therefore, by this treaty, was bound to give this Nash up to justice, he was so bound by law; for the treaty is the law of the land: if so, the charge of interference to influence the decisions of a court of justice, is without foundation. The reason why this article was inserted in the treaty, is evident. Murder is a crime against the laws of God and man, and ought never to be committed with impunity. Forgery is an offence affecting all commercial countries, and should never go unpunished; and therefore every government, especially a commercial one, acts wisely in delivering fugitives guilty of such crimes to justice. Nash was charged with having committed murder on board a British ship of war. Now a dispute has arisen whether murder committed on board such a ship of war, was committed within the jurisdiction of Great Britain. I have no doubt as to the point. All vessels, whether public or private, are part of the territory and within the jurisdiction of the nation to which they belong. This is according to the law of nations. All nations have this jurisdiction, and the reason is obvious, ***642** for every country carrying on commerce, is answerable to other nations for the conduct of their subjects on the ocean. Were it not so, crimes committed on board vessels of war would go unpunished; for no other country can claim jurisdiction. This person, then, was charged with

murder committed on board a British ship of war. I say it was committed within the jurisdiction of Great Britain, By the constitution, (since the treaty is the law of the land,) America was bound to give him up: but who is the person to deliver up a fugitive according to that article in the treaty? The president was the only person to take the proper steps, and to take cognizance of the business. He represents the United States in their concerns with foreign powers. This affair could not be tried before a court of law. No court of justice here has jurisdiction over the crime of murder committed on board a British ship of war. Now, as the requisition was made to the president on the part of the British government to deliver this man up, it became necessary to know whether there was sufficient evidence of his criminality pursuant to the treaty. The judge of the court of Carolina was therefore called upon to inquire into the evidence of his criminality. He was the instrument made use of by the president to ascertain that fact. His delivery was the necessary act of the president, which he was by the treaty and the law of the land, bound to perform; and had he not done so, we should have heard louder complaints from that party who are incessantly opposing and calumniating the government, that the president had grossly neglected his duty by not carrying a solemn treaty into effect. Was this, then, an interference on the part of the president with the judiciary without precedent, against law and against mercy; for doing an act which he was bound by the law of the land to carry into effect, and over which a court of justice had no jurisdiction? Surely not; neither has it merited to be treated in the manner in which the traverser has done in his publication. A defence of greater novelty I never heard before.

Take this publication in all its parts, and it is the boldest attempt I have known to poison the minds of the people. He asserts that Mr. Adams has countenanced a navy, that he has brought forward measures for raising a standing army in the country. The traverser is certainly a scholar, and has shown himself a man of learning, and has read much on the subject of armies. But to assert, as he has done, that we have a standing army in this country, betrays the most egregious ignorance, or the most wilful intentions to deceive the public. We have two descriptions of armies in this country--we have an army which is generally called the Western army, enlisted for five years only--can this be a standing army? Who raises them? Congress. Who pays them? The people. We have also another army, called the provisional army, which is enlisted during the existence of the war with France--neither of these can, with any propriety, be called a standing army. In fact, we cannot have a standing army in this country, the constitution having expressly declared that no appropriation shall be made for the support of an army longer than two years. Therefore, as congress may appropriate money for the support of the army annually, and are obliged to do it only for two years, there can be no standing army in this country until the constitution is first destroyed. There is no subject on which the people of America feel more alarm, than the establishment of a standing army. Once persuade them that the government is attempting to promote such a measure, and you destroy their confidence in the government. Therefore, to say, that under the auspices of the president, we were saddled with a standing army, was directly calculated to bring him into contempt with the people, and excite their hatred against him.

It is too much to press this point on the traverser. But he deserves it. This publication is evidently intended to mislead the ignorant, and inflame their minds against the president, and to influence their votes on the next election. The traverser says, he has proved that the president has advocated a standing army--how has he proved it? There is no standing army; I have before stated, the army is only raised for five years, and during the existing differences--he tells you, Mr. Adams is a friend to the establishment of a navy; I wonder who is not a friend to a navy which is to protect the commerce and power of this country. The traverser has, to prove these points, read to you many extracts from the addresses and answers to the president. He has selected a number of passages, which, he asserts, prove the approbation of the president to the creation of a navy, and forming a standing army. But we are to recollect gentlemen, that when in consequence of the unjust proceedings of France, the great mass of the people thought proper to address the president, expressing in those addresses, sentiments of attachment and confidence in the president, and their determination to resist the oppression of the French government, the president replied to them, in answers which generally were the echo of their sentiments, and in fact, his expressions were as general as the nature of the addresses would permit--therefore, the traverser ought to have blamed the addressers, and not the president. The

Marine Society of Boston, as old seamen, address the president in favour of a navy. The president in reply, thinks a navy is the proper defence of the country.

I believe, gentlemen, in the first part of my charge, I made remarks on the assertions of the traverser, that the president had borrowed money at eight per cent. in time of peace. Therefore, it will not be necessary to enlarge on that point. You will please to notice, gentlemen, that the traverser in his defence must prove every charge he has made to be true; ***643** he must prove it to the marrow. If he asserts three things, and proves but one, he fails; if he proves but two, he fails in his defence, for he must prove the whole of his assertions to be true. If he were to prove, that the president had done everything charged against him in the first paragraph of the publication--though he should prove to your satisfaction, that the president had interfered to influence the decisions of a court of justice, that he had delivered up Jonathan Robbins without precedent, against law and against mercy, this would not be sufficient, unless he proved at the same time, that Jonathan Robbins was a native American, and had been forcibly impressed, and compelled to serve on board a British ship of war. If he fails, therefore, gentlemen, in this proof, you must then consider whether his intention in making these charges against the president were malicious or not. It is not necessary for me to go more minutely into an investigation of the defence. You must judge for yourselves--you must find the publication, and judge of the intent with which that publication was made, whether it was malice or not? If you believe that he has published it without malice, or an intent to defame the president of the United States, you must acquit him. If he has proved the truth of the facts asserted by him, you must find him not guilty.

After the jury had returned with a verdict of guilty:

CHASE, Circuit Justice. Mr. Cooper, as the jury have found you guilty, we wish to hear any circumstances you have to offer in point of the mitigation of the fine the court may think proper to impose on you, and also in extenuation of your punishment. We should therefore wish to know your situation in life, in regard to your circumstances. It will be proper for you to consider of this. As you are under recognizance, you will attend the court some time the latter end of the week. (The court appointed Wednesday.)

Proceedings on Wednesday, April 30, 1800.

CHASE, Circuit Justice. Mr. Cooper, have you anything to offer to the court previous to passing sentence?

Mr. Cooper. The court have desired me to offer anything relating to my circumstances in mitigation of the fine, or any observation that occurs to me in extenuation of the offence. I have thought it my duty (not for the purpose of deprecating any punishment which the court may deem it proper to inflict, but) to prevent any accidental or apparent harshness of punishment on part of the court, for want of that information which it is in my power to give. For this reason, therefore, and that the court may not be misled, I think it right to say, that my property in this country is moderate. That some resources I had in England, commercial failures there have lately cut off: that I depend principally on my practice: that practice, imprisonment will annihilate. Be it so. I have been accustomed to make sacrifices to opinion, and I can make this. As to circumstances in extenuation, not being conscious that I have set down aught in malice, I have nothing to extenuate.

CHASE, Circuit Justice. I have heard what you have to say. I am sorry you did not think proper to make an affidavit in regard to your circumstances; you are a perfect stranger to the court, to me at least. I do not know you personally-- I know nothing of you, more than having lately heard your name mentioned in some publication. Every person knows the political disputes which have existed amongst us. It is notorious that there are two parties in the country; you have stated this yourself. You have taken one side--we do not pretend to say, that you have not a right to express your sentiments, only taking care not to injure the characters of those to whom you are opposed. Your circumstances ought to have been disclosed, on affidavit, that the court might have judged as to the amount of the offence; nor did we want to hurt you, by this open disclosure.

Mr. Cooper. I have nothing to disclose that I am ashamed of.

CHASE, Circuit Justice. If we were to indulge

our own ideas, there is room to suspect that in cases of this kind, where one party is against the government, gentlemen who write for that party would be indemnified against any pecuniary loss; and that the party would pay any fine which might be imposed on the person convicted. You must know, I suppose, before you made any publication of this kind, whether you were to be supported by a party or not, and whether you would not be indemnified against any pecuniary loss. If the fine were only to fall on yourself, I would consider your circumstances; but, if I could believe you were supported by a party inimical to the government, and that they were to pay the fine, not you, I would go to the utmost extent of the power of the court. I understand you have a family, but you have not thought proper to state that to the court. From what I can gather from you, it appears that you depend on your profession for support; we do not wish to impose so rigorous a fine as to be beyond a person's abilities to support, but the government must be secured against these malicious attacks. You say that you are not conscious of having acted from malicious motives. It may be so; saying so, we must believe you; but, the jury have found otherwise. You are a gentleman of the profession, of such capacity and knowledge, as to have it more in your power to mislead the ignorant. I do not want to oppress, but I will restrain, as far as I can, all such licentious attacks on the government of the country.

Mr. Cooper. I have been asked by the court whether, in case of a fine being imposed upon me, I shall be supported by a party. Sir, I solemnly aver, that throughout my life, here and elsewhere, among all the political questions is which I have been concerned, I have ***644** never so far demeaned myself as to be a party writer. I never was in the pay or under the support of any party; there is no party in this, or any other country, that can offer me a temptation to prostitute my pen. If there are any persons here who are acquainted with what I have published, they must feel and be satisfied that I have had higher and better motives, than a party could suggest. I have written, to the best of my ability, what I seriously thought would conduce to the general good of mankind. The exertions of my talents, such as they are, have been unbought, and so they shall continue; they have indeed been paid for, but they have been paid for by myself, and by myself only, and sometimes dearly. The public is my debtor, and what I have paid or suffered for them, if my duty should again call upon me to write or to act, I shall again most readily submit to. I do not pretend to have no party opinions, to have no predilection for particular descriptions of men or of measures; but I do not act upon minor considerations; I belong here, as in my former country, to the great party of mankind. With regard to any offers which may have been made to me, to enable me to discharge the fine which may be imposed, I will state candidly to the court what has passed, for I wish not to conceal the truth; I have had no previous communication or promise whatever, I have since had no specific promises of money or anything else. I wrote from my own suggestions. But, many of my friends have, in the expectation of a verdict against me, come forward with general offers of pecuniary assistance; these offers I have, hitherto, neither accepted nor rejected. If the court should impose a fine beyond my ability to pay, I shall accept them without hesitation; but if the fine be within my circumstances to discharge, I shall pay it myself. But the insinuations of the court are ill founded, and if you, sir, from misapprehension or misinformation have been tempted to make them, your mistake should be corrected.

PETERS, District Judge.

I think we have nothing to do with parties; we are only to consider the subject before us. I wish you had thought proper to make an affidavit of your property. I have nothing to do, sitting here, to inquire whether a party in whose favour you may be, or you, are to pay the fine. I shall only consider your circumstances, and impose a fine which I think adequate; we ought to avoid any oppression. It appears that you depend chiefly upon your profession for support. Imprisonment for any time would tend to increase the fine, as your family would be deprived of your professional abilities to maintain them.

CHASE, Circuit Justice.

We will take time to consider this. Mr. Cooper, you may attend here again.

Thursday, Mr. Cooper attended, and the court sentenced him to pay a fine of four hundred dollars; to be imprisoned for six months, and, at the end of that period, to find surety for his good behaviour,

himself in a thousand, and two sureties in five hundred dollars each.

NOTE. Judge Chase's conduct in this case, which was marked with a moderation in strong contrast with the harshness afterwards exhibited in the prosecution of Callender [Case No. 14,709], was ably defended by Mr. Harper, in a speech on the sedition act, in the house of representatives in January, 1801 (Harper's Works, 375), and was not thought sufficiently marked, to entitle it even to a nominal place in the memorable articles of impeachment, of November, 1804. Mr. Cooper's defence, however, so written out by himself as to make up a review of the whole administration, attracted great attention; and his imprisonment for an offence thought so trivial, was a popular subject for electioneering declamation. Mr. Adams himself thought the thing had gone too far, and would have pardoned him, had not Mr. Cooper issued a letter, in which he told him, that, so far from asking for clemency, he would not 'accept' it, unless coupled with an acknowledgment by the president of the breach of good faith which the publication of the alleged provocatory letter involved. See Aurora, for May 10, 1700. Of course nothing could be done but let the imprisonment run out. This it did, and the fine was paid. Forty years afterwards, at the same time with that imposed upon Lyon [Case No. 8,646], it was repaid with interest. In Porcupine, Mr. Cooper, as well as Dr. Priestley, were among the principal subjects of ridicule and denunciation; but, perhaps, the most bitter notice taken of them by Cobbett, was a poem called 'Prison Eclogue,' published by him in London, in 1801, and afterwards incorporated in Porcupine's works. The student will find in the Aurora of May 6, May 9, and May 19, papers of some interest emanating from Mr. Cooper on the subject of the trial in the text.

Mr. Cooper's life, however, is so connected with American history, as to require more than a general notice. He was born in London in 1759, and was educated at Oxford. Intended for the law, he did not confine himself to merely legal studies, but devoted himself with great success to the natural sciences, particularly chemistry, over which he soon obtained a mastery. His professional studies, so far as his history shows, never were very severely conducted; and soon after his advent at the bar, he allowed himself to be carried into another orbit, by accepting an ambassadorship from a democratic club in England, to a democratic club in France. For this both he, himself, and his patron, Mr. Watt, of steamengine fame, from whom his diplomatic credentials had issued, were assailed in the house of commons by Mr. Burke. This gave Mr. Cooper an opportunity which he but too gladly seized; and at once there issued a pamphlet reply, which made up for the want of vivacity of its style by the excessive inflammation of its temper. 'As long as you sell this at a high price,' said Sir John Scott, 'you can do no harm; but the moment it is turned into a penny slip, that moment I will prosecute you.' This kindly caution of course shrunk the circulation of the 'reply,' and the result was, that Mr. Cooper, abandoning for a time politics, undertook to introduce into practice in Manchester, the important secret of extracting chlorine from common salt, which though afterwards so valuable, he was not then able to bring into successful operation.

Leaving the wreck both of business and of political fortune, Mr. Cooper at last made up his mind to accompany Dr. Priestley to America, not free, it must be admitted,--at least so far as Dr. Priestley is concerned,--from the conviction that, resist it as they might, the young republic would soon press them into the ranks of its law-makers. But this seemed to be a mistake, and the result was, that Mr. Cooper soon went into a violent opposition to Mr. Adams, the then president, not, however, until he had first somewhat ***645** circuitously intimated that he might accept the post of commissioner of the British treaty. Of this opposition, the prosecution in the text was the fruit. On coming out of prison, Mr. Cooper found the minority rapidly turning into a majority, and in a short time, the administration which had prosecuted him was overthrown. His untiring industry, his almost universal philosophical attainments, and his courageous temper, but more particularly the sufferings he had undergone in the maintenance of the freedom of the press, placed him high in the esteem of the dominant party. After having been appointed a commissioner to negotiate a settlement of the Luzerne difficulties in Pennsylvania--a duty he discharged with remarkable skill and success--he was nominated by Governor McKean to the president judgeship of a judicial district.

Mr. Cooper's proceedings after he became the wielder of judicial power, form an odd sequel to his experience when he was its subject. Scarcely five

years had passed after he was out of prison, before he was on the bench; and scarcely five years more had passed before he was impeached before the senate of Pennsylvania, upon charges, which, were it not that they were gravely preferred and amply supported, might be considered burlesques of those upon which he was instrumental in impeaching Judge Chase, in the senate of the United States. He was charged with pouncing upon delinquent jurors on the first day of the court, with fines and bench warrants, in violation of the venerable Pennsylvania practice, of giving them the quarto die post; with imprisoning a Quaker for not pulling off his hat; with committing three parties for 'whispering,' an offence for which he declared he would hear no apology; with issuing warrants without previous oath, and then committing the constables who refused to serve them; with insisting in one case in examining under oath, a prisoner charged with crime, as to his own guilt; with sending private notes to juries in criminal cases, tending to extract a verdict of guilty; with carting a Luzerne convict to the Philadelphia prison, a thing not then provided for, which ended in the convict being kept in abeyance by the Philadelphia jailor, who refused to receive him, and the court who refused to take him back, thereby, under his new ambulatory commitment, withdrawing the sheriff from his public duties; and with brow-beating counsel, witnesses and parties, in cases so numerous as to make their recapitulation cover three pages. The Presbyterian and Quaker professions, he was charged with declaring in open court, to be 'all damned hypocrisy and nonsense;' and divers specifications were given of illegal interference on his part in the profits of cases before him, an of private speculations in interests which were to pass under his adjudication. On February 21, 1811, these charges having been formally laid before the Pennsylvania house of representatives, were referred to a committee, who two days afterwards reported, that the evidence produced before them sufficiently substantiated the specifications of passionate and oppressive judicial bearing, leaving, however, the accusation of peculation without any further basis than that afforded by an imprudent purchase of certain property, sold at sheriff's sale under process from the court, a transaction which, though clear from any moral stain, the committee thought to be of doubtful propriety and dangerous precedent. They submitted, in conclusion, a resolution, 'that a committee be appointed to draft an address to the governor for the removal of Thomas Cooper, Esq., from the office of president judge of the Eighth judicial district of Pennsylvania.' Under this resolution, which passed 73 to 20, a committee was appointed which reported an address to the governor, which was carried 59 to 34, in the face of a very powerful protest by Mr. Gibson, now chief justice of Pennsylvania, who took the ground that the offences specified by the committee were misdemeanours, cognizable by impeachment alone. To this was joined a paper, in which the greater portion of the minority joined, declaring, that whatever may have been the peculiarities of manner of Mr. Cooper, there was no evidence which showed judicial misconduct. Under the Pennsylvania constitution, the governor 'may,' on address from the legislature, remove a judge from office; and, as Governor Snyder on a former occasion, when the attempt had been made to shake off the judges of the supreme court, had declared that 'may' sometimes means 'won't,' a vigorous effort was now made to induce him to give once more the same lenient grammatical construction. The governor, it seems, had been the client of Mr. Cooper in former times, and had lived with him for many years on terms of personal intimacy, but whether from this account he felt a greater delicacy in interfering, or whether, in fact, he thought that the case was one in which he ought not to defeat the legislative will, the only reply he made, was a note through the secretary of the commonwealth, announcing that Mr. Cooper's judicial tenure was closed.

Of this procedure, in everything but its result, a duodecimo of the more solemn trial, which in the senate of the United States Judge Chase was the subject, not the least remarkable feature was, that it was carried on, with a few exceptions, by the very party of which Mr. Cooper had been lately one of the most lively leaders, and for which,--if political persecution by an outgoing administration is to be considered as a calamity,--he was one of the greatest sufferers. It may be that, like Callender, he felt a natural disgust when he found that under Mr. Jefferson, many men were put ahead of him who had not received the honours of martyrdom under Mr. Adams; or it may be that when he got on the bench,--for which, by the way, he had not received the necessary professional training,--he became subject to that nervous debility by which the most plethoric patriotism is sometimes there prostrated; but it is certain that very soon he cooled towards the

Democrats, and, as was alleged in the evidence before the house committee, even went so far as to drop, when in court, expressions by no means complimentary to their persons, or their doctrines. This change--though not the overt acts said to have sprung from it--he confesses in an address issued from him at the close of the proceedings, at Lancaster, April 4, 1811. 'Nor have I been anxious to conceal,' he says, 'that during a long course of observation on the conduct of parties in this country, I have not found that the Democrats or Republicans have much reason to boast of more disinterested views, or more tolerant principles, than their opponents. I have long found it impossible for me to go all lengths with the party to which I belonged, and, of course, I have shared the fate of all moderate men; I have influence with no party, and have willingly and deliberately incurred the decided hatred of the most violent and thorough going of my own. I went over to France in 1792, an enthusiast, and I left it in disgust. I came here; and seventeen years experience of a democratic government in this country, has also served to convince me it may have its faults; that it is not quite so perfect in practice, as it is beautiful in theory, and that the speculations of my youth do not receive the full sanction of my maturer age; nor do I find that justice and disinterestedness, wisdom, and tolerance, are the necessary fruits of universal suffrage, as it is exercised in Pennsylvania, for these are not always the qualifications that procure a man to be sent as the representative of the people.'

Mr. Cooper's fine chemical acquirements, which, during all the storms of his eventful life, had never been submerged, now gave him a safe retreat. He was first placed in a philosophical professorship in Dickinson College, and afterwards in a highly honourable post in the University of Pennsylvania, which he finally abandoned for the chemical chair in Columbia College, South Carolina, of which he soon became president. In the nullification struggle he took ***646** a bold part, issuing documents of the most ultra states' rights tone, and showing that if he had added nothing to the sprightliness, he had lost nothing of the fire, of the pamphleteer of 1795-1800. He died in 1840, when engaged in revising the South Carolina Statutes, a duty charged on him by the legislature, after having published, besides numberless tracts on politics, divinity, and metaphysics, a treatise on the bankrupt laws, a translation of Justinian, a treaties on political economy, a manual of chemistry, as well as a general compendium of useful information.

The defendant applied to the court for a letter to be addressed to several members of congress requesting attendance as witnesses on his behalf, which motion was refused. See Case No. 14,861.

END OF DOCUMENT

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: 6/13/95

TO: ERIC JASO

Company Name: OIC

Fax Number: 501-221-8707 Telephone Number:

FROM: RAJEEV DUGGAL

Number of Pages: 6 (including this cover sheet)

Message: ATTACHED IS A REVIEW OF FILES STORES I FOUND. THEY ARE ORGANIZED BY PRESIDENT + ARE IN CHRONOLOGICAL ORDER.

I WILL GIVE YOU A CALL AFTER YOU'VE HAD SOME TIME TO REVIEW BOTH FAXES.

CONFIDENTIALITY NOTE

c:\faxform rdb

MEMORANDUM

TO: Alex Azar
Eric H. Jaso

FROM: Rajeev Duggal

DATE: June 13, 1995

RE: Review of Press Stories Regarding Presidents as Witnesses

1. Jefferson in 1807

Jefferson received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr, Mr. Jefferson's first Vice President. Justice Marshall, presiding over the trial, declared that the President was subject to the law. After first resisting, citing the independence of the executive branch from the judicial branch, Mr. Jefferson submitted the letter, making clear that his decision was voluntary. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1; Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

2. Monroe in 1818

President James Monroe was served with a subpoena to testify at a criminal trial, but based on his attorney general's advice, he declined, saying his presidential duties were paramount. He said he would submit to a deposition, but the court instead used interrogatories, which he answered. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

3. Tyler and Adams in 1846

Former Presidents John Tyler and John Quincy Adams appeared before congressional committees in response to subpoenas in the investigation of whether their Secretary of State Daniel Webster improperly disbursed funds from a confidential fund. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

4. Lincoln in 1862

Abraham Lincoln voluntarily appeared before a congressional committee. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

5. Grant in 1875

Ulysses S. Grant at first volunteered to testify at a criminal trial, but after consulting with his staff chose to give a deposition instead. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

6. Nixon in 1974

a. During the 1974 trial in the coverup of the Watergate affair, John D. Ehrlichman, a domestic policy adviser at the Nixon White House, sought Mr. Nixon's appearance. U.S. District Judge John Sirica agreed that former President Nixon should be called to testify as a defense witness.

Nixon objected that he was too ill to travel from his home in San Clemente to Washington as he was suffering from phlebitis [vein inflammation]. Sirica in response sent a panel of court appointed doctors to examine Nixon and excused Nixon only after they reported that he was seriously ill. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1; Robert L Jackson, North Lawyers Renew Bid for Reagan to Testify, The L.A. Times, Mar. 25, 1989, at A14.

b. Nixon was ordered to produce the Watergate tapes in response to a subpoena after the tapes were shown to be necessary to a fair administration of justice. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989.

7. Ford in 1975

In 1975, Gerald Ford consented to a videotaped interview for use in the trial of Lynette "Squeaky" Fromme, who was convicted of attempting to assassinate him. The videotape was played for jurors at trial. Administration lawyers lost a bid to have the court accept a written statement by the President. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1; North Tactic Revives an Old Debate: Can a President be Forced to Testify?, Associated Press, Jan. 4, 1989; Ruth Marcus, Subpoenaing the President: Not Without Precedent; In 1807, Jefferson Refused to Appear, But the Issue Has Never Been Clearly Decided, The Washington Post, Jan. 1, 1989, at A7.

8. Carter in 1980s

a. In 1980, Jimmy Carter while in office voluntarily answered questions on a videotape in a grand jury investigation of Robert L. Vesco, a fugitive financier. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1

b. President Carter while in office voluntarily provided videotaped testimony as a government witness in the perjury and gambling trial of a Georgia State Senator. North Tactic Revives an Old Debate: Can a President be Forced to Testify?, Associated Press, Jan. 4, 1989; Ruth Marcus, Subpoenaing the President: Not Without Precedent; In 1807, Jefferson Refused to Appear, But the Issue Has Never Been Clearly Decided, The Washington Post, Jan. 1, 1989, at A7.

c. A circuit court judge refused to subpoena President Carter in the bribery case against a businesswoman charged with trying to buy an Illinois lawmaker's vote for the Equal Rights Amendment. Deborah Singer, Judge in EPA Bribery Case Refuses to Subpoena Carter, Associated Press, Aug. 1, 1980.

9. Nixon in 1980

In 1980, Nixon voluntarily appeared as a witness in the trial of two former officials of the FBI who had been accused of conducting illegal break-ins. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1.

10. Nixon in 1982

Process servers were unable to get past Secret Service agents to serve former President Nixon with a subpoena seeking written testimony in a case by a couple against the Ford Motor Company. Bob Springer, Lawyer Says Can't Get Past Door to Serve Nixon With Subpoena, Associated Press, Aug. 25, 1982.

11. Reagan and Bush in the North Trial

a. Reagan answered interrogatories written by Independent Counsel Lawrence Walsh and submitted to the grand jury that returned an indictment against Oliver North. Judge Gesell ruled that Reagan need not testify in North's trial. Deborah Zabarenko, Allowing President's Testimony Would Break U.S. Precedent, Reuters, Mar. 31, 1989; Ruth Marcus, Subpoenaing the President: Not Without Precedent; In 1807, Jefferson Refused to Appear, But the Issue Has Never Been Clearly Decided, The Washington Post, Jan. 1, 1989, at A7.

b. U.S. District Judge Gesell threw out Oliver North's subpoena of President Bush but ruled that former President Reagan could be compelled to testify. Bush Excused From North Trial, The L.A. Times, Jan. 30, 1989, at A1.

c. "Both Reagan and Bush received defence subpoenas at North's Iran-Contra trial, but the judge in that case ruled that their testimony was not necessary or relevant." James Vincini, Bush, Reagan to be Subpoenaed at Poindexter Iran-Contra Trial, Reuters, June 16, 1989.

d. During two hours of oral argument D.C. Circuit Judge Silberman "noted that Reagan's written answers to questions in the Iran-Contra affair were submitted to a grand jury, but were never provided to North's lawyers." Silberman questioned "why, 'as a matter of basic fairness'" the written answers were not turned over to North. Pete Yost, Appeals Judge Questions Why Reagan Didn't Testify for North, Associated Press, Feb. 6, 1990.

12. Reagan and Bush in the Poindexter Trial

a. Judge Greene ruled that Poindexter may not subpoena President Bush's notes and diaries because Bush had no operational control over Bush. Ronald Ostrow, Judge Grants Access To Reagan's Papers, The L.A. Times, Oct. 25, 1989, at A1.

b. Judge Greene ordered President Reagan to release 29 excerpts and to answer 154 of the 183 questions posed by Poindexter's lawyers. Poindexter's Right to a Fair Trial Outweighs Reagan's Right to Executive Privilege, Newsday, Feb. 8, 1990, at 60.

c. "The great majority of some 183 questions Iran-Contra defendant John Poindexter proposes to ask former President Reagan are material to his defense, the U.S. District Court for the District of Columbia held Feb. 5 as it ordered Reagan to give testimony via videotaped deposition for use at the defendant's trial."

"There is no precedent for compelled in-court testimony by a former president, the court noted; on the other hand, written answers to interrogatories cannot fulfill the essence of the defendant's Sixth Amendment right. However, taking Reagan's testimony by videotape has the virtue of permitting him to fully exercise his right to claim executive privilege, if he so chooses, while at the same time eliminating the inevitable disruptions repeated claims of privilege would cause at trial. Moreover, the court said, national security concerns argue in favor of taking Reagan's testimony in a private setting." Former President Reagan Must Give Taped Testimony in Iran-Contra Trial, 58 U.S.L.W. 1126 (Feb. 20, 1990).

d. President Reagan was set to testify in the Poindexter trial. "'This will be the first time a sitting president has been compelled to appear in a court proceeding for adversarial questioning on his own conduct in office,' notes Prof. Paul F. Rothstein of the Georgetown University Law Center, a criminal law expert who has closely followed the Iran-Contra proceedings. 'It is really quite an event.'" Fred Strasser, Reagan Testimony Takes Center Stage, The National Law Journal, Feb. 26, 1990, at 1.

13. Other

a. "Courts going back to the early 1800s have ruled that presidents may be forced to testify in a criminal case. However, no president or former president actually has been forced to testify under subpoena." "'Everybody says it [can be done] but nobody has done it,' remarked Judge Greene during yesterday's hearing." Poindexter Lawyers Must Put Questions to Reagan in Writing, The Washington Times, Jan. 24, 1990, at A4.

b. No sitting president has ever testified in court in a criminal trial, although a few Presidents and former Presidents have provided testimony or its equivalent in criminal trials and grand jury proceedings. David Johnston, Judge Won't Order Reagan Testimony, The New York Times, April 1, 1989, at A1.

Paula Corbin **JONES**, Plaintiff,
v.
William Jefferson **CLINTON** and Danny Ferguson, Defendants.

No. LR-C-94-290.

United States District Court,
E.D. Arkansas,
Western Division.

Dec. 28, 1994.

Former state employee brought civil rights action against sitting President of the United States and against state trooper who was assigned to President when President was Arkansas governor for alleged conduct occurring when President was governor. The District Court, 858 F.Supp. 902, ruled that issue of presidential immunity deserved threshold consideration and, therefore, President would be allowed to defer filing of any other pleadings or motions until immunity issue was resolved. President moved for immunity. The District Court, Susan Webber Wright, J., held that: (1) President was not entitled to absolute immunity, and (2) President was entitled to limited or temporary immunity from immediate trial, but discovery and deposition process could proceed as to all persons including the President.

Motion denied.

[1] UNITED STATES ⚿ 26
393k26
Sitting President of the United States was not entitled to absolute immunity with respect to sexual harassment action brought against him for alleged conduct occurring when President was governor of Arkansas.

[1] UNITED STATES ⚿ 50.5(5)
393k50.5(5)
Sitting President of the United States was not entitled to absolute immunity with respect to sexual harassment action brought against him for alleged conduct occurring when President was governor of Arkansas.

[1] UNITED STATES ⚿ 50.10(1)
393k50.10(1)
Sitting President of the United States was not entitled to absolute immunity with respect to sexual harassment action brought against him for alleged conduct occurring when President was governor of Arkansas.

[2] FEDERAL CIVIL PROCEDURE ⚿ 1266
170Ak1266
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[2] FEDERAL CIVIL PROCEDURE ⚿ 1323.1
170Ak1323.1
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[2] UNITED STATES ⚿ 26
393k26
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment

action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[2] UNITED STATES ⇐ 50.5(5)
393k50.5(5)
Sitting President of United States was entitled to limited or temporary Presidential immunity from immediate trial with respect to sexual harassment action brought against him for alleged conduct occurring when President was Arkansas governor and thus, President could not be tried until he left office, but discovery and deposition process could proceed as to all persons including the President; President should not have to devote his time and effort to defense of case at trial while in office, this was not case in which necessity existed to rush to trial nor case that would likely be tried with few demands on Presidential time, plaintiff was not in rush to get case to court, and allowing discovery process to proceed would eliminate problem that witnesses might die or become forgetful due to passage of time.

[3] FEDERAL CIVIL PROCEDURE ⇐ 1956
170Ak1956
Allegations against state trooper who was assigned to sitting President of United States when President was Arkansas governor would be tried at the same time as those against the President who was entitled to limited or temporary presidential immunity from immediate trial with respect to sexual harassment action brought against President and trooper stemming from alleged incident when President was Arkansas governor because there was too much interdependency of events and testimony to proceed piecemeal; trooper's case was integrally related to allegations against President and both cases arose out of the same alleged incident.

***691** Daniel M. Traylor, Traylor Law Firm, Little Rock, AR, and Gilbert K. Davis and Joseph Cammarata Fairfax, VA, for plaintiff.

Kathlyn Graves, Wright, Lindsey & Jennings, Stephen C. Engstrom, Wilson, Engstrom, Corum, Dudley & Coulter, Little Rock, AR, and Robert S. Bennett, Skadden, Arps, Slate, Meaghen & Flom, Washington, DC, for defendants.

Bill W. Bristow, Seay & Bristow, Jonesboro, AR and Robert Batton, Jacksonville, AR, for Mr. Ferguson.

MEMORANDUM OPINION AND ORDER

SUSAN WEBBER WRIGHT, District Judge.

The Plaintiff, Paula Corbin Jones, filed a damage suit against the Defendants William Jefferson Clinton and Danny Ferguson to recover for acts which were alleged to have taken place primarily while Defendant Clinton was Governor of Arkansas and Defendant Ferguson was a Trooper with the Arkansas State Police assigned to the Governor. Subsequently, in the General Election of November, 1992, Mr. Clinton was elected President of the United States and assumed that office on January 20, 1993.

The complaint was filed on May 6, 1994, and was predicated on an alleged incident which was said to have occurred on May 8, 1991. The action alleged sexual harassment and conspiracy pursuant to 42 U.S.C. §§ 1983 and 1985, which are provisions included in civil rights legislation of the reconstruction era. It also alleged state law claims of defamation and outrage.

Defendant Ferguson responded to these allegations by, in essence, denying any which might involve questionable activities on his part. Defendant Clinton responded with a motion to bifurcate the briefing schedule so as to permit the question of Presidential ***692** immunity to be argued on a motion to dismiss before any other questions were presented. On July 21, 1994, the Court entered a Memorandum and Order allowing President Clinton to file a motion to dismiss on the basis of Presidential immunity and deferring and preserving the filing of any other motions or pleadings until the issue of Presidential immunity had been resolved. Jones v. Clinton, 858 F.Supp. 902 (E.D.Ark.1994).

The Court noted that this order was purely procedural in nature and addressed only the question of whether Presidential immunity would be considered as a threshold issue. Id. at 907 n. 6.

The basic issue, therefore, which this Memorandum Opinion and Order addresses is whether a civil action may be asserted against the President of the United States while he is in office when the fact situation alleged in the complaint arose before his election and assumption of office.

I.

Absolute Immunity of the President from Civil Suit

The President has asserted that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office. This, of course, is a claim of absolute immunity. The President would have the Court dismiss the complaint while preserving through some equitable tolling of the statute of limitations the right of Ms. Jones to sue him civilly as soon as he left office. The Justice Department in its Statement of Interest of the United States also argued for immunity, but urged the Court in the alternative simply to stay the proceedings until the President had left office. Ms. Jones argued against immunity, but also argued alternatively for dismissal with an automatic reinstatement on the Court's docket on the last day of his Presidency and against a stay. All briefs discussed at some length the intent of the framers of the Constitution and interpretations of various scholars and judges relating to this subject, and all were thorough and well researched.

A. The English Legacy

The Court believes that the place to begin this discussion, before coming to the vital question of constitutional interpretation, is in English law and the development of the rights and liberties of the English people. The rights and liberties of England became our inheritance. The Constitution of the United States and the constitutions of the states contain provisions that come directly from that source.

Almost all of the states adopted "reception statutes" receiving into state law the English common law and acts of Parliament as they existed as of a certain date--which was usually 1607, 1620, or 1776--except to the extent that they were contrary to our federal or state constitutions or statutes or were contrary to our form of government. Arkansas adopted such a statute shortly after becoming a state. Ark.Code Ann. § 1-2-119 (Michie 1987); Ark.Stat.Ann. § 1-101 (1976 Repl.); discussed in Moore v. Sharpe, 91 Ark. 407, 121 S.W. 341 (1909). The statute adopted the English common law, subject to the stated limitations, as it existed prior to the fourth year of James I. Various English statutes or common law rules passed into Arkansas law as a result. E.g. Biscoe v. Thweatt, 74 Ark. 545, 86 S.W. 432 (1905) (Statute of Charitable Uses); Horsley v. Hilburn, 44 Ark. 458 (1884) (Rule in Shelley's Case implicitly recognized but not applied to fee tail pursuant to superseding Arkansas statute); Moody v. Walker, 3 Ark. 140 (1840) (Rule Against Perpetuities). Also received were those portions of the Magna Carta relating to due process of law, equal protection, trial by jury, and rights unrelated to the feudal system.

The Magna Carta was largely a restatement of feudal law pertaining to land tenures and their incidents, and thus most of it has no application here. However, in addition to enshrining in English law some of our basic rights and liberties, it constituted a series of limitations placed upon the King and his authority. There would follow in English history a long and bloody struggle to define the rights of the monarchy as opposed to ***693** Parliament and the citizenry and also to the common law itself.

The tension between the King and Parliament, on the one hand, and the King and the common law, on the other, reached its heights with the ascension to the throne of the Stuart monarchy in the person of King James the First (who was James the Sixth of Scotland). Friction soon arose between the King and the House of Commons. At the root of the disagreement, once again, was the Magna Carta. See generally William Swindler, Magna Carta: Legend and Legacy 169-176 (1965).

An important participant in all of this was Sir Edward Coke, whose writings had an enormous influence on English and American law, and who had served as Solicitor General and later Attorney General under Queen Elizabeth I and also as Chief Justice of the Court of Common Pleas. He

subsequently would become Chief Justice of the King's Bench under King James I. See 3 Roscoe Pound, Jurisprudence 428 (1959). Under Elizabeth, as her attorney, Coke had been a staunch defender of the Crown, but as a judge, he would quote Bracton to King James: "The King ought to be under no man, but under God and the law." Swindler, supra, at 172. He also stated in Dr. Bonham's Case, 8 Co. 113b, 118a, 77 Eng.Rep. 646, 652 (1610): "And it appears in our bodies, that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void" if they are "against common right and reason." William B. Lockhart et al., The American Constitution 251 (5th ed. 1981). That was unlikely to be a true statement of the law in the early 17th Century, but to the extent that it was precedent, it may be said to be an early expression of judicial review.

None of this and other frictions set well with the King, and Coke was dismissed from the bench, turning his efforts to Parliament. The continuing friction between Parliament and James' successor, King Charles I, ultimately led to the adoption of the Petition of Right, which in essence ratified and extended the Magna Carta, and in effect further limited the prerogatives of the Crown. A defining moment came when the House of Commons rejected a proposal of the House of Lords that would add a clause recognizing the sovereignty of the King. Coke gave this fulmination:

> I know that prerogative is part of the law, but sovereign power is no Parliamentary word; in my opinion, it weakens Magna Carta and all our statutes; for they are absolute without any saving of sovereign power. And shall we now add to it, we shall weaken the foundation of law, and then the building must needs fall; take we heed what we yield unto--Magna Carta is such a Fellow, he will have no Sovereign.

Swindler, supra, at 185.

The Petition of Right was one of the foundation stones of the English Constitution. It enlarged upon the Magna Carta as a constitutional limitation upon the power of the monarchy. It made it apparent that the King's prerogative was limited. Sub Deo et Lege [FN1] was the law of the land.

> FN1. In Prohibitions Del Roy, 77 Eng.Rep. 1342, 1343, 12 Co.Rep. 64, 65 (K.B.1608), Lord Coke wrote: [B]ut His Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et lege. [That the King ought not to be under any man, but under God and the law.] quoted in DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 203 (1963). In Catherine Drinker Bowen's book, The Lion and the Throne, the situation which led to this opinion is discussed in some detail. The events of this period in English legal and political history were conclusive in determining the end of "the divine right of Kings" and subjecting the King to the law. This is historically important to us in that the founding fathers cast very little light (outside of the impeachment provision) upon suits against the President, and this matter was never addressed by Congress in passing laws enacted pursuant to the Constitution. It must be assumed that the rights of the President do not rise above the rights of an English monarch in the early 17th Century. Despite these statements by Lord Coke that the King was subject to the law, there existed contemporaneously in England the rule that "the King can do no wrong," a relic presumably rooted in the divine right of Kings. Blackstone expressed it this way: Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong: which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the

people, and therefore cannot be exerted to their prejudice. The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Chitty ed. 1855) (emphasis in the original). Of course, when Blackstone published his Commentaries, this idea was already ludicrous in the light of the history of the English monarchy. A litany of the wrongs, weaknesses and sins of English kings would establish that they were not only capable of "doing wrong" but also of "thinking wrong" and were replete with folly and weakness. The English concept of kingship never entered into the law of the United States, although in England it apparently "exists today to give the Queen an absolute immunity from being sued for personal torts in the civil courts." R.J. Gray, Private Wrongs of Public Servants, 47 CAL.L.REV. 303, 307 (1959). See also Mayer G. Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 NW.U.L.REV. 526 (1977). States did not adopt through the reception statutes those aspects of English law relating to the monarchy since kings and queens are contrary to our form of government. Thus what remains of our English heritage on this point are the basic documents of English liberties--the Magna Carta, the Petition of Right, Habeas Corpus, and the English Bill of Rights. Moreover, as Chief Justice John Marshall pointed out in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), the King is subject to being "sued" in the form of a petition "and he never fails to comply with the judgment of his court."

***694** B. The American Experience

In the formulation of Article II of the Constitution, there were varying viewpoints as to the office of the President. [FN2] Some, such as Roger Sherman of Connecticut, believed that the President should be "nothing more than an instrument for carrying the will of the Legislature into effect," while others, such as Gouverneur Morris of Pennsylvania, thought the President should be "the guardian of the people, even of the lower classes, against Legislative tyranny." Arthur Schlesinger, Jr., The Constitution: Article II, in An American Primer 121-22 (Daniel J. Boorstin ed., 1968). What resulted was the compromise that we have today, amended only slightly from the original. It sets out the powers and duties of the Executive Branch (i.e., the President and the administrators he appoints), but it does not address the immunity question.

FN2. Russell Kirk cites Sir Henry Maine for the proposition that "the office of the President really is the office of a King--the chief difference being that the American President is subject to election, at fixed terms, and that the office is not hereditary." He adds: "Maine even suggests that the framers of the Constitution may have had in mind the powers of George III, when they established the powers of the American presidency." He continues in that vein discussing how powerful an office it is. He adds, however, that the restraint exercised by the first six presidents prevented the reduction of the legislative and judicial branches "to insignificance." RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 427-428 (1974). This seems to be an exaggeration, however, since during that period of time, the opinions of Chief Justice John Marshall sufficed to prevent the Executive Branch from subverting the Judicial Branch, although the first six presidents did exercise substantial restraint, particularly Washington and Adams. It seems much more likely that in providing for the Executive Branch, the founders did not have George III in mind at all, except in an unfavorable sense. The "George" that they likely had in mind was George Washington. The Executive Branch was probably modeled for the first man to occupy it--which may explain why even the insertion of an impeachment provision for criminal offenses was a matter of debate.

A large part of the problem, aside from the silence of the Constitution, is that for all practical purposes, the Executive Branch, unlike the Congress and the Supreme Court, consists of only one person. His administrative ***695** appointees serve at his pleasure. Thus, a large part of the President's assertion may be summarized in the proposition that, without immunity, to cripple the Presidency in one way or another in civil litigation is to deliver a blow to and weaken the effectiveness of the entire Executive Branch of government which in effect is only one person, the President.

The importance of unimpeded, independent

branches of government is discussed by Alexander Hamilton [FN3] in The Federalist No. 51:

> FN3. Some attribute this paper to James Madison. In I THE PEOPLE SHALL JUDGE 312 (University of Chicago Social Science Staff 1949), its author is listed "Hamilton or Madison."

> Were the executive, magistrate, or the judges not independent of the legislature in this particular, their independence in every other would be merely nominal ...
> [We must give] to those who administer every department the necessary constitutional means and personal motives to resist encroachments of the others.... The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

I The People Shall Judge 312, 313 (University of Chicago Social Science Staff 1949). He is speaking of independence from other branches, but also of the responsibility that goes along with it.

The President and his lawyers, in arguing the immunity issue, seem to place substantial reliance on the intention of the framers of the Constitution. Much of what they argue relates to the impeachment process. For example, they seize in their brief upon this commentary by Hamilton from The Federalist No. 69: "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of the law." Of course, Hamilton was talking about impeachment under Article II, Section 4, under which the President may be "removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." That has nothing to do with immunity from civil suit. Article II, and Hamilton, were addressing criminal conduct on the part of the President.

This is not to say, however, that the question of Presidential immunity from suit was not discussed at the Constitutional Convention or during the years immediately following. Justice Lewis Powell addresses this in speaking for the majority of the Court in Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982):

> [T]here is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Federal Convention of 1787, p. 64 (1911) (remarks of Gouverneur Morris); id., at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice President John Adams--both delegates to the Convention--that 'the President, personally, was not the subject to any process whatever.... For [that] would ... put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.' Journal of William Maclay 167 (E. Maclay ed. 1890).

***696** 457 U.S. at 751-52 n. 31, 102 S.Ct. at 2701-02 n. 31.

Justice Powell also quoted from Justice Joseph Story's Commentaries on the Constitution of the United States to this effect:

> 'There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them ... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.' 3 J. Story, Commentaries on the Constitution of the United States Sec. 1563, pp. 418-419 (1st ed.

1833).
457 U.S. at 749, 102 S.Ct. at 2701.

But just as the English law moved from the divine right of kings assertion to the assertion of Lord Coke and Parliament that the King was under God and the law, the situation in American law prior to Fitzgerald had proceeded essentially in the same direction with regard to the office of President. For example, it has been pointed out that when Hamilton made the statement quoted previously from The Federalist No. 69, "he was referring to his own plan" rather than reciting faithfully what had been proposed. Raoul Berger, Selected Writings on the Constitution 46-47 n. 94 (1987). Moreover, the discussion at the Constitutional Convention revolved around the impeachment process, the basis for which was the commission of "high crimes and misdemeanors." Although Justice Story, writing several decades later, discusses civil cases, as previously quoted, he is writing from the perspective of someone who was a boy at the time of the Convention--although admittedly he was rather close in time to those proceedings. He was successful in that what he wrote was embodied in Fitzgerald. There was much opposition even to the impeachment provision; some thought that the Supreme Court should conduct the trial rather than the Senate. James Madison was an advocate of that view, although Gouverneur Morris thought that "no other tribunal than the Senate could be trusted" and believed that the Supreme Court "were too few in number and might be warped or corrupted." 2 Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 535 (reported by James Madison) (Gaillard Hunt & James Brown Scott, eds., 1987).

The disagreement over Presidential immunity at the Constitutional Convention carried over into the years that followed. In United States v. Burr, 25 F.Cas. 30 (C.C.D.Va.1807) (No. 14,692d), Chief Justice John Marshall ruled that a subpoena duces tecum could be issued to President Thomas Jefferson. Jefferson protested strongly, arguing that the three branches of government had to be independent of each other, including independence by the executive from the judiciary. (Discussed in Nixon v. Fitzgerald, 457 U.S. at 751 n. 31, 102 S.Ct. at 2701-02 n. 31.) In Livingston v. Jefferson, 15 F.Cas. 660 (C.C.D.Va.1811) (No. 8,411), damages were sought for alleged trespass committed by a federal officer at the direction of Jefferson, but a federal court dismissed it for having been brought improperly in Virginia. The immunity issue was not reached. Of course, even before these cases, the argument of total independence of the Executive Branch from judicial action had been settled in large part by Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). This case is remembered for the recognition and use of judicial review by the Supreme Court of an Act of Congress, but it also directed by mandamus that Secretary of State James Madison deliver Marbury's justice of the peace commission to him contrary to the desires of President Jefferson. While not bearing upon the immunity question directly, it was apparent that the Executive Branch was not immune from action by the Judicial Branch in enforcing mandates of the Constitution. In fact, Chief Justice Marshall said of Marbury's rights and remedies: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163.

***697** However, in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867), the Supreme Court refused to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. Chief Justice Salmon P. Chase, writing for a unanimous Court, declined to enjoin enforcement of the legislation even though it was allegedly unconstitutional. He distinguished Marbury by stating that it only related to ministerial duties involving no discretion while these Acts related to "executive and political" duties involving broad discretion. To enjoin the President would be to restrain him from carrying out his constitutional responsibility to execute the laws. Enjoining him would threaten the separation of powers between the branches and the independence of the President. See similarly, Kendall v. United States, 37 U.S. (12 Pet.) 524, 610, 9 L.Ed. 1181 (1838), and National Treasury Employees Union v. Nixon, 492 F.2d 587, 608-612 (D.C.Cir.1974).

Of course, the complaint of Paula Corbin Jones in this civil case relates neither to the ministerial nor the executive duties of the President. The allegations relate to alleged conduct of the President while he was Governor of Arkansas. (The allegations, it might be noted, also do not relate to any ministerial or executive duty of the Office of

Governor.) The Justice Department, in its brief, stated that it knew of only three private suits based on pre-presidential conduct which had been adjudicated during the President's term in office. These three were (1) an action against Theodore Roosevelt and the Board of Police in New York City, which was resolved in the Board's favor in 1904, People ex rel. Hurley v. Roosevelt, 179 N.Y. 544, 71 N.E. 1137 (1904); (2) A damage suit against Harry Truman based upon his conduct as a county judge in 1931, resolved in Truman's favor in 1946, Devault v. Truman, 354 Mo. 1193, 194 S.W.2d 29 (1946); and (3) a suit against John F. Kennedy in California Superior Court asserting a tort claim from an automobile accident occurring during the 1960 campaign, which was ultimately settled, Bailey v. Kennedy, No. 757,200 (Cal.Super.Ct.1962).

However, the case most applicable to this one is Nixon v. Fitzgerald, cited previously. In a 5-4 decision, the Supreme Court decided that President Nixon had absolute immunity from a suit brought by A. Ernest Fitzgerald, a management analyst with the Department of the Air Force, whom the President ordered fired because he had given congressional testimony on cost overruns which embarrassed his superiors in the Department of Defense (and presumably embarrassed the President also). Fitzgerald sued for damages. The district court rejected President Nixon's assertion of Presidential immunity. The court of appeals affirmed, but the Supreme Court reversed, holding that the President had absolute immunity from a civil suit for damages resulting from official actions taken by the President while in office. The majority opinion of Justice Lewis Powell was hotly disputed in a dissent by Justice Byron White, in which Justices Blackmun, Brennan and Marshall joined. The majority opinion was in accord with the view of the scholar, Edward S. Corwin, in discussing the President's immunity from judicial process. Edward S. Corwin, The President: Office and Powers 138 (3d ed. 1948).

But the facts of Fitzgerald, as stated previously, are not the same as those in this case. Mr. Nixon was President when he fired Mr. Fitzgerald and was acting in his capacity as the head of the Executive Branch. Mr. Clinton was not President and was not even the President-elect when the alleged cause of action arose in this case.

The Constitution, of course, is silent on all of this. The framers debated even the subject of whether the President should be subject to impeachment for criminal acts and, if so, who should conduct the trial. There is nothing in the document relating to civil actions. Justice Story, supra, was of the mind that the President possessed immunity from civil suit, and the Supreme Court in Fitzgerald agreed in a severely divided opinion that the President was civilly immune from suits brought for official actions taken while in office.

Thus, the hard fact is that these issues of immunity, whether absolute or qualified, have been left in the hands of the Judicial Branch, particularly the Supreme Court. This District Court is not activist in nature and is not inclined to "make law" where none ***698** exists. As stated by Chief Justice John Marshall in Marbury v. Madison, however: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

[1] This Court recognizes the reasoning of Justice Powell and his thin majority in Nixon v. Fitzgerald that the President has absolute immunity from civil damage actions arising out of the execution of official duties of office. However, this Court does not believe that a President has absolute immunity from civil causes of action arising prior to assuming the office. Nowhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support for such a proposition be found. It is contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law.

Therefore, the President's Motion to Dismiss on Grounds of Presidential Immunity is denied.

II.

Limited or Temporary Immunity from Trial

[2] The question does not end here, however, because the intent of the Supreme Court in Nixon v. Fitzgerald would seem to carry this case beyond the question of absolute immunity from civil suit. The language of the majority opinion by Justice Powell is sweeping and quite firm in the view that to disturb the President with defending civil litigation that does not demand immediate attention under the

circumstances would be to interfere with the conduct of the duties of the office.

Justice Powell states unequivocally the following: "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." 457 U.S. at 751, 102 S.Ct. at 2702. He adds:

> In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

457 U.S. at 753, 102 S.Ct. at 2703.

Chief Justice Burger expressed the same theme in his concurring opinion: "Exposing a President to civil damages actions for official acts within the scope of the Executive authority would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment." 457 U.S. at 762, 102 S.Ct. at 2707.

Of course, in the preceding part of this opinion, this Court has pointed out that President Clinton's alleged acts took place before he was President and that he was not acting in the scope of Executive authority. Nonetheless, the concerns expressed by a majority of the Supreme Court are not lessened by the fact that these alleged actions preceded his Presidency, nor by the fact that his alleged actions would not have been within his official governmental capacity anyway. The problem, still, is essentially the same--the necessity to avoid litigation, which also might blossom through other unrelated civil actions, and which could conceivably hamper the President in conducting the duties of his office. This situation, as stated by Justice Powell in one of the preceding quotations from Nixon v. Fitzgerald, could have harmful effects in connection not only with the President but also with the nation in general.

It is therefore the view of this Court that although President Clinton is not entitled to have this action dismissed on the basis of immunity, he should not have to devote his time and effort to the defense of this case at trial while in office.

This is not a case in which any necessity exists to rush to trial. It is not a situation, for example, in which someone has been terribly injured in an accident through the alleged negligence of the President and desperately needs to recover such damages as may be awarded by a jury. It is not a divorce action, or a child custody or child support case, in which immediate personal ***699** needs of other parties are at stake. Neither is this a case that would likely be tried with few demands on Presidential time, such as an in rem foreclosure by a lending institution.

The situation here is that the Plaintiff filed this action two days before the three-year statute of limitations expired. Obviously, Plaintiff Jones was in no rush to get her case to court and, in fact, has stated publicly and in her brief that her lawsuit came about in an effort to clear her name of allegations of sexual activity involving then-Governor Clinton. Her complaint, in ¶¶ 41-47, discusses in detail this situation and indicates that suit was brought because of the use of the name "Paula" in an article appearing in The American Spectator, in which the author purportedly obtained his information from state troopers, including Defendant Ferguson. Consequently, the possibility that Ms. Jones may obtain a judgment and damages in this matter does not appear to be of urgent nature for her, and a delay in trial of the case will not harm her right to recover or cause her undue inconvenience. For want of better phraseology, this amounts to the granting of temporary or limited immunity from trial as Fitzgerald seems to require due to the fact that the primary defendant is the President. The Court believes that such ruling is also permitted under Rule 40 of the Federal Rules of Civil Procedure allowing district courts to place matters upon the trial calendar "as the courts deem expedient." Further, such limited immunity from trial would seem to be justified under the equity powers of the Court.

By putting the case on hold, as far as trial is concerned, the Court avoids any tolling of the statute of limitations problems which might otherwise be presented if the case were dismissed without prejudice. Despite the fact that the President considers himself estopped to object to a refiling, the Court believes that a delay of the trial is the better way to proceed.

This does not mean, however, that the case is put on the shelf for all purposes. There would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself. This approach eliminates the problem that witnesses may die, disappear, become incapacitated, or become forgetful due to the passage of time.

[3] Because there is too much interdependency of events and testimony to proceed piecemeal, the allegations against the trooper will be tried at the same time as those against the President. His case is integrally related to the allegations against the President; both cases arose out of the same alleged incident; and while the suit against the Trooper has unrelated matters based upon his alleged actions and statements subsequent to the alleged incident, it would not be possible to try the Trooper adequately without testimony from the President.

III.
Conclusion

The Court has attempted to follow its understanding of Nixon v. Fitzgerald and other cases as well as to adhere to the historical framework involved. Most importantly, the Court has sought to give effect to the full meaning of the separation of powers doctrine originally enunciated by Montesquieu and implicit in the founding fathers' structure of the Constitution. Essential Presidential prerogatives are "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974).

On the other hand, in situations in which the President was not the holder of his office when the action allegedly arose, there would seem to be no immunity against civil litigation. The rights of Plaintiff Jones as an American citizen must be protected. Sub Deo et lege is our law as well as the law of Great Britain. No one, be he King or President, is above the law.

To protect the Office of President, however, from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is necessary to provide that the President cannot be tried in the context presented here until he leaves office. President Clinton's term in office, if he is re-elected in 1996, would end no later than January 20, 2001. ***700** An earlier termination might come on January 20, 1997, which is only slightly over two years away. By permitting discovery as to all including the President, the Court is laying the groundwork for a trial shortly after the President leaves office.

In granting limited or temporary immunity from immediate trial to President Clinton, the Court wishes to emphasize that it holds no brief for alleged sexual harassment, a matter of important concern to many people. The importance of such issue is another reason why there should be no absolute immunity in this case, but only a temporary Presidential immunity from trial.

Finally, the Court must express its awareness that this case is one in which new law is being made. All of the references to historical events and to other cases do not change that fact. In making such a ruling, the Court is also not unmindful of the fact that to this extent the separation of powers has been breached. But it has happened before in many cases including United States v. Nixon, supra, and many of the landmark decisions of Chief Justice John Marshall. In the end, the decision must be made by the courts when there is doubt and only limited precedent.

As previously noted, it "is emphatically the province and duty of the judicial department to say what the law is." Marbury, 5 U.S. (1 Cranch) at 177. United States v. Nixon reaffirmed that statement: "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." 418 U.S. at 705, 94 S.Ct. at 3106. That is what this Court has tried to do, keeping in mind the words of Chief Justice John Marshall that "we must never forget that it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 407, 4 L.Ed. 579 (1819), [FN4] and that it is intended to endure for generations and to be applied to the various crises of human affairs.

FN4. As explained by Judge Robert H. Bork, Chief Justice Marshall was pointing out that "there are differences in the way we deal with different legal materials.... By this [Chief Justice Marshall] meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a

> document that could not, by its nature and uses, 'partake of the prolixity of a legal code.' " ROBERT H. BORK, THE TEMPTING OF AMERICA 145 (1990).

The President's motion seeking immunity from suit is denied. The court will issue a scheduling order in due course.

IT IS SO ORDERED.

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Citation 25 F.Cas. 55 FOUND DOCUMENT Database DCT-OLD Mode Page
(Cite as: 25 F.Cas. 55, *55)

***55** George Hay, Dist. Atty., William Wirt, and Alexander MacRae, counsel for the prosecution.

[FN2]Before MARSHALL, Chief Justice, and GRIFFIN, District Judge.

FN2 Prior proceedings on the examination for commitment will be found reported as Case No. 14,692a.

The court was opened at half past twelve o'clock, when Col. Aaron Burr appeared, with his counsel, Edmund Randolph, John Wickham, Benjamin Botts and John Baker. [Luther Martin also appeared as counsel at a later stage of the trial.]

The clerk having called the names of the gentlemen who had been summoned on the grand jury, Mr. Burr's counsel demanded a sight of the panel, which was shown to them.

Mr. Burr addressed the court, pointing out some irregularities in summoning a part of the panel. The marshal, he said, by the law of Virginia under which he acted, was required ***56** to summon twenty-four freeholders of the state to compose the grand jury. When he has summoned that number his function is completed. He proposed to inquire of the marshal and his deputies what persons they had summoned, and at what periods, to ascertain whether some had not been substituted in the place of others stricken off the panel. After some discussion as to the authority of the marshal to excuse grand jurors who had once been summoned, and to substitute others on the panel in lieu of them.

MARSHALL, Chief Justice

MARSHALL, Chief Justice, remarked that it was not in the power of the marshal to summon more than twenty-four, as the act of assembly authorized only that number. If he should summon twenty-five, the last would not have power to act; and the marshal would have no power to displace any one of the others, to put the last in his place. When the panel had been completed by the marshal, its deficiencies could only be supplied from the bystanders, under the directions of the court.

Mr. Burr said, the court having established the principle, we must ask their aid to come at the facts. We wish to know when certain persons were summoned, when discharged, and whether other persons were substituted in their stead.

Major Scott, the marshal, said he had not the least objection to state all the facts. A few days ago he had received a letter from Col. John Taylor, of Caroline, one of those whom he had summoned on the jury, stating that a hurricane had destroyed his carriagehouse, and with it his carriages, so that he could not use them; and that indisposition would prevent him from riding to Richmond on horseback. This letter he had laid before their honors, and the chief justice had deemed his excuse reasonable. He had then summoned Mr. Barbour to serve in Col. Taylor's place. He had also received a letter from Mr. John MacRae, informing him that he was going to leave the state for his health. He had, in consequence, summoned Doctor Foushee in his place. He added, that he felt it his duty to bring twenty-four jurymen into court, and acted upon that principle.

THE COURT

THE COURT decided that Mr. Barbour and Dr. Foushee were not on the grand jury.

Mr. Burr said, the panel being now reduced to sixteen, he understood it to be the proper time to make any other exceptions to the panel. With regret he should proceed to exercise the privilege of challenging for favor; and in the exercise of this right he should perhaps appeal to the authority of the court to try the jurors challenged.

Mr. Hay called for the law justifying the application.

Mr. Burr said he desired it to be distinctly understood that he claimed the same right of challenging the grand jury for favor that he had of challenging the petit jury. He admitted it was not a peremptory challenge, but that he must show good cause to support it. It would, of course, be necessary to appoint triers to decide, and before whom the party and the witnesses to prove or disprove the favor must appear.

Mr. Botts argued and cited authorities in support of the motion.

Mr. Hay disavowed the intention of opposing substantial exceptions, and admitted the law to be as stated by the opposite counsel. [FN3]

FN3 This is in accordance with both Robertson's and Carpenter's reports. But in his speech on the motion to arrest the evidence, Mr. Hay said the challenge of grand jurors was 'not warranted by any English precedent,' and intimated that he had acquiesced in it because he was indifferent 'whether A, B and C, or D, E and F composed a part' of the grand jury. Mr. Martin, in his reply to Mr. Hay, said, 'if he had examined Hawkins's Pleas of the Crown, even in the index, he would have found that grand jurors may be challenged. It is there briefly stated that any person under prosecution may, before he is indicted, challenge a grand juror, as being outlawed for felony, &c., a villein, or returned at the instance of the prosecutor, or not returned by the proper officer.' He also referred to the 'American Museum,' where, he said, it would be seen 'that in a case that came before Judge Grimke, in South Carolina, it was expressly decided that the counsel of the accused have a right to challenge, for good cause, all or any of the grand jury.' These authorities do not seem to sustain Mr. Burr's position, that he had the same right to challenge the grand jury 'for favor' that he had of challenging the petit jury. Hawkins says, 'it seems' that grand jurors may be challenged as aforesaid, but refers to no decision on that subject. At most the authority goes no further than this: that a grand juror may be challenged for incompetency, or for being irregularly or improperly returned. This is a very different thing from a general right of challenge 'for favor.' It is believed that no authority, anterior to this trial, can be found extending the right to challenge grand jurors further than the citation from Hawkins goes. Later decisions and dicta may be found, admitting the right of challenge for favor; but it is believed they are all based upon the authority of Burr's Case, or on special statutory provisions. In Com. v. Clark, 2 Browne, 325, Judges Tilghman and Breckenridge allowed a challenge for favor. In U. S. v. White [Case No. 16,679], the court said that 'an exception for favor which might be a good cause of challenge, cannot be pleaded to the indictment.' The decision in the former case, and the implication in the latter, are both based upon the authority of Burr's Case

Mr. Burr.--I shall, then, proceed to name the persons and causes of challenge. The first I shall mention is William B. Giles, against whom there are two causes of challenge. The first is a matter of some notoriety, because dependent on certain documents or records; the second is a matter of fact, which must be substantiated by witnesses. As to the first, Mr. Giles, when in the senate of the United States, had occasion to pronounce his opinion on certain documents by which I was considered to be particularly implicated. Upon those documents he advocated the propriety of suspending the writ of habeas corpus. The constitution however, forbids such suspension, except in cases of invasion or insurrection, when the public safety requires it. It was therefore to be inferred that Mr. Giles did ***57** suppose that there was a rebellion or insurrection, and a public danger of no common kind. It is hardly necessary to observe that with this rebellion, and this supposed danger, I myself had been supposed to be connected. Perhaps this may be a sufficient reason to set aside Mr. Giles. But if not, I shall endeavor to establish by evidence that he has confirmed these opinions by public declarations; that he has declared that these documents, involving me, contained guilt of the highest grade.

Mr. Botts.--There is no necessity of adding anything to the observations of Colonel Burr. If the right of challenge exists, the right to try the challenge exists also. But while I am up, I will declare that no reflection is intended to be made on the character or conduct of Mr. Giles. That gentleman will be candid enough to admit that there is not the least design to wound his feelings. It is with the utmost reluctance that Colonel Burr has prevailed upon himself to advance this exception. I have authorities, however, to prove that these two causes are sufficient to disqualify Mr. Giles. The first relates to his public, the second to his individual conduct.

Mr. Giles.--As to exceptions to myself personally, I can have no objection to have them tried. The court will, however, perceive the delicate situation in which I shall be placed. The triers will have to interrogate witnesses, and the result either way is ineligible. I have no objection to state to the court every impression I have ever had upon this subject. But to calling witnesses to detail loose conversations, so liable to be misunderstood, forgotten, or misrepresented, I am certainly opposed.

Mr. Hay.--I was about to make a proposition which might relieve us from all this useless embarrassment, and which might gratify the views of the accused. If the gentlemen who are challenged on the jury will consent to withdraw themselves, I can have no objection. I am content that every one who has made declarations expressive of a decisive opinion should be withdrawn from the jury. I am not disposed to spend time on such points as these.

Mr. Burr.--It will certainly save time, and I assent to the proposition.

Mr. Giles.--The circumstances which have just occurred place me in an unpleasant situation. I have no objection to disclose in the usual way, with candor, the real state of my mind in relation to the accused. But I have an objection to the introduction of witnesses to prove casual expressions, which are so liable to be misconceived. In the present state of things, expressions

might be imputed to me which I never used, or expressions which I really used might be mistaken or misrepresented by the witness; or the witness might deduce inferences from my expressions which they did not justify. It was by no means agreeable to me to have been summoned on this grand jury. But for some time past I have invariably pursued this maxim: 'Neither to avoid nor to solicit any public appointment; but when called to the discharge of any public duty by the proper authority, conscientiously to attempt its execution.' In undertaking to serve on the present grand jury, I was influenced by the same consideration. With respect to my public conduct, I presume it is of public notoriety, and it will speak for itself. I not only voted for the suspension of the privilege of the writ of habeas corpus, in certain cases, but I proposed that measure. I then thought, and I still think, that the emergency demanded it; that it was fully justified by the evidence before the senate; and I now regret that the nation had not energy enough to support the senate in that measure. This opinion was formed upon the state of the evidence before the senate, which, in all questions of a general nature, is of a very different character from the legal evidence necessary in a judicial investigation. My mind is, however, free to receive impressions from judicial evidence. In relation to the accused, I feel very desirous, and have often so expressed myself, that the various transactions imputed to him should undergo a full and fair judicial investigation; and that, through that medium, they should receive their just and true character, whatever in point of fact they might be, and that he should be presented in that character to the world. I have no personal resentments against the accused; and if he has received any information inconsistent with this statement, it is not true. However, as it is left to me to elect whether to serve on the grand jury or not, I will certainly withdraw.

THE CHIEF JUSTICE.--The court thinks that if any gentleman has made up and declared his mind it would be best to withdraw.

Mr. Burr.--A gentleman who has prejudged this cause is certainly unfit to be a juryman. It would be an effort above human nature for this gentleman to divest himself of all prepossessions. I believe his mind to be as pure and unbiased as that of any gentleman under such circumstances. But the decisive opinion he has formed upon this subject, though in his public character, disqualifies him for a juryman. But he is one of the last men on whom I would wish to cast any reflections. So far from having any animosity against him, he would have been one of those whom I should have ranked among my personal friends. The other gentleman whom I shall challenge is Wilson Cary Nicholas.

Mr. Nicholas desired that the objection against him should be stated.

Mr. Burr.--The objection is, that he has entertained a bitter personal animosity against me; and therefore I cannot expect from him that pure impartiality of mind which is necessary to a correct decision. I feel the delicacy ***58** of my situation; but if the gentleman will consent to withdraw, I will waive any further inquiry.

Col. Wilson C. Nicholas rose and addressed the court as follows: My being in this situation certainly was not a thing of choice. When I was summoned by the marshal, I urged him in the strongest manner to excuse me. I mentioned to him that it would be extremely inconvenient to me to attend the court, and that it would be very unpleasant to serve on the jury, on account of the various relations in which I had stood to Colonel Burr. I had been in congress at the time when the attempt was made to elect Colonel Burr president of the United

States. My feelings and opinions on that occasion are well known. I had served three years in the senate while Colonel Burr was president of that body, and was one of those who, previous to the last election, had taken a very decided part in favor of the nomination of the present vice president, for the office at that time filled by Colonel Burr. Moreover, from the time that Colonel Burr first went to the Western country, my suspicions were very much excited a to his probable objects in that part of the United States; in consequence of which I gave early, and perhaps too great, credit to the charges which were brought against him. Such was my opinion of the importance of New Orleans, not only to the prosperity, but to the union of the states, that I felt uncommon anxiety at what I believed to be the state of our affairs in the West, and had expressed my impressions very freely in conversation, and in letters to my friends during the last winter. Under these circumstances, I doubted the propriety of my being put on the jury; but I felt no distrust of myself, as I was confident that I could discharge the duty under just impression of what I owe to my country, to the accused, and to my own character. The marshal assured me that he felt the strongest disposition to oblige me, but that he thought he could not do it consistently with his duty. He supposed there was scarcely a man to be found who had not formed and expressed opinions about Colonel Burr. That he, too, was in a situation of great delicacy and responsibility, and that without the utmost circumspection on his part, he would be exposed to censure. I renewed my application to the marshal several times, and always received the same answer. Thus situated, I determined to attend the court, both from a sense of duty and because I would not put it in the power of the malicious and those disposed to slander me to assign motives for absenting myself which had no kind of influence on me. Another reason for pursuing this course presented itself some time after I had formed this determination. I conceived that an attempt had been made to deter me from attending this court. I was informed by a friend in the city, that he had heard that one of the most severe pieces which had ever been seen was preparing for publication, if I did attend, and serve on the grand jury. From what quarter this attack was to come, I do not know. The only influence which that circumstance had was to confirm me in the determination I had made, as I was much more inclined to defy my enemies than to ask their mercy or forbearance. From the first I hesitated whether I ought not to make the same representation to the court that I had made to the marshal. As I was in doubt on the subject before I came from home, I committed to paper the substance of what I have now said, and consulted three gentlemen who were lawyers, men of honor, and my personal friends. Their advice to me was not to mention it, for they did not believe that the court would or ought to discharge me for the reasons I had mentioned. As I was in doubt myself I determined to follow their advice, and the more readily as they seemed confident that I would not be discharged, and I was not ambitious of acquiring in this way a reputation for scrupulous delicacy. I was perfectly willing that my reputation should rest on the general tenor of my life, and did not believe that my character required such a prop. At present I feel myself embarrassed how to act. I certainly was, and an, anxious not to serve on the jury, but am unwilling to withdraw, lest it should be thought that I shrink from the discharge of public duty of great responsibility, and am not willing to be driven from the discharge of that duty in a way which should lead to a belief that the objection to me is

either acknowledged to be well founded or has been sustained by the court. Upon this subject, the example of Mr. Giles has great weight with me. That consideration, and a hope that my motives cannot now be misunderstood or misrepresented, will induce me to do as he has done.

Colonel Burr.--The circumstance mentioned by the gentleman, that an attempt has been made to intimidate him, must have been a contrivance of some of my enemies for the purpose of irritating him, and increasing the public prejudice against me, since it was calculated to throw a suspicion on my cause. Such an act was never sanctioned by me, nor by any of my friends. I view it with indignation, and disclaim any knowledge of the fact in question.

THE COURT established the following as being the proper questions to be put to jurors: First, have you made up your mind on the case, or on the guilt of Colonel Burr, from the statements you have seen in the papers or otherwise? and finally, have you formed and expressed (or delivered) and opinion on the guilt or innocence of Colonel Burr (or the accused?)

Mr. Joseph Eggleston asked to be excused from serving on the grand jury. He had, on reading the deposition of Gen. Eaton in the newspapers, expressed considerable warmth ***59** and indignation on the subject likely to come before the grand jury, and on that account it might be both indelicate and improper for him to serve on that body. But after being examined by the CHIEF JUSTICE as to the nature of the opinions he had formed, Mr. Burr remarked, that the industry which had been used to prejudice the public mind against him left him very little chance of an impartial jury, and that on the subject of Major Eggleston's application to be excused he should remain perfectly passive. The court did not excuse him.

The panel was here called over, and fourteen only appeared. The marshal then summoned from the bystanders John Randolph, Jr., and William Foushee. The court appointed Mr. John Randolph foreman of the grand jury. Being called upon to take the foreman's oath, Mr. Randolph asked to be excused from serving, on the ground that he had formed an opinion concerning the nature and tendency of certain transactions imputed to Col. Burr.

Mr. Burr remarked that he was really afraid they should not be able to find any man without such prepossessions.

The CHIEF JUSTICE remarked that a man must not only have formed, but declared an opinion, to disqualify him. Mr. Randolph said he did not recollect of having declared one; and he was not excused.

Mr. John Randolph was then sworn as foreman; and the rest of the panel being called to the book, when the name of Dr. Foushee was called he stated that from reading the president's message, Gen. Eaton's deposition, and other publications, he had formed an opinion of Col. Burr's guilt. After some discussion, Dr. Foushee was permitted to withdraw, and Col. James Barbour was summoned in his place.

The grand jury were then sworn, as follows: John Randolph, Junior, Foreman, Joseph Eggleston, Joseph C. Cabell, Littleton W. Tazewell, Robert Taylor, James Pleasants, James M. Garnett, William Daniel, John Brockenbrough, John Mercer, Edward Pegram, Mumford Beverly, John Ambler, Thomas Harrison, Alexander Shephard, and James Barbour.

The CHIEF JUSTICE delivered an appropriate charge to the grand jury, in which he particularly dwelt upon the nature of treason, and the testimony requisite to prove it; after which the jury retired.

Mr. Burr then stated his desire that the court should instruct the grand jury on certain leading points, as to the admissibility of certain evidence which he supposed would be laid before the grand jury by the attorney for the United States.

Mr. Hay objected to the proposition as unprecedented. After some discussion, in which Messrs. Burr, Hay, Randolph, and Botts participated,

The CHIEF JUSTICE observed that he was not prepared at present to say whether the same evidence was necessary before the grand jury as before the petit jury; whether two witnesses to an overt act were required to satisfy a grand jury. This was a point he would have to consider. That he had not made up his mind on the evidence of facts said to be done in different districts; how far the one could be adduced as evidence in proof or confirmation of the others; but his present impression was, that facts done without the district may be brought in to prove the material fact said to be done within the district, when that fact was charged.

The question was postponed for further discussion, on Mr. Hay's pledging himself that no evidence should be laid before the grand jury without notice being first given to Mr. Burr and his counsel.

Saturday, May 23, 1807.

The counsel for Col. Burr observed that, if it met the approbation of the court, the discussion of the propriety of giving special instructions to the grand jury would take place on Monday next. This proposition was assented to, and it was understood that Mr. Burr's counsel were to give due notice of the propositions they intended to submit.

The grand jury appearing pursuant to adjournment, the CHIEF JUSTICE informed them that the absence of Gen. Wilkinson, a witness deemed important by the counsel for the United States, and the uncertainty of his arrival at any particular period, made it necessary that they should be adjourned.

After some conversation between the court and bar as to the propriety of adjourning the grand jury to some future day of the term, they were finally adjourned till the Monday following.

Monday, May 25, 1807.

The grand jury appeared in court, and on its being stated by their foreman that they had been two days confined to their chambers, and had no presentment to make, or bill before them, Mr. Hay observed that he had two bills prepared, but wished to postpone the delivering of them till the witnesses were present, and until it was ascertained that all the evidence relied upon by the counsel for the prosecution could be had. He thought it probable that in the course of a week he should hear of Gen. Wilkinson, who was still absent, and whose testimony was deemed very important. After some conversation as to the propriety of adjourning the grand jury to a distant day of the term,

Mr. Hay gave notice of his intention to submit a motion to commit Mr. Burr on a charge of high treason. On the previous examination, he said, there was no evidence of an overt act, and he was committed for a misdemeanor only. The evidence is different now.

Some remarks having been made as to the impropriety of discussing the subject in the presence of the grand jury, they were requested to withdraw.

The argument and opinion delivered on the *60 motion to commit will be found reported as Case No. 14,692b. The opinion was delivered on Tuesday, May 26, 1807. It closed with these words: 'If it is the choice of the prosecutor on the part of the United States to proceed with this motion, it is the opinion of the court that he may open his testimony.'

Mr. Hay then rose, and observed that he was struck with the observations of the court relative to 'publications,' and he would attempt, if possible, to make some arrangement with the counsel on the other side, to obviate that inconvenience; and he understood they were disposed to do the same.

The counsel on both sides then retired by permission of the court for this purpose. They returned in a short time, and Mr. Hay informed the court that the counsel for the United States and for Colonel Burr, not having yet been able to agree upon any arrangement which would attain his object, namely, that of having Colonel Burr recognized in a sum sufficiently large to insure his appearance to answer the charge of high treason against the United States, without incurring the inconvenience resulting from a public disclosure of the evidence at this early stage of the proceeding, wished to have further time for that desirable purpose. This was granted by the court, and it then adjourned till next day.

Wednesday, May 27, 1807.

Mr. Hay informed the court that all hopes of the arrangement which he had mentioned yesterday were at an end; for he had received a letter from Colonel Burr's counsel positively refusing to give additional bail. He therefore deemed it his duty to go on with the examination of the witnesses in support of his motion to commit Mr. Burr. He observed, that he regretted extremely that it became necessary in his judgment to pursue this course. He felt the full force of the objections to a disclosure of the evidence, and to the necessity of the court's declaring its opinion, before the case was laid before a jury; but those considerations must yield to a sense of what his engagements to the United States imperiously demanded of him; that in adducing the evidence, he should observe something like chronological order. He should first read the depositions of the witnesses who were absent, and afterwards bring forward those who were present, so as to disclose all the events, as they successively happened.

Mr. Wickham stated that there were two distinct charges against Colonel Burr. The first was for a misdemeanor, for which he had already entered into recognizance; the second was a charge of high treason against the United States, which was once proposed without success, and is now again repeated. On this charge the United States must substantiate two essential points: first, that there was an overt act committed; and secondly, that Colonel Burr was concerned in it. Everything that does not bear upon these points is of course inadmissible; the course therefore laid down by the attorney for the United States is obviously improper. He proposes to examine his witnesses in a kind of chronological order.

Colonel Burr required that the evidence should be taken in strict legal order. The court and even the opposite counsel will see the propriety of observing this order. If the attorney for the United States has affidavits to

produce, let him first demonstrate that they have a right to produce them. We first call upon him to prove by strict legal evidence, that an overt act of treason has been committed. If he cannot establish that one point, all the evidence which he can produce is nugatory and unavailing.

Mr. Hay protested against the right of counsel for the accused to dicate to him the order of introducing his testimony. The two charges against Aaron Burr, he said, were naturally and intimately blended. They form distinct parts of one great design. What that great design was, in all its bearings and remifications, he was not absolutely certain; but had always conceived that before Mexico was invaded New Orleans was to be taken. How, then, was it possible to separate these two allegations? How could the prosecution separate, line by line, and word by word, the evidence produced to prove these two distinct allegations? It appeared to him as though the counsel for the defence were determined to stop him at the very threshold of everything which he attempted to do. How could he advance if every inch of ground was to be measured out to him with such strictness and objections? The proposition was wholly unprecedented, that the counsel before an examining court should be instructed how to bring out his evidence. He claimed the right to bring it forward in its chronological order.

After some remarks by Mr. Wickham and Mr. Burr.

The CHIEF JUSTICE said it would certainly be better, if the evidence was produced to prove the fact first, and that to show their coloring afterwards; for no evidence certainly has any bearing on the present case unless an overt act be proved. However, if the attorney for the United States thinks the chronological order the best, he may pursue his own course; but the court trusts to him, that he will produce nothing which does not bear upon the case.

After some further remarks by Mr. Hay and Mr. Randolph, Mr. Hay produced Gen. Wilkinson's affidavit.

Mr. Botts objected to the admissibility of the paper, on the ground that it was not competent evidence. He said on this question the supreme court were divided.

The CHIEF JUSTICE here interposed, and remarked that the supreme court were divided on the question of the competency of ***61** the letter annexed to the affidavit, not as to the admissibility of the affidavit itself.

Mr. Botts proceeded to state his objections to the competency of the affidavit in this court in the present proceeding. First, he objected that an ex parte affidavit ought not to be received when the witness himself could be produced in court. General Wilkinson could and ought to have been here, and this being the case, his affidavit ought not to be received. But the proposition which he mainly pressed was, that no evidence of any nature whatever, ought to be taken until there is indubitable proof that there was war levied in this district, (Virginaia,) and until it is proved that an overt act was committed by Mr. Burr.

Mr. Hay, interrupting, observed that the gentleman was renewing a proposition which had been decided by the court.

Mr. Burr said he had understood the gentleman who spoke first apprized the court that the evidence should come forward subject to discussion, which would be made as the evidence went on. The gentleman was only going into the nature of the evidence presented.

Mr. Botts resumed. He quoted the constitutional definiton of treason, and

asked if it meant that, if one-half of the crime of treason was to be found in this district, you might look for the other half elsewhere? If the affidavit imported anything, it was a declaration or confession; and no declaration or confession could constitute any ingredient of an overt act, unless that confession be made 'in open court.' He enforced his views at considerable length.

Messrs. Wickham and Randolph followed, in support of the motion to exclude the testimony at this stage of the proceeding.

The CHIEF JUSTICE stated that the supreme court had already decided, that the affidavit might be admitted under certain circumstances; but they had also determined that General Wilkinson's affidavit did not contain any proof of an overt act; that he was certainly extremely willing to permit the attorney for the United States to pursue his own course in the order of drawing out his evidence, under a full confidence that he would not waste the time of the court by producing any extraneous matters; but where was the necessity of producing General Wilkinson's affidavit first? If there was no other evidence to prove the overt act, General Wilkinson's affidavit goes for nothing, for so the supreme court have already decided; and by that decision he should consider himself bound, even if he had dissented from it. Why, then, introduce this affidavit?

After some further discussion by counsel, the CHIEF JUSTICE said that unless there was a fact to be proved, he was of opinion that no testimony ought to be produced. The question before the court was not whether there had been a treasonable intent, but an overt act. That fact must be proved before there can be any treason, or any commitment for treason.

Mr. Hay then called Peter Taylor, who was Mr. Blennerhassett's gardener, and Jacob Allbright, a laborer, who had worked on his island, who gave their testimony. [This testimony is more fully detailed hereafter, and, in consequence, is omitted here.]

After these witnesses were examined, the affidavit of Jacob Dunbaugh was offered. The argument on the motion to exclude it, which took up the balance of the day, and the opinion of the court excluding the affidavit, delivered the following day, are reported as Case No. 14,692c.

Mr. Hay observed that as the examination of Colonel Burr for treason had already taken up much time without any progress in the business, and, from the disposition manifested by his counsel, it might last not only ten days, but even ten years longer, he considered it his duty, from information which he had received that morning, to suggest to the court the propriety of binding Colonel Burr in a further recognizance from day to day till the examination could be ended. He stated, on the authority of a letter just come to hand from the secretary at war, that General Wilkinson, with several other witnesses, might be expected here between the 28th and 30th of this month. This circumstance, said he, renders it essential that he should be considered in custody until he gives security that his person shall be forthcoming to answer the charge of treason against the United States. The gentlemen who appear as counsel for Colonel Burr may be, and no doubt are sincere, in the opinion they have expressed, that he will not shrink from the charges exhibited against him, and will not, in any conjuncture of circumstances which may occur, fly from a trial; but those gentlemen must pardon me for saying that I entertain a very different opinion. I must believe that his regard for the safety of his own

life, would, if he perceived it in danger, prevail over his regard for the interest of his securities. I give notice, therefore, that I consider him as being already in custody to answer the motion I have made for his commitment, and that he cannot be permitted to go at large without giving security for his appearance from day to day. His situation now is the same as that when he was first apprehended and brought before a single judge for the purpose of examination. Your honor at that time considered him as in custody, and bound him over from day to day; and I only contend that the same course should be pursued at this time.

Mr. Wickham.--The gentleman thinks he has obtained the effect of his motion merely by having made it. I cannot perceive the propriety of a motion to compel Colonel Burr to give bail in any sum before the probable cause to believe him guilty of treason has ***62** been shown. When he was brought before your honor for examination, you conceived the sum of $5,000 sufficient security for his daily appearance. But a recognizance has already been given in double that sum, binding him not to depart without the leave of this court. Yet now, although no probable proof of treason has been exhibited, Mr. Hay requires the court to demand of Colonel Burr additional security! I trust that such a motion will not prevail.

Mr. Martin.--It has already been decided by the supreme court of the United States, that not a single expression in Wilkinson's affidavit amounts to any proof of the charge of treason. The motion of the gentleman amounts to this: 'We have no evidence of treason, and are not ready to go to trial for the purpose of proving it; we therefore move the court to increase the bail.'

Mr. Randolph.--The first motion of the counsel for the United States was to commit Colonel Burr on the ground of probable cause only. This goes a step farther, and wishes the same thing to be done on the ground of a probable cause of a probable cause; but we trust that we shall not be deprived of our liberty or held to bail on a mere uncertain expectation of evidence.

Some further remarks were made by Mr. MacRae, Mr. Wirt, Mr. Botts, and Mr. Hay.

The CHIEF JUSTICE delivered the opinion of the court, the substance of which was as follows: It is certainly necessary that a person accused should be retained in custody, or required to give security for his appearance while his examination is depending. The amount of the security to be required must depend, however, upon the weight of the testimony against him. On a former occasion, Colonel Burr was held to bail for his daily appearance in the sum of five thousand dollars only, because there was no evidence before the judge to prove the probability of his having been guilty of treason. When the examination was completed, the sum of ten thousand dollars was considered sufficient to bind him to answer the charge of a misdemeanor only, because the constitution requires that excessive bail should not be taken; but that recognizance had no application to the charge of treason. Yet, whether additional security ought to be required in the present stage of this business, before any evidence has appeared to make the charge of treason probable, is a question of some difficulty. It would seem that evidence sufficient to furnish probable cause must first be examined before the accused can be deprived of his liberty or any security can be required of him. Yet, before this could be done, he might escape and defeat the very end of the examination. In common cases, where a person charged with a crime is arrested and brought before a

magistrate, the arrest itself is preceded by an affidavit, which furnishes grounds of probable cause. The prisoner therefore is continued in custody, or bailed until the examination is finished: but here there has been no arrest for treason, and Colonel Burr is not in custody for that offence. The evidence then must be heard, to determine whether he ought to be taken into custody; but as the present public and solemn examination is very different from that before a single magistrate; as very improper effects on the public mind may be produced by it, I wish that the court could be relieved from the embarrassing situation in which it is placed, and exempted from the necessity of giving any opinion upon the case, previously to its being acted upon by the grand jury. It is the wish of the court, that the personal appearance of Colonel Burr could be secured without the necessity of proceeding in this inquiry.

Colonel Burr rose and observed, that he denied the right of the court to hold him to bail in this stage of the proceedings; that the constitution of the United States was against it--declaring that no person shall be arrested without probable cause made out by oath or affirmation. But if the court were embarrassed, he would relieve them by consenting to give bail; provided it should be understood that no opinion on the question even of probable cause was pronounced by the court by the circumstance of his giving bail.

The CHIEF JUSTICE said, that such was the meaning of the court.

Mr. Martin said, for his part, he should prefer that all the evidence should be fully gone into. Instead of fearing that public prejudice would thereby be excited against Colonel Burr, he believed it would remove all the prejudices of that sort which now prevailed.

The CHIEF JUSTICE.--As a bill would probably be sent up to the grand jury, the court wishes to declare no opinion either way.

Some conversation then occurred relative to the quantum of bail; and Colonel Burr mentioned, that he would propose that the sum should be ten thousand dollars, if he should be able to find security to that amount, of which he expressed himself to be doubtful. Mr. Hay contended that fifty thousand dollars would not be too much. But the court finally accepted of the offer, made by Colonel Burr, who, after a short interval, entered into a recognizance with four sureties, to wit: Messrs. Wm. Langburn, Thomas Taylor, John G. Gamble, and Luther Martin; himself in the sum of ten thousand dollars, and each surety in the sum of two thousand five hundred dollars, conditioned, that he would not depart without leave of the court.

Mr. Martin, when offered as surety for Colonel Burr, said, that he had lands in the district of Virginia, the value of which was more than double the sum; and that he was happy to have this opportunity to give a public proof of his confidence in the honor of Colonel Burr, and of his conviction that he *63 was innocent. All further proceedings in the case were thereupon postponed until the next day.

On Friday, the 29th of May, and on Monday, Tuesday, and Wednesday, the 1st, 2d, and 3d of June, the court met and adjourned without taking up the case, on account of the non-arrival of General Wilkinson. On the last dmentioned day the district attorney stated that he did not think it probable that General Wilkinson would arrive for ten or twelve days, and suggested an adjournment of the grand jury for that length of time. Finally, they were adjourned to Tuesday, the 9th of June.

Tuesday, June 9, 1807.

The court met pursuant to adjournment, and all the grand jorors appeared. General Wilkinson not having yet arrived, after some conversation between the court and bar as to the probable time of his arrival, the grand jury were further adjourned to Thursday following.

Immediately upon the adjournment of the grand jury a question arose as to the production of certain papers by the government, and was followed by a motion for a subpoena duces tecum directed to the president of the United States, which will be found reported as Case No. 14,692d. The argument consumed several days, and an opinion was delivered Saturday, June 13, 1807. After which

Mr. Burr called up the motion for a supplemental charge to the grand jury, in support of which he had, on yesterday, submitted a series of propositions, with citations of authorities.

The CHIEF JUSTICE stated that he had drawn up a supplemental charge, which he had submitted to the attorney for the United States, with a request that it should also be put into the hands of Colonel Burr's counsel; that Mr. Hay had, however, informed him that he had been too much occupied to inspect the charge with attention, and deliver it to the opposite counsel; but another reason was, that there was one point in the charge which he did not fully approve. He should not, therefore, deliver his charge at present, but should reserve it until Monday. In the meantime, Colonel Burr's counsel could have an opportunity of inspecting it, and an argument might be held on the points which had produced an objection from the attorney for the United States.

(After some conversation between the court and bar, as to whether the arguments on the supplemental charge should be submitted in writing or orally, the subject was passed over, and it appears never to have been again called up.)

At the instance of the district attorney, four witnesses, viz. Thomas Truxton, William Eaton, Benjamin Stoddert, and Stephen Decatur, were sworn to testify before the grand jury. The clerk then proceeded to call four other witnesses to the book, but when Erick Bollman appeared, Mr. Hay addressed the court to the following effect: Before Mr. Bollman is sworn I must inform the court of a particular, and not an immaterial circumstance. He, sir, has made a full communication to the government of the plans, the designs, and views of Aaron Burr. As these communications might criminate Dr. Bollman before the grand jury, the president of the United States has communicated to me this pardon (holding it in his hands) which I have already offered to Dr. Bollman. He received it in a very hesitating manner, and I think informed me that he knew not whether he should or should not accept it. He took it from me, however, as he informed me, to take the advice of counsel. He returned it in the same hesitating manner; he would neither positively accept nor refuse it. My own opinion is that Dr. Bollman, under these circumstances, cannot possibly criminate himself. This pardon will completely exonerate him from all the penalties of the law. I believe his evidence to be extremely material. In the presence of this court I offer this pardon to him, and if he refuses, I shall deposit it with the clerk for his use. Will you (addressing himself to Dr. Bollman) accept this pardon?

Dr. Bollman.--No, I will not, sir.
Mr. Hay then observed that Dr. Bollman must be carried up to the grand jury with an intimation that he had been pardoned.
Mr. Martin.--It has always been Dr. Bollman's intention to refuse this pardon; but he has not positively refused it before, because he wished to have this opportunity of publicly rejecting it.
Several other witnesses were sworn.
Mr. Martin did not suppose that the pardon was real or effectual; if he made any confessions before the grand jury, they might find an indictment against him, which would be valid, notwithstanding the pardon; that the pardon could not be effectual before it was pleaded to an indictment in open court.
Mr. Hay inquired whether Dr. Bollman might not go to the grand jury.
The CHIEF JUSTICE suggested that it would be better to settle the question about the validity of the pardon before he was sent to the grand jury.
Mr. Hay.--I am anxious to introduce the evidence before the grand jury in a chronological order, and the suspension of Dr. Bollman's testimony will make a chasm in my arrangement. He added that, however, it was not very important whether he was sent now or some time hence to the grand jury.
Mr. Martin.--Dr. Bollman is not pardoned, and no man is bound to criminate himself.
The CHIEF JUSTICE required his authorities.
Mr. Martin.--I am prepared to show that a party even possessed of a pardon is still indictable by the grand jury, unless he has pleaded it in court.
The other witnesses were sent to the grand jury, and Dr. Bollman was suspended. Four other witnesses were then sworn. ***64**
Mr. Hay.--I again propose to send Dr. Bollman to the grand jury.
At this time the marshal entered, and Mr. Hay informed the court that the grand jury had sent for the article of the constitution and the laws of congress relating to treason, and the law relating to the misdemeanor.
Jacob Dunbaugh was sworn and sent to the grand jury.
Some desultory conversation here ensued between the bar and the court respecting Dr. Bollman, when Mr. Hay addressed the opposite counsel: Are you then willing to have Dr. Bollman indicted? Take care in what an awful condition you are placing this gentleman.
Mr. Martin.--Doctor Bollman, sir, has lived too long to be alarmed by such menaces. He is a man of too much honor to trust his reputation to the course which you prescribe for him.
The CHIEF JUSTICE.--There can be no question but Dr. Bollman can go up to the jury; but the question is, whether he is pardoned or not? If the executive should refuse to pardon him, he is certainly not pardoned.
Mr. Martin.--But there can be no doubt, if he chooses to decline his pardon, that he stands in the same situation with every other witness, who cannot be forced to criminate himself.
Some desultory conversation here ensued, when Mr. Hay observed that he should extremely regret the loss of Dr. Bollman's testimony. He believed it to be material. He trusted that he should obtain it, however reluctantly given. The court would perceive, that Dr. Bollman now possessed so much zeal as even to

encounter the risk of an indictment for treason. Whether he should appear before the grand jury under the circumstances of a pardon being annexed to his name, might hereafter become the object of a distinct inquiry. In the meantime he might go up without any such notification. The counsel of Mr. Burr acquiesced.

The CHIEF JUSTICE.--Whether he be really pardoned or not, I cannot at present declare. I must take time to deliberate.

Mr. Hay.--Categorically then I ask you, Mr. Bollman, do you accept your pardon?

Mr. Bollman.--I have already answered that question several times. I say no. I repeat, that I would have refused it before, but that I wished this opportunity of publicly declaring it.

Mr. Hay.--If the grand jury have any doubts about the questions that they put to Dr. Bollman, they can apply to the court for instructions. I assert, sir, that Mr. Bollman is a pardoned man. I wish the opposite counsel to prove that he is not. I therefore move, sir, that he be sent up to the grand jury, certified by you, that he is pardoned. I make this motion that gentlemen who wish to discuss the question may have an opportunity of adducing their arguments.

Mr. Williams appeared as counsel for Dr. Bollman, and addressed the court in his behalf, insisting he was not bound to criminate or calumniate himself, although pardoned. He claimed, however, that the pardon having been refused, the court could take no notice of it. He also insisted that no pardon except by statute could protect a party against a criminal prosecution, as a pardon under the great seal was not effectual until it had been pleaded and allowed in court. He cited numerous authorities in support of his positions.

Mr. Martin supported the same positions. He said, another reason why Dr. Bollman had refused the pardon was, that it would be considered an admission of guilt. He did not consider a pardon necessary for an innocent man. Dr. Bollman, sir, knows what he has to fear from the prosecution of an angry government, but he will brave it all. The man who did so much to rescue the Marquis La Fayette from his imprisonment, and who has been known at so many courts, bears too great a regard for his reputation, to wish to have it sounded throughout Europe that he was compelled to abandon his honor through a fear of unjust prosecution.

After some remarks by Messrs. MacRae and Hay, Dr. Bollman was sent up to the grand jury without any particular notification; the questions as to the effect of the pardon tendered to him, and how far he could be compelled to testify, being reserved for future discussion and decision.

Mr. Hay requested leave to inform the grand jury that fatigue alone had prevented General Wilkinson from attending them on that day, but that he should appear before them on Monday. The court then adjourned to Monday.

Monday, June 15, 1807.

The court met pursuant to adjournment.

Gen. Wilkinson was sworn and sent to the grand jury, with a notification that it would facilitate their inquiries if they would examine him immediately.

Mr. Wickham reminded the court that the attorney for the United States had pledged himself to send up no papers to the grand jury which had not previously passed the inspection of the court; but it had since occurred to Col. Burr's counsel that the witnesses themselves might carry up improper papers. He

submitted to the court whether they ought not to instruct the grand jury to receive no papers, except through the medium of the court.

Upon this motion a running debate of considerable length ensued.

Finally, the CHIEF JUSTICE remarked that he was not satisfied that a court ought to inspect the papers which form a part of a witness's testimony before he is sent to the grand jury. He had reduced to writing an opinion to be sent to the grand jury. It instructed them not to inspect any papers, but such as formed a part of the narrative of the witness, and proved to be the papers of the person against whom an indictment was exhibited.

At the instance of Mr. Hay, the instruction ***65** was so amended as to submit such papers as tend to justify the witness, but not to bear upon the accused.

Mr. Hay informed the court that the grand jury had sent for Dr. Bollman; that they wanted him to decipher, if he could, a ciphered letter annexed to Mr. Willie's affidavit, and which he held in his hand; that Mr. Willie, the reputed secretary of Mr. Burr, would prove the identity of the paper, and Dr. Bollman, it was expected, would interpret it.

At the suggestion of Mr. Martin, the affidavit was severed from the letter.

Mr. Willie appearing in court, Mr. Hay produced the ciphered letter annexed to his affidavit, and said: This is the letter which I wish to transmit to the grand jury. It is addressed, I understand, to Dr. Bollman, under a fictitious name, and is all in the handwriting of Mr. Willie.

Mr. Botts objected to its being sent up to the grand jury until both its materiality and its authenticity had been proved.

Mr. Hay said that was a hard proposition, as it was written partly in ciphers and partly in German. He deemed it material, because he understood it was either dictated by the accused, or first written by him and afterwards written by his secretary, and at his request. It was addressed to Henry Wilbourn, alias Erick Bollman. He wished it to be sent up while Dr. Bollman was before the grand jury.

After considerable sparring between counsel, Mr. Willie was called to the stand.

The argument of the question of the right to compel Willie to testify took up the balance of the day, and will be found reported in Case No. 14,692e.

Tuesday, June 16, 1807.

As soon as the court met, Mr. Hay produced and read the following letter from the president of the United States, in answer to his letter on the subject of the subpoena duces tecum, observing, at the same time, that he read it to show the disposition of the government not to withhold any necessary papers, and that if gentlemen would specify what orders they wanted, they would be furnished without the necessity of expresses:

'Washington, June 12, 1807.

'Sir: Your letter of the 9th is this moment received. Reserving the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest permits to be communicated, and to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions whatever the purposes of justice may require. But the letter of General Wilkinson, of October 21st, requested for the defence of Colonel Burr, with every other paper relating to the charges against him, which were in my possession when the attorney general went on to Richmond in March. I then delivered to him; and I

have always taken for granted he left the whole with you. If he did, and the bundle retains the order in which I had arranged it, you will readily find the letter desired under the date of its receipt, which was November 25th; but lest the attorney general should not have left those papers with you, I this day write to him to forward this one by post. An uncertainty whether he be at Philadelphia, Wilmington, or New Castle, may produce delay in his receiving my letter, of which it is proper you should be apprised. But as I do not recollect ehe whole contents of that letter, I must beg leave to devolve on you the exercise of that discretion which it would be my right and duty to exercise, by withholding the communication of any parts of the letter which are not directly material for the purposes of justice. With this application, which is specific, a prompt compliance is practicable; but when the request goes to copies of the orders issued in relation to Colonel Burr to the officers at Orleans and Natchez, and by the secretaries of the war and navy departments, it seems to cover a correspondence of many months, with such a variety of officers civil and military, all over the United States, as would amount to the laying open of the whole executive books. I have desired the secretary of war to examine his official communications, and on a view of these we may be able to judge what can and ought to be done towards a compliance with the request. If the defendant allege that there was any particular order which, as a cause, produced any particular act on his part, then he must know what this order was, can specify it, and a prompt answer can be given. If the object had been specified, we might then have had some guide for our conjectures, as to what part of the executive records might be useful to him. But with a perfect willingness to do what is right, we are without the indications which may enable us to do it. If the researches of the secretary at war should produce anything proper for communication, and pertinent to any point we can conceive in the defence before the court, it shall be forwarded to you. I salute you with esteem and respect

'Thomas Jefferson.

'George Hay, Esq.'

Some conversation ensued about the specification of the papers wanted from the executive.

Mr. Hay stated that in his communication to the president, to which this letter was a reply, he had mentioned these papers in the terms by which he thought the opposite counsel would probably have described them. The president, however did not deem this description sufficient.

Colonel Burr's counsel then stated that they had sent an express to Washington for these papers, with a subpoena to the president, and that it would appear on the return whether they could obtain them or not.

Here a desultory conversation ensued, in ***66** which Mr. Hay insisted that Dr. Bollman was a pardoned man, and ought to communicate all he knew to the grand jury, which was denied by the other side; when Dr. Bollman, addressing himself to the court, said: I have answered every question that was put to me by the grand jury.

The CHIEF JUSTICE inquired if there was any objection to asking Dr. Bollman if he could decipher the letter.

Mr, Martin said it would be time enough to discuss that question after the letter shall have been before the grand jury.

Mr. MacRae.--I wish the question now put. I asked Willie whether he

understood that part of the letter which is in cipher; he could not be criminal if he did not understand it. I wish the part which is written in German now to be explained, to show that there is nothing criminal in it. I wish Bollman to translate that part.

The CHIEF JUSTICE said he would prefer to proceed with the other point; how far a witness may refuse to answer a question which he thinks would criminate himself.

Mr. Botts then addressed the codurt at some length on that point. In the course of his remarks he intimated that the letter in question had been obtained by the robbery of the post office, and referred to the mark '25' on its back, (which he said was the only post mark of many of the country post offices,) as evidence that it has been taken from the post office.

Mr. Williams, counsel for Mr. Willie, followed Mr. Botts in support of the position that the witness was not bound to answer any question, the answer to which he believed would tend to criminate himself.

Messrs. MacRae and Hay replied at some length, after which the court adjourned.

Wednesday, June 17, 1807.

At the meeting of the court Mr. Hay referred to the insinuations that had been thrown out yesterday, that the ciphered letter in question had been taken improperly if not feloniously from the post office; and said this was evidently done to affect the character of Gen. Wilkinson. He read a note which he had just received from Gen. Wilkinson, stating that the letter was delivered to him by Charles Patton, of the house of 'Meeker, Williamson & Patton,' New Orleans.

Mr. Martin then addressed the court on the question of the right of Mr. Willie to decline answering the questions prolpounded to him by the counsel for the prosecution. He contended that 'a witness is not compelled to answer when it tends to criminate him, nor where it does not relate to the issue,' and cited authorities in aupport of the proposition.

Mr. Wickham followed in an argument on the same side.

After some further desultory conversation, the CHIEF JUSTICE asked whether there were any other questions before the court.

Mr. MacRae requested a decision on Dr. Bollman's case, as he wished to interrogate him about the ciphered letter.

Mr. Williams said he was ready to discuss the question.

Mr. Burr.--There will arise some very important questions, affecting the very source of the jurisdiction of this country. I have several affidavits to produce to show that improper means have been used to procure witnesses, and thereby contaminate the public justice. When these proofs have been duly exhibited, it will be the province of the court to decide whether they will not arrest the progress of such improper conduct, and prevent the introduction of such evidence.

Mr. Botts rose to apprise the oppositite counsel that there were three or four questions of importance which the counsel for Mr. Burr should bring forward as soon as possible. Two or three days ago he had commented on the plunder of the post office, and he assured the counsel for the prosecution that he should probe that subject to the bottom, as no man could be more anxious than himself that the stigma which this transaction attaches to the inferior or superior officers of the government should be wiped off.

CHIEF JUSTICE.--Unless these allegations affected some testimony that was

about to be delivered, how can you introduce this subject?

Mr. Burr.--The court has very properly demanded some proof of the relevancy of our proposition. Sir, we are ready to prove the violation of the post office. We are ready to fasten it on individuals now here, and we are ready to name the post offices if the court require it, which have been thus plundered. When it comes out that evidence has been thus improperly obtaidned, we shall say, sir, that it is contaminated by fraud. I will name three persons who have been guilty of improper conduct, in improperly obtaining letters from the post office to be evidence against me. These are Judge Toulmin, of the Mississippi territory, John G. Jackson, a member of congress, and General Wilkinson. Two of these persons are within the reach of this court. As well as the improper manner in which they have procured affidavits and witnesses against me, I mention these circumstances for two reasons: first, that the facts may be proved to the satisfaction of the court; and second, that the court may lay their hands on testimony thus procured.

Mr. Botts.--The circumstance of the post mark proves that the post office was robbed of that letter; therefore it is not evidence.

The CHIEF JUSTICE said, let the consequences be as they may, this court cannot take cognizance of any act which has not been committed within this district. That mark is not necessarily a post mark. The court can only know the fact, in a case to which it applies, except to commit and send for trial.

Mr. Hay.--Let some specific motion be ***67** made, and the evidence procured; and if there have been any crime committed, let the offenders be prosecuted according to law. These gentlemen know the course, and I most solemnly promise to discharge the duties of my office, whether they bear against General Wilkinson, or the man at the bar. If the crime have been committed, it is not the province of the court to notice it till after an indictment has been found.

Mr. Botts.--We only wish to prove and prevent a repetition any continuance of this improper mode of proceeding. The proof will affect General Wilkinson.

CHIEF JUSTICE.--If it did affect General Wilkinson it could not prevent him from being a witness.

Some desultory conversation here ensued, when Mr. Burr observed that he was afraid he was not sufficiently understood, from mingling two distinct propositions together. As to the subject of the post offices, it might rest for the present; but as to the improper means employed in obtaining testimony, they were at this moment in actual operation.

Some witnesses had been brought here by this practice, and it was one which ought immediately to be checked; he did not particularly level his observations against General Wilkinson. He did not say that the attorney for the United States ought to indict, or that such a crime, if committed out of this district, was cognizable by the court, unless it be going on while the court is in session, or the cause depending; in those cases improper practices relative to crimes committed out of the limits of this court may be examined, and the persons committing them attached. Such practices have been since I have been recognized here, and they ought to be punished by attachment.

Mr. Wirt.--I do not yet understand the gentlemen. What is the object of their motion? Mr. Botts.--We shall hereafter make it; we have no other object by the present annunciation than to give gentlemen a timely notice of our intentions.

Mr. Burr.--We have sufficient evidence on which to found our motion.

What motion? demanded Mr. Hay.

Mr. Burr.--I thought, sir, I had sufficiently explained my intentions. I may either move for a rule to show cause why an attachment should not issue against Judge Toulmin, John G. Jackson, and General Wilkinson, or what is sometimes, though not so frequently practiced, I may directly move for an attachment itself.

Mr. MacRae.--At whose instance?

Mr. Burr.--At the public's.

Mr. MacRae.--A pretty proceeding, indeed! that the public prosecution should thus be taken out of the hands of the public prosecutor, and that the accused should supersede the attorney for the United States!

Mr. Burr.--A strange remark indeed! As if it were not the business of the injured person himself to institute the complaint.

Mr. Hay.--I wish for further explanation. Let the specific charge on which their motion is founded be clearly pointed out and reduced to writing.

Mr. Burr.--The motion will be for an attachment for the irregular examination of witnesses, practicing on their fears, forcing them to come to this place, and transporting them from New Orleans to Norfolk.

At this moment Mr. Randolph entered the court, and observed that if he had been present he would have himself opened this motion, which was intended to operate immediately upon General Wilkinson, and ultimately upon some other persons. Mr. Randolph here read the motion which he would have submitted to the court.

Mr. Hay protested against this proceeding, which, he said, was calculated to interrupt the course of the prosecution, and was levelled at General Wilkinson alone.

After some further remarks from Mr. Hay and from Messrs. Randolph and Martin--Mr. Hay said he should move to postpone the motion of the gentlemen till the prosecution was over, because it would necessarily interrupt the business before the court, because it was intended to impeach the credit of a witness, and because this inquiry could as well be conducted after as before the prosecution.

Mr. Wickham replied to Mr. Hay. He said, among other things, that General Wilkinson had brought witnesses with him from New Orleans by military force. He had taken their depositions entirely ex parte at the point of the bayonet, for the purpose of keeping their testimony straight. He would lay down the broad proposition that the man who goes about collecting affidavits upon affidavits in relation to a matter to be investigated in this court corrupts the fountains of justice. We have already seen a volume of such at this bar. He particularly referred to Mr. Jackson, who comes here with the depositions of witnesses who are thus bound hand and foot, thus tongue-tied, because their depositions had been taken. He had seen them in this very court examining witnesses with affidavits in their hands, and comparing the one with the other; depositions taken not by commissions, but ex parte. When an interested agent thus goes about collecting depostitions, and with ignorant men shaping them just as he pleases, he acts contrary to law and to the spirit and genius of our government; and such acts are a contempt of this court, if done during the prosecution, by interfering with the purposes of justice. Such men are liable

to attachment from the very moment that the government took possession of Colonel Burr's person; not from the moment of first arrest, but from the time when they ordered Perkins to conduct his prisoner from Fredericksburg to Richmond. It was necessary to institute this proceeding now to prevent the repetition of such practices during the progress of the trial. At the conclusion of Mr. Wickham's remarks.

The CHIEF JUSTICE said that the pendency *68 of the prosecution was no objection to hearing the motion, but it was another question whether there were any grounds for it or not, and that the court would not say that a motion relating to the justice of the case ought not to be heard.

The court then adjourned.

Thursday, June 18, 1807. As soon as the court met, the CHIEF JUSTICE delivered an opinion in the case of Willie. This will be found reported as Case No. 14,692e. After the delivery af such opinion

Mr. Williams (counsel for Mr. Willie) stated that he had misunderstood him the other day in court, and in a subsequent conversation had obtained more accurate information. He does understand a part of that letter.

Mr. Hay requested that Mr. Willie should be called into court. When he appeared Mr. Hay interrogated him. Do you understand the contents of that letter? Answer. No. Mr. Willie afterwards said that he understood the part of the letter which is written in Dutch.

Mr. Hay.--Was this letter written by the hand or the direction of Aaron Burr?

Mr. Wickham objected to the question.

The CHIEF JUSTICE.--The witness and his counsel will consult.

Mr. Hay repeated the question. Mr. Willie. Yes. Mr. Hay. Which? by his hand or his direction? Mr. Willie. By his direction. It was copied from a paper written by himself.

Mr. Hay.--I wish this paper to be carried to the grand jury. I presume there can be no objection.

Mr. Botts.--No objection! We call upon you to show the materiality of that letter.

Mr. Hay.--I deny the necessity of any such thing. Until this letter be deciphered it will be perfectly unintelligible to me and to the grand jury. It is no more than a blank piece of paper.

Mr. Wickham.--I had always understood before that the testimony which is laid before a grand jury must not only be legal in itself, but proved to be material.

Mr. Williams begged leave to interrupt the gentleman. Mr. Willie is anxious to be particularly understood. He says that this ciphered letter was first written by Colonel Burr, and afterwards copied. But it is the cipher only which has been copied from Colonel Burr's original.

Mr. Hay.--It is quite sufficient, sir. If Colonel Burr wrote the ciphered part, he will be considered the author of the whole.

Mr. Wickham.--The gentleman has stated a curious proposition indeed! I had always understood before that the whole included the part; but it seems now that the part is to comprehend the whole.

After some further discussion, in which several of the counsel participated,

The CHIEF JUSTICE said he had in some measure anticipated this question, and had reflected upon it; his opinion was, that a paper to go before the grand or petit jury must be relevant to the case, even if its materiality were not

proved. Why send this paper before the grand jury, if it cannot be deciphered? If it can be deciphered before the grand jury, why not before the court? Let it, then, be deciphered, and its relevancy may at once be established.

Mr. Hay then requested Dr. Bollman to be called, that he might be interrogated as to its contents; but before he appeared, Mr. John Randolph entered at the head of the grand jury, and addressed the court as follows: May it please the court: One of the witnesses under examination before the grand jury has answered certain questions touching a letter in ciphers. The grand jury understand that this letter is in the possession of the court, or of the counsel for the prosecution. They have thought proper to appear before you, to know whether the letter referred to by the witness be in the possession of the court?

The CHIEF JUSTICE then remarked that as the letter was wanted by the grand jury, a witness having referred to it, that was sufficient to establish its relevancy, and directed it to be delivered to them.

Mr. MacRae hoped that before the grand jury retired they would be informed that a witness had proved that this letter was originally written by Aaron Burr.

Mr. Wickham hoped that they would also be informed that the superscription on that letter has not been proved to have been written by Colonel Burr. The witness did not and would not say that he knew the superscription to have been written by him. The grand jury retired and the court adjourned.

Friday, June 19, 1807.

As soon as the court met, Mr. Burr addressed them. He stated that the express that he had sent on to Washington with the subpoena duces tecum had returned to this city on Wednesday last, but had received no other than a verbal reply from the president of the United States that the papers wanted would not be sent by him, from which I have inferred, said Mr. Burr, that he intends to send them in some other way. I did not mention this circumstance yesterday to the court, under an expectation that the last night's mail might give us further intelligence on the busject. I now rise to give notice that unless I receive a satisfactory intimation on this subject before the meeting of the court, I shall to-morrow move the court to enforce its process.

Motion was then made for an attachment against General Wilkinson 'for a contempt in obstructing the administration of the justice of this court,' the argument on which occupied the balance of the day. Case No. 14,692f.

Saturday, June 20, 1807.

The court met according to adjournment. Present, the same judges as yesterday. ***69**

Mr. Randolph rose to proceed with his motion, when he was interrupted by Mr. Hay, who spoke to this effect:

I have a communication to make to the court, and to the counsel of the accused. The court will recollect the answer which I received from the president, to my letter respecting certain papers. He stated in that letter that General Wilkinson's letter of the 21st October had been delivered to Mr. Rodney, the attorney general, from whom he would endeavor to obtain it. By the last mail I have received this letter from the president on the same subject.

'Washington, June 17, 1807.

'Sir: In answering your letter of 9th, which desired a communication of one

to me from General Wilkinson, specified by its date, I informed you in mine of the 12th that I had delivered it, with all other papers respecting the charges against Aaron Burr, to the attorney general when he went to Richmond; that I had supposed he had left them in your possession, but would immediately write to him, if he had not, to forward that particular letter without delay. I wrote to him accordingly on the same day, but having no answer I know not whether he has forwarded the letter. I stated in the same letter that I had desired the secretary of war to examine his office in order to comply with your further request to furnish copies of the orders which had been given respecting Aaron Burr and his property; and, in a subsequent letter of the same day, I forwarded you copies of two letters from the secretary at war, which appeared to be within the description expressed in your letter. The order from the secretary of the navy you said you were in possession of. The recdipt of these papers has, I presume, so far anticipated, and others this day forwarded, will have substantially fulfilled the object of a subpoena from the district court of Richmond, requiring that those officers and myself should attend the court in Richmond, with the letter of General Wilkinson, the answer to that letter, and the orders of the department of war and the navy therein generally described. No answer to General Wilkinson's letter, other than a mere acknowledgment of its receipt in a letter written for a different purpose, was ever written by myself or any other. To these communications of papers I will add, that if the defendant suppose there are any facts within the knowledge of the heads of departments or of myself, which can be useful for his defence, from a desire of doing anything our situation will permit in furtherance of justice, we shall be ready to give him the benefit of it, by way of deposition through any persons whom the court shall authorize to take our testimony at this place. I know indeed that this cannot be done but by consent of parties, and I therefore authorize you to give consent on the part of the United States. Mr. Burr's consent will be given of course, if he suppose the testimony useful.

'As to our personal attendance at Richmond, I am persuaded the court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case, as it would should we receive a similar one to attend the trials of Blennerhassett and others in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any co-ordinate authority.

'With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication. Hence, under our constitution, in requests of papers from the legislative to the executive branch, an exception

is carefully expressed, 'as to those which he may deem the public welfare may require not to be disclosed,' as you will see in the inclosed resolution of the house of representatives, which produced the message of January 22d, respecting this case. The respect mutually due between the constituted authorities in their official intercourse, as well as sincere dispositions to do for every one what is just, will always insure from the executive, in exercising the duty of discrimination confided to him, the same candor and integrity to which the nation has, in like manner, trustee in the disposal of its judiciary authorities. Considering you as the organ for communicating these sentiments to the court, I address them to you for that purpose, and salute you with esteem and respect.

Thos. Jefferson.'

Accompanying this letter is a copy of the resolution of the house of representatives containing the exception to which the president refers. I have also received a letter from Mr. Smith, the secretary of the navy, containing an authentic copy of the order which was wanted, precisely corresponding with the unauthenticated copy in my possession.

Mr. Wickham.--I presume that these must be considered and noted as the return to the 'subpoena duces tecum.'

Mr. Hay.--So far as they go. When we receive General Wilkinson's, the return will be complete. I have also received a letter ***70** from the secretary of war, which contains all the orders of his department relative to Aaron Burr. All which papers I shall deposit with the clerk of this court.

The following is the order of the navy department:

'I certify that the annexed is a true copy from the records in the office of the department of the navy of the United States of of the navy of the United States of the letter from the secretary of the navy to Captain John Shaw, dated 20th December, 1806. In faith whereof, I, Robert Smith, secretary of the navy of the United States of America, have signed these presents, and caused the seal of my office to be affixed hereto, at the city of Washington, this 17th day of June, Anno Domini 1807, and in the 31st year of the independence of the said states.

'(Registered,) Rt. Smith,'

'Secretary of the Navy.

'Ch. W. Goldsborough,

'Ch. Clk., N. D.'

'(Copy.)

'Navy Department, 20th December, 1806.

'Sir: A military expedition formed on the western waters by Colonel Burr will soon proceed down the Mississippi, and by the time you receive this letter will probably be near New Orleans. You will, by all the means in your power, aid the army and malitia in suppressing this enterprise. You will, with your boats, take the best position to intercept and to take, and, if necessary, to destroy, the boats descending under the command of Colonel Burr, or of any person holding an appointment under him. There is great reliance on your vigilance and exertions. I have the honor to be, sir, your most obedient,

'(Signed) Rt. Smith.

'Captain John Shaw, or the Commanding Naval Officer at New Orleans.'

Thereupon the motion for attachment was brought on and argued. The argument and opinion will be found reported as Case No. 14,692f.

On Wednesday, the 24th of June, while Mr. Botts was speaking on the motion for an attachment, the grand jury entered, when Mr. John Randolph, their foreman, addressed the court, and stated that they had agreed upon several indictments, which he handed in at the clerk's table. The clerk then read the endorsements upon them as follows: 'An indictment against Aaron Burr for treason. A true bill.' 'An indictment against Aaron Burr for a misdemeanor. A true bill.' 'An indictment against Herman Blannerhasset [FN4] for treason. A true bill.' 'An indictment against Herman Blannerhassett for a misdemeanor. A true bill.' The foreman then stated that the grand jury had still other subjects for their consideration, and had adjourned themselves to meet to-morrow at ten o'clock.

FN4 So in the indictment. The correct spelling is 'Harman Blennerhassett.'

After Mr. Botts had concluded his argument, Mr. Burr addressed the court, and observed that as bills had been found against him, it was probable the public prosecutors would move his commitment. He would, however, suggest two ideas for the consideration of the court: the one was, that it is within their discretion to bail in certain cases, even when the punishment was death; and the other was, that it was expedient for the court to exercise their discretion in this instance, as he should prove that the indictment against him had been obtained by perjury.

Mr. Hay moved for the commitment of Aaron Burr. He stated that if the court had power to bail by the 33d section of the judicial act, it was only to be exercised according to their sound discretion, and that the prisoner was not to demand bail as a matter of right.

Mr. Martin said the counsel for the prosecution had admitted the right of the court to give bail according to its discretion.

Mr. MacRae did not understand from the judicial act that the discretion was to be exercised at this stage of the business, but only at the time of making the arrest.

After some further remarks by Messrs. Martin, Wirt, and Wickham, the CHIEF JUSTICE said: Mr. Martin, have you any precedents where a court has bailed for treason, after the finding of a grand jury, on either of these grounds; that the testimony laid before the grand jury had been impeached for perjury, or that other testimony had been laid before the court, which had not been in possession of the grand jury?

Mr. Martin said that he had not anticipated this case, and had not, therefore, prepared his authorities; but he had no doubt that such existed.

Mr. Burr said, if the court have no discretion, it is unnecessary to produce evidence. That question ought, therefore, to be previously settled.

Some further discussion ensued, as to the question whether the court had any discretion, when Mr. Burr said, that if the court thought it had the power to bail in any case after bill found, it would then be necessary to show that it ought to exercise its discretion in this instance. That the finding of the jury was founded on the testimony of a perjured witness. That General Tupper would prove that there had been no such resistance of his authority as had been

stated by that witness.
After same further conversation between counsel, Mr. Burr wished to know whether the court would go into testimony extrinsic to the indictment.
The CHIEF JUSTICE said he had never known a case similar to the present when such an examination had taken place. [FN5]

FN5 The court will in no instance inquire into the character of the testimony which has influenced the grand jury in finding an indictment. State v. Boyd, 2 Hill (S. C.) 288. ***71**

Mr. Martin would produce authorities if he had time allowed him.
The CHIEF JUSTICE insisted upon the necessity of producing adjudged cases to prove that the court could bail a party against whom an indictment had been found.
Mr. Burr did not wish to protract the session of the court to suit his own personal convenience. There was no time at present to look for authorities.
The CHIEF JUSTICE observed that he was then under the necessity of committing Colonel Burr.
Mr. Burr stated that he was willing to be committed, but hoped that the court had not forestalled its opinion.
The CHIEF JUSTICE.--I have only stated my present impression. This subject is open for argument hereafter. Mr. Burr stands committed to the custody of the marshal.
He was accordingly committed to the gaol, and the court adjourned.
On Thursday, the 25th of June, while Mr. Hay was addressing the court on the motion for an attachment against General Wilkinson, the grand jury entered, and their foreman, Mr. John Randolph, addressed the court as follows: 'May it please the court: The grand jury have been informed that there is in the possession of Aaron Burr a certain letter, with the post mark of May 13th, from James Wilkinson, in ciphers, which they deem to be material to certain inquiries now pending before them. The grand jury are perfectly aware that they have no right to demand any evidence from the prisoner under prosecution which may tend to criminate himself. But the grand jury have thought proper to appear in court to ask its assistance, if it think proper to grant it, to obtain the letter with his consent.'
Mr. Burr rose and asked whether the court were about to give an opinion?
The CHIEF JUSTICE stated that the court was about to say that the grand jury were perfectly right in the opinion, that no man can be forced to furnish evidence against himself; he presumed that the grand jury wished also to know whether the person under prosecution could be examined on other questions not criminating himself?
Mr. Burr declared that it would be impossible for him, under certain circumstances, to expose any letter which had been communicated to him confidentially; how far the extremity of circumstances might compel him to such a conduct, he was not prepared to decide; but it was impossible for him even to deliberate on the proposition to deliver up anything which had been confided to his honor, unless it were extorted from him by law.
Mr. Randolph.--We will withdraw to our chamber, and when the court has decided upon the question it will announce it to the grand jury.
The CHIEF JUSTICE knew not that there was any objection to the grand jury

calling before them and examining any man as a witness who laid under an indictment.

Mr. Martin said there could be no objection.

Mr. Randolph said he was afraid that the object of the grand jury had been misunderstood by the court. The grand jury had not appeared before the court to apply for the person of Aaron Burr, to obtain evidence from him, but for a certain paper which might or might not be in his possession; and upon that paper being or not being in his possession, and upon its being possible or not possible to identify that paper, it might depend whether Aaron Burr himself were or were not a material evidence before them; and then the grand jury withdrew.

When Mr. Hay had concluded his argument, Mr. MacRae addressed the court. He was solicitous he said, to lay a communication before it, on a circumstance which had lately transpired. The grand jury had asked for a certain letter in ciphers, which was supposed to have been addressed by General Wilkinson to the accused. The court had understood the ground on which the accused had refused to put it in their possession, to be an apprehension lest his honor should be wounded by his thus betraying matters of confidence. I have seen General Wilkinson, sir, since this declaration was made. I have informed him of the communication which has thus been made, and the general has expressed his wishes to me, and requested me to express those wishes, that the whole of the correspondence between Aaron Burr and himself may be exhibited before the court. The accused has now, therefore, a fair opportunity of producing this letter; he is absolved from all possible imputation; his honor is perfectly safe.

Mr. Burr.--The court will probably expect from me some reply. The communication which I made to the court, has led, it seems, to the present invitation. I have only to say, sir, that this letter will not be produced. The letter is not at this time in my possession, and General Wilkinson knows it.

Mr. MacRae hoped that notice of his communication would be sent to the grand jury.

Mr. Martin hoped that Colonel Burr's communication also would go along with it.

The CHIEF JUSTICE was unwilling to make the court the medium of such communications.

Mr. MacRae hoped the court would notify his communication to the grand jury, and for an obvious reason. When the grand jury came into court to ask for the paper, what did the accused say? Did he declare that it was not in his possession? No: he merely said that honor forbade him to disclose it. The inference undoubtedly was, that he had the paper, but could not persuade himself to disclose it. And what then must have been the impression of the grand ***72** jury? A cloud of suspicions must have fastened itself upon their minds; suspicions unjustly injurious to the character of General Wilkinson and which the present communication may at once disperse. It is but justice, therefore, to General Wilkinson, to whom the inquiries of the grand jury may at present relate, to give them the benefit of this information.

Mr. Burr.--General Wilkinson, sir, is extremely welcome to all the eclat which he may expect to derive from this challenge; but as it is a challenge from him, it is a sufficient reason why I should not accept it. But as the remarks of

the last gentleman seem to convey some reproach against me, (which no man who knows me can believe me to deserve) it may be proper to say, that I did voluntarily, and the presence of a witness, put the letter out of my hands, with the express view that it should not be used improperly against any one. I wished, sir. to disable any person, even myself, from laying it before the grand jury. General Wilkinson knows this fact.

The CHIEF JUSTICE then reduced these communications to writing, and transmitted them to the grand jury.

Mr. Burr.--Let it be understood, that I did not put this letter out of my possession because I expected the grand jury would take up this subject but from a supposition that they might do so.

Mr. Wickham, about to speak, was interrupted by the entrance of the grand jury when Mr. Randolph, their foreman, informed the court that they had agreed upon some presentments, which he then delivered into the hands of the clerk. The clerk then read as follows:

'The grand inquest of the United States, for the district of Virginia, upon their oaths, present, that Jonathan Dayton, late a senator in the congress of the United States, from the state of New Jersey; John Smith, a senator in the congress of the United States, from the state of Ohio; Comfort Tyler, late of the state of New York; Israel Smith, late of the state of New York; and Davis Floyd, late of the territory of Indiana, are guilty of treason against the United States, in levying war against the same, to wit: at Blennerhassett's Island, in the county of Wood, and state of Virginia, on the 13th day of December, 1806.'

Friday, June 26, 1807.

The court met about nine o'clock, and, about ten o'clock, the grand jury entered, and Mr. Randolph, their foreman, presented ten indictments, found true bills; that is, one indictment for treason, and another for a misdemeanor, against each of the following individuals, viz.: Jonathan Dayton, John Smith, Comfort Tyler, Israel Smith, and Davis Floyd.

The CHIEF JUSTICE then made a short address to the grand jury, in which he complimented them upon the great patience and cheerful attention with which they had performed the arduous and laborious duties in which they had been so long engaged, and concluded, by discharging them from all further attendance.

The court then adjourned till twelve o'clock. As soon as it met again, Mr. Botts requested the court to remove Mr. Burr from the public gaol, to some comfortable and convenient place of confinement. He depicted, in very strong terms, the miserable state of the prison where he was then confined. The grounds of this motion are to be found in the following affidavit made by some of Mr. Burr's counsel, and laid before the court:

'We, who are counsel in the defence of Colonel Burr, at the suit of the United States, beg leave to represent to the court, that in pursuance of our duty to him, we have visited him in his confinement in the city gaol: that we could not avoid remarking the danger, which will most probably result to his health, from the situation, inconveniences and circumstances attending the place of his confinement; but we cannot forbear to declare our conviction, that we ourselves cannot freely and fully perform what we have undertaken for his defence, if he remain in the gaol aforesaid, deprived, as he is, of a room to himself, it being scarcely possible for us to consult with him upon the various necessary occasions which must occur, from all which we believe that he will be deprived

of that assistance from counsel, which is given to him by the constitution of the United States, unless he be removed.
Edmund Randolph.
'John Wickham.
'Benjamin Botts.
'Sworn to in open court, by Edmund Randolph, John Wickham, and Benjamin Botts, Esquires. June 25th, 1807.
'William Marshall, Clerk.'
The counsel for the prosecution were perfectly silent on the motion. After a long and desultory argument by Mr. Burr's counsel, the court determined that the prisoner should be removed to his former lodgings near the capitol, provided they could be made sufficiently strong for his safe keeping, being of opinion that the act of congress authorized it, on the foregoing affidavit, to make the order of removal.
Mr. Latrobe, surveyor of the public buildings of the United States, was requested to inspect them; and upon his report the court passed the following order: 'Whereupon, it is ordered, that the marshal of this district do cause the front room of the house now occupied by Luther Martin, Esq., which room has been and is used as a dining room, to be prepared for the reception and safe keeping of Colonel Aaron Burr, by securing the shutters to the windows of the said room by bars, and the door by a strong bar or padlock. And that he employ a guard of seven men to be placed on the floor of the adjoining unfinished house, and on the same story with the before described front room, and also at the door ***73** opening into the said front room; and upon the marshal's reporting to the court that the said room has been so fitted up and the guard employed, that then the said marshal be directed, and he is hereby directed, to remove to the said room, the body of the said Aaron Burr from the public gaol, there to be by him safely kept.'
Mr. Hay.--My only wish is, that this prosecution should be regularly conducted. Is it not the usual practice to read the indictment first and then move for the venire?
Mr. Burr.--I have been furnished with a copy of the indictment; I have perused it and I am ready to plead not guilty to it.
Mr. Wirt.--The usual form requires the actual arraignment of the prisoner; however, the court may dispense with it, if it think proper.
Mr. Hay was indifferent about the form, if the law could be substantially executed. He supposed that a simple acknowledgment of the prisoner was sufficient, without the customary form of holding up his hand.
CHIEF JUSTICE.--It is enough, if he appear to the indictment, and plead not guilty.
The clerk then read the indictment against Aaron Burr, for treason against the United States; which specifies the place of the overt act, to be at Blennerhassett's Island; and the time, the 10th day of December, 1806.
When he had concluded, Mr. Burr addressed the court: I acknowledge myself to be the person named in the indictment. I plead not guilty; and put myself upon my country for trial.
Mr. Hay then addressed the court on the venire that was to try the issue between the prisoner and the United States. He expressed some doubt whether the 29th section of the act of congress called the judicial act [1 Stat. 88], was still in force, which required twelve jurors, at least, to be summoned

from the county where the offence was committed. If this law was still in force, it would be necessary to summon twelve petit jurors from the county of Wood, which would render it impossible to have the trial at an early day.

The CHIEF JUSTICE said he had no doubt the law was still in force.

Mr. Burr said as this law was most probably intended for the benefit of the accused, he consented to waive the right.

Mr. Wirt suggested a doubt whether consent in such a case could take away error.

The CHIEF JUSTICE believed that the provision was not absolutely obligatory, if both parties would waive the right.

Mr. Hay said he felt no disposition to delay the trial; but he could not think of pledging himself to such a measure without due deliberation. He would consult the gentlemen associated with him, and inform the court of the result.

The counsel for the prosecution then retired to consult. On their return, Mr. Hay informed the court that they could not assume the responsibility of consenting to such a proposition, as the law seemed imperative. He must therefore request the court to direct a venire of twelve men, at least, to be summoned from Wood county.

A long conversation ensued as to the time that would be necessary to summon the venire from Wood county, as it would be necessary to postpone the trial accordingly; opinions varying from twenty to thirty-five days. The court made an order for a venire of forty-eight jurors, twelve of whom, at least, were to be summoned from Wood county. Without fixing the time for the trial, the court adjourned.

On Saturday, the 27th of June, an order was made postponing the trial to the third day of August, and for the return of the venire on that day.

Monday, June 29, 1807.

Mr. Hay laid the following order of the executive council before the court:

'In Council, June 29, 1807. The board being informed that an affidavit has been filed in the circuit court of the United States, for the Virginia district, which states that the gaol for the county of Henrico and city of Richmond is inconvenient and unhealthy, and so crowded with state offenders and debtors that there are no private apartments therein for the reception of persons charged with offences against the laws of the United States, it is therefore advised that the governor be requested to tender the said court, (through the federal attorney of the district of Virginia,) apartments in the third story of the public gaol and penitentiary house for the reception of such persons as shall be directed under the authority of the United States to be confined therein.

'Extract from the minutes.

'Daniel L. Hylton, Clerk of the Council.'

The following was the order of the court on this subject: 'Which tender the court doth accept for the purpose above mentioned.'

The final decision of the motion to commit Aaron Burr to the penitentiary was postponed until to-morrow.

Tuesday, June 30, 1807.

After the court met the motion to commit Aaron Burr to the penitentiary was renewed. It was objected to by his counsel, on the ground (and an affidavit was made by them to the same effect) that in so important a case it was essentially necessary for the most uninterrupted intercourse to subsist between

the prisoner and his counsel; but that the distance of the penitentiary, combined with their own professional avocations, would necessarily narrow and interrupt this intercourse. It was also said that, by particular regulations of the penitentiary, the custody of the prisoner would be transferred from the marshal to the superintendent, and that the communications of the prisoner with his counsel would be limited to the very same short period which was allowed to the other visitants: that is, from eleven to one o'clock. ***74**

The attorney for the United States replied to these objections.

The CHIEF JUSTICE said when there was a public gaol not unreasonable distant or unfit for the reception of the prisoner, and when the court was called upon on the part of the United States to commit a prisoner to its keeping, that he conceived himself bound to comply with the requisition; that when he had given the order for his removal from the gaol to his own lodgings, it was under an expectation that the trial would be prosecuted immediately, and that the intercourse between the prisoner and his counsel would be necessarily incessant; but as a postponement had taken place, such an intercourse would not be absolutely necessary; under such circumstances, therefore, he should direct the removal of the prisoner to the penitentiary, if he were still to continue in the possession of the marshal, and if his counsel were to have free and uninterrupted access to him.

Some difficulty having thus occurred on these points, the executive council was immediately convened. In a short time the following letter was submitted to the court:

'Council Chamber, June 30, 1807.

'Sir: In pursuance of an advice of the council of state, I beg leave, through you, to inform the circuit court of the United States, now sitting, that any persons who may be confined in the gaol and penitentiary house, on the part of the United States, will be considered as in the custody, and under the sole control of the marshal of the district; that he will have authority to admit any person or persons to visit the confined that he may think proper, and that he will be authorized to select for the purposes aforesaid, any apartment in the penitentiary now unoccupied, that he may deem most conducive to safety, health, and convenience. I am, with great respect, sir, your obedient servant,

'Wm. H. Cabell.

'George Hay, Esq.'

The court then made the following order: 'In consequence of the offer made by the executive of apartments in the third story of penitentiary and state prisoa, for persons who may be confined therein, under the authority of the United States, and of the foregoing letter from the governor of this commonwealth, it is ordered, on the motion of the attorney for the United States, that so soon as the apartments in the third story of the public gaol and penitentiary shall be fit for the reception and safe keeping of Aaron Burr, that he be removed thereto, and safely kept therein by the marshal, until the second day of August next, when he shall be brought back to the prison where he is now placed, there to be guarded in like manner as at present, until the further order of the court.'

Monday, August 3, 1807.

On this day the circuit court of the United States for the Fifth circuit and district of Virginia, was held according to adjournment. Present: the CHIEF JUSTICE of the United States; George Hay, William Wirt, and Alexander MacRae,

Esquires, counsel for the prosecution.

The prisoner was brought into court from his apartment, near the Swan Tavern, to which he had been removed on Saturday.

Edmund Randolph, John Wickham, Benjamin Botts, John Baker, and Luther Martin, Esquires, appeared as his counsel.

The court assembled at twelve o'clock. An immense concourse of citizens attended to witness the proceedings of this important trial.

Mr. Hay observed that he could take no steps in this business until he had ascertained whether the witnesses summoned on the part of the United States were present; he therefore requested that their names might be called over; they were more than one hundred in number. Their names were accordingly called.

Mr. Hay begged leave to mention that he had nothing more to submit to the court this day. There were many of the witnesses of whose places of residence he was ignorant; several had not appeared; many had been merely pointed out to him by the attorney general of the United States. He observed that, therefore, he had not yet been able to furnish Colonel Burr with a list of the witnesses, and a statement of the places of their residence, as the law requires; that, as many of those who had been summoned and recognized had failed to appear, he was not ready to proceed with the trial immediately. He also informed the court that a list of the venire had been delivered on Saturday to Colonel Burr, but had since been discovered to be inaccurate. It became, therefore, necessary (an act of congress having directed this to be done at least three days before the trial) to deliver a correct list on this day; and, of course, the trial would be postponed until the requisite time should have elapsed.

The CHIEF JUSTICE inquired, then, to what day it would be proper to adjourn the court.

Mr. Hay could not possibly state by what day he should be able to prepare his lists.

Mr. Burr observed that it was not probable that he should avail himself of any privileges to which he might be entitled from any delay in furnishing him with the list of jurors, or of any incorrectness in the list; and therefore the court might adjourn to any day which was convenient to the attorney for the United States. If the day of adjournment depended on his own consent, he should not object to any adjournment, provided it did not extend further than Wednesday.

Mr. Hay had no objection to that day.

At the instance of Mr. Hay the names of the jurors were called, when forty-six answered to their names, two only being absent.

Mr. Burr reminded the court of the motion which he had made, on a former occasion, for a subpoena duces tecum, addressed to the president of the United States. That motion ***75** had been partly complied with. He wished to know of the court whether it were not a matter of right for him to obtain a subpoena duces tecum. If it were not, he should then lay a specific motion before the court.

The CHIEF JUSTICE did not believe it to be the practice in Virginia to obtain such a subpoena upon a mere application to the clerk. The motion must be brought before the court itself.

Mr. Hay said that he would say nothing on this subject until he understood the object of the application: that if it were to obtain the letter which was not

formerly furnished, he would inform the opposite counsel that he had it now among his papers, and was ready to produce it.

Mr. Burr.--That is one object of the application. Another is, to obtain a certain communication from General Eaton to the president of the United States, which is mentioned in his deposition.

Mr. Hay said that he was not certain whether he had that communication, but believed that it was among his papers. If it were there, he would certainly produce it.

Mr. Burr.--But if, after a search, the gentleman finds that he has not that paper, will he consent, out of court, to issue a subpoena to the president of the United States, under the qualification I have mentioned? I wish not, at the present exigency, to derange the affairs of the government, or to demand the presence of the executive officers at this place. All that I want are certain papers.

Mr. Hay said that he could not consent to it; he would rather that a regular application should be made for it to the court.

Mr. Burr.--Then, sir, I shall move for a subpoena duces tecum, to the president of the United States, directing him to attend with certain papers. This subpoena will issue as in the former instance. I shall furnish the clerk with the necessary specification of the paper which I require.

The court was then adjourned till Wednesday, twelve o'clock.

Wednesday, August 5, 1807.

The court met, according to adjournment. Present: JOHN MARSHALL, Chief Justice of the United States.

The names of the witnesses being called over, and many being still absent, Mr. Hay was not ready to proceed. He presumed all of the witnesses would be present in a few days.

After some conversation as to the time to which the court should adjourn, Mr. Hay proposed an arrangement as to the mode of conducting the trial, in respect to the order in which counsel should speak.

The CHIEF JUSTICE said the best mode appeared to him to be this: that the case should be opened fully by one of the gentlemen on the part of the United States; then opened fully by one of the counsel on the other side; that the evidence should be next gone through, and the whole commented upon by another of the gentlemen employed by the United States, who should be answered by the rest of the counsel for Colonel Burr; and one only of the counsel for the United States should conclude the argument.

Without coming to any arrangement, the court adjourned till Friday, twelve o'clock.

Friday, August 7, 1807.

The court met according to adjournment. Present: JOHN MARSHALL, Chief Justice of the United States, and CYRUS GRIFFIN, Judge of the District of Virginia.

The witnesses were again called over, and several who had not been present before, appeared, and were recognized to attend until discharged by the court. The counsel for the United States, however, not being as well prepared to go into the trial as they expected to be, (many of their witnesses being still absent,) the trial was farther postponed, and the court adjourned until Monday next, at twelve o'clock.

In the course of this day, a difficulty was suggested by Major Scott, the

marshal of the Virginia district, as arising out of the order of the court, by virtue of which Colonel Burr had been removed from the penitentiary house to his present lodgings. He stated that he had been informed from good authority, that the secretary of the treasury had declared that he would not allow his charge of seven dollars per day, for the guards employed for the safe-keeping of the prisoner; and, therefore, he might lose that sum, which he had hitherto been advancing out of his own pocket.

The CHIEF JUSTICE declared the firm conviction of the court, that the order, heretofore made, was legal and proper; that the payments made in pursuance thereof would be sanctioned by the court, and ought to be allowed by the secretary of the treasury. He could not believe that the secretary would finally disallow those items in the marshal's account. But, as the officer of the court ought not to be subjected to any risk in obeying its directions, and if the secretary should refuse to allow him a credit for the money paid, the court had no power to compel him to do so, and the situation of the marshal was such that he dared not enter into a controversy with the secretary; the court was disposed to rescind the order, unless some arrangement could be made by Colonel Burr and his counsel, for the indemnification of the marshal.

Colonel Burr declared that an offer had already been made on his part to indemnify the marshal, and that he was still ready and willing to give him satisfactory security that the money should be paid him, in case the secretary of the treasury should refuse to allow the credit.

Some desultory conversation ensued, but nothing positive was agreed upon; but it appeared ***76** to be understood that security was to be given to Major Scott, and that Colonel Burr was to remain in his apartment near the Swan Tavern.

Monday, August 10, 1807.

The court met pursuant to adjournment.

Harman Blennerhassett was brought into court, and Mr. Hay moved that he be arraigned for treason. Mr. Botts objected, on the ground that he had not been furnished with a copy of the indictment three days previously; and he was reconducted to his prison. Four of the venire were excused on account of indisposition. The clerk informed Mr. Burr that he was at liberty to challenge such of the venire as he might object to.

Mr. Burr begged leave to inform the jurors, who were within hearing, that a great number of them may have formed and expressed opinions about him which might disqualify them from serving on this occasion. He expected that, as they came up, they would discharge the duties of conscientious men, and candidly answer the questions put to them, and state all their objections against him. The deputy marshal then summoned first, Hezekiah Bucky.

Mr. Botts.--We challenge you for cause. Have you ever formed and expressed an opinion about the guilt of Colonel Burr? Mr. Bucky. I have not, sir, since I have been subpoenaed. Question. Had you before? Answer. I had formed one before in my own mind.

Mr. Hay wished that the question of the opposite counsel could assume a more precise and definite form. If this question were proposed to this man, and to every other man of the panel, he would venture to predict that there could not be a jury selected in the state of Virginia, because he did not believe that there was a single man in the state, qualified to become a juryman, who had not, in some form or other, made up, and declared an opinion on the conduct of

the prisoner. The transactions in the West had excited universal curiosity; and there was no man who had not seen and decided on the documents relative to them. Do gentlemen contend that in a case so peculiarly interesting to all, the mere declaration of an opinion is sufficient to disqualify a juryman? A doctrine of this sort would at once acquit the prisoner; for where is the jury that could try him? Such a doctrine amounts to this: that a man need only to do enough to draw down the public attention upon him, and he would immediately effect his discharge. Mr. Hay concluded with a hope that the question would assume a more definite form; he should not pretend to decide the form in which it should be proposed, for that was province of the court; it was a privilege to which every court is entitled, and one which the court had exercised in the case of James T. Callender.

Mr. Botts considered it as a misfortune ever to be deplored, that in this country, and in this case, there had been too general an expression of the public sentiment, and that this generality of opinion would disqualify many, but he had never entertained a doubt, until the gentleman for the prosecution had avowed it, that twelve men might be found in Virginia, capable of deciding this question with the strictest impartiality. He still trusted that the attorney for the United States was mistaken, that the catastrophe was not completely fixed, and that every man in the state had not pledged himself to convict Colonel Burr whether right or wrong. He was not present at the trial of James T. Callender; but all America had heard the question which was then propounded to the juryman, and that was, whether he had made up and expressed an opinion respecting the guilt of the prisoner.

Mr. Hay said that he would put Mr. Botts right as to matter of fact. The court would recollect that on the trial of Callender, the question was, not whether the juryman had formed and expressed an opinion on that case generally, but on the subject-matter that was to be tried, and contained in the indictment. The question then in the present case should be, have you formed and expressed an opinion on the point at issue: that is, whether Aaron Burr be guilty of treason? On the trial of Callender, the court would particularly recollect that Mr. John Bassett having objected to himself, because he had read the libellous publication, was actually overruled, because it was not on the book itself, but on the subject-matter of the indictment, that he was called upon to say whether he had ever expressed an opinion?

Mr. Burr declared that there was a material distinction between that and the present case. Mr. Bassett's acknowledging that he had seen the book did not disqualify him from serving on the jury; in the same manner the person who had seen a murder committed would not be an incompetent juror in the prosecution for that crime. But if a man pretended to decide upon the guilt of a prisoner, upon mere rumor, he would manifest such a levity and bias of mind as would effectually disqualify him. Mr. Bucky, however, has not yet come out completely with his declarations. Let him be further interrogated.

Mr. Hay observed that the question would still be too general and vague, if it were even to be 'Have you expressed any opinion on the treason of Aaron Burr?' for the case stated in the indictment was infinitely more specific. It was treason in levying war against the United States at Blennerhassett's Island. Unless this particular allegation be proved, it sefeats all the other parts of the accusation; and it was probably on this point that the juror had never made up any opinion.

Mr. Martin contended that it was the duty of every juryman to come to the trial of any case with the most perfect impartiality, and ***77** more particularly one where life and reputation were at stake; that it was a libel upon Virginia, a blot upon the whole state, to assert, that twelve men could not be found to decide such a case, with no other knowledge that what they had picked up from newspapers; that there was a material distinction between this and Callender's Case [Fed. Cas. No. 14,709]; the libel was a book in every man's hand, but does any juryman in the present case pretend to know the testimony on which this charge depends? The gentleman proposes to ask the juryman whether he has made up an opinion on Colonel Burr's treason? But it is expressly probable that most of them knew not what treason is; and though they may decide upon the guilt of Colonel Burr, they may be ignorant whether it come under the name and description of treason.

The CHIEF JUSTICE observed that it might save some altercation if the court were to deliver its opinion at the present time; that it was certainly one of the clearest principles of natural justice, that a juryman should come to a trial of a man for life with a perfect freedom from previous impressions, that it was clearly the duty of the court to obtain, if possible, men free from such bias; but that if it were not possible from the very circumstances of the case--if rumors had reached and prepossessed their judgments, still the court was bound to obtain as large a portion of impartiality as possible, that this was not more a principle of natural justice, than a maxim of the common law, which we have inherited from our forefathers, that the same right was secured by the constitution of the United States, which entitles every man under a criminal prosecution, to a fair trial by 'an impartial jury.' Can it be said however, that any man is an impartial juryman who has declared the prisoner to be guilty and to have deserved punishment? If it be said that he has made up this opinion, but has not heard the testimony, such an excuse only makes the case worse; for if the man has decided upon insufficient testimony, it manifests a bias that completely disqualifies himself from the functions of a juryman. It is too general a question to ask, whether he has any impressions about Colonel Burr. The impressions may be so light that they do not amount to an opinion of guilt, nor do they go to the extent of believing that the prisoner deserves capital punishment. With respect to Mr. Bassett's opinion, it was true he had read 'The Prospect Before Us;' and he had declared that it was a libel, but Mr. Bassett had formed no opinion about James T. Callender's being the author. It was the same principle in the present case. If a juryman were to declare that the attempt to achieve the dismemberment of the Union, was treason, it would not be a complete objection or disqualification; but it would be the application of that crime to a particular individual; it would be the fixing it on Aaron Burr that would disable him from serving in this case. Let the counsel then proceed with the inquiry.

Mr. Botts.--Have you said that Colonel Burr was guilty of treason? Mr. Bucky.--No. I only declared that the man who acted as Colonel Burr was said to have done, deserves to be hung. Question. Did you believe that Colonel Burr was that man? Answer. I did, from what I had heard.

Mr. Hay.--I understand then, that the question proposed in Callender's Case is

to be overruled?

The CHIEF JUSTICE.--My Brother, Judge GRIFFIN, does not recollect whether it particularly went to the indictment or not.

GRIFFIN, District Judge.--I think the question was 'relative to the matter in issue.'

Mr. Hay.--The very position that I have laid down.

The CHIEF JUSTICE.--The simple question is, whether the having formed an opinion, not upon the evidence in court, but upon common rumor, renders a man incompetent to decide upon the real testimony of the case?

Mr. Wirt (addressing Mr. Bucky).--Did I understand you to say that you concluded upon certain rumors you had heard, that Colonel Burr deserved to be hung? Mr. Backy.--I did. Question. Did you believe these rumors? Answer. I did. Question. Would you, if you were a juryman, form your opinion upon such rumors? Answer. Certainly not.

Mr. MacRae.--Did you form and express your opinion upon the question, whether an overt act of treason had been committed at Blennerhassett's Island? Answer. It was upon other rumors, and not upon that, that I had formed an opinion.

Mr. Martin submitted it to the court, whether he could be considered on impartial juryman.

THE COURT decided that he ought not to be so considered, and he was accordingly rejected.

James G. Laidly stated that he had formed and expressed some opinions unfavorable to Colonel Burr; that he could not pretend to decide upon the charges in the indictment, which he had not heard; that he had principally taken his opinions from newspaper statements; and that he had not, as far as he recollected, expressed an opinion that Colonel Burr deserved hanging; but that his impression was, that he was guilty. He was therefore set aside.

James Compton being challenged for cause and sworn, stated that he had formed and expressed an opinion from hearsay that Colonel Burr was guilty of treason, and of that particular treason of which he stood charged, as far as he understood. He was rejected.

Mr. Burr observed, that as gentlemen on the part of the prosecution had expressed a willingness to have an impartial jury, they could not refuse that any juryman should state all his objections to himself; and that he had no doubt, in spite of the contrary assertions ***78** which had been made, that they could get a jury from his panel.

Hamilton Morrison, upon being called, said that he had frequently thought and declared that Colonel Burr was guilty, if the statements which he had heard were true; that he did not know whether they were so, but only thought, from the great clamor which had been made, that it might be possible that they were true; that he had not passed any positive opinion, nor was he certain that he had always qualified it by saying, 'if these things were true;' that he does not recollect to have said that Colonel Burr ought to be punished, without stating at the same time, 'if he were guilty.' Mr. Morrison was suspended for further examination.

Yates S. Conwell had formed and expressed an opinion, from the reports he had heard, that Colonel Burr must be guilty of high treason. He was accordingly set aside.

Jacob Beeson declared that he had for some time past formed an opinion, as

well from newspaper publications as from the boats which had been built on the Ohio, that Colonel Burr was guilty; and that he himself had borne arms to suppress this insurrection. He was therefore set aside as incompetent.

William Prince declared he had nearly the same impressions as Mr. Beeson; that he too had borne arms, as well on Blennerhassett's Island as on descending the river in search of Blennerhassett. He was set aside in like manner.

Nimrod Saunders declared that he had expressed an opinion previously to his being summoned on the jury, that the prisoner had been guilty of treason. He was therefore set aside as incompetent.

Thomas Creel had no declaration to make, and he was challenged for cause. Upon being interrogated, he stated that he had never asserted that the prisoner ought to be punished; that he had said that he was a sensible man, and if there were any hole left he would creep out of it; that he had conceived that Colonel Burr had seduced Blennerhassett into some acts that were not right; that he had never positively said that Colonel Burr was guilty; that he had said that Blennerhassett was the most blamable, because he was in good circumstances and well off in life, whereas Colonel Burr's situation was desperate, and that he had little to lose; that he had not said that Colonel Burr had directly misled Mr. Blennerhassett, but through the medium of Mrs. Blennerhassett; in short, that there was no determinate impression on his mind respecting the guilt of the prisoner.

The CHIEF JUSTICE did not think that this was sufficient to set him aside, and suspended his case for further examination.

Anthony Buckner had freqnently said that the prisoner deserved to be hung. He was therefore set aside.

David Creel had formed an opinion from the statements in the newspapers, and if these were true the prisoner was certainly guilty. He had expressed a belief that he was guilty of the charges now brought against him, and that he ought to be hanged. He was therefore rejected.

The above named jurors were all from Wood county.

Jurors from the body of the district:

John Horace Upshaw declared that he conceived himself to stand there as an unprejudiced juryman, for he was ready to attend to the evidence; but that as he had formed opinions hostile to the prisoner, (if opinions they can be called which are formed from newspaper testimony,) and had, he believed, frequently expressed them, that he was unwilling to subject himself to the imputation of having prejudged the cause.

Mr. Burr.--We challenge Mr. Upshaw for cause.

Mr. Hay.--Then, sir, I most seriously apprehend that we shall have no jury at all. I solemnly believe Mr. Upshaw is an intelligent and upright man, and can give a correct verdict on the evidence; and I will venture to assert, (whatever credit my friends on the other side will allow to my assertion,) that I myself could do justice to the accused. I believe that any man can who is blessed with a sound judgment and integrity. We might as well enter at once a nolle prosequi, if he is to be rejected.

Mr. Wickham.--Then according to the gentleman's doctrine, any honest man, no matter what his impressions may be, is a competent juryman. Is this agreeable to the principles of law? Does the gentleman mean to insinuate that when we object to a juryman it is for his want of honesty? No, sir, every man is subject to partialities and aversions, which may unconsciously sway his

judgment. Mr. Upshaw does no doubt deem himself an impartial juryman; but Mr. Upshaw may be deceived.

After some desultory argument between Messrs. Hay and Wickham, Mr. Wirt proceeded to ask Mr. Upshaw whether he had understood him to say that notwithstanding the hostile impressions he had taken up from newspaper reports, these impressions had not received that determinate character which might entitle them to the name of opinions? Answer. I have received impressions hostile to Colonel Burr, and have expressed them with some warmth, but my impressions have not been induced by anything like evidence They were predicated on the deposition of General Eaton and the communications of General Wilkinson, to the president of the United States. I had conceived that the prisoner had been guilty of some criminal act against the public, and ought to be punished; and I believe, also, that I went on further to vindicate the conduct of those gentlemen who would appear as the principal witnesses against him, and also of the government in the measures which it had taken to suppress his plans. After some further and animated discussion on this point, Mr. Upshaw's case was suspended for subsequent examination.

William Pope declared that his impressions ***79** were nearly the same with those of the gentleman who had preceded him; that he had thought at first, from newspaper representations, that it was Colonel Burr's intention to make his fortune in the west by the settlement of lands; that when he had afterwards understood that he had formed a union with Wilkinson to proceed to Mexico, he had regarded the prisoner's conduct in such a light that, if he had proceeded to Mexico, he would have considered it as an excusable offence; but when he had afterwards understood that there was treason mixed with his projects, it was impossible for him to view his conduct without the deepest indignation. If these impressions could be called prejudices, he trusted that he should always retain them. What other sentiments could he feel against such a crime, perpetrated against the very best government on the surface of the earth? But Mr. Pope declared that from his heart he believed that he could divest himself of these unfavorable impressions, and give Colonel Burr a fair and honorable trial. He would add that, in pursuance of the spirit manifested by the constitution which required two witnesses to an overt act of treason, he should think it necessary that the evidence for the United States should be so strong as to make the scale preponderate.

Mr. Wickham.--You will not misunderstand me, Mr. Pope, when I ask you whether you have not been a candidate for your county, and whether you be not now a delegate? Answer. Yes. Question. In canvassing among the people, have you not declared that the government had acted properly in commencing this prosecution? Answer. Yes; I believe I have said generally that I thought Colonel Burr was guilty of high treason. Mr. Pope was therefore set aside.

Peyton Randolph declared that it had never been his wish or intention to shrink from the discharge of a public duty, but that he had peculiar objections to serve on this occasion, one of which only he should state. He had been enrolled and was qualified as a lawyer in this court; and he would submit it to the court whether this did not exempt, if not disqualify, him from serving?

The CHIEF JUSTICE admitted Mr. Randolph's privilege, unless there were an express interposition on the part of the prisoner to retain him and others of the venire who had privileges; for this would call a conflicting privilege into operation.

Mr. Burr said that he should be passive.
John Bowe did not recolleck to have said that the prisoner was guilty of treason, but of something hostile to the peace and happiness of the United States. Upon being interrogated, he observed that he was a delegate from the county of Hanover, that there had been a competition at the last election, that he had had occasion to speak at that time of the views of the prisoner, but had always done it cautiously; had never asserted that he ought to be hung, but that he was guilty of something unfriendly to the peace of the United States.
Mr. Wickham.--You have said that the prisoner was guilty? Answer. Yes.
The CHIEF JUSTICE.--Did you ever make up an opinion about his levying troops and making war against the United States? Answer. Yes; but I have never expressed it.
Mr. Burr.--Take the whole together, and it amounts to an opinion of treason. Mr. Bowe has said that Colonel Burr was guilty; and of what? Of that which in Mr. Bowe's mind amounts to the definition of treason. He was therefore set aside.
John Roberts had thought and declared, from the reports in the public newspapers, that the prisoner was guilty of treason, though he had no doubt that his opinion might be changed by the production of other testimony. He was set aside as incompetent.
Joshua Chaffin excused from indisposition.
7. Jervis Storrs observed that the state of his mind was like that of the gentleman who had gone before him, (Mr. Bowe;) he was in the habit of reading newspapers, and could not but examine their statements relative to those transactions. If he could believe General Eaton's assertion, that the prisoner had threatened to turn congress out of doors, and assassinate the president, he had said, and would still say, that Colonel Burr was guilty of treason. If General Wilkinson's letter were true, he had surely been guilty of something in the West that was hostile to the interest of the United States. He did not know whether in the multifarious conversations he had had on this subject he had always expressed this opinion of his guilt with that reservation. He had very often communicated his impressions, that he was plotting some hostile designs against the United States. Mr. Storrs confessed that he might be prejudiced against the prisoner, and that he might be judging too highly of his own mind to entertain the belief that he could divest himself of all his impressions; and upon the whole, he expressed a wish not to serve. He was then rejected.
8. Miles Selden declared that it was impossible not to have entered into the frequent conversations which had occurred on this topic, and to have declared some opinion; that he had always said that Colonel Burr was guilty of something, and that if he was guilty of treason against such a government as that of the United States, he would deserve to be hung; that he could not assert that he had always accompanied his opinions with this reservation, but that he was not afraid to trust himself in the rendering of a verdict. Upon being interrogated, he said that he had frequently jested on this subject, and particularly recollected to have said in a sportive conversation with Colonel Mayo, that this was a Federal plot, and that Burr had been set on by the

Federalists. Colonel Selden was therefore suspended for further consideration.

9. Lewis Truehart had said that if the reports were correct, Colonel Burr had been *80 guilty of something inimical to the country, and that he always qualified his opinions in that manner.

Colonel Tinsley was then called in as a witness, who stated that from a conversation with Mr. Truehart, he thought that he had discovered that he had a general prepossession against Colonel Burr. He did not expect to be called on, and had no very distinct recollection of the particulars; that this was before any of the proceedings of the trial; and when he heard that he was summoned as one of the venire, he then recollected their conversation and happened casually to mention it. Mr. Truehart suspended.

William Yancey had expressed an opinion on newspaper testimony that Colonel Burr was guilty; that he had frequently said that he would believe the statements of newspapers till the contrary was proved, but that he had no doubt he should entertain a different sentiment, if other testimony were produced. He was set aside.

Thomas Prosser was next called. He said that he had made numberless declarations about Colonel Burr; that he had believed him to be guilty of a treasonable intention, but not of the overt act; on this point he had suspended his opinion, but he was rather inclined to believe that he had not committed it.

Mr. Martin.--Can this gentleman be considered as an impartial juryman, when he thus comes with his mind made up on one half of the guilt? He was suspended for further consideration.

John Staples had been under the same impressions which had been described by others; that he dared to say that he had said Colonel Burr was guilty of levying troops and making war upon the United States. He was set aside.

Edward C. Standard acknowledged that his prejudices against Colonel Burr had been deep-rooted; that he had no doubt of the criminality of his motives, but that he had doubts of the commission of an overt act; he regretted that a man of his talents and energetic mind should be lost to his country. Upon being interrogated, he observed that he had doubts as to the overt act, because he believed him to be a man of such deep intrigue as never to jeopardize his own life till thousands fell before him. He was rejected.

Richard B. Goode was then called. I have never seen, neither do I believe that I have heard correctly, the evidence in this prosecution. From common report and newspaper information I have formed an opinion has vorable to Colonel Burr. That opinion has been strengthened by what I have heard from the lips of Colonel Burr in this court; but without arrogating to myself more virtue than belongs to other men, if I know myself, I have formed no opinion which cannot be altered by the evidence.

Mr. Baker.--Did you not endeavor to displace Mr. Heth as captain of the Manchester cavalry, for becoming the bail of Colonel Burr? Answer. I never did. (Here sundry witnesses were directed to be called.)

Mr. Goode.--I will state the circumstance to which you allude, unless you prefer to prove it.

THE COURT.--Do so, if you please.

Mr. Goode.--On the 4th of July, 1806, I was a member of a committee with Captain Heth, appointed to prepare toasts to be drunk on that day by the Manchester cavalry. I profess to be attached to the present administration of

the general government, and wished to express such a sentiment. Captain Heth declared that he had not confidence in the executive, and rather than express such a sentiment he would resign his commission. At that time, I thought Captain Heth and myself differed only as to measures, and not as to principles; and that it was an honest opinion. But in a few months after, when I understood that Captain Heth had become bail for Colonel Burr, and was his zealous friend, with whom he was neither connected nor acquainted, but a stranger, who, three years ago, would have been consigned to the grave by Captain Heth, and those thinking with him upon political subjects, and when I recollected the charge preferred against Colonel Burr, I confess that the declaration and conduct of Captain Heth made such impressions upon my mind, that I refused to trust my person with him as a military commander, and I would do it again.

Colonel Burr.--Pray, sir, did you not write a letter to Captain Heth? Answer. I did; and I have reasons to believe that that letter is in your possession, or in the possession of your counsel. You are at liberty to show it to the court, or I will repeat that part of it which relates to Captain Heth and yourself.

THE COURT.--Do, sir.

Mr. Goode.--A few weeks past, I received a letter from Captain Heth, commanding me to appear at a certain time and place, in order to take my proper command in the troop. I wrote him, in answer, that my post as a soldier would never be abandoned, and that my duty as a citizen forbade that I should silently approve of the conduct of those who had extended a favor to a traitor, which the justice of my country denied to an unfortunate debtor, or words to that effect.

Mr. Goode was then rejected.

Nathaniel Selden stated he had formed an opinion, particularly from General Eaton's deposition, that the intentions of the prisoner were hostile to the United States, but that he had also said he had seen no evidence to satisfy him that he had been guilty of an overt act. He was suspended for further consideration.

16. Esme Smock declared that he had formed and expressed an opinion that Colonel Burr had treasonable designs.

CHIEF JUSTICE.--To what time did your opinion relate?

Mr. Smock.--I formed my opinion from newspaper publications and common report;

UNITED STATES of America
v.
John M. POINDEXTER.

No. Cr. No. 88-0080-01 (HHG).

United States District Court,
District of Columbia.

Oct. 24, 1989.

Defendant, charged with obstruction of Congress and violation of general federal false statement law, filed number of pretrial motions, including motions to dismiss indictment. The District Court, Harold H. Greene, J., held that: (1) indictment was not duplicitous so as to require dismissal; (2) National Security Council was "public office" for purposes of statute prohibiting destruction of records deposited in "public office"; (3) indictment sufficiently charged offense of obstruction of Congress; and (4) certain terms in indictment would be stricken on grounds of prejudice.

So ordered.

See also 719 F.Supp. 6.

[1] COURTS ⚿ 99(1)
106k99(1)
Law of case doctrine requires that, absent extraordinary and compelling circumstances, rulings made in earlier phase of particular litigation are binding in later phases of same lawsuit.

[2] INDICTMENT AND INFORMATION ⚿ 125(2)
210k125(2)
Ordinarily two or more distinct offenses may not be charged in single count.

[3] INDICTMENT AND INFORMATION ⚿ 125(19.1)
210k125(19.1)
Formerly 210k125(19)
Despite contention of defendant that first count of indictment charged one conspiracy to make false statements and destroy documents, another to obstruct congressional inquiries, and a third to obstruct other congressional inquiries, count charged but one single conspiracy to defeat congressional inquiries by various means, and thus, was permissible method of charging conspiracy.

[4] CONSPIRACY ⚿ 48.1(1)
91k48.1(1)
Existence of single conspiracy or multiple conspiracies is primarily question of fact for jury.

[5] CONSPIRACY ⚿ 24(2)
91k24(2)
For purposes of determining whether single count of indictment charges several conspiracies, neither number of objects nor number of means to effectuate those objects transforms single conspiracy into several such agreements.

[6] INDICTMENT AND INFORMATION ⚿ 125(1)
210k125(1)
Fact that different proof may be required for each of offenses alleged as objectives of conspiracy does not render indictment charging conspiracy duplicitous.

[6] INDICTMENT AND INFORMATION ⚿ 127
210k127
Fact that different proof may be required for each of offenses alleged as objectives of conspiracy does not render indictment charging conspiracy duplicitous.

[7] RECORDS ⚿ 22
326k22
"Public office" within meaning of statute prohibiting person from willfully and unlawfully concealing, removing, mutilating, or destroying records, paper or documents filed in any "public office" is not limited to those offices to which public customarily comes; rather, term includes those offices not accessible to public where normally more important and vital governmental records are kept. 18 U.S.C.A. § 2071(b).

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

[8] RECORDS ⚿ 22
326k22
National Security Council was "public office" within meaning of statute prohibiting destruction of documents filed or deposited in any "public office." 18 U.S.C.A. § 2071(b).

[9] RECORDS ⚿ 22

326k22
Statute prohibiting destruction, mutilation or concealment of documents filed in "public office" applies only to unlawful destruction or removal of official records, and as such does not impact upon functioning of presidency when applied to National Security Council. 18 U.S.C.A. § 2071(b).

[10] RECORDS ⚿ 22
326k22
"Custodians" under statute prohibiting custodian of records filed in public office from concealing, removing or destroying those records does not apply only to those who are custodians of records in technical sense, such a clerks or librarians, but rather, includes others working in government agency who have access to sensitive documents. 18 U.S.C.A. § 2071(b).

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

[11] INDICTMENT AND INFORMATION ⚿ 71.2(2)
210k71.2(2)
Defendant must be advised by indictment of specific charge against him in order to enable him to prepare defense and to protect him against double jeopardy. U.S.C.A. Const.Amend. 5.

[11] INDICTMENT AND INFORMATION ⚿ 71.2(4)
210k71.2(4)
Defendant must be advised by indictment of specific charge against him in order to enable him to prepare defense and to protect him against double jeopardy. U.S.C.A. Const.Amend. 5.

[12] INDICTMENT AND INFORMATION ⚿ 60
210k60
Indictment is sufficient if it contains elements of offense in enough detail to apprise defendant of particular offense with which he is charged. U.S.C.A. Const.Amend. 5; Fed.Rules Cr.Proc.Rule 7(c)(1), 18 U.S.C.A.

[13] OBSTRUCTING JUSTICE ⚿ 11
282k11
Charge that defendant knowingly and corruptly obstructed due and proper exercise of power of inquiry under which investigations were being held by congressional committees, to wit, consideration of proposed resolution by committees in question, by making and causing to be made false statements and representations to committees, for purposes of concealing material matters, together with other factual allegations contained in indictment, adequately apprised defendant of factual basis for charge of obstruction of Congress. 18 U.S.C.A. § 1505.

[14] OBSTRUCTING JUSTICE ⚿ 11
282k11
Indictment furnished sufficient information to defendant about letters upon which obstruction of Congress charge was based to enable defendant to prepare defense and to protect against double jeopardy, where indictment referred to years letters were sent and made reference to author of letters and to previous information provided in another paragraph of indictment. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 1505.

[15] OBSTRUCTING JUSTICE ⚿ 1
282k1
Alleged informality of congressional inquiries did not protect defendant from charge of obstruction of Congress; obstruction of Congress statute protects preliminary and informal inquiries against obstruction as well as formal proceedings. 18 U.S.C.A. § 1505.

[16] UNITED STATES ⚿ 23(3)
393k23(3)
Congressional inquiries were "due and proper" exercises of power of inquiry of Congress, despite contentions that Congressional committees violated their own rules and those of House of Representatives. 18 U.S.C.A. § 1505.

[17] CONSTITUTIONAL LAW ⚿ 68(1)
92k68(1)
Political question doctrine does not leave it to President to determine whether member of his staff has violated criminal law, nor does it protect members of any branch of government from revelations of wrongdoing or ignorance.

[18] OBSTRUCTING JUSTICE ⚿ 8
282k8
Despite contention of defendant that crux of obstruction of Congress allegation was statement made on behalf of and after consultation with

President, and that foreign policy and national security were implicated, defendant charged with obstruction of Congress could not assert political question defense; adjudication of foreign policy issues was not involved, but rather, all that was involved was question of whether defendant had violated laws proscribing obstruction of Congress. 18 U.S.C.A. § 1505.

[19] OBSTRUCTING JUSTICE ⇦ 1
282k1
Obstruction of Congress statute prohibits an endeavor to obstruct as well as a completed obstruction. 18 U.S.C.A. § 1505.

[20] OBSTRUCTING JUSTICE ⇦ 11
282k11
Failure of indictment to allege that statements made by defendant had actual effect of impeding congressional inquiry did not render indictment charging obstruction of Congress insufficient. 18 U.S.C.A. § 1505.

[21] INDICTMENT AND INFORMATION ⇦ 125(4.1)
210k125(4.1)
Formerly 210k125(4)
Two or more acts which could be charged as separate offenses may be charged as single count if these acts can legitimately be characterized as part of single, continuing scheme or course of conduct.

[22] FRAUD ⇦ 68.10(3)
184k68.10(3)
General federal false statements law applies to statements made in response to congressional committee inquiries. 18 U.S.C.A. § 1001.

[23] FRAUD ⇦ 68.10(3)
184k68.10(3)
General federal false statements law is applicable to unsworn statements communicated by executive branch official to member of committee of Congress in informal circumstances. 18 U.S.C.A. § 1001.

[24] FRAUD ⇦ 68.10(1)
184k68.10(1)
General federal false statements law does not punish expressions of differences of opinions between representatives of two branches on policy issues, but only statements that are proven to be false. 18 U.S.C.A. § 1001.

[25] FRAUD ⇦ 68.10(1)
184k68.10(1)
President's unquestioned rule in constitutionally assigned functions of foreign affairs and national security may allow his advisor to be "less than forthcoming" about prospective foreign policy initiative; however, it does not allow such advisor to make false statements to Congress in violation of general federal false statements law. 18 U.S.C.A. § 1001.

[26] FRAUD ⇦ 68.10(4)
184k68.10(4)
Materiality of false statement is essential element of offense in prosecution under general federal false statement statute. 18 U.S.C.A. § 1001.

[27] FRAUD ⇦ 68.10(4)
184k68.10(4)
Test of materiality of false statement for purposes of general federal false statement statute is whether false statement has natural tendency to influence, or was capable of influencing, decision of tribunal in making determination required to be made. 18 U.S.C.A. § 1001.

[28] FRAUD ⇦ 68.10(1)
184k68.10(1)
Actual reliance by agency, department or committee to whom false statement was made is not element of offense under general federal false statement statute. 18 U.S.C.A. § 1001.

[29] FRAUD ⇦ 68.10(1)
184k68.10(1)
Despite defendant's contention that members of executive branch so commonly made false statements when required to provide information to Congress, particularly with respect to sensitive activities, without being prosecuted for their acts, that he was justified in believing that such action was not criminal, defendant charged with obstruction of Congress and violation of general false statement law was provided with sufficient fair notice that his conduct was criminal. 18 U.S.C.A. §§ 1001, 1505.

[29] OBSTRUCTING JUSTICE ⇦ 1
282k1
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Congress, particularly with respect to sensitive activities, without being prosecuted for their acts, that he was justified in believing that such action was not criminal, defendant charged with obstruction of Congress and violation of general false statement law was provided with sufficient fair notice that his conduct was criminal. 18 U.S.C.A. §§ 1001, 1505.

[30] CONSTITUTIONAL LAW ⚿ 265
92k265
Due process does not require that Government cite litigated fact pattern directly on point as prerequisite to institution of criminal proceedings. U.S.C.A. Const.Amend. 5.

[31] CRIMINAL LAW ⚿ 13.1(1)
110k13.1(1)
Prior litigation is prerequisite to prosecution for violation of statute only if particular law is ambiguous or fails to give to world in language that common world will understand notice of what law intends to do if certain line is passed.

[32] WITNESSES ⚿ 16
410k16
Defendant charged with obstruction of Congress and violation of general federal false statements law would be allowed subpoena duces tecum for specific, relevant documents in custody of former President or Archivist of United States on former President's behalf, where there was sufficient likelihood that, if claims made in defendant's proffer were correct, documents sought from former President would be material to defendant's defense. 18 U.S.C.A. §§ 1001, 1505.

[33] CONSTITUTIONAL LAW ⚿ 72
92k72
No individual, whatever his position, is exempt from obligation inherent in law to provide evidence, especially where such evidence is sought by defendant in criminal case in exercise of his constitutional right to mount defense to serious charges against him; however, respect for chief executive and head of branch of government coequal to judiciary dictates that production of evidence from sitting President not be coerced unless such evidence is necessary to defense and just resolution of cause.

[33] CRIMINAL LAW ⚿ 627.5(1)
110k627.5(1)
No individual, whatever his position, is exempt from obligation inherent in law to provide evidence, especially where such evidence is sought by defendant in criminal case in exercise of his constitutional right to mount defense to serious charges against him; however, respect for chief executive and head of branch of government coequal to judiciary dictates that production of evidence from sitting President not be coerced unless such evidence is necessary to defense and just resolution of cause.

[33] CRIMINAL LAW ⚿ 1222.1
110k1222.1
Formerly 110k1222
No individual, whatever his position, is exempt from obligation inherent in law to provide evidence, especially where such evidence is sought by defendant in criminal case in exercise of his constitutional right to mount defense to serious charges against him; however, respect for chief executive and head of branch of government coequal to judiciary dictates that production of evidence from sitting President not be coerced unless such evidence is necessary to defense and just resolution of cause.

[34] WITNESSES ⚿ 16
410k16
Defendant charged with obstruction of Congress and violation of general federal false statements law would be denied subpoena duces tecum for vice presidential papers, even though defendant asserted that vice president knew about various activities relevant to case, where defendant did not and could not point to any vice presidential authorization for his activities, and even assuming authorization would be valid defense, papers appeared to be largely cumulative.

[35] RECORDS ⚿ 31
326k31
Provision of Classified Information Procedures Act which requires defendant to notify prosecution prior to trial of all classified information defense expects to use at trial is not unconstitutional. Classified Information Procedures Act, § 5(a), 18 U.S.C.A.App.; U.S.C.A. Const.Amends. 5, 6.

[36] CRIMINAL LAW ⚿ 393(1)
110k393(1)

Classified Information Procedures Act, which requires that defendant notify prosecution prior to trial of all classified information defense expects to use at trial, does not impermissibly infringe defendant's Fifth Amendment right to be silent and right to testify in his own defense; statute does not require defendant to specify whether he will testify or what he will testify about, but rather, requires merely general disclosure as to what classified information will be used. Classified Information Procedures Act, § 5(a), 18 U.S.C.A.App.; U.S.C.A. Const.Amend. 5.

[36] RECORDS ⚿ 31
326k31
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[37] CRIMINAL LAW ⚿ 662.1
110k662.1
Classified Information Procedures Act, which requires defendant to notify prosecution prior to trial of all classified information defense expects to use at trial, does not violate defendant's Sixth Amendment right to confront witnesses against him; statute requires defendant merely to identify universe of classified information he intends to use, it does not require that defendant attribute any particular piece of information to cross-examination of any particular witness. U.S.C.A. Const.Amend. 6; Classified Information Procedures Act, § 5(a), 18 U.S.C.A.App.

[38] INDICTMENT AND INFORMATION ⚿ 121.1(7)
210k121.1(7)
Defendant was not entitled to bill of particulars, where particulars defendant requested went essentially only to evidentiary details and Government's legal theory.

[39] INDICTMENT AND INFORMATION ⚿ 137(1)
210k137(1)
Terms "among other things," "among others," "among," "at least," "including," "included, but not limited to," "in part," and "various" could indicate to jury that defendant was charged with offenses and conduct in addition to those actually listed in indictment, and thus, terms would be stricken from indictment.

[40] INDICTMENT AND INFORMATION ⚿ 137(1)
210k137(1)
Term "lethal" in relation to supplies being shipped to contras and description of military supplies as consisting of "millions of rounds" and "hundreds of thousands of pounds" in indictment arising out of Iran-contra affair would not be stricken; quantities described were apparently those involved, at least according to Government, and throughout relations between United States and contras, distinction between lethal and humanitarian assistance had been made.

[41] INDICTMENT AND INFORMATION ⚿ 137(1)
210k137(1)
Despite defendant's contention that term "enterprise" was term of art well known under Racketeer Influenced and Corrupt Organization Act, and that therefore use of term in indictment arising out of Iran-contra affair might suggest racketeering, term "enterprise" would not be stricken as prejudicial; term "enterprise" is fairly neutral description of activities of alleged conspirators, and if term means anything other than business to most individuals, it most likely evokes starship or space shuttle.

[42] INDICTMENT AND INFORMATION ⚿ 137(1)
210k137(1)
Term "coverup" was inflammatory, especially in context of alleged criminal activity arising out of Iran-contra affair, and thus, term would be stricken from indictment.

[43] INDICTMENT AND INFORMATION ⚿ 137(1)
210k137(1)
References, in indictment arising out of Iran-contra affair, to defendant's original codefendants and to

press reports about shipments to Iran would not be stricken as irrelevant descriptive recitals; references to codefendants were relevant to obstruction of Congress and false statements charges, and press report references were necessary to understanding of background of congressional inquiries into activities of defendant with respect thereto. 18 U.S.C.A. §§ 1001, 1505.

[44] INDICTMENT AND INFORMATION ⚿ 137(1)
210k137(1)
Reference, in indictment arising out of Iran-contra affair, to codefendant's discharge from his position and fact that defendant himself resigned from his position would be stricken as irrelevant; inclusion of facts could be taken by jury as objective indications of fault or of administration's determinations of fault, and thus, were prejudicial without any special relevance.

[45] INDICTMENT AND INFORMATION ⚿ 137(1)
210k137(1)
Reference in obstruction of Congress indictment to Boland Amendment would not be stricken, despite defendant's contention that amendment had relevance, if at all, only to defendant's state of mind; amendment's restrictions were focus of congressional inquiries at issue, as well as of defendant's allegedly false and misleading statements, and thus, were relevant to indictment. 18 U.S.C.A. § 1505.

[46] INDICTMENT AND INFORMATION ⚿ 144.1(1)
210k144.1(1)
Alleged prejudicial pretrial publicity arising out of Iran-contra affair did not establish grounds for dismissal of indictment charging obstruction of Congress and violation of general federal false statement statute. 18 U.S.C.A. §§ 1001, 1505.

[47] CRIMINAL LAW ⚿ 126(2)
110k126(2)
Alleged pretrial publicity did not warrant change of venue of prosecution for obstruction of Congress and violation of general false statement statute in connection with Iran-contra affair; not only was publicity not especially prejudicial to defendant, but publicity regarding Iran-contra affair, like that accompanying many other governmental white-collar criminal cases, was national rather than local. 18 U.S.C.A. §§ 1001, 1505.

[48] CRIMINAL LAW ⚿ 700(1)
110k700(1)
Dismissal for failure to follow policies of Department of Justice of indictment charging violation of general federal false statement statute and obstruction of Congress was not warranted; very nature of independent counsel's responsibilities suggest that it may not always be possible for him to follow the policies of Department of Justice. 28 U.S.C.A. § 594(f); 18 U.S.C.A. §§ 1001, 1505.

[49] CRIMINAL LAW ⚿ 700(1)
110k700(1)
United States attorney's manual, by its own language, creates no rights in any party, and thus, failure of independent counsel to follow policy set forth in manual did not require dismissal of indictment charging obstruction of justice and violation of general federal false statement law in connection with Iran-contra affair. 18 U.S.C.A. §§ 1001, 1505.

[50] CRIMINAL LAW ⚿ 700(1)
110k700(1)
Independent counsel's failure to present exculpatory evidence to grand jury did not require dismissal of indictment arising out of Iran-contra affair.

***17** Lawrence Walsh, Washington, D.C., for plaintiff.

Richard Beckler, Washington, D.C., for defendant.

OPINION

***18** HAROLD H. GREENE, District Judge.

[1]Defendant has filed a number of pretrial motions, the government has filed oppositions, and the Court has received replies and voluminous appendices. In general, the motions will be denied. Several of them are subject to denial on a fairly summary basis, either because Judge Gesell of this Court ruled on the issues adversely to defendant while the Poindexter matter was still pending before him, and the rulings are therefore the "law of the case," [FN1] or because there is direct appellate precedent in point contrary to the position taken by

defendant.

FN1. The law of the case doctrine requires that, absent extraordinary and compelling circumstances, rulings made in earlier phases of particular litigation are binding in later phases of the same lawsuit. See International Union, UAW v. Donovan, 756 F.2d 162, 165 (D.C.Cir 1985); Laffey v. Northwest Airlines, Inc. 642 F.2d 578, 585 (D.C.Cir.1980); Laffey v. Northwest Airlines, Inc. 740 F.2d 1071, 1082-83 (D.C.Cir.1984) United States v. Eilberg, 553 F.Supp. 1, 3 (D.D.C.1981).

Notwithstanding these preliminary obstacles, the Court has subjected all of defendant's motions to careful analysis. Where it has concluded that a particular position taken by defendant is contrary to the law of the case or appellate precedent, it has nevertheless considered the merits, at least to the extent of satisfying itself that an injustice would not be done, in the context of this case, by following the previous rulings, or that some distinction did not exist between the situation here and that presented by the precedents. Other motions were of course considered under broader criteria. Not yet decided is defendant's motion pursuant to Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) with respect to which a number of issues are being set down for oral argument.

I
Count One

Defendant has moved to dismiss Count One of the indictment, which charges him with a violation of 18 U.S.C. § 371 by participation in a conspiracy, on two grounds: (1) that it alleges not one but several conspiracies and is therefore multiplicious; and (2) that to the extent that Count One incorporates Count Sixteen of the original indictment it fails to state an offense. The motion lacks merit and will be denied.

A. Multiplicity

[2] Defendant contends that Count One charges one conspiracy to make false statements and destroy documents which theoretically could have started in August 1985; another, to obstruct congressional inquiries, which began on July 25, 1986 and ended August 6, 1986; and a third, to obstruct other congressional inquiries, which began in November 1986; and that on this basis the count is fatally multiplicious. [FN2]

FN2. Ordinarily two or more distinct offenses may not be charged in a single count. 1 C. Wright, Federal Practice and Procedure: Criminal, § 142 (2d ed. 1982); but see, Part III--E infra.

[3][4][5][6] However, the Court concludes that Count One charges but a single conspiracy to defeat congressional inquiries into the defendants' Iran-contra activities by a variety of means, as necessary to conceal the conspirators' activities, and that this is a permissible and not multiplicious method of charging a conspiracy. [FN3] Neither a number of objects nor a numbers of means to effectuate those objects transforms a single conspiracy into several such agreements. See Braverman v. United ***19** States, 317 U.S. 49, 53-54, 63 S.Ct. 99, 101-02, 87 L.Ed. 23 (1942), where the Supreme Court stated that "[w]hether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one ... [On this basis, the] allegation in a single count of a conspiracy to commit several crimes is not duplicitous....". See also, United States v. Treadwell, 760 F.2d 327, 336 (D.C.Cir.1985); United States v. Addonizio, 451 F.2d 49, 59-60 (3rd Cir.1972). [FN4] In fact, a single conspiracy count which includes allegations of several objects, several means, and several overt acts is more typical of criminal litigation in the federal courts--as, for example, in indictments charging violations of the drug laws--than the segmented charges defendant claims to be the only ones warranted by law. [FN5]

B. Incorporation of Count Sixteen

FN3. Contrary to defendant's contention (Reply Brief at 2-3, 7), there is no reason why a single conspiracy could not have as its object the obstruction of several legislative inquiries not overlapping as to time, into the same or of related subjects. As the Court of Appeals said in United States v. Tarantino, 846 F.2d 1384, 1391 (D.C.Cir.1988), the existence of a single conspiracy or multiple conspiracies is primarily a question of fact for the jury. Defendant's attempt to distinguish Tarantino on the basis that the indictment here

charges multiple conspiracies simply assumes the result.

FN4. Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), the famous spokes-of-the-wheel case and the only decision cited by defendant with even marginal relevance to the issue, involved a series of totally unrelated offenses tied together only through a "common key figure." That description does not fit the charges here.

FN5. For similar reasons, Count One is not duplicitous or multiplicitous in the sense that different proof may be required for each of the offenses alleged as objectives, inasmuch as the evidence would go toward establishing a single offense. See United States v. Hubbard, 474 F.Supp. 64, 71-72 (D.D.C.1979) (single conspiracy although the 59 overt acts constituting the means and objectives "can logically be grouped into separate categories"); United States v. Recognition Equipment, 711 F.Supp. 1, 7-9 (D.D.C.1989) (conspiracy charge included allegations of a kickback scheme, a scheme to replace the Postmaster General, theft of USPS property, mail and wire fraud, and corruption of USPS operations, but the court held that the indictment properly charged a single conspiracy to violate statutes and to impede the lawful functions of the USPS "by multiple and interrelated means" for the ultimate purpose of securing the contract for the defendant).

Count One, as narrowed by the government in August 1989, retains as one of its objects the violation by Poindexter's then codefendant Oliver North of 18 U.S.C. § 2071(b), as alleged in Count Sixteen of the original indictment. Count Sixteen, in turn, charged that North altered or caused to be altered certain memoranda of the National Security Council (NSC) that were in his custody. Defendant argues, first, that there could be no violation because the NSC is not a "public office" within the meaning of the statute, and second, that North did not have "custody" of the papers he allegedly falsified and destroyed. These arguments are likewise without merit.

[7] It is defendant's theory that a "public" office is only one to which the public customarily comes, as, for example, a Post Office window or a welfare office. To be sure, the term "public" office could conceivably be construed to mean just that; however, it could also be taken to mean a governmental office, as distinguished from a private one. There is not the slightest reason to suppose that, when Congress sought to protect governmental documents from destruction, concealment, or mutilation, it meant to single out those offices that are customarily visited by members of the public, while leaving unprotected those offices not accessible to the public where normally the more important and vital government records are kept.

It is accordingly not surprising that the reported decisions do not bear out defendant's theory. In Coplon v. United States, 191 F.2d 749 (D.C.Cir.1951), the Court of Appeals for this Circuit upheld the espionage conviction of a Department of Justice employee who had concealed and removed highly secret FBI reports located in Department of Justice offices not accessible to the public. In a similar vein, in McInerny v. United States, 143 F. 729 (1st Cir.1906), the First Circuit, discussing the categories of records protected by the predecessor statute of section 2071, mentioned such documents as the "report of a commanding general as to the operations of an army, or of a naval commander" [that when] "deposited or filed in the proper office, would clearly enough in the sense of ***20** the statute be so far a record of the events to which it relates as to render a person responsible who takes it from its public place and destroys it." 143 F. at 133. [FN6]

FN6. The same conclusion was reached in United States v. North, 708 F.Supp. 364, 369 n. 3 (D.D.C.1988). Defendant's reliance to the contrary on Davidson v. United States, 292 F. 750 (3rd Cir.1923) is misplaced, for in that case not only was the conviction affirmed, but the records were truly not public records; they were the records of a bankrupt, title to which remained with the trustee, which had merely been left with the bankruptcy referee, but had not even filed in the bankruptcy proceeding.

[8][9] These cases only acknowledge the obvious. Even if there were no such decisions, the Court would not lightly hold, absent compelling legislative history, that Congress intended to restrict the statute to the protection of the often relatively unimportant documents found in areas where the public has access while withholding that protection from the documents of the National Security Council [FN7]

in whose integrity the public and the government have the highest interest. [FN8]

FN7. The Court also rejects defendant's argument that application of section 2071 to NSC documents would intrude upon the constitutionally-based doctrine of executive privilege. Defendant's Memorandum at 16-17. That statute, of course, applies only to the unlawful destruction or removal of official records, and as such it does not impact the functioning of the Presidency. See Nixon v. Administrator of General Services, 433 U.S. 425, 439-55, 97 S.Ct. 2777, 2788-96, 53 L.Ed.2d 867 (1977), where the Supreme Court held that even the required processing of Presidential papers, with no claim of criminality, did not improperly invade Executive power.

FN8. See also, 44 U.S.C. §§ 2201-2207, Presidential Records Act of 1978, whose purpose it was "to establish public ownership of records created by future Presidents and their staff in the course of discharging their official duties." (emphasis added) H.R.Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S.Code Cong. & Adm.News 5732, 5733. The government has asserted that it will prove at trial that NSC staff members were informed that documents in the central files of the NSC were official governmental records that could not be destroyed or otherwise tampered with.

[10] Defendant's argument regarding "custody" suffers from similar artificiality. There is no warrant for supposing, and no legislative history suggesting, that Congress meant to subject to punishment under section 2071 only those who are the custodians of records in the technical sense, such as clerks or librarians, but to permit others working in a government agency who have access to sensitive documents to destroy or alter them with impunity. The obvious purpose of the statute is to prohibit the impairment of sensitive government documents by those officials who have access to and control over them, and no court has ever held to the contrary. See generally, Coplon, supra, where the defendant was found to have custody of classified documents to which she gained access in the course of her employment as an attorney in the Internal Security Section of the Department of Justice. Not only was she not the official "custodian" of the records, but she had specifically been told that she no longer had routine access to them.

The motion to dismiss Count One is denied.

II
Counts Two and Three

Count Two of the indictment alleges that from July 21 to August 6, 1986, defendant obstructed and endeavored to obstruct inquiries being had by several committees of the House of Representatives in violation of 18 U.S.C. § 1505. This obstruction is alleged to have occurred basically in two ways: (1) by the dispatch of letters to the committees on July 21, 1986 which were false, and (2) by making arrangements for a meeting between House members and Oliver North in the course of which North made a number of false statements. Both of these activities are alleged to have been intended to obstruct the inquiry of the House committees. According to defendant, Count Two fails to state an offense on various grounds.

A. Failure to Inform Defendant of the Offense

[11][12] A defendant must, of course, be advised by the indictment of the specific ***21** charge against him in order to enable him to prepare a defense and to protect him against double jeopardy. Hamling v. United States, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 2907-2908, 41 L.Ed.2d 590 (1974); United States v. Conlon, 628 F.2d 150, 155-56 (D.C.Cir.1980); United States v. Shorter, 608 F.Supp. 871, 874 n. 2 (D.D.C.1985), aff'd. 809 F.2d 54 (D.C.Cir.1987); United States v. Madeoy, 652 F.Supp. 371, 374 (D.D.C.1987). An indictment is sufficient in this regard if it contains the elements of the offense and enough detail to apprise the defendant of the particular offense with which he is charged. Conlon, id. at 155. See also, Fed.R.Crim.P. 7(c)(1). The indictment in this case meets these requirements.

[13] Paragraph 11 of Count Two clearly details the elements of the offense of obstruction of Congress: that Poindexter knowingly and corruptly obstructed the due and proper exercise of the power of inquiry under which investigations were being had by congressional committees, to wit, the consideration of a proposed resolution by the committees in question, and that he did so by making and causing to be made false statements and

representations to these committees, for the purpose of concealing material facts.

It may be that this paragraph is by itself adequate to protect Count Two against a claim of insufficient notice of the charges. In any event, the count contains additional specificity, for while the factual allegations contained therein are somewhat disjointed, they adequately apprise the defendant of the factual basis for the charge against which he must defend.

[14] Defendant's claim focuses on paragraphs 7 through 10 of Count Two. Paragraph 7 states that defendant's July 21 letters, which referred to 1985 letters, were false and misleading because, as defendant "well knew and believed, the 1985 letters ... would not have been a truthful response to the 1986 inquiries." It is defendant's position that, because Count Two does not identify the 1985 letters further or specify in what manner they were false, the allegation is vague and does not permit him properly to prepare for trial on this charge. However, the reference to "the 1985 letters" in paragraph 7, together with the reference to Robert C. McFarlane in paragraph 5 (the author of the letters), and that to previous information "provided by this office" in paragraph 6, furnish sufficient information to defendant about "the 1985 letters" to enable him to prepare his defense and to protect him against double jeopardy. [FN9]

> FN9. The Court also takes note that the 1985 letters were identified in considerable detail in Counts Five through Seven of the original indictment in this case.

Defendant further claims that paragraphs 8 through 10 fail to allege any additional acts of obstruction with the requisite specificity. [FN10] Paragraph 8 states that, in response to a request from the Chairman of the House intelligence committee, and "in accordance with arrangements made and approved by the defendant POINDEXTER," Oliver North met with members and staff of the committee to answer questions relating to the Iran-contra affair. Paragraph 9 goes on to allege that in the course of the meeting, North made numerous specified false and misleading statements intended to obstruct the Committee's inquiry. Finally, paragraph 10 avers that following that meeting, Poindexter, knowing that North's representations had been false, nevertheless sent a message to him stating, "Well done."

> FN10. It is not clear that defendant's motion would prevail even if he were correct in that claim, for Count Two would charge an offense even if it did not contain paragraphs 8 through 10.

The precise discussions between Poindexter and North prior to the meeting on August 6 are not averred. However, the relevant paragraphs, in conjunction with the "Well Done" congratulation following the false statements at the meeting--about which Poindexter knew--make clear that Poindexter is alleged to have arranged for North to lie to the committee members and staff so as to obstruct their inquiry. To the extent that it might be argued that the language did not adequately inform defendant of the alleged criminality, this was ***22** certainly done by the juxtaposition of these factual charges with paragraph 11 which relates the facts to an obstruction. The Court concludes that paragraphs 8 through 11 as well as paragraph 7 provide the defendant with enough factual detail to enable him to prepare his defense.

B. Due and Proper Inquiry

[15] Defendant contends next that the congressional inquiries at issue in Counts Two and Three were insufficiently formal to be protected against obstruction, and that they lacked the necessary compulsion. It is established, however, that the statute protects preliminary and informal inquiries against obstruction as well as formal proceedings. United States v. Mitchell, 877 F.2d 294 (4th Cir.1989); United States v. North, 708 F.Supp. 385, 386 (D.D.C.1988); see also, Rice v. United States, 356 F.2d 709, 712 (8th Cir.1966); United States v. Fruchtman, 421 F.2d 1019 (6th Cir.1970). Defendant's reliance to the contrary on McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927) is misplaced. That case holds only that Congress may use compulsory process to exercise its power of inquiry, not that all other means for exercising that power are invalid.

[16] In a related argument, defendant claims that the committees violated their own rules and those of the House of Representatives, and that for that reason the inquiries in question were not "due and proper" exercises of the power of inquiry. [FN11]

However, to the extent that defendant cites authority for that claim, it stands only for the proposition that a witness from whom a committee seeks to compel answers has a right to insist that the proper procedures be followed. See, e.g., Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963); Liveright v. United States, 347 F.2d 473 (D.C.Cir.1965). What the cases do not hold is that, when a congressional committee is engaged in a less formal inquiry--as committees frequently do, in advance or in lieu of formal, sworn hearings--the witnesses are free to lie and otherwise to obstruct the body without fear of the law of obstruction. The Court of Appeals for this Circuit said in Shimon v. United States, 352 F.2d 449, 450 (D.C.Cir.1965), that "Congress' concern with the obstruction of justice may not be avoided by such empty technicalities;" and the Fourth Circuit recently reiterated

> FN11. Among the rules allegedly violated was House Rule XI which requires committee meetings to be open to the public, compels the committees to keep a complete record of their proceedings, requires the chairman to announce the subject of the investigation at the start of any hearing, and allows each witness to obtain a transcript of the proceedings.

> The question of whether a given congressional investigation is a 'due and proper exercise of the power of inquiry' for purposes of § 1505 can not be answered by a myopic focus on formality. Rather, it is properly answered by a careful examination of all the surrounding circumstances. If it is apparent that the investigation is a legislative exercise of investigative authority by a congressional committee in an area within the committee's purview, it should be protected by § 1505.

Mitchell, 877 F.2d at 300-01; see also, United States v. Sutton, 732 F.2d 1483, 1490 (10th Cir.1984). [FN12]

> FN12. The questions raised by the committees must of course be within their jurisdiction--as they were here.

C. Political Question

Defendant next contends that a scrutiny of his letters would be equivalent to a scrutiny of the President's conduct and pronouncements, and that on this basis Count Two presents a political question beyond the competence of the Judiciary under the separation of powers, Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), particularly since foreign policy and national security were implicated. Haig v. Agee, 453 U.S. 280, 292, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640 (1981); C. & S. AirLines v. Waterman Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948). More specifically, he asserts that "the crux of the obstruction of Congress allegation is a statement made on behalf of ***23** and after consultation with the President ... [that] expressed the President's belief that the Administration was in compliance" [with the Boland Amendment]. Defendant's Memorandum at 24. Defendant goes on to say that, since the President had declared through his spokesmen that the NSC staff had not been in violation of either the spirit or the letter of the law, to pursue Count Two would be "to call into question" the "presidential pronouncements.... The clear implication of a guilty verdict on.... Count two would be either that President Reagan lied on these other occasions or that he had no grasp of what he was talking about in the area of foreign affairs. Either way, a showing of an absolute lack of respect for the President would result." Defendant's Memorandum at 26-27.

[17] The Court does not know at this juncture whether the defendant made his statements "after consultation with the President" nor does the Court know whether these statements represented the President's views. That may or may not have been so; at this time we have only defendant's version of his discussion with President Reagan. But see, Part V-B infra. In any event, the political question doctrine does not leave it to the President to determine whether a member of his staff has violated the criminal law, nor does it protect members of any branch of government from revelations of wrongdoing or ignorance.

[18] Nothing in this case would require the Court to adjudicate foreign policy issues, a subject plainly beyond its competence; all that is involved is the question whether one particular individual--this defendant--has violated the laws proscribing obstruction of Congress, a subject not beyond the Court's jurisdiction. The Supreme Court has instructed the lower courts that it would be "error to

suppose that every case or controversy that touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. at 211, 82 S.Ct. at 707; see also, Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 227, 106 S.Ct. 2860, 2864, 92 L.Ed.2d 166 (1986); United States v. Nixon, 418 U.S. 683, 694, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974). The political question defense is therefore rejected.

D. Count Three

[19][20] Defendant claims that Count Three is based on false statements alone, and that on this basis, under United States v. Griffin, 589 F.2d 200, 205 (5th Cir.1979), the indictment should have alleged that the statements had the actual effect of impeding a congressional inquiry. See also, United States v. Perkins, 748 F.2d 1519 (11th Cir.1984). The short answer to that contention is that the obstruction statute prohibits an "endeavor to" obstruct as well as a completed obstruction. See, United States v. Russell, 255 U.S. 138, 41 S.Ct. 260, 65 L.Ed. 553 (1921); United States v. Jackson, 513 F.2d 456, 460 (D.C.Cir.1975). [FN13] It follows that an obstructive effect is not a prerequisite to a violation.

> FN13. Moreover, Griffin, the precedent principally relied on by defendant, was recently rejected by the Fifth Circuit which had authored that decision. See United States v. Williams, 874 F.2d 968, 980-81 (5th Cir.1989).

Beyond that, Count Three is not premised solely on false statements; several additional acts of obstruction are charged. According to the indictment, the House and Senate intelligence committees began to inquire in early November 1986 into reports that the government was selling arms to Iran, and they decided to seek the testimony of defendant Poindexter, in addition to CIA Director William J. Casey, on that issue. Arrangements were made for a meeting with Poindexter on November 21, 1986 and, in anticipation of that meeting, defendant directed his subordinates, including Oliver North, to prepare a chronology of events leading to the arms shipments, to be used at the meeting. The final version of the chronology, it is claimed, deliberately misrepresented the time the government first learned of the shipment of Hawk missiles to Iran, and in his appearances Poindexter made false statements to the congressional ***24** delegation corresponding to the chronology.

Additionally, defendant allegedly sought to obstruct the committees by deleting stored messages from his files in the NSC computer system that would have revealed his activities in relation to the Iran initiative and in the provision of assistance to the Contras. All these actions are said to have been taken with the specific purpose of obstructing the inquiries of the congressional committees and of concealing facts that were material to these inquiries and that would have prolonged them had they been truthfully disclosed. In short, the allegations in Count Three go beyond false statements; the indictment alleges that defendant committed other acts of obstruction as well, and on that basis, too, the argument based on Griffin must be rejected.

E. Duplicity

[21] Defendant finally contends with respect to Counts Two and Three that they are each impermissibly duplicitous because he is charged in each count with obstructing more than one congressional committee by more than one method. Accordingly, says the defendant, these counts must be either dismissed or modified. However, it does not follow that, because a count alleges several acts, each of which could constitute a separate offense, each such act must be charged as a separate count or be dismissed for duplicity. On the contrary, as discussed in Part I supra, two or more acts which could be charged as separate offenses may be charged as a single count if these acts can legitimately be characterized as part of a single, continuing scheme or course of conduct. See United States v. Mangieri, 694 F.2d 1270, 1282 (D.C.Cir.1982); United States v. Shorter, 809 F.2d 54, 56 (D.C.Cir.1987). Indeed, a contrary rule would risk unfairness to the defendant who might otherwise be subjected to multiple punishments for a single criminal episode. Any dangers presented by the prosecution of a defendant by way of a single count with more than one allegation of criminal conduct--such as the possibility that the jury would render a guilty verdict without unanimity regarding the events in question--can be more than adequately controlled through instructions to the jury.

III
Counts Four and Five

Count Four of the indictment charges defendant with violation of 18 U.S.C. § 1001, in that he allegedly falsely told members of the Senate and House intelligence committees (1) that he did not learn until January 1986 that Hawk missiles had been shipped to Iran two months earlier, and (2) that he had not learned until November 20, 1986 that anyone in the United States government had prior knowledge of the shipment of such missiles to Iran in November 1985. The allegation is that defendant had, in fact, been advised by Oliver North by November 20, 1985 that such a shipment was about to take place, and in November and December 1985 that a shipment of Hawk missiles had occurred.

Count Five of the indictment charges a violation of 18 U.S.C. § 1001, in that defendant allegedly falsely told members of the Senate intelligence committee that he had not learned until January 1986 that Hawk missiles had been shipped to Iran in November 1985, when in fact Oliver North had advised him in November and December 1985 that such a shipment was about to take place, and he was further advised by North that such a shipment had taken place.

Defendant requests that these counts be dismissed for failure to state offenses under section 1001; that the statute may not be applied to unsworn statements by an Executive Branch official; that the statute does not provide fair notice to him that his conduct was prohibited by law; and that the false statements he allegedly made were not material.

A. Statements made to Congress

[22] Defendant contends most broadly that section 1001--the general federal false statements law--does not apply to statements made with respect to the non-administrative ***25** functions of the Legislative Branch. While conceding that no case has ever carved out such an exception, he urges that, inasmuch as the courts have held that the statute does not apply to the adjudicative functions of the Judicial Branch, this Court should, on the same basis, hold that the law does not apply to the Congress (except for its administrative functions).

It is quite correct that several courts have decided that a person may not be convicted under section 1001 for statements made in the course of judicial proceedings. See United States v. Rodgers, 466 U.S. 475, 483 n. 4, 104 S.Ct. 1942, 1948 n. 4, 80 L.Ed.2d 492 (1984), for a collection of the relevant cases; and in this jurisdiction see, Morgan v. United States, 309 F.2d 234, 237 (D.C.Cir.1962). Even if this Court were inclined to draw the parallel defendant invites it to draw between the Judicial and the Legislative Branches in this respect--and it is not [FN14]--the Court of Appeals for this Circuit has determined that section 1001 applies to congressional committee inquiries.

> FN14. To do so would, inter alia, result in an interpretation of the law that punished the deception of Congress in trivial "administrative" contexts, while permitting deceptions that affect the core functions of the Legislative Branch. Moreover, the court in Morgan rested its decision on the problems that would arise in the judicial context were the statute applied to "traditional trial tactics," 309 F.2d at 237--a consideration that does not apply to statements made to the Congress.

In United States v. Hansen, 772 F.2d 940, 943-44 (D.C.Cir.1985), that court, speaking through Judge (now Justice) Scalia explicitly and unambiguously held that a House committee is a "department" for purposes of section 1001, since that term "was meant to describe the executive, legislative and judicial branches of the Government" (citing Bramblett infra). [FN15] It further expressly held that the term "jurisdiction" encompasses an investigation by a congressional committee. Id. In other words, Hansen has authoritatively decided that a congressional investigation is "a ... matter within the jurisdiction of any department of the United States." That, of course, ends the matter as far as this Court is concerned.

> FN15. Defendant's effort to characterize the Hansen case as one which, unlike the instant case, involves only housekeeping functions, is unavailing, for three reasons. First, the Hansen court did not suggest any distinction between congressional housekeeping and legislative functions, so as to include the former and exempt the latter. Second, it hardly makes sense to classify a congressional investigation of Hansen, a Member of Congress, as "housekeeping," while regarding an inquiry into the behavior of Executive officials, such as defendant, as legislative. Third, inquiries that begin as housekeeping matters frequently have the potential to result in legislative investigations--which is

precisely what happened in Hansen--thus rendering impractical the distinction defendant seeks to draw. In addition to Hansen, see also, United States v. Bramblett, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); United States v. D'Amato, 507 F.2d 26 (2d Cir.1974); United States v. Diggs, 613 F.2d 988 (D.C.Cir.1979); North, 708 F.Supp. at 383-84.

B. Unsworn and Informal Communications to Congress

[23] Defendant contends next that section 1001 may not properly be applied to an unsworn statement communicated by an Executive Branch official to a member or a committee of Congress in informal circumstances.

As discussed in Part II above, Poindexter, who was not under subpoena to meet with the members of the intelligence committees, nevertheless agreed to meet with some of these members and their staffs at the White House. According to his motion, the purpose of the meeting was to provide policy background prior to the taking of the sworn testimony of CIA Director Casey; Poindexter himself was not to appear for the actual hearings; the White House conference did not include the trappings of a formal committee meeting; he was not placed under oath; and no verbatim transcript was maintained. In short, the meeting partook of none of the formalities of a full-fledged congressional hearing.

Defendant predicts that the application of the false statements statute in that kind of setting would have a chilling effect on communications between the two branches of government. As he notes, "[o]fficials in ***26** the Executive Branch routinely communicate with Congress concerning an enormous range of subjects relating to the business of government, including proposed legislation, matters under investigation by Congress, actions taken or contemplated by the Executive Branch, Congress's oversight of the Executive Branch, budget requests, treaties, and presidential appointments. Such communications may be written or oral, formal or informal, and may involve individuals at any level of the Executive Branch and either members of Congress or other staffs." Defendant's Memorandum at 19. In this view, the situation is aggravated by the fact that section 1001 prohibits false statements in the broadest sense. [FN16]

FN16. Section 1001 has been held to prohibit not only false statements concerning objective facts but also false statements concerning intent. See Corcoran v. United States, 229 F.2d 295 (5th Cir.1956). It has been held to prohibit not only statements that are false but also those that fail to disclose a material fact. See United States v. Mattox, 689 F.2d 531, 533 (5th Cir.1982). It has also been held to reach statements not only made directly to the federal government but also statements submitted to nonfederal agencies receiving federal funds. See United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir.1983). And it has been held applicable even to false statements in records subject to government inspection. See Gonzales v. United States, 286 F.2d 118 (10th Cir.1960).

The Court is not unsympathetic to these considerations. It may indeed be that the application of section 1001 to statements made by Executive officials in the course of informal contacts with congressional officers would complicate future relationships between the two branches and thus could disrupt the orderly functioning of government. At a minimum, it could eventuate that the Executive officials would be more stilted and careful and less forthcoming than they might otherwise be.

[24] On the other hand, it cannot be gainsaid that the chill defendant forecasts between the Executive and the Legislative Branches on account of false statement prosecutions may be nothing more than the natural consequence of the deterrent effect of the criminal law. After all, section 1001 does not punish expressions of differences of opinion between representatives of the two branches on policy issues, but only statements that are proven to be false. Moreover, as the government notes, at this juncture it is only speculation that enforcement of section 1001, as in the instant case, would damage communications between Congress and the Executive. Should such damage occur, the appropriate forum for a policy-driven exception to the statute would be the political branches, not the Judiciary.

[25] In any event, here again, the Court is not writing on a clean slate. In Marzani v. United States, 168 F.2d 133 (D.C.Cir.), aff'd by an equally

divided Court, 335 U.S. 895, 69 S.Ct. 299, 93 L.Ed. 431 (1948), the Court of Appeals upheld a conviction of a government employee who had lied about his past Communist connections. The court took note of the defendant's objection

> ... that the statements were not under oath and were not stenographically transcribed; that the interview was at appellant's request; that there were only two participants in the conference; that they addressed each other by their first names, and that they discussed a variety of topics.

Id. at 141-42. But, said the court, the statute

> ... does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations, ... in any matter with the jurisdiction of any department or agency of the United States.'

Id. at 142. This Court is of course bound by that determination and will follow it. [FN17]

> FN17. Nor would the Court be justified in drawing the distinction defendant asks it to draw between ordinary citizens and officials of the Executive Branch. In our free, constitutional system, such a distinction would be proper only if it were clearly required by a mandate of the policymaking branches of government. No such mandate is present here. On a similar basis, the Court rejects defendant's argument that the application of section 1001 to communications from the President's advisor on foreign affairs and national security would be improperly to invade the Presidential prerogatives in these two areas. The President's unquestioned role in these constitutionally assigned functions may allow his advisor to be "less than forthcoming about prospective foreign policy initiatives," Defendant's Memorandum at 23; it does not allow such an advisor to make false statements to the Congress.

***27** C. Materiality

[26][27] Defendant also argues that the allegedly false statements he made were not material to the committees' inquiries. Materiality is an essential element of the offense in a prosecution such as this. Freidus v. United States, 223 F.2d 598, 601 (D.C.Cir.1955); Weinstock v. United States, 231 F.2d 699, 701 (D.C.Cir.1956). The test of materiality is "whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." Weinstock at 701-02; see also, Hansen, supra.

Defendant contends that the element of materiality is lacking here because the indictment does not allege that element and the government cannot prove actual reliance by the committees on his allegedly false statements. Neither claim is justified.

[28] The indictment alleges both in Count Four and in Count Five that defendant "unlawfully, willfully, and knowingly made and caused to be made material false, fictitious, and fraudulent statements and representations ..." (emphasis added). Insofar as proof is concerned, defendant's formulation represents a mistaken view of the law. The Court of Appeals has plainly said that "proof of actual reliance is not required; the Government need only make a reasonable showing of its potential effects." Hansen, 772 F.2d at 949; see also, United States v. Diggs, 613 F.2d 988, 999 (D.C.Cir.1979). This formulation of the appropriate standard by the Court of Appeals does not include the element defendant claims to be critical: that of actual reliance. See also, United States v. Quirk, 167 F.Supp. 462, 464 (E.D.Pa.), aff'd, 266 F.2d 26 (3d Cir.1959). In any event, it will be for those who evaluate the trial evidence to decide whether the government has proved materiality.

Defendant claims, more directly, that representations regarding his personal knowledge of the Hawk shipment to Iran were not material; that the committees were inquiring far more broadly into the participation of the United States government as such in sales of weapons to that country. That, again, is too cramped a view of the scope of congressional inquiries and of the concept of materiality. To be sure, the committees were investigating the issue of United States government involvement in sales of arms to Iran. But it was plainly material to that inquiry when the defendant--the President's principal advisor on national security and the senior official of the NSC, the body identified with the Iran initiative--first learned of government involvement in the shipment of arms to that country.

The motion to dismiss Counts Four and Five of the indictment is denied.

IV
Fair Notice Under Statute

Defendant contends, in a separate motion, that sections 1001 and 1505 of Title 18 failed to provide him with fair notice that his conduct was criminal, and that this vice infects Counts Two through Five. He does not, he cannot, argue that these statutes are impermissibly vague as not providing notice to one and all that it is a crime knowingly to make false statements to congressional bodies, as to other government agencies, or that it is a crime to deliberately obstruct investigations or inquiries by such entities. Both sections have been applied and sustained too many times for that argument to be seriously made.

[29] Defendant's point is both narrower and broader: it is that members of the Executive Branch so commonly make false statements when required to provide information to Congress, particularly with respect to sensitive activities, without ever having been prosecuted for their acts, that ***28** he was justified in believing that such action was not criminal. Defendant's Memorandum at 2-3, 8, 12-14. The Court rejects this notion for several reasons.

[30][31] First, it is simply not true that no Executive official had ever been prosecuted prior to the Iran-contra affair on the charge of lying to a congressional committee. See United States v. Lavelle, 751 F.2d 1266 (D.C.Cir.1985). Second, due process does not require that the government cite a "litigated fact pattern directly on point" as a prerequisite to the institution of criminal proceedings. United States v. Mallas, 762 F.2d 361, 364 (4th Cir.1985). It would therefore be irrelevant if Executive officials had not previously been prosecuted for false statements to Congress. [FN18] Third, Congress made it clear by enactment of the Hughes-Ryan Amendment, 50 U.S.C. § 413, which imposes substantial reporting requirements on the Executive Branch relating to intelligence activities, that it expects Executive officials to tell the truth when reporting to Congress with respect to such activities. Thus, if, as defendant claims, there is a pattern of lying by Executive officials when reporting to the Congress, [FN19] the proper response under Hughes-Ryan would be to end that practice rather than to sanction it by accepting it as a defense to a criminal charge. Finally, as Judge Gesell stated in North, it would come as no surprise to an ordinary citizen that section 1001 prohibits the making of false statements to a government agency; nor should it come as a surprise to a high government official. 708 F.Supp. at 368.

FN18. Prior litigation is a prerequisite only if the particular law is ambiguous or fails to give "to the world in language that the common world will understand [notice] of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).

FN19. The Court of course has neither the ability nor the jurisdiction to make a judgment on that issue.

Defendant's motion to dismiss Counts II through V for lack of fair notice is denied.

V
Subpoenas Duces Tecum

Defendant has moved under F.R.Crim.P. Rule 17(c) for an order setting a pretrial return date at least sixty days before trial for subpoenas duces tecum. The government opposes the motion as premature and nonspecific. Defendant has also requested the production of documents from former President Reagan and former Vice President Bush. [FN20]

FN20. In order to minimize confusion, the Court will generally refer herein to President George Bush as Vice President Bush--the position he occupied at the time of the events which are the subject of this criminal action--and to former President Ronald Reagan as President Reagan.

A. General

Defendant argues that the pretrial production of documents by way of subpoena is necessitated by the large volume of papers known to exist relating to a variety of critical issues--evidentiary materials in the possession of government officials, including members of Congress and Presidents Reagan and Bush; highly sensitive intelligence reports relevant, inter alia, to a demonstration of knowledge and approval of defendant's activities and those of his alleged co-conspirators; documents relevant and

necessary to prepare for the cross-examination of government witnesses; and documents relating to the issue of defendant's intent. Defendant's Motion at 2-3. This list is disquieting, for it parallels in substantial part the discovery motion defendant has filed and which the Court ruled on in detail under date of September 11, 1989. [FN21]

> FN21. This disquiet is not significantly alleviated by defendant's observation that, to the extent that the government complies with its obligation to produce documents in the possession of Executive Branch agencies, some, but not all of this evidence will not be sought by subpoena. Defendant's Motion at 3 note 2.

On that basis, the Court cannot but concur with the government's observation that pretrial return dates ought not be used improperly as blank checks for the use of ***29** trial subpoenas duces tecum as a supplemental discovery device. See United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); United States v. Ferguson, 37 F.R.D. 6 (D.D.C.1965). The government also suggests that, under established law, the Court should delay dates and make rulings only on specific subpoenas to specific witnesses calling for the production of specific, identified materials.

The Court appreciates that, with respect at least to some documents, the litigation of such issues as privilege may take some time, and that an early return date is for that reason warranted. On the other hand, the Court is not prepared to hand to defendant a blank check for the issuance of wide-ranging subpoenas to government officials and others, either to duplicate discovery already allowed or to secure discovery that the Court rejected. In order to accommodate the various legitimate interests, the Court will order a return date forty days in advance of the trial, that is, December 13, 1989, with respect to specific subpoenas for clearly identified, relevant evidence, after application therefor is made.

B. Presidential and Vice Presidential Documents

On September 11, 1989, in ruling upon defendant's discovery requests, the Court stated with respect to a demand for notes and diaries maintained by and for President Reagan and Vice President Bush, that it would defer a decision thereon, pending the filing of (1) legal memoranda from both parties on the question whether the Independent Counsel could be required to produce documents maintained by President Reagan, in view of the Presidential Records and Materials Preservation Act, 44 U.S.C.A. § 2101 et seq.; and (2) a more specific proffer from defendant as to the involvement of these two high officials in the events which led to his indictment. These papers have now been submitted.

First. The issue of the method of securing access to the Reagan documents has been resolved. The Independent Counsel submitted a memorandum which concluded that the Presidential Records Act grants to former President Reagan and to the Archivist of the United States, but not to counsel for the government, access to and control over these papers. Defendant responded by stating that, while he did not necessarily agree with the Independent Counsel's legal conclusions, he was willing to forgo production through that official by means of Rule 16, F.R.Crim.P., but would instead seek to access the Presidential and Vice Presidential documents by means of a subpoena duces tecum pursuant to Criminal Rule 17. Not only does this agreement settle the issue of the method of production; it is also preferable from the point of view of clarity. If any claims of privilege are advanced, they may be made directly, in response to the subpoena, rather than through the circuitous route of an objection made to the Independent Counsel who would then, in turn, pass such claims on to defendant and the Court.

Second. Defendant's more specific proffer concerning the materiality of the Presidential and Vice Presidential documents was submitted in camera (to avoid the disclosure of possibly privileged documents) and ex parte (to avoid revelation of defense strategy to the prosecution in advance of trial). The memorandum embodying that proffer, with various exhibits, was carefully examined by the Court.

According to that proffer, President Reagan met with Poindexter daily, frequently alone; [FN22] they routinely had conversations with regard to national security matters, including, among other things, the Iran initiative and the Contra support program; assistance to the Contras by third countries; the role of Richard Secord as a

middleman in the transfer of arms to Iran; private and third country fundraising for the Contras; the depth of the Administration's commitment to the Contras and its desire to continue to provide military support ***30** to them; the Administration's view of the relationship between the Boland Amendment and the National Security Council, and the application of that statute to the NSC; the Administration's view of the resolution of inquiry under consideration by the House Foreign Affairs Committee and on the accuracy of the chronology prepared by Oliver North and reviewed by Poindexter.

FN22. This is in sharp contrast to the relationship between President Reagan and Oliver North, who may have never seen the President on a one-to-one basis.

[32] On a number of these issues, it is claimed, President Reagan formulated the Administration's position for the guidance of Poindexter (and sometimes others). On other issues, Mr. Reagan allegedly entertained Poindexter's plans without voicing any objection. It appears that notes were taken by the President and others on these conversations and, according to defendant, these notes or Presidential diary entries made pursuant thereto would support his defense to the charges in the various counts of the indictment.

If the claims made in defendant's proffer are correct--a matter which the Court of course cannot and does not evaluate at this stage of the proceedings [FN23] but, in view of the specificity of defendant's proffer, [FN24] accepts as true for present purposes--there is "a sufficient likelihood" that the documents sought from President Reagan would be material to the Poindexter defense. [FN25] Accordingly, if the defendant submits to the Court subpoenas duces tecum for specific, relevant documents in the custody of former President Reagan or of the Archivist of the United States on his behalf, with a return date sixty days in advance of trial, that is, November 23, 1989, the Court will authorize their issuance.

FN23. Only the papers themselves can provide the answer.

FN24. To preserve the in camera character of the proffer, its details are discussed herein only to the extent necessary for an explanation of the rationale underlying the Court's ruling.

FN25. United States v. Nixon, 418 U.S. 683, 700, 94 S.Ct. 3090, 3103, 41 L.Ed.2d 1039 (1973). The Court concludes that the defendant has made the showing required by Rule 17(c): (1) that the documents appear to be evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that he cannot properly prepare for trial without such production and inspection in advance of trial and that failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition." Id.

[33][34] Third. The situation is different as concerns Vice President Bush. Although defendant asserts that the then Vice President knew about various activities relevant to this case, he does not and could not point to a Vice Presidential authorization of his activities as a defense--assuming for present purposes that authorization by a superior would be a valid defense--for the Vice President had no operational authority with respect to Poindexter. Regarding other subjects, e.g., the claimed knowledge by high officials of defendant's activities, it appears to the Court, at least on the present showing, that the Vice Presidential papers may be largely cumulative. Therefore, based on that showing, and because of the deference due the incumbent President, [FN26] the Court denies defendant's request for the Bush papers at this time. [FN27]

FN26. No individual, whatever his position, is exempt from the obligation inherent in our laws to provide evidence, especially where such evidence is sought by a defendant in a criminal case in the exercise of his constitutional right to mount a defense to serious charges against him. However, respect for the Chief Executive and head of a branch of government co-equal to the Judiciary dictates that the production of evidence from a sitting President not be coerced, by subpoena or otherwise, unless such evidence is necessary to the defense and a just resolution of the cause.

FN27. The Court's decision on this issue is obviously without prejudice to its reevaluation in the event that the defendant is able at a later point to

make the case for a more pressing need for the documents in his defense against the charges.

Fourth. The Independent Counsel apparently has in his possession copies of an notes based upon some Presidential documents, Memorandum, at 16 and n. 7, and defendant requests the production of these papers. There is, however, a question of privilege at least as to some of the notes prepared by Independent Counsel attorneys. In any event, inasmuch as the Court ***31** has stated that it may authorize a subpoena for the originals, it will defer a ruling on defendant's separate request for copies and notes at this time, without prejudice to a renewal of the request if the demand for the original documents is frustrated or unduly delayed.

VI
Constitutionality of CIPA

[35] Defendant contends that, as applied to him, section 5 of the Classified Information Procedures Act (CIPA), 18 U.S.C.App. IV § 5(a) is unconstitutional. Section 5 of CIPA requires a defendant to notify the prosecution prior to trial of all classified information the defense expects to use at trial. According to defendant, this requirement violates his Fifth Amendment right to remain silent; his Fifth and Sixth Amendment rights to testify in his own defense; his Sixth Amendment right to the effective assistance of counsel; his right to cross examine witnesses against him; and his right to due process of law. In the opinion of this Court, these contentions exaggerate the effects of the CIPA requirements, and they will be rejected. [FN28]

FN28. The government also argues that a decision on this issue would be premature because defendant is not yet being required to do anything pursuant to the statute. While that observation is technically accurate, nothing would be gained by the brief delay in adjudication that would follow from the Court's deferral in accordance with the government's argument.

A. General

Congress enacted CIPA as a means for coping with the so-called "graymail" problem--the problem of defendants in criminal cases threatening to introduce classified information at trial, thus confronting the government with the choice between permitting highly sensitive national security information to become publicly known, on the one hand, and capitulating to the graymail by dismissing the charges, on the other. H.R.Rep. No. 96-831, Pt. 1, 96th Cong., 2d Sess. (1980); S.Rep. No. 96-823, 96th Cong., 2d Sess. (1980) U.S.Code Cong. & Admin.News p. 4294. As may be imagined, both alternatives are unpalatable to the prosecuting authorities and presumably to the public. CIPA seeks to resolve this difficulty by giving the trial judge the opportunity to rule on questions of admissibility of classified information in advance of its use as evidence in open court.

Under the CIPA procedures, as defendant correctly states, the defense is required (by section 5) to notify the Court and the prosecutor of its intention to disclose particular classified information at trial. Section 6(a) permits the prosecution thereafter to request an in camera hearing for a determination of the use, relevance, and admissibility of this proposed defense evidence. If the Court makes an affirmative finding with respect thereto, the government may move for, and the Court may authorize, the substitution of unclassified facts or a summary of the classified information in the form of an admission by the government. Under section 6(e)(2) if the government prevents a defendant from disclosing classified information at trial, the Court may find against the prosecution on any issue to which the excluded information relates; it may strike or preclude the testimony of particular government witnesses; and it may dismiss the indictment or specific counts thereof.

As this summary of the provisions of CIPA suggests, the law establishes a carefully balanced framework for consideration of the difficult issue of the use of classified information by the defense. In addition, although the statute in terms speaks only of a defense obligation to disclose the classified information it intends to use at trial, this Court has also required the government to present all the classified documents it intends to introduce as part of its case-in-chief, [FN29] and the government must, in fact, do so before the defense makes its disclosure. [FN30]

FN29. That is also the procedure adopted in the North case.

FN30. The government claims that it has already

complied with this obligation.

*32 Moreover, the protection of the rights of defendant is paramount under the statutory scheme: if the Attorney General files an affidavit objecting to the disclosure of the classified material, [FN31] and the Court determines that other remedies, including satisfactory unclassified substitutes providing defendant "with substantially the same ability to make his defense as would disclosure of the specific classified information," cannot be fashioned, [FN32] it must provide relief, including, where appropriate, by a dismissal of the indictment.

FN31. Section 6(e) of CIPA.

FN32. Section 6(c)(1) of CIPA.

This Court is fully mindful of its obligation, stemming from the Constitution itself, as well as from the statute, not to deprive the defendant of the ability to defend himself against the criminal charges brought against him. As between that obligation, on the one hand, and the various governmental interests involved, on the other, [FN33] the Court does not intend to relegate defendant's constitutional rights to second place.

FN33. These interests include the continued prosecution of the defendant as well as the need to safeguard classified materials.

In conformity with the statute, the Court expects to make a substantial effort, with the assistance of the parties, to fashion equivalent substitutes for highly sensitive documents where these documents cannot be revealed in their original form due to the potential damage to national security. [FN34] If for some reason a substitute cannot be fashioned for reasons other than a defense failure to cooperate in good faith, and the document or documents in question are clearly material, the Court will not hesitate to grant the appropriate relief to the defendant, if necessary by a dismissal of the charges. [FN35]

FN34. The Court assumes that, as in North, the government will not prevent the defendant from use as evidence in his defense documents which, whatever their technical classification, would not harm national security if disclosed, and further, that documents actually used in the North trial will be disclosed here as well, without objection.

FN35. However, both parties are on notice that the Court will neither honor the designation by the defendant of documents that are plainly not material and where the principal aim is to generate a dismissal, nor will it countenance government refusals to cooperate with the publication of documents which would not be harmful to national security.

In connection with defendant's assertion that the burdens imposed on him by CIPA are onerous while "no burden whatsoever" is imposed on the government, Reply Memorandum at 5, not only is that claim disproved by the discussion supra, but it must also be remembered that, in addition to its CIPA burdens, the government has discovery obligations not incurred by a criminal defendant. These include the duty to furnish to a criminal defendant in advance of trial: (1) documents that are material to the preparation of the defense, (2) documents the government intends to introduce in its case-in-chief; (3) documents that were obtained from or belong to the defendant; (4) all written or recorded statements of the defendant; (5) a copy of defendant's prior criminal record; (6) reports of physical or mental examinations and scientific tests or experiments; (7) all exculpatory evidence; and (8) all prior statements of government witnesses. In short, defendant's complaint that he is laboring under burdens not shouldered by the government is simply untrue.

It is not surprising, therefore, that every court that has passed on the constitutionality of CIPA has upheld it. See United States v. Wilson, 750 F.2d 7, 9-10 (2d Cir.1984); United States v. Wilson, 721 F.2d 967, 976 (4th Cir.1983); United States v. Collins, 720 F.2d 1195, 1200 (11th Cir.1983); United States v. Jolliff, 548 F.Supp. 229, 231 (D.Md.1981); U.S. v. North, 708 F.Supp. 399 (D.D.C.1988).

To be sure, defendant correctly states that, because of his previous position as National Security Advisor and because of the nature of the charges, these proceedings may be extraordinary in the breadth of the classified information involved. [FN36] *33 However, the Court is not prepared to hold that, for this reason alone, the congressionally-mandated CIPA process will not be applied. If

defendant's suggestion constituted the proper rule, public officials in high national security positions would in practical effect be immune from the operation of the criminal laws with respect to criminal excesses in the exercise of their authority: in the absence of the CIPA tool provided by Congress for dealing with the classified information dilemma, prosecutions instituted on account of such derelictions by such officials would inevitably have to be aborted. That is not, that cannot be, the law. No court has so held, and this Court will not set such a precedent.

FN36. However, as the Court noted in its September 11, 1989 Opinion, much of that information is relevant and material only indirectly, as part of the defendant's purpose to demonstrate lack of motive and hence lack of criminal intent.

The Court will now turn to defendant's specific constitutional arguments.

B. Fifth Amendment

[36] Defendant's principal contention is that, inasmuch as CIPA requires him to divulge to the government what classified information he may personally testify to at trial, the statute impermissibly burdens his Fifth Amendment right to be silent and his right to testify in his own defense. This contention is erroneous on several grounds.

In the first place, section 5 of CIPA does not require a defendant to specify whether he will testify or what he will testify about. The statute requires merely a general disclosure as to what classified information the defense expects to use at the trial, regardless of the witness or the document through which that information is to be revealed. In other words, defendant need not reveal what he will testify about or whether he will testify at all.

Moreover, it is of course hardly a novel proposition that defendants in criminal cases may be required to disclose elements of their defenses in advance of trial. Examples of such requirements are Fed.R.Crim.P. 12.1 (alibi defense); Fed.R.Crim.P. 12.2 (insanity defense); Fed.R.Crim.P. 12.3 (public authority defense); Fed.R.Crim.P. 16 (medical and scientific tests, and tangible objects, and certain documents). Provisions requiring the revelation of such defenses in advance of trial have consistently been held to be constitutional. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970); [FN37] Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); and see, e.g., United States v. Fitts, 576 F.2d 837 (10th Cir.1978); United States v. Buchbinder, 796 F.2d 910 (7th Cir.1986); United States v. Duggan, 743 F.2d 59 (2d Cir.1984). [FN38]

FN37. Defendant attempts to distinguish Williams principally on the ground that the Florida statute there before the Court excluded the defendant's own testimony from the notice requirement. However, there is no indication that the Supreme Court's decision depended on that fact. Other than simply to quote the language of the statute, the Court did not even refer to the provision defendant here regards as critical. And none of the decisions interpreting and passing on the federal notice provisions make the distinction defendant proposes.

FN38. Defendants have also been required to reveal their defenses in additional circumstances, such as the relation of particular testimony to evidence the defendant intends to present. See, e.g., United States v. Mitchell, 385 F.Supp. 1190, 1192-93 (D.D.C.1974); United States v. Ismaili, 828 F.2d 153, 161-62 (3rd Cir.1987); United States v. Trenary, 473 F.2d 680, 682 (9th Cir.1973).

Defendant relies for the contrary proposition primarily upon Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972). However, the state statute there at issue, unlike the federal immunity law, required the defendant to testify at the outset of the presentation of his case or to forego testifying altogether. It was that feature of the statute, and none other, that caused the Supreme Court to find a constitutional violation. But here, as noted above, there is no compulsion on the defendant to reveal as to when he will testify, or even whether he will testify. All he is required to do under CIPA is to identify the classified information on which his side intends to rely in the course of its overall presentation, not who will disclose it as a part of any particular testimony. In short, it is simply not true that, as defendant asserts, he, "like the defendant in Brooks, ***34** is compelled to choose ... whether he will testify at trial." Defendant's Memorandum at 6. [FN39] The leap from the requirement of disclosure--similar to the

disclosure of an alibi or an insanity defense--to a violation of defendant's right to testify or not to testify, is too wide to be justified.

> FN39. To buttress the point that he could not be required to provide notice of the classified information he intends to use at trial, defendant notes that in the North case, Judge Gesell did not require the defendant to notice his anticipated classified testimony. Memorandum at 11 n. 8. That is correct only in a technical sense. Judge Gesell ruled that There will be no review of defendant North's testimony in advance. When and if he is about to testify, his counsel will advise the Court if it then appears the testimony will involve classified national security disclosures beyond those then authorized under prior rulings of the Court and, again, a specific further ruling will be obtained. 698 F.Supp. at 322. Moreover, by that time, Judge Gesell had already required North to disclose pursuant to section 5 of CIPA (1) each classified document he intended to use at trial (orders of July 8, 1988, August 5, 1988, and October 19, 1988) and (2) all classified documents or other classified testimonial information not covered by previous CIPA orders that North reasonably expected to use at trial (orders of November 23, 1988 and December 22, 1988).

Defendant further seeks to distinguish the precedents by pointing to the important interests present in the decided cases on the government's side of the equation. E.g., Defendant's Memorandum at 9 (importance of rules designed to assure fairness and reliability). However, as the Supreme Court has noted, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307, 101 S.Ct. 2766, 2782, 69 L.Ed.2d 640 (1981). CIPA serves that interest by providing a mechanism for protecting both the unnecessary disclosure of sensitive national security information and by helping to ensure that those with significant access to such information will not escape the sanctions of the law applicable to others by use of the graymail route. S.Rep. No. 96-823, 96th Cong., 2d Sess. at 3 (1980) U.S.Code Cong. & Admin.News pp. 4294, 4296.

C. Counsel, Confrontation, and Due Process

Similar, if not identical, considerations dispose of defendant's arguments which assert a denial of effective assistance of counsel, the failure to afford confrontation, and a denial of due process.

Defendant's claim that his Sixth Amendment right to counsel is violated when he is required to testify before his counsel has the opportunity to make an educated decision on whether to have defendant take the stand is merely the Fifth Amendment argument discussed above in another garb. See also, Lakeside v. Oregon, 435 U.S. 333, 341, 98 S.Ct. 1091, 1096, 55 L.Ed.2d 319 (1978).

[37] Likewise without substance is the complicated argument that CIPA violates defendant's "Sixth Amendment right to confront the witnesses against him by forcing him to notify the prosecution pretrial of all the classified information that he expects to elicit from prosecution witnesses on cross-examination and all such information that will be disclosed in defense counsel's questions to those witnesses." Defendant's Memorandum at 13, 15. This argument assumes that defendant has an unqualified right to undiminished surprise with respect to his cross-examination, and that if there is any impairment of the element of surprise, however slight, cross-examination must be regarded as per se ineffective. [FN40]

> FN40. Of course, CIPA does not "eviscerate[ ] the right [to cross examination] altogether." Defendant's Memorandum at 14-15. The statute requires a defendant merely to identify the universe of the classified information he intends to use; he need not attribute any particular piece of information to the cross examination of any particular witness.

However, as the Supreme Court said in Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (emphasis in original). See also, United States v. ***35** Owens, 484 U.S. 554, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988); Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987); United States v. Tarantino, 846 F.2d 1384, 1405 (D.C.Cir.1988); United States v. Anderson, 881 F.2d 1128, 1137 (D.C.Cir.1989). Finally, as concerns the claim that

the disclosure requirements of CIPA violate the Due Process Clause by imposing a "one-sided burden" on him, it also lacks merit. As discussed at some length above, the CIPA burdens are not one-sided, but they are carefully balanced, [FN41] and there is therefore no basis for a due process complaint. United States v. Collins, 720 F.2d 1195 (11th Cir.1983).

FN41. If, as in Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), there were no balance, the relevant statute could not stand.

VII
Surplusage

[38] Defendant has moved pursuant to Fed.R.Crim.P. 7(d) to strike surplusage from the indictment. [FN42] It is clear (1) that with respect to surplusage the Court has wide discretion, [FN43] and (2) that the standard under Rule 7(d) is exacting. [FN44] It is also settled that a defendant is entitled to have language stricken only if it is both irrelevant and prejudicial, see, e.g., United States v. Jordan, 626 F.2d 928, 930 n. 1 (D.C.Cir.1980), and the Rule has been construed as not favoring the striking of surplusage. Id.

FN42. Defendant's related motion, that for a bill of particulars, is not well taken. As discussed in Parts I through IV, supra, the indictment adequately apprises defendant of the charges against him. The particulars defendant requests go essentially only to the evidentiary details and the government's legal theory, and they therefore need not be spread upon the record by a bill of particulars. See United States v. Pollack, 534 F.2d 964, 970 (D.C.Cir.1976). The request is especially ill founded in view of the government's uncontradicted claim that it has furnished to defendant hundreds of thousands of pages of materials, including copies of all the documents it intends to offer in its case-in-chief. (The government has also provided further particulars as part of its Memorandum filed September 8, 1989). In short, defendant has ample notice of the facts needed to prepare his defense. See also, the November 8, 1988 Order in North.

FN43. The Rule provides that the court "may" strike surplusage.

FN44. See C. Wright, Federal Practice and Procedure: Criminal 2d § 127 at 426 (1982).

[39] First. Defendant requests that the Court strike from the indictment the terms "among other things," "among others," "among," "at least," "including," "included, but not limited to," "in part," and "various," the contention being that this language will lead the jury to speculate that defendant was guilty of or responsible for actions in addition to those charged in the indictment. The government points to the fact that Judge Gesell declined to strike this type of language in North, and that in several contexts its use is innocuous.

The Court does not agree. It indicated in United States v. Whitehorn, 710 F.Supp. 803, 819 (D.D.C.1989) that similar terms could improperly indicate to a jury that the defendants were charged with offenses and conduct in addition to those actually listed in the indictment, and on this basis it ordered them stricken. Similar reasoning and a similar result apply here. Accordingly, the Court hereby orders all such language stricken. [FN45]

FN45. Of course, as in Whitehorn, the government will not be precluded by this ruling from introducing relevant and material evidence tending to prove the conspiracy charged in Count One, and the manner and means by which it was to be achieved. See 710 F.Supp. at 819.

Second. Defendant claims that certain language in the indictment is needlessly inflammatory. However, with respect to most of the terms to which defendant objects, the language is necessary, neutrally descriptive, or both.

[40] For example, defendant objects to use of the term "lethal" in relation to supplies being shipped to the Contras. However, through much of the history of the relations between the United States and the Contras, a distinction has been made between lethal and humanitarian assistance, and there is no reason why those ***36** properly descriptive terms should be excluded from the indictment. [FN46]

FN46. Defendant's objection to the description of military supplies as consisting of "millions of rounds" and "hundreds of thousands of pounds," is likewise not well taken, since those were apparently the quantities involved, at least according to the government.

[41] Similar reasoning causes the Court to deny defendant's objection to the terms "Enterprise," "divert," "diversion," and "clandestine." Indeed, the term "Enterprise," which defendant has particularly emphasized, is a fairly neutral description of the activities of the alleged conspirators. [FN47] Defendant contends to the contrary that the jury might relate the term to racketeering, on the basis that "the word 'enterprise' is a well-known term of art under the RICO statute." Defendant's Memorandum at 10. There may be a few dozen lawyers in this country to whom this "term of art" is well known and who will immediately think of RICO when the word "enterprise" is mentioned; to most individuals, if that term means anything other than a business, it more likely evokes a starship or a space shuttle.

FN47. In fact, one of the defendants, Secord, apparently used the term in that context before the Iran-contra congressional committee.

[42] However, the Court agrees with defendant that use of the term "cover up" is inflammatory, especially in the context of the kind of criminal activity that is at issue here. Further, inasmuch as the term is used in the indictment in tandem with the word "conceal," it is not necessary, and it is therefore hereby ordered to be stricken.

[43] Third. Insofar as defendant's category of "irrelevant descriptive recitals" are concerned, the Court will, once again, retain some terms and strike others. The references in Counts Two, Three, and Four to Poindexter's original co-defendants Secord and Hakim are relevant to the obstruction and false statement claims, and they will not be stricken. On the same basis, the Court will not require the elimination of references to press reports about shipments to Iran, as they are necessary to an understanding of the background of the congressional inquiries and the activities of the defendants with respect thereto. See United States v. Langella, 776 F.2d 1078, 1081 (2d Cir.1985).

[44] On the other hand, there is no valid reason for allegations in the indictment that Oliver North was discharged and that Poindexter resigned from their respective positions. Inclusion of these facts could be taken by the jury as objective indications of fault or of Reagan Administration determinations of fault; they are thus prejudicial without having any special relevance. These particular allegations are therefore ordered to be stricken.

[45] Fourth. Defendant contends that the references in the indictment to the Boland Amendment improperly suggest to the jury that he violated that statute, and that on this basis all such references should be stricken. The request is denied. It is defendant's theory that references to the Boland Amendment have relevance, if at all, only to his state of mind. Defendant's Memorandum at 15. That, however, is not a justified assumption. To be sure, "the defense contends" that this statute was inapplicable to the NSC staff and, according to defendant, the "evidence in this case will establish" that it was not intended to apply to that staff and could not constitutionally have been applied to that staff's activities. Defendant's Memorandum at 15 and n. 14. However, obviously the relevance of the Boland Amendment to this case is not to be measured by defendant's contentions alone.

The Boland Amendment restrictions were the focus of the congressional inquiries at issue here, as well as of defendant's allegedly false and misleading statements. [FN48] To eliminate from the indictment ***37** references to the Boland Amendment would be the equivalent of performing "Hamlet" without the Prince of Denmark. [FN49]

FN48. Defendant's claim is that this case is "virtually identical" to United States v. Mandel, 415 F.Supp. 997, 1008-09 (D.Md.1975), in that there, as here, the defense contended that certain subjects were inapplicable to the defendant. However, the Code of Ethics in Mandel was merely one of many possible indicia of an intent to deceive, and the Mandel decision questioned whether the prosecution would even be able to demonstrate the Code's relevance at trial. Because of the Boland Amendment's crucial position in the instant case, no such question exists here.

FN49. W. Scott, The Talisman, introduction.

Similar reasoning applies to defendant's request that the Court strike the background paragraphs in Count One--those that describe the relationship between the United States and Iran, the fact that hostages were held in Lebanon, the seizure of the American embassy in Iran, and the like. These

paragraphs are not only not prejudicial but they are relevant in the sense that it would be difficult, if not impossible, for the jury to understand defendant's allegedly false statements and obstruction without that background. See United States v. Langella, supra.

As concerns, finally, the incorporation by reference in Counts Two through Five of the allegations in Count One regarding Secord and Hakim, Poindexter's co-defendants at the time the indictment was returned, here again, the activities of the Enterprise, of which these two defendants were allegedly members, were among the very subjects of the false statements and the obstruction with which Poindexter is charged. The request to strike them is therefore likewise denied.

VIII

Publicity, Department of Justice Policies, and Abuse of Grand Jury

The remaining motions require only relatively brief discussion.

A. Pretrial Publicity

[46] Defendant has moved to dismiss the indictment, or in the alternative, for a change of venue, because of prejudicial pretrial publicity.

As concerns the defense request for a dismissal, there does not appear to be a single precedent anywhere in the federal court system granting so drastic a remedy, no matter how widespread or prejudicial the publicity. [FN50] No reason has been advanced for establishing such a precedent here.

> FN50. United States v. Sweig, 316 F.Supp. 1148 (S.D.N.Y.1970), cited by defendant, merely suggested that dismissal might be warranted where prosecutorial misconduct contributed to prejudicial publicity that influenced a grand jury. Even that dicta however, was rejected by the Second Circuit. See United States v. Curcio, 712 F.2d 1532, 1544-45 (2d Cir.1983). Similarly, in Delaney v. United States, 199 F.2d 107 (1st Cir.1952), the other case relied on by defendant, the court upheld a trial judge's decision to deny a motion to dismiss, questioning whether a dismissal on account of prejudicial pretrial publicity would ever be appropriate. 199 F.2d at 111-12.

[47] Moreover, even a change of venue is not warranted, for several interrelated reasons.

In United States v. Haldeman, 559 F.2d 31, 60, 63-64 (D.C.Cir.1976), the Court of Appeals for this Circuit held that an appropriate voir dire of potential jurors was preferable to a transfer to another venue as a means for dealing with pretrial publicity. [FN51] At a time when this case was still joined with that of Oliver North, Judge Gesell denied a similar motion without prejudice, observing that "[e]xperience here again in this city with high profile cases engendering publicity such as Watergate ... strongly suggest that a completely impartial jury can be seated." United States v. North, 713 F.Supp. 1444 (D.D.C.1989). Following the voir dire, the Court reiterated that view, stating that it was "entirely satisfied that the jurors eventually selected are unbiased ...". North, 713 F.Supp. at 1445. The verdict in North--a conviction on some counts and an acquittal on most others--has validated that judgment.

> FN51. In that case, relied on by defendant, Memorandum at 16, it was the court's decision that the "District Court was correct to follow this circuit's well established procedure by refusing appellants' pre-voir dire requests for a continuance or a change of venue." 559 F.2d at 63-64 (citations omitted).

In the event, both in Watergate and in the North case, it was found possible to assemble an impartial jury notwithstanding publicity that was far more widespread than in the instant case.

***38** Moreover, what publicity there has been has not been especially prejudicial to Poindexter. This is not a case, such as one involving a rape, the large-scale distribution of drugs, murder under revolting circumstances, or the like, that causes widespread and near-unanimous revulsion against the accused. See Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). To the contrary. Media coverage and public opinion have been divided, with some regarding the Iran-contra defendants as deserving of public opprobrium while others consider them to be national heroes. [FN52] See,

United States v. Moreno Morales, 815 F.2d 725, 736 (1st Cir.1987).

FN52. President Reagan himself expressed that view, widely reported in the press, with respect to Oliver North. Washington Post, March 26, 1989 at p. A1.

Defendant argues that the publicity that followed the verdict in the North case was damaging to him, in that Judge Gesell and others made comments that could be construed as referring to Oliver North's superiors as being as guilty as or more guilty than North. However, to the extent that there was such comment, it appears to have been directed not at this defendant but at President Reagan and others better known to the public than Poindexter. [FN53] In any event, just as the Court of Appeals found in Haldeman that the Watergate defendants received a fair trial notwithstanding widespread publicity, so can this defendant. [FN54]

FN53. To be sure, as defendant points out, one of the North jurors did refer to Poindexter by name. Washington Post, May 6, 1989 at p. A7. But that comment, and what publicity it received, was isolated. Indeed it is found in the thirty-third paragraph of a thirty-four paragraph article.

FN54. It is not apparent, in any event, what a change of venue would accomplish. The publicity regarding the Iran-contra affair, like that accompanying many "governmental," white collar criminal cases, and unlike those involving common law offenses, has been national rather than local.

B. Failure to Follow Department of Justice Policies

[48] There is likewise no merit to the motion to dismiss the indictment for failure to follow the policies of the Department of Justice. The very nature of the Independent Counsel's responsibilities suggests that it may not always be possible for him to follow those policies, [FN55] and it is for that very reason that the Independent Counsel statute explicitly provides that he is required to follow Department of Justice policies only "to the extent possible." See 28 U.S.C. § 594(f). [FN56] On this basis, defendant's contentions--that the Independent Counsel should have secured the permission of the Attorney General before prosecuting him as one who received a grant of immunity, or that he should have secured an Attorney General determination as to whether prosecution would lead to excessive disclosure of classified information [FN57]--border on the frivolous. The Independent Counsel, as the very name suggests, is to be independent of the Attorney General.

FN55. See also, North, Order of November 10, 1988 at 18 n. 1.

FN56. See also, S.Rep. No. 123, 100th Cong., 1st Sess. 24, reprinted in 1987 U.S.Code Cong. & Adm.News 2150, 2173.

FN57. As for defendant's related claim that his prosecution by the Independent Counsel risks the revelation of national secrets, the short answer is that it would be the intelligence agencies, not defendant, that would have cause for complaint. See Attorney General's Guidelines for Prosecutions Involving Classified Information at 7.

[49] Moreover, much of defendant's argument rests on alleged departures from guidelines set forth in the U.S. Attorney's Manual--a document that, by its own language, creates no rights in any party. U.S. Attorney's Manual § 1-1.00 (1984); United States v. Busher, 817 F.2d 1409, 1411-12 (9th Cir.1987); see also United States v. Caceres, 440 U.S. 741, 749-55, 99 S.Ct. 1465, 1470-73, 59 L.Ed.2d 733 (1979).

C. Prosecutorial Abuse of Grand Jury

There is no merit whatever to the claim that the Independent Counsel in several ways abused the grand jury process.

***39** [50] First. Defendant asserts that the Independent Counsel failed to present exculpatory evidence to the grand jury, and that this so tainted the process that the indictment should be dismissed. In the first place, it is the majority view in the federal courts that the prosecution has no duty to present exculpatory evidence to the grand jury. See generally, United States v. Ismaili, 828 F.2d 153, 165 n. 13 (3d Cir.1987). Furthermore, the only specific evidence cited in support of defendant's claim is the alleged failure of the Independent Counsel to present to the body President Reagan's response to written interrogatories. However, not

only is it not established that the President's views would have been exculpatory, but his answers to the written interrogatories were, in fact, presented to the grand jury. North, 713 F.Supp. at 1450. Finally on this issue, the Court notes the Supreme Court's admonition in Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956) that a defendant has no right to "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

Second. Defendant asserts that the presence of Associate Independent Counsel before the grand jury was improper, in that section 594(c) of the Ethics in Government Act unconstitutionally empowers the Independent Counsel to appoint associates or other assistants. The Supreme Court held the Independent Counsel provisions of the Ethics in Government Act to be constitutional just last year in Morrison v. Olson, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988)--a decision nowhere mentioned in defendant's papers. In another decision directly on point but not referred to by defendant--In re Sealed Case, 829 F.2d 50, 57-59 (D.C.Cir.1987)--the Court of Appeals for this Circuit specifically determined that Associate Independent Counsel may conduct grand jury investigations.

Third. The final claim of alleged prosecutorial misconduct are that the Independent Counsel, a former federal judge, was at times referred to before the grand jury as "Judge Walsh," and that he improperly expressed his appreciation to the grand jury and otherwise sought to create the impression that the grand jury and those presenting evidence to it were engaged in a joint enterprise. With respect to the first claim, Judge Gesell advised counsel in open court as long ago as June of last year that complete disclosure had been made to the grand jury of Mr. Walsh's nonjudicial status. North, 708 F.Supp. at 372. As concerns the second, the Court concludes that the statements quoted by defendant are so innocuous as to render inappropriately extravagant his call for the use of this Court's supervisory power to curb a "pattern of extensive prosecutorial misconduct." Defendant's Memorandum at 19. [FN58]

FN58. It should also be noted that, when this defendant's case was still before him, Judge Gesell reviewed the grand jury transcripts and found no evidence of abuse.

IX
Kastigar Issues

The parties' submissions are not sufficiently developed on various key points to permit the Court to render a decision at this time on the issues arising under Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), regarding the relationship between this prosecution and the immunity granted to Poindexter with respect to his testimony in Congress. [FN59] Accordingly, the Court will hold a non-evidentiary hearing on Kastigar issues on October 27, 1989, at 10:00 a.m. Among the issues to be discussed at that hearing will be the question of the right of the defendant to a dismissal on account of taint from immunized testimony, or to an evidentiary ***40** hearing with respect thereto, for the following four separate categories of persons: (1) grand jurors, (2) grand jury witnesses, (3) Independent Counsel attorneys, and (4) prospective trial witnesses.

FN59. For example, while the government's memorandum relies on various legal principles, it does not always make it clear how these principles apply to the facts of this case. Thus, the memorandum states (at p. 19) that the prosecution "may rely on the testimony of witnesses who have been exposed to immunized testimony," but it does not attempt to explicate the breadth of the exposure of the trial witnesses, the period when it occurred, or its impact on the witnesses' independent knowledge, if any.

With respect to witnesses, the parties are invited to address the subject both with respect to those whose names and the substance of their testimony were memorialized in sealed submissions to the Chief Judge of this Court or otherwise, prior to the taking of immunized testimony in Congress; and with respect to those whose names and testimony were not known or fixed before that testimony was taken. With respect to Independent Counsel attorneys, the parties are invited to distinguish between attorneys who were subjected to the procedures Mr. Walsh testified to before Judge Gesell in April 1988, and those who became involved in the Independent Counsel's Iran-contra effort after that time. The parties may also wish to discuss what type of pretrial evidentiary hearing, if any, would be appropriate or required. One hour will be allocated to each side.

X
Trial Date

Upon consideration of the pretrial work that must still be done by the parties and the Court, as well as the tasks to be performed by the so-called Interagency Group with respect to the identification of classified materials in connection with the CIPA process, the Court is setting January 22, 1990 as the date for the start of the trial.

END OF DOCUMENT

Paul M. BRANZBURG, Petitioner,
v.
John P. HAYES, Judge, etc., et al.
In the Matter of Paul PAPPAS, Petitioner.
UNITED STATES, Petitioner,
v.
Earl CALDWELL.

Nos. 70--85, 70--94, 70--57.

Argued Feb. 22, 23, 1972.
Decided June 29, 1972.

Certiorari was granted to review judgment of the United States Court of Appeals for the Ninth Circuit, 434 F.2d 1081, upholding refusal of newsman to appear and testify before grand jury with respect to confidential sources, and judgments of the Court of Appeals of Kentucky, at 461 S.W.2d 345 and in an unreported case, and the Supreme Judicial Court of Massachusetts, 358 Mass. 604, 266 N.E.2d 297, rejecting claimed rights of newsmen to refuse to testify before grand juries with respect to confidential sources. The Supreme Court, Mr. Justice White, held that requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment; and that a newsman's agreement to conceal criminal conduct of his news sources, or evidence thereof, does not give rise to any constitutional testimonial privilege with respect thereto.

Judgment at 434 F.2d 1081 reversed; judgments at 461 S.W.2d 345 and 266 N.E.2d 297, and in unreported Kentucky case, affirmed.

Mr. Justice Powell filed concurring opinion; Mr. Justice Douglas dissented and filed opinion, see 92 S.Ct. 2686; Mr. Justice Stewart dissented and filed opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

[1] CONSTITUTIONAL LAW ⇐ 90.1(3)
92k90.1(3)
Requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment. U.S.C.A.Const. Amend. 1.

[2] FEDERAL COURTS ⇐ 508
170Bk508
Constitutional claim to newsman's privilege was properly preserved for review by certiorari where it was presented to state court, though newsman in state court relied primarily upon state statute creating a newsman's privilege and though the state court considered that such reliance constituted abandonment of the constitutional claim and did not consider the latter claim. U.S.C.A.Const. Amend. 1; K.R.S. 421.100.

[3] GRAND JURY ⇐ 36.2
193k36.2
Formerly 193k36
News reporters have the same obligation as other citizens to respond to grand jury subpoenas and to answer questions relevant to an investigation into the commission of crime. U.S.C.A.Const. Amend. 1.

[4] CONSTITUTIONAL LAW ⇐ 90.1(3)
92k90.1(3)
Neither the First Amendment nor any other constitutional provision protects citizens from disclosing to a grand jury information that they have received in confidence. U.S.C.A.Const. Amend. 1.

[4] GRAND JURY ⇐ 36.3(2)
193k36.3(2)
Formerly 410k196
Neither the First Amendment nor any other constitutional provision protects citizens from disclosing to a grand jury information that they have received in confidence. U.S.C.A.Const. Amend. 1.

[5] CONSTITUTIONAL LAW ⇐ 90(3)
92k90(3)
The First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. U.S.C.A.Const. Amend. 1.

[6] CONSTITUTIONAL LAW ⇐ 90(3)
92k90(3)
The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. U.S.C.A.Const. Amend. 1.

[7] GRAND JURY ⇐ 26
193k26

Grand jury has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.

[8] CONSTITUTIONAL LAW ⇦ 265
92k265
Indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[9] GRAND JURY ⇦ 36.1
193k36.1
Formerly 193k36
The public has a right to every man's evidence before a grand jury except for those persons protected by a constitutional, common law, or statutory privilege.

[10] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Only where a reporter's news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.

[11] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
When a newsman is subpoenaed to testify before a grand jury, the First Amendment does not protect his agreement to conceal the criminal conduct of a news source, or evidence thereof. U.S.C.A.Const. Amend. 1.

[12] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Public interest in possible future news about crime from undisclosed, unverified sources does not take precedence over public interest in pursuing, by grand jury investigation, and prosecuting those crimes reported to the press by informants, and in thus deterring the commission of such crimes in the future. U.S.C.A.Const. Amend. 1.

[13] GRAND JURY ⇦ 25
193k25
The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. Fed.Rules Crim.Proc. rule 6(e), 18 U.S.C.A.

[14] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
Any indirect burden on First Amendment rights imposed by calling newsmen to testify before a grand jury where it is likely that they can supply information to aid in determination of whether illegal conduct has occurred and whether there is sufficient evidence to return an indictment is justified by the fundamental governmental role of the grand jury in securing the safety of the person and property of the citizen by the investigation of crime; the governmental interest in such role is compelling and paramount and calling newsmen in such circumstances bears a reasonable relationship to the achievement of the governmental purpose. U.S.C.A.Const. Amend. 1.

[15] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
It is not necessary under the First Amendment that, before a newsman may be called to testify before a grand jury with respect to information obtained from confidential sources, it be shown that a crime has been committed and that the newsman possesses relevant information not available from other sources. U.S.C.A.Const. Amend. 1.

[16] CONSTITUTIONAL LAW ⇦ 90(2)
92k90(2)
Freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals. U.S.C.A.Const. Amend. 1.

[17] CONSTITUTIONAL LAW ⇦ 90.1(3)
92k90.1(3)
Grand juries must operate within the limits of the First Amendment as well as the Fifth and may not harass the press for purposes not of law enforcement but of disrupting a reporter's relationship with his news sources. U.S.C.A.Const. Amends. 1, 5.

[17] GRAND JURY ⇦ 33
193k33
Grand juries must operate within the limits of the First Amendment as well as the Fifth and may not harass the press for purposes not of law enforcement but of disrupting a reporter's relationship with his news sources. U.S.C.A.Const. Amends. 1, 5.

[18] CONSTITUTIONAL LAW ⇦ 90.1(3)

92k90.1(3)
There is no First Amendment newsman's testimonial privilege, either qualified or absolute, arising from receipt of confidential information, to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. U.S.C.A.Const. Amend. 1.

[19] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Newsman had no constitutional privilege to refuse to appear before a grand jury until the government demonstrated some compelling need for his testimony. U.S.C.A.Const. Amend. 1.

[20] WITNESSES ⇦ 196.1
410k196.1
Formerly 410k196
Where newsman had observed violations of state narcotics laws, he had no privilege to refuse to answer questions that directly related to the criminal conduct. U.S.C.A.Const. Amend. 1; K.R.S. 218.010(14), 218.210.

[21] GRAND JURY ⇦ 36.3(2)
193k36.3(2)
Formerly 193k36
Newsman had duty to appear before grand jury and answer questions put to him, subject to supervision of presiding judge as to the propriety, purposes and scope of the grand jury inquiry and of the pertinence of the probable testimony.

****2648 *665** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence thereof. Pp. 2655--2670.

No. 70--85, 461 S.W.2d 345, and Kentucky Court of Appeals judgment in unreported ****2649** case of Branzburg v. Meigs; and No. 70--94, 358 Mass. 604, 266 N.E.2d 297, affirmed; No. 70--57, 434 F.2d 1081, reversed.

On Writ of Certiorari to the Court of Appeals of Kentucky.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Edgar A. Zingman, Louisville, Ky., for petitioner Paul M. Branzburg in No. 70--85; Robert C. Ewald, Louisville, Ky., on the briefs.

E. Barrett Prettyman, Jr., Washington, D.C., for petitioner, the Commonwealth of Mass. in No. 70--94; William H. Carey, New Bedford, Mass., on the briefs.

Solicitor Gen., Erwin Griswold for the United States in No. 70--57; David A. Wilson, Jr., Peterson, Asst. Attys. Gen., William Bradford Reynolds, Beatrice Rosenberg, and Sidney M. Glazer, Washington, D.C., on the briefs.

***666** Edwin A. Schroeting, Jr., Louisville, Ky., for respondents John P. Hayes and others in No. 70--85; W. C. Fisher, Jr., Louisville, Ky., on the brief.

Joseph J. Hurley, First Asst. Atty. Gen., for respondent, Commonwealth of Mass., in No. 70--94; Robert H. Quinn, Atty. Gen., Walter H. Mayo III, Asst. Atty. Gen., and Lawrence T. Bench, Deputy Asst. Atty. Gen., on the brief.

Anthony G. Amsterdam, Washington, D.C., for respondent Earl Caldwell in No. 70--57; Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, New York City, and William Bennett Turner, San Francisco, Cal., on the brief.

William Bradford Reynolds, Washington, D.C., for the United States as amicus curiae urging affirmance in Nos. 70--85 and 70--94; Sol. Gen.

Erwin Griswold, Asst. Atty. Gen., David B. Wilson, Jr., and Beatrice Rosenberg, Washington, D.C., on the brief.

Briefs of amici curiae urging affirmance in No. 70--57 and reversal in Nos. 70--85 and 70--94 were filed by Alexander M. Bickel, New Haven, Conn., Lawrence J. McKay, Floyd Abrams, Daniel Sheehan, Corydon B. Dunham, Clarence Fried, Alan J. Hruska, New York City, Robert S. Rifkind, Washington, D.C., Anthony A. Dean, and Edward C. Wallace, New York City, for New York Times Co., Inc., and others; by Don H. Reuben, Lawrence Gunnels, Steven L. Bashwiner, and Thomas F. Ging., Chicago, Ill., for Chicago Tribune Co.; by Arthur B. Hanson, Washington, D.C., for American Newspaper Publishers Assn.; and by Irving Leuchter, Newark, N.J., for American Newspaper Guild, AFL-CIO, CLC.

John T. Corrigan, Cleveland, Ohio, filed a brief for the National District Attorneys Association urging reversal in No. 70--57 and affirmance in No. 70--94.

Briefs of amici cruiae urging affirmance in No. 70--57 were filed by Irwin Karp, New York City, for Authors League of America, Inc.; by W. Theodore Pierson and J. Laurent *667 Scharff, Washington, D.C., for Radio Television News Directors Assn.; and by Earle K. Moore and Samuel Rabinove, New York City, for Office of Communication of the United Church of Christ and others.

Briefs of amici curiae in No. 70--57 were filed by Leo P. Larkin, Jr., Stanley Godofsky, and John J. Sheehy, New York City, for Washington Post Co. and others; by Richard M. Schmidt, Jr., for American Society of Newspaper Editors and others; by Roger A. Clark, New York City, for National Press Photographers Assn.; and by Melvin L. Wulf, New York City, Paul N. Halvonik, San Francisco, Cal., A. L. Wirin, Fred Okrand and Lawrence R. Sperber, Los Angeles, Cal., for American Civil Liberties Union and others.

Opinion of the Court by Mr. Justice WHITE, announced by THE CHIEF JUSTICE.

[1] The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech **2650 and press guaranteed by the First Amendment. We hold that it does not.

I

The writ of certiorari in No. 70--85, Branzburg v. Hayes and Meigs, brings before us two judgments of the Kentucky Court of Appeals, both involving petitioner Branzburg, a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Kentucky.

On November 15, 1969, the Courier-Journal carried a story under petitioner's by-line describing in detail his observations of two young residents of Jefferson County synthesizing hashish from marihuana, an activity which, they asserted, earned them about $5,000 in three weeks. The article included a photograph of a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish. The article stated that petitioner had promised not to *668 reveal the identity of the two hashish makers. [FN1] Petitioner was shortly subpoenaed by the Jefferson County grand jury; he appeared, but refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana. [FN2] A state trial court judge [FN3] ordered petitioner to answer these questions and rejected his contention that the Kentucky reporters' privilege statute, Ky.Rev.Stat. s 421.100 (1962), [FN4] the First Amendment of the United States Constitution, or ss 1, 2 and 8 of the Kentucky Constitution authorized his refusal to answer. Petitioner then sought prohibition and mandamus in the Kentucky Court of Appeals on the same grounds, but the Court of Appeals denied the petition. Branzburg v. *669 Pound, 461 S.W.2d 345 (1970), as modified on denial of rehearing, Jan. 22, 1971. It held that petitioner had abandoned his First Amendment argument in a supplemental memorandum he had filed and tacitly rejected his argument based on the Kentucky Constitution. It also construed Ky.Rev.Stat. s 421.100 as affording a newsman the privilege of refusing to divulge the identity of an informant who supplied him with information, but held that the statute did not permit a reporter to refuse to testify about events he had observed personally, including the identities of those persons he had observed.

FN1. The article contained the following paragraph: "I don't know why I'm letting you do this story,' (one informant) said quietly. 'To make the narcs (narcotics detectives) mad, I guess. That's the main reason.' However, Larry and his partner asked for and received a promise that their names would be changed.' App. 3--4.

FN2. The Foreman of the grand jury reported that petitioner Branzburg had refused to answer the following two questions: '#1. On November 12, or 13, 1969, who was the person or persons you observed in possession of Marijuana, about which you wrote an article in the Courier-Journal on November 15, 1969? #2. On Novebmer 12, or 13, 1969, who was the person or persons you observed compounding Marijuana, producing same to a compound known as Hashish?' App. 6.

FN3. Judge J. Miles Pound. The respondent in this case, Hon. John P. Hayes, is the successor of Judge Pound.

FN4. Ky.Rev.Stat. s 421.100 provides: 'No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.'

The second case involving petitioner Branzburg arose out of his later story published on January 10, 1971, which described in detail the use of drugs in Frankfort, Kentucky. The article reported that in order to provide a comprehensive survey of the 'drug scene' in Frankfort, petitioner had 'spent two weeks interviewing several dozen drug users in the capital city' and had seen some of them smoking marihuana. A number of conversations with and observations of several unnamed drug users were recounted. Subpoenaed to appear before a Franklin County grand jury 'to testify in the matter of violation of statutes concerning **2651 use and sale of drugs,' petitioner Branzburg moved to quash the summons; [FN5] the motion was denied, although *670 an order was issued protecting Branzburg from revealing 'confidential associations, sources or information' but requiring that he 'answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by (him).' Prior to the time he was slated to appear before the grand jury, petitioner sought mandamus and prohibition from the Kentucky Court of Appeals, arguing that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given to him in confidence, his effectiveness as a reporter would be greatly damaged. The Court of Appeals once again denied the requested writs, reaffirming its construction of Ky.Rev.Stat. s 421.100, and rejecting petitioner's claim of a First Amendment privilege. It distinguished Caldwell v. United States, 434 F.2d 1081 (CA9 1970), and it also announced its 'misgivings' about that decision, asserting that it represented 'a drastic departure from the generally recognized rule that the sources of information of a newspaper reporter are not privileged under the First Amendment.' It characterized petitioner's fear that his ability to obtain *671 news would be destroyed as 'so tenuous that it does not, in the opinion of this court, present an issue of abridgement of the freedom of the press within the meaning of that term as used in the Constitution of the United States.'

FN5. Petitioner's Motion to Quash argued: 'If Mr. Branzburg were required to disclose these confidences to the Grand Jury, or any other person, he would thereby destroy the relationship of trust which he presently enjoys with those in the drug culture. They would refuse to speak to him; they would become even more reluctant than they are now to speak to any newsman; and the news media would thereby vitally hampered in their ability to cover the views and activities of those involved in the drug culture. 'The inevitable effect of the subpoena issued to Mr. Branzburg, if it not be quashed by this Court, will be to suppress vital First Amendment freedoms of Mr. Branzburg, of the Courier-Journal, of the news media, and of those involved in the drug culture by driving a wedge of distrust and silence between the news media and the drug culture. This Court should not sanction a use of its process entailing so drastic an incursion upon First Amendment freedoms in the absence of compelling Commonwealth interest in requiring Mr. Branzburg's apearance before the Grand Jury. It is insufficient merely to protect Mr.

Branzburg's right to silence after he appears before the Grand Jury. This Court should totally excuse Mr. Branzburg from responding to the subpoena and even entering the Grand Jury room. Once Mr. Branzburg is required to go behind the closed doors of the Grand Jury room, his effectiveness as a reporter in these areas is totally destroyed. The secrecy that surrounds Grand Jury testimony necessarily introduces uncertainties in the minds of those who fear a betrayal of their confidences.' App. 43--44.

[2] Petitioner sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals, and we granted the writ. [FN6] 402 U.S. 942, 91 S.Ct. 1616, 29 L.Ed.2d 109 (1971).

FN6. After the Kentucky Court of Appeals' decision in Branzburg v. Meigs was announced, petitioner filed a rehearing motion in Branzburg v. Pound suggesting that the court had not passed upon his First Amendment argument and calling to the court's attention the recent Ninth Circuit decision in Caldwell v. United States, 434 F.2d 1081 (1970). On Jan. 22, 1971, the court denied petitioner's motion and filed an amended opinion in the case, adding a footnote, 461 S.W.2d 345, at 346 n. 1, to indicate that petitioner had abandoned his First Amendment argument and elected to rely wholly on Ky.Rev.Stat. s 421.100 when he filed a Supplemental Memorandum before oral argument. In his Petition for Prohibition and Mandamus, petitioner had clearly relied on the First Amendment, and he had filed his Supplemental Memorandum in response to the State's Memorandum in Opposition to the granting of the writs. As its title indicates, this Memorandum was complementary to petitioner's earlier Petition, and it dealt primarily with the State's construction of the phrase 'source of any information' in Ky.Rev.Stat. s 421.100. The passage that the Kentucky Court of Appeals cited to indicate abandonment of petitioner's First Amendment claim is as follows: 'Thus, the controversy continues as to whether a newsman's source of information should be privileged. However, that question is not before the Court in this case. The Legislature of Kentucky has settled the issue, having decided that a newsman's source of information is to be privileged. Because of this there is no point in citing Professor Wigmore and other authorities who speak against the grant of such a privilege. The question has been many times debated, and the Legislature has spoken. The only question before the Court is the construction of the term 'source of information' as it was intended by the Legislature.' Though the passage itself is somewhat unclear, the surrounding discussion indicates that petitioner was asserting here that the question of whether a common-law privilege should be recognized was irrelevant since the legislature had already enacted a statute. In his earlier discussion, petitioner had analyzed certain cases in which the First Amendment argument was made but indicated that it was not necessary to reach this question if the statutory phrase 'source of any information' were interpreted expansively. We do not interpret this discussion as indicating that petitioner was abandoning his First Amendment claim if the Kentucky Court of Appeals did not agree with his statutory interpretation argument, and we hold that the constitutional question in Branzburg v. Pound was properly preserved for review.

*672 In re Pappas, No. 70--94, originated when petitioner Pappas, a television newsman-photographer working out of the Providence, Rhode Island, office of a New Bedford, Massachusetts, television station, was called to New Bedford on July 30, 1970, to report on civil disorders there which involved fires and other turmoil. He intended to cover a Black Panther news conference at that group's headquarters in a boarded-up store. Petitioner found the streets around the store barricaded, but he ultimately gained entrance to the area and recorded and photographed a prepared statement read by one of the Black Panther leaders at about 3 p.m. **2652 [FN7] He then asked for and received permission to re-enter the area. Returning at about 9 o'clock, he was allowed to enter and remain inside Panther headquarters. As a condition of entry, Pappas agreed not to disclose anything he saw or heard inside the store except an anticipated police raid, which Pappas, 'on his own,' was free to photograph and report as he wished. Pappas stayed inside the headquarters for about three hours, but there was no police raid, and petitioner wrote no story and did not otherwise reveal what had occurred in the store while he was there. Two months later, petitioner was summoned before the Bristol *673 County Grand Jury and appeared, answered questions as to his name, address, employment, and what he had seen and heard outside Panther headquarters, but refused to answer

any questions about what had taken place inside headquarters while he was there, claiming that the First Amendment afforded him a privilege to protect confidential informants and their information. A second summons was then served upon him, again directing him to appear before the grand jury and 'to give such evidence as he knows relating to any matters which may be inquired of on behalf of the Commonwealth before . . . the Grand Jury.' His motion to quash on First Amendment and other grounds was denied by the trial judge who, noting the absence of a statutory newsman's privilege in Massachusetts, ruled that petitioner had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed. The case was reported for decision to the Supreme Judicial Court of Massachusetts. [FN8] The record there did not include a transcript of the hearing **2653 on the motion to quash, nor did it reveal the specific questions petitioner had refused to answer, the expected nature of his testimony, the nature of the grand jury investigation, or the likelihood of the grand jury's securing the information it sought from petitioner by other means. [FN9] The *674 Supreme Judicial Court, however, took 'judicial notice that in July, 1970, there were serious civil disorders in New Bedford, which involved street barricades, exclusion of the public from certain streets, fires, and similar turmoil. We were told at the arguments that there was gunfire in certain streets. We assume that the grand jury investigation was an appropriate effort to discover and indict those responsible for criminal acts.' 358 Mass. 604, 607, 266 N.E.2d 297, 299 (1971). The court then reaffirmed prior Massachusetts holdings that testimonial privileges were 'exceptional' and 'limited,' stating that '(t)he principle that the public 'has a right to every man's evidence" had usually been preferred, in the Commonwealth, to countervailing interests. Ibid. The court rejected the holding of the Ninth Circuit in Caldwell v. United States, supra, and 'adhere(d) to the view that there exists no constitutional newsman's privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury.' [FN10] 358 Mass., at 612, 266 N.E.2d, at 302--303. Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only 'indirect, theoretical, and uncertain.' Id., at 612, 266 N.E.2d, at 302. The court concluded that '(t)he obligation of newsmen . . . is that of every citizen . . . to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries.' Id., at 612, 266 N.E.2d, at 303. The court nevertheless noted that grand juries were subject to supervision by the presiding *675 judge, who had the duty 'to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation,' ibid., to insure that a witness' Fifth Amendment rights were not infringed, and to assess the propriety, necessity, and pertinence of the probable testimony to the investigation in progress. [FN11] The burden was deemed to be on the witness to establish the impropriety of the summons or the questions asked. The denial of the motion to quash was affirmed and we granted a writ of certiorari to petitioner Pappas. 402 U.S. 942, 91 S.Ct. 1619, 29 L.Ed.2d 110 (1971).

FN7. Petitioner's news films of this event were made available to the Bristol County District Attorney. App. 4.

FN8. The case was reported by the superior court directly to the Supreme Judicial Court for an interlocutory ruling under Mass.Gen.Laws, c. 278, s 30A and Mass.Gen.Laws, c. 231, s 111 (1959). The Supreme Judicial Court's decision appears at 358 Mass. 604, 266 N.E.2d 297 (1971).

FN9. 'We do not have before us the text of any specific questions which Pappas has refused to answer before the grand jury, or any petition to hold him for contempt for his refusal. We have only general statements concerning (a) the inquiries of the grand jury, and (b) the materiality of the testimony sought from Pappas. The record does not show the expected nature of his testimony or what likelihood there is of being able to obtain that testimony from persons other than news gatherers.' 358 Mass., at 606--607, 266 N.E.2d, at 299 (footnote omitted).

FN10. The court expressly declined to consider, however, appearances of newsmen before legislative or administrative bodies. Id., at 612 n. 10, 266 N.E.2d, at 303 n. 10.

FN11. The court noted that 'a presiding judge may consider in his discretion' the argument that the use of newsmen as witnesses is likely to result in unnecessary or burdensome use of their work

> product, id., at 614 n. 13, 266 N.E.2d, at 304 n. 13, and cautioned that: 'We do not suggest that a general investigation of mere political or group association of persons, without substantial relation to criminal events, may not be viewed by a judge in a somewhat different manner from an investigation of particular criminal events concerning which a newsman may have knowledge.' Id., at 614 n. 14, 266 N.E.2d, at 304 n. 14.

United States v. Caldwell, No. 70--57, arose from subpoenas issued by a federal grand jury in the Northern District of California to respondent Earl Caldwell, a reporter for the New York Times assigned to cover the Black Panther Party and other black militant groups. A subpoena duces tecum was served on respondent on February 2, 1970, ordering him to appear before the grand jury to testify and to bring with him notes and tape recordings of interviews given him for publication by officers and spokesmen of the Black Panther Party concerning the aims, purposes, and activities **2654 of that organization. [FN12] Respondent objected to the scope *676 of this subpoena, and an agreement between his counsel and the Government attorneys resulted in a continuance. A second subpoena, served on March 16, omitted the documentary requirement and simply ordered Caldwell 'to appear . . . to testify before the Grand Jury.' Respondent and his employer, the New York Times, [FN13] moved to quash on the ground that the unlimited breadth of the subpoenas and the fact that Caldwell would have to appear in secret before the grand jury would destroy his working relationship with the Black Panther Party and 'suppress vital First Amendment freedoms . . . by driving a wedge of distrust and silence between the news media and the militants.' App. 7. Respondent argued that 'so drastic an incursion upon First Amendment freedoms' should not be permitted 'in the absence of a compelling governmental interest--not shown here--in requiring Mr. Caldwell's appearance before the grand jury.' Ibid. The motion was supported by amicus curiae memoranda from other publishing concerns and by affidavits from newsmen asserting the unfavorable impact on news sources of requiring reporters to appear before grand juries. The Government filed three memoranda in opposition to the motion to quash, each supported by affidavits. These documents stated that the grand jury was investigating, among other things, possible violations of a number of criminal statutes, including 18 U.S.C. s 871 (threats against the President), 18 U.S.C. *677 s 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. s 231 (civil disorders), 18 U.S.C. s 2101 (interstate travel to incite a riot), and 18 U.S.C. s 1341 (mail frauds and swindles). It was recited that on November 15, 1969, an officer of the Black Panther Party made a publicly televised speech in which he had declared that '(w)e will kill Richard Nixon' and that this threat had been repeated in three subsequent issues of the Party newspaper. App. 66, 77. Also referred to were various writings by Caldwell about the Black Panther Party, including an article published in the New York Times on December 14, 1969, stating that '(i)n their role as the vanguard in a revolutionary struggle the Panthers have picked up guns,' and quoting the Chief of Staff of the Party as declaring that: 'We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle (sic).' App. 62. The Government also stated that the Chief of Staff of the Party had been indicted by the grand jury on December 3, 1969, for uttering threats against the life of the President in violation of 18 U.S.C. s 871 and that various efforts had been made to secure evidence of crimes under investigation through the immunization of persons allegedly associated with the Black Panther Party.

> FN12. The subpoena ordered production of '(n)otes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization, its officers, staff, personnel, and members, including specifically but not limited to interviews given by David Hilliard and Raymond 'Masai' Hewitt.' App. 20.

> FN13. The New York Times was granted standing to intervene as a party on the motion to quash the subpoenas. Application of Caldwell, 311 F.Supp. 358, 359 (ND Cal. 1970). It did not file an appeal from the District Court's contempt citation, and it did not seek certiorari here. It has filed an amicus curiae brief, however.

**2655 On April 6, the District Court denied the motion to quash, Application of Caldwell, 311 F.Supp. 358 (NDCal.1970), on the ground that 'every person within the jurisdiction of the government' is bound to testify upon being properly summoned. Id., at 360 (emphasis in original). Nevertheless, the court accepted respondent's First Amendment arguments to the extent of issuing a protective order providing that although respondent had to divulge *678 whatever information had been given to him for publication, he 'shall not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist in the course of his efforts to gather news for dissemination to the public through the press or other news media.' The court held that the First Amendment afforded respondent a privilege to refuse disclosure of such confidential information until there had been 'a showing by the Government of a compelling and overriding national interest in requiring Mr. Caldwell's testimony which cannot be served by any alternative means.' Id., at 362.

Subsequently, [FN14] the term of the grand jury expired, a new grand jury was convened, and a new subpoena ad testificandum was issued and served on May 22, 1970. A new motion to quash by respondent and memorandum in opposition by the Government were filed, and, by stipulation of the parties, the motion was submitted on the prior record. The court denied the motion to quash, repeating the protective provisions in its prior order but this time directing Caldwell to appear before the grand jury pursuant to the May 22 subpoena. Respondent refused to appear before the grand jury, and the court issued an order to show cause why he should not be held in contempt. Upon his further refusal to go before the grand jury, respondent was ordered committed for contempt until such time as he complied with the court's order or until the expiration of the term of the grand jury.

FN14. Respondent appealed from the District Court's April 6 denial of his motion to quash on April 17, 1970, and the Government moved to dismiss that appeal on the ground that the order was interlocutory. On May 12, 1970, the Ninth Circuit dismissed the appeal without opinion.

*679 Respondent Caldwell appealed the contempt order, [FN15] and the Court of Appeals reversed. Caldwell v. United States, 434 F.2d 1081 (CA9 1970). Viewing the issue before it as whether Caldwell was required to appear before the grand jury at all, rather than the scope of permissible interrogation, the court first determined that the First Amendment provided a qualified testimonial privilege to newsmen; in its view, requiring a reporter like Caldwell to testify would deter his informants from communicating with him in the future and would cause him to censor his writings in an effort to avoid being subpoenaed. Absent compelling reasons for requiring his testimony, he was held privileged to withhold it. The court also held, for similar First Amendment reasons, that, absent some special showing of necessity by the Government, attendance by Caldwell at a secret meeting of the grand jury was something he was privileged to refuse because of the potential impact of such an appearance on the flow of news to the public. We granted the United States' petition for certiorari. [FN16] 402 U.S. 942, 91 S.Ct. 1616, 29 L.Ed.2d 109 (1971).

FN15. The Government did not file a cross-appeal and did not challenge the validity of the District Court protective order in the Court of Appeals.

FN16. The petition presented a single question: 'Whether a newspaper reporter who has published articles about an organization can, under the First Amendment, properly refuse to appear before a grand jury investigating possible crimes by members of that organization who have been quoted in the published articles.'

II

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: that to gather news it is often necessary **2656 to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless *680 forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter

should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to overide the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government, [FN17] decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is 'compelling' or 'paramount,' [FN18] and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact ***681** on protected rights of speech, press, or association. [FN19] The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information. [FN20]

FN17. Curtis Publishing Co. v. Butts, 388 U.S. 130, 145, 87 S.Ct. 1975, 1986, 18 L.Ed.2d 1094 (1967) (opinion of Harlan, J.); New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); Talley v. California, 362 U.S. 60, 64--65, 80 S.Ct. 536, 538--539, 4 L.Ed.2d 559 (1960); Bridges v. California, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941); Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936); Near v. Minnesota, 283 U.S. 697, 722, 51 S.Ct. 625, 633, 75 L.Ed. 1357 (1931).

FN18. NAACP v. Button, 371 U.S. 415, 439, 83 S.Ct. 328, 341, 9 L.Ed.2d 405 (1963); Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945); DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 829, 86 S.Ct. 1148, 1151, 16 L.Ed.2d 292 (1966); Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960); Schneider v. State, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939); NAACP v. Alabama, 357 U.S. 449, 464, 78 S.Ct. 1163, 1173, 2 L.Ed.2d 1488 (1958).

FN19. Freedman v. Maryland, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965); NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1313, 12 L.Ed.2d 325 (1964); Martin v. City of Struthers, 319 U.S. 141, 147, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943); Elfbrandt v. Russell, 384 U.S. 11, 18, 86 S.Ct. 1238, 1241, 16 L.Ed.2d 321 (1966).

FN20. There has been a great deal of writing in recent years on the existence of a newsman's constitutional right of nondisclosure of confidential information. See, e.g., Beaver, The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence, 47 Ore.L.Rev. 243 (1968); Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 Nw.U.L.Rev. 18 (1969); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970); Comment, The Newsman's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif.L.Rev. 1198 (1970); Note, The Right of the Press to Gather Information, 71 Col.L.Rev. 838 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand.L.Rev. 667 (1971).

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not quality for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions ****2657** upon speech or assemby, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from ***682** any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

[3][4] The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune

from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. [FN21] The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

> FN21. 'In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. '. . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice.' 8 J. Wigmore, Evidence s 2286 (McNaughton rev. 1961). This was not always the rule at common law, however. In 17th century England, the obligations of honor among gentlemen were occasionally recognized as privileging from compulsory disclosure information obtained in exchange for a promise of confidence. See Bulstrod v. Letchmere, 2 Freem. 6, 22 Eng.Rep. 1019 (1676); Lord Grey's Trial, 9 How.St.Tr. 127 (1682).

[5] It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite ***683** the possible burden that may be imposed. The Court has emphasized that '(t)he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' Associated Press v. NLRB, 301 U.S. 103, 132--133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192--193, 66 S.Ct. 494, 497--498, 90 L.Ed. 614 (1946), where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946). Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), similarly overruled assertions that the First Amendment precluded application of the Sherman Act to a news-gathering and disseminating organization. Cf. Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 276, 55 S.Ct. 182, 184, 79 L.Ed. 356 (1934); Citizen Publishing Co. v. United States, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969); Lorain Journal Co. v. United States, 342 U.S. 143, 155--156, 72 S.Ct. 181, 187--188, 96 L.Ed. 162 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. Grosjean v. American Press Co., 297 U.S. ****2658** 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936); Murdock v. Pennsylvania, 319 U.S. 105, 112, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943).

The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See New York Times Co. v. Sullivan, 376 U.S. 254, ***684** 279--280, 84 S.Ct. 710, 725--726, 11 L.Ed.2d 686 (1964); Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 147, 87 S.Ct. 1975, 1987, 18 L.Ed.2d 1094 (1967) (opinion of Harlan, J.,); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed.2d 35 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377--378, 67 S.Ct. 1249, 1255--1256, 91 L.Ed. 1546 (1947).

[6] It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Zemel v. Rusk, 381 U.S. 1, 16--17, 85 S.Ct. 1271, 1280--1281, 14 L.Ed.2d 179 (1965); New York Times Co. v. United States, 403 U.S. 713, 728--730, 91

S.Ct. 2140, 2148--2149, 29 L.Ed.2d 822 (1971), (Stewart, J., concurring); Tribune Review Publishing Co. v. Thomas, 254 F.2d 883, 885 (CA3 1958); In the Matter of United Press Assns. v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). In Zemel v. Rusk, supra, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction 'render(ed) less than wholly free the flow of information concerning that country.' 381 U.S., at 16, 85 S.Ct., at 1281. The ban on travel was held constitutional, for '(t)he right to speak and publish does not carry with it the unrestrained right to gather information.' Id., at 17, 85 S.Ct., at 1281. [FN22]

FN22. 'There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.' 381 U.S., at 16--17, 85 S.Ct., at 1281.

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or ***685** disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt 'stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested,' neglected to insulate witnesses from the press, and made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.' Id., at 358, 359, 86 S.Ct., at 1520. '(T)he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters.' Id., at 361, 86 S.Ct., at 1521. See also Estes v. Texas, 381 U.S. 532, 539--540, 85 S.Ct. 1628, 1631--1632, 14 L.Ed.2d 543 (1965); Rideau v. Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963).

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a ****2659** criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. See, e.g., Ex parte Lawrence, 116 Cal. 298, 48 P. 124 (1897); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); Clein v. State, 52 So.2d 117 (Fla.1950); In re Grunow, 84 N.J.L. 235, 85 A. 1011 (1913); People ex rel. Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); Adams v. Associated Press, 46 F.R.D. 439 (SD Tex. 1969); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D.C.Mass.1957). See generally Annot., 7 A.L.R.3d 591 (1966). In 1958, a news gatherer asserted for the first time that the First Amendment ***686** exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit, Garland v. Torre, 259 F.2d 545 (CA2), cert. denied, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958), but the claim was denied, and this argument has been almost uniformly rejected since then although there are occasional dicta that, in circumstances not presented here, a newsman might be excused. In re Goodfader, 45 Haw. 317, 367 P.2d 472 (1961); In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963); State v. Buchanan, 250 Or. 244, 436 P.2d 729, cert. denied, 392 U.S. 905, 88 S.Ct. 2055, 20 L.Ed.2d 1363 (1968); Murphy v. Colorado (No. 19604 Sup.Ct.Colo.), cert. denied, 365 U.S. 843, 81 S.Ct. 802, 5 L.Ed.2d 810 (1961) (unreported, discussed in In re Goodfader, supra, 45 Haw., at 366, 367 P.2d, at 498 (Mizuha, J., dissenting)). These courts have applied the presumption against the existence of an asserted testimonial privilege, United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950), and have concluded that the First Amendment interest asserted by the newsman was outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses.

The opinions of the state courts in Branzburg and Pappas are typical of the prevailing view, although a few recent cases, such as Caldwell, have recognized and given effect to some form of constitutional newsman's privilege. See State v. Knops, 49 Wis.2d 647, 183 N.W.2d 93 (1971) (dictum); Alioto v. Cowles Communications, Inc., C.A. No. 52150 (ND Cal.1969); In re Grand Jury Witnesses, 322 F.Supp. 573 (ND Cal.1970); People v. Dohrn, Crim.No. 69--3808 (Cook County, Ill., Cir.Ct.1970).

[7][8][9] The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded ***687** criminal prosecutions. [FN23] Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and 'its constitutional prerogatives are rooted in long centuries of Anglo-American history.' Hannah v. Larche, 363 U.S. 420, 489--490, 80 S.Ct. 1502, 1544, 4 L.Ed.2d 1307 (1960). (Frankfurter, J., concurring in result). The Fifth Amendment provides that '(n)o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.' [FN24] The adoption ****2660** of the grand jury 'in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.' Costello v. United States, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming ***688** majority of the States. [FN25] Because its task is to inquire into the Existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.' Blair v. United States, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, id., at 279--281, 39 S.Ct., at 470--471, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950); Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375 (1932); 8 J. Wigmore, Evidence s 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings. [FN26]

FN23. 'Historically, (the grand jury) has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.' Wood v. Georgia, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962) (footnote omitted).

FN24. It has been held that 'infamous' punishments include confinement at hard labor, United States v. Moreland, 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700 (1922): incarceration in a penitentiary, Mackin v. United States, 117 U.S. 348, 6 S.Ct. 777, 29 L.Ed. 909 (1886); and imprisonment for more than a year, Barkman v. Sanford, 162 F.2d 592 (CA5), cert. denied, 332 U.S. 816, 68 S.Ct. 155, 92 L.Ed. 393 (1947). Fed.Rule Crim.Proc. 7(a) has codified these holdings: 'An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information.'

FN25. Although indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment, Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), a recent study reveals that 32 States require that certain kinds of criminal prosecutions he initiated by indictment. Spain, the Grand Jury, Past and Present: A Survey, 2

Am.Crim.L.Q. 119, 126--142 (1964). In the 18 States in which the prosecutor may proceed by information, the grand jury is retained as an alternative means of invoking the criminal process and as an investigative tool. Ibid.

FN26. Jeremy Bentham vividly illustrated this maxim: 'Are men of the first rank and consideration--are men high in office--men whose time is not less valuable to the public than to themselves--are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.' 4 The Works of Jeremy Bentham 320--321 (J. Bowring ed. 1843). In United States v. Burr, 25 Fed.Cas. pp. 30, 34 (No. 14,692d) (C.C.Va.1807), Chief Justice Marshall, sitting on Circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States.

***689** A number of States have provided newsmen a statutory pvivilege of varying breadth, [FN27] but the majority have not ****2661** done so, and none has been provided by federal statute. [FN28] Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution ***690** is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. [FN29] Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant ***691** questions put to them in the course of a valid grand jury investigation or criminal trial.

FN27. Thus far, 17 States have provided some type of statutory protection to a newsman's confidential sources: Ala.Code, Tit. 7, s 370 (1960); Alaska Stat. s 09.25.150 (Supp.1971); Ariz.Rev.Stat.Ann. s 12--2337 (Supp.1971--1972); Ark.Stat.Ann. s 43--917 (1964); Cal.Evid.Code s 1070 (Supp.1972); Ind.Ann.Stat. s 2--1733 (1968), IC 1971, 34--3--5--1; Ky.Rev.Stat. s 421.100 (1962); La.Rev.Stat.Ann. ss 45:1451--45:1454 (Supp.1972); Md.Ann.Code, art. 35, s 2 (1971); Mich.Comp.Laws s 767.5a (Supp.1956), Mich.Stat.Ann. s 28.945(1) (1954); Mont.Rev.Codes Ann. s 93--601--2 (1964); Nev.Rev.Stat. s 49.275 (1971); N.J.Rev.Stat. ss 2A:84A--21, 2A:84A--29 (Supp.1972--1973); N.M.Stat.Ann. s 20--1--12.1 (1970); N.Y.Civil Rights Laws, McKinney's Consol.Laws, c. 6, s 79--h (Supp.1971--1972); Ohio Rev.Code Ann. s 2739.12 (1954); Pa.Stat.Ann., Tit. 28, s 330 (Supp.1972--1973).

FN28. Such legislation has been introduced, however. See, e.g., S. 1311, 92d Cong., 1st Sess. (1971); S. 3552, 91st Cong., 2d Sess. (1970); H.R. 16328, H.R. 16704, 91st Cong., 2d Sess. (1970); S. 1851, 88th Cong., 1st Sess. (1963); H.R. 8519, H.R. 7787, 88th Cong., 1st Sess. (1963); S. 965, 86th Cong., 1st Sess. (1959); H.R. 355, 86th Cong., 1st Sess. (1959). For a general analysis of proposed congressional legislation, see Staff of Sentate Committee on the Judiciary, 89th Cong., 2d Sess., The Newsman's Privilege (Comm. Print 1966).

FN29. The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth. Wigmore condemns such privileges as 'so many derogations from a positive general rule (that everyone is obligated to testify when properly summoned)' and as 'obstacle(s) to the administration of justice.' 8 J. Wigmore, Evidence s 2192 (McNaughton rev. 1961). His criticism that 'all privileges of exemption from this duty are exceptional, and are therefore to be discountenanced,' id., at s 2192, p. 73 (emphasis in original) has been frequently echoed. Morgan, Foreward, Model Code of Evidence 22--30 (1942); 2 Z. Chafee, Government and Mass

Communications 496--497 (1947); Report of ABA Committee on Improvements in the Law of Evidence, 63 A.B.A. Reports 595 (1938); C. McCormick, Evidence 159 (2d ed. 1972); Chafee, Privileged Communications: Is justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?, 52 Yale L.J. 607 (1943); Ladd, Privileges, 1969 Law & the Social Order 555, 556; 58 Am.Jur., Witnesses s 546 (1948); 97 C.J.S. Wtinesses s 259 (1957); McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (CA2 1937) (L. Hand, J.). Neither the ALI's Model Code of Evidence (1942), the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws (1953), nor the Proposed Rules of Evidence for the United States Courts and Magistrates (rev. ed. 1971) has included a newsman's privilege.

[10] This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing **2662 information relevant to the grand jury's task.

The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection. It would be frivolous to assert--and no one does in these cases--that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immume, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring *692 that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. To assert the contrary proposition

> 'Is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . It suffices to say that however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing.' Toledo Newspaper Co. v. United States, 247 U.S. 402, 419--420, 38 S.Ct. 560, 564, 62 L.Ed. 1186 (1918). [FN30]

FN30. The holding in this case involved a construction of the Contempt of Court Act of 1831, 4 Stat. 487, which permitted summary trial of contempts 'so near (to the court) as to obstruct the administration of justice.' The Court held that the Act required only that the conduct have a 'direct tendency to prevent and obstruct the discharge of judicial duty.' 247 U.S., at 419, 38 S.Ct., at 564. This view was overruled and the Act given a much narrower reading in Nye v. United States, 313 U.S. 33, 47--52, 61 S.Ct. 810, 815--817, 85 L.Ed. 1172 (1941). See Bloom v. Illinois, 391 U.S. 194, 205--206, 88 S.Ct. 1477, 1484--1485, 20 L.Ed.2d 522 (1968).

[11] Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are

not.

*693 There remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others. Newsmen frequently receive information from such sources pursuant to a tacit or express agreement to withhold the source's name and suppress any information that the source wishes not published. Such informants presumably desire anonymity in order to avoid being entangled as a witness in a criminal trial or grand jury investigation. They may fear that disclosure will threaten their job security or personal safety or that it will simply result in dishonor or embarassment.

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. The available data **2663 indicate that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure and may be silenced if it is held by this Court that, ordinarily, newsmen must testify pursuant to subpoenas, [FN31] but the evidence fails to demonstrate that there would be a significant construction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and *694 to a great extent speculative. [FN32] It would be difficult to canvass the views of the informants themselves; surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees. [FN33] Reliance by the press on confidential informants does not mean that all such sources will in fact dry up because of the later possible appearance of the newsman before a grand jury. The reporter may never be called and if he objects to testifying, the prosecution may not insist. Also, the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that *695 relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public. Moreover, grand juries characteristically conduct secret proceedings, and law enforcement officers are themselves experienced in dealing with informers, and have their own methods for protecting them without interference with the effective administration of justice. There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his.

FN31. Respondent Caldwell attached a number of affidavits from prominent newsmen to his initial motion to quash, which detail the experiences of such journalists after they have been subpoenaed. Appendix to No. 70--57, pp. 22--61.

FN32. Cf. e.g., the results of a study conducted by Guest & Stanzler, which appears as an appendix to their article, supra, n. 20. A number of editors of daily newspapers of varying circulation were asked the question, 'Excluding one-or two-sentence gossip items, on the average how many stories based on information received in confidence are published in your paper each year? Very rough estimate.' Answers varied significantly, e.g., 'Virtually innumerable,' Tucson Daily Citizen (41,969 daily circ.), 'Too many to remember,' Los Angeles Herald-Examiner (718,221 daily circ.), 'Occasionally,' Denver Post (252,084 daily circ.), 'Rarely,' Cleveland Plain Dealer (370,499 daily circ.), 'Very rare, some politics,' Oregon Journal (146 403 daily circ.). This study did not purport to measure the extent of deterrence of informants caused by subpoenas to the press.

FN33. In his Press Subpoenas: An Empirical and legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 6--12, Prof. Vince Blasi discusses these methodological

problems. Prof. Blasi's survey found that slightly more than half ot the 975 reporters questioned said that they relied on regular confidential sources for at least 10% of their stories. Id., at 21. Of this group of reporters, only 8% were able to say with some certainty that their professional functioning had been adversely affected by the threat of subpoena; another 11% were not certain whether or not they had been adversely affected. Id., at 53.

[12] Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if **2664 they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More important, *696 it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities. [FN34] Misprision of a felony--that is, the concealment of a felony 'which a man knows, but never assented to . . . (so as to become) either principal or accessory,' 4 W. Blackstone, Commentaries, *121, was often said to be a common-law crime. [FN35] The first Congress passed a statute, 1 Stat. 113, s 6, as amended, 35 Stat. 1114, s 146, 62 Stat. 684, which is still in effect, defining a federal crime of misprision:

FN34. See Statute of Westminster First, 3 Edw. 1, c. 9, p. 43 (1275); Statute of Westminster Second, 13 Edw. 1, c. 6, pp. 114--115 (1285); Sheriffs Act of 1887, 50 & 51 Vict., c. 55, s 8(1); 4 W. Blackstone, Commentaries *293--295; 2 W. Holdsworth, History of English Law 80--81, 101--102 (3d ed. 1927); 4 id., at 521--522.

FN35. See, e.g., Scrope's Case, referred to in 3 Coke's Institute 36; Rex v. Cowper, 5 Mod. 206, 87 Eng.Rep. 611 (1969); Proceedings under a Special Commission for the County of York, 31 How.St.Tr. 965, 969 (1813); Sykes v. Director of Public Prosecutions, (1961) 3 W.L.R. 371. But see Glazebrook, Misprision of Felony--Shadow or Phantom?, 8 Am.J.Legal Hist. 189 (1964). See also Act 5 & 6 Edw. 6, c. 11 (1552).

'Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be (guilty of misprision).' 18 U.S.C. s 4. [FN36]

FN36. This statute has been contrued, however, to require both knowledge of a crime and some affirmative act of concealment or participation. Bratton v. United States, 73 F.2d 795 (CA10 1934); United States v. Farrar, 38 F.2d 515, 516 (Mass.), aff'd on other grounds, 281 U.S. 624, 50 S.Ct. 425, 74 L.Ed. 1078 (1930); United States v. Norman, 391 F.2d 212 (CA6), cert. denied, 390 U.S. 1014, 88 S.Ct. 1265, 20 L.Ed.2d 163 (1968); Lancey v. United States, 356 F.2d 407 (CA9), cert. denied, 385 U.S. 922, 87 S.Ct. 234, 17 L.Ed.2d 145 (1966). Cf. Marbury v. Brooks, 7 Wheat. 556, 575, 5 L.Ed. 522 (1822) (Marshall, C.J).

*697 It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him.

Of course, the press has the right to abide by its agreement not to publish all the information it has, but the right to withhold news is not equivalent to a First Amendment exemption from the ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function. Private restraints on the flow of information are not so favored by the First

Amendment that they override all other public interests. As Mr. Justice Black declared in another context, '(f)reedom of the press from governmental **2665 interference under the First Amendment does not sanction repression of that freedom by private interests.' Associated Press v. United States, 326 U.S., at 20, 65 S.Ct., at 1425.

Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed *698 law enforcement officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers. But

> '(t)he purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.' Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957).

Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. Roviaro v. United States, supra, at 60--61, 62, 77 S.Ct. at 627--628, 629; McCray v. Illinois, 386 U.S. 300, 310, 87 S.Ct. 1056, 1062, 18 L.Ed.2d 62 (1967); Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968); Alford v. United States, 282 U.S. 687, 693, 51 S.Ct. 218, 220, 75 L.Ed. 624 (1931). Clearly, this system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands. We think that it should remain there and that public authorities should retain the options of either insisting on the informer's testimony relevant to the prosecution of crime or of seeking the benefit of further information that his exposure might prevent.

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection *699 for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press. [FN37]

> FN37. Though the constitutional argument for a newsman's privilege has been put forward very recently, newsmen have contended for a number of years that such a privilege was desirable. See, e.g., Siebert & Ryniker, Press Winning Fight to Guard Sources, Editor & Publisher, Sept. 1, 1934, pp. 9, 36--37; G. Bird & F. Merwin, The Press and Society 592 (1971). The first newsman's privilege statute was enacted by Maryland in 1896, and currently is codified as Md.Ann.Code Art. 35, s 2 (1971).

It is said that currently press subpoenas have multiplied, [FN38] that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching **2666 interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere. The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information relevant to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach.

> FN38. A list of recent subpoenas to the news media is contained in the appendix to the brief of amicus New York Times in No. 70--57.

[13] The argument for such a constitutional privilege rests heavily on those cases holding that

the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose, see cases cited at n. 19, supra. We do not deal, however, with a governmental institution that has abused ***700** its proper function, as a legislative committee does when it 'expose(s) for the sake of exposure.' Watkins v. United States, 354 U.S. 178, 200, 77 S.Ct. 1173, 1185, 1 L.Ed.2d 1273 (1957). Nothing in the record indicates that these grand juries were 'prob(ing) at will and without relation to existing need.' DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 829, 86 S.Ct. 1148, 1151, 16 L.Ed.2d 292 (1966). Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed, cf. NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), and the characteristic secrecy of grand jury proceedings is a further protection against the undue invasion of such rights. See Fed.Rule CrimProc. 6(e). The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged. Costello v. United States, 350 U.S. 359, at 364, 76 S.Ct. 406, at 409, 100 L.Ed. 397 (1956).

[14] The requirements of those cases, see n. 18, supra, which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' Bates v. Little Rock, supra, 361 U.S. at 525, 80 S.Ct. at 417. If the test is that the government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,' Gibson v. Florida Legislative Investigation Committee, ***701** 372 U.S. 539, 546, 83 S.Ct. 889, 894, 9 L.Ed.2d 929 (1963), it is quite apparent (1) that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property; and (2) that, based on the stories Branzburg and Caldwell wrote and Pappas' admitted conduct, the grand jury called these reporters as they would others--because it was likely that they could supply information to help the government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.

[15] Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of offective law enforcement necessarily includes an investigatory function with respect to determining ****2667** whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. 'When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.' Wood v. Georgia, 370 U.S. 375, 392, 82 S.Ct. 1364, 1374, 8 L.Ed.2d 569 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' United States v. Stone, 249 F.2d 138, 140 (C.A.2 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. Costello v. United States, 350 U.S., at 362, 76 S.Ct., at 408. It is ***702** only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made.

> 'It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted.' Hale v. Henkel, 201 U.S. 43, 65, 26 S.Ct. 370, 375, 50 L.Ed. 652 (1906).

See also Hendricks v. United States, 223 U.S. 178,

32 S.Ct. 313, 56 L.Ed. 394 (1912); Blair v. United States, 250 U.S., at 282--283, 39 S.Ct., at 471, 63 L.Ed. 979. We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. [FN39] For ****2668** them, it would appear that only an absolute privilege would suffice.

> FN39. 'Under the case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest. A 'general' deterrent effect is likely to result. This type of effect stems from the vagueness of the tests and from the uncertainty attending their application. For example, if a reporter's information goes to the 'heart of the matter' in Situation X, another reporter and informant who subsequently are in Situation Y will not know if 'heart of the matter rule X' will be extended to them, and deterrence will thereby result. Leaving substantial discretion with judges to delineate those 'situations' in which rules of 'relevance' or 'importance' apply would therefore seem to undermine significantly the effectiveness of a reporter-informer privilege.' Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 341 (1970). In re Grand Jury Witnesses, 322 F.Supp. 573 (ND Cal.1970), illustrates the impact of this ad hoc approach. Here, the grand jury was, as in Caldwell, investigating the Black Panther Party, and was 'inquiring into matters which involve possible violations of Congressional acts passed to protect the person of the President (18 U.S.C. s 1751), to free him from threats (18 U.S.C. s 871), to protect our armed forces from unlawful interference (18 U.S.C. s 2387), conspiracy to commit the foregoing offenses (18 U.S.C. s 371), and related statutes prohibiting acts directed against the security of the government.' Id., at 577. The two witnesses, reporters for a Black Panther Party newspaper, were subpoenaed and given Fifth Amendment immunity against criminal prosecution, and they claimed a First Amendment journalist's privilege. The District Court entered a protective order, allowing them to refuse to divulge confidential information until the the Government demonstrated 'a compelling and overriding national interest in requiring the testimony of (the witnesses) which cannot be served by any alternative means.' Id., at 574. The Government claimed that it had information that the witnesses had associated with persons who had conspired to perform some of the criminal acts that the grand jury was investigating. The court held the Government had met its burden and ordered the witnesses to testify: 'The whole point of the investigation is to identify persons known to the (witnesses) who may have engaged in activities violative of the above indicated statutes, and also to ascertain the details of their alleged unlawful activities. All questions directed to such objectives of the investigation are unquestionably relevant, and any other evaluation thereof by the Court without knowledge of the facts before the Grand Jury would clearly constitute 'undue interference of the Court." Id., at 577. Another illustration is provided by State v. Knops, 49 Wis.2d 647, 183 N.W.2d 93 (1971), in which a grand jury was investigating the August 24, 1970, bombing of Sterling Hall on the University of Wisconsin Madison campus. On August 26, 1970, an 'underground' newspaper, the Madison Kaleidoscope, printed a front-page story entitled 'The Bombers Tell Why and What Next--Exclusive to Kaleidoscope.' An editor of the Kaleidoscope was subpoenaed, appeared, asserted his Fifth Amendment right against self-incrimination, was given immunity, and then pleaded that he had a First Amendment privilege against disclosing his confidential informants. The Wisconsin Supreme Court rejected his claim and upheld his contempt sentence: '(Appellant) faces five very narrow and specific questions, all of which are founded on

information which he himself has already volunteered. The purpose of these questions is very clear. The need for answers to them is 'overriding,' to say the least. The need for these answers is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks.' 49 Wis.2d, at 658, 183 N.W.2d, at 98--99.

***703** [16] We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege ***704** would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. In re Grand Jury Witnesses, 322 F.Supp. 573, 574 (ND Cal.1970). Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' Lovell v. City of Griffin, 303 U.S. 444, 450, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938). See also Mills ***705** v. Alabama, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966); Murdock v. Pennsylvania, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury. [FN40]

FN40. Such a privilege might be claimed by groups that set up newspapers in order to engage in criminal activity and to therefore be insulated from grand jury inquiry, regardless of Fifth Amendment grants of immunity. It might appear that such 'sham' newspapers would be easily distinguishable, yet the First Amendment ordinarily prohibits courts from inquiring into the content of expression, except in cases of obscenity or libel, and protects speech and publications regardless of their motivation, orthodoxy, truthfulness, timeliness, or taste. New York Times Co. v. Sullivan, 376 U.S. 254, at 269--270, 84 S.Ct. 710, at 720--721, 11 L.Ed.2d 686; Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 689, 79 S.Ct. 1362, 1365, 3 L.Ed.2d 1512 (1959); Winters v. New York 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948); Thomas v. Collins, 323 U.S. 516, at 537, 65 S.Ct. 315, at 326, 89 L.Ed. 430. By affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content.

****2669** In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in ***706** distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving

state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true--that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries--prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in connection *707 with subpoenaing members of the press to testify before grand juries or at criminal trials. [FN41] These rules are a major step in the direction the reporters **2670 herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

FN41. The Guidelines for Subpoenas to the News Media were first announced in a speech by the Attorney General on August 10, 1970, and then were expressed in Department of Justice Memo. No. 692 (Sept. 2, 1970), which was sent to all United States Attorneys by the Assistant Attorney General in charge of the Criminal Division. The Guidelines state that: 'The Department of Justice recognizes that compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment rights. In determining whether to request issuance of a subpoena to the press, the approach in every case must be to weigh that limiting effect against the public interest to be served in the fair administration of justice' and that: 'The Department of Justice does not consider the press 'an investigative arm of the government.' Therefore, all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.' The Guidelines provide for negotiations with the press and require the express authorization of the Attorney General for such subpoenas. The principles to be applied in authorizing such subpoenas are stated to be whether there is 'sufficient reason to believe that the information sought (from the journalist) is essential to a successful investigation,' and whether the Government has unsuccessfully attempted to obtain the information from alternative non-press sources. The Guidelines provide, however, that in 'emergencies and other unusual situations,' subpoenas may be issued which do not exactly conform to the Guidelines.

[17] Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. [FN42] Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship *708 with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

FN42. Cf. Younger v. Harris, 401 U.S. 37, 49, 53--54, 91 S.Ct. 746, 753, 754--755, 27 L.Ed.2d 669 (1971).

III

[18][19] We turn, therefore, to the disposition of the cases before us. From what we have said, it necessarily follows that the decision in United States v. Caldwell, No. 70--57, must be reversed. If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation, then it is a fortiori true that there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some 'compelling need' for a newsman's testimony. Other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance.

[20] The decisions in No. 70--85, Branzburg v. Hayes and Branzburg v. Meigs, must be affirmed. Here, petitioner refused to answer questions that

directly related to criminal conduct that he had observed and written about. The Kentucky Court of Appeals noted that marihuana is defined as a narcotic drug by statute, Ky.Rev.Stat. s 218.010(14) (1962), and that unlicensed possession or compounding of it is a felony punishable by both fine and imprisonment. Ky.Rev.Stat. s 218.210 (1962). It held that petitioner 'saw the commission of the statutory felonies of unlawful possession of marijuana and the unlawful conversion of it into hashish,' in Branzburg v. Pound, 461 S.W.2d, at 346. Petitioner may be presumed to have observed similar violations of the state narcotics laws during the research he did for the story that forms the basis of the subpoena in Branzburg v. Meigs. In both cases, if what petitioner wrote was true, *709 he had direct information to provide the grand jury concerning the ommission of serious crimes.

[21] The only question presented at the present time in In re Pappas, No. 70--94, is whether petitioner Pappas must appear before the grand jury to testify pursuant to subpoena. The Massachusetts Supreme Judicial Court characterized the record in this case as 'meager,' and it is not clear what petitioner will be asked by the grand jury. It is not even clear that he will be asked to divulge information received in confidence. We affirm the decision of the Massachusetts Supreme Judicial Court and hold that petitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to 'the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony.' 358 Mass., at 614, 266 N.E.2d, at 303--304.

So ordered.

Judgment at 434 F.2d 1081 reversed; judgments at 461 S.W.2d 345 and 266 N.E.2d 297 affirmed.

**2671 Mr. Justice POWELL, concurring.

I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. Certainly, we do not hold, as suggested in Mr. Justice STEWART's dissenting opinion, that state and federal authorities are free to 'annex' the news media as 'an investigative arm of government.' The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media--properly free and untrammeled in the fullest sense of these terms--were not able to protect themselves.

As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will *710 be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. [FN*]

FN* It is to be remembered tha tCaldwell asserts a constitutional privilege not even to appear before the grand jury unless a court decides that the Government has made a showing that meets the three preconditions specified in the dissenting opinion of Mr. Justice Stewart. To be sure, this would require a 'balancing' of interests by the court, but under circumstances and constraints significantly different from the balancing that will be appropriate under the court's decision. The newsman witness, like all other witnesses, will have to appear; he will not be in a position to litigate at the threshold the State's very authority to subpoena him. Moreover, absent the constitutional preconditions that Caldwell and that dissenting opinion would impose as heavy burdens of proof to be carried by the State, the court--when called upon to protect a newsman from improper or prejudicial questioning--would be free to balance the competing interests on their merits in the particular case. The new constitutional rule endorsed by that dissenting

> opinion would, as a practical matter, defeat such a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated.

In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

***725** Mr. Justice STEWART, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The Court's crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society. The question whether a reporter has a constitutional right to a confidential relationship with his source is of first impression here, but the principles that should guide our decision are as basic as any to be found in the Constitution. While Mr. Justice POWELL'S enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury. The Court thus invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government. Not only will this decision impair performance of the press' constitutionally protected functions, but it will, I am convinced, in the ****2672** long run, harm rather than help the administration of justice.

I respectfully dissent.

I

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's ***726** protection of a free press, Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660; New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686, [FN1] because the guarantee is 'not for the benefit of the press so much as for the benefit of all of us.' Time, Inc. v. Hill, 385 U.S. 374, 389, 87 S.Ct. 534, 543, 17 L.Ed.2d 456. [FN2]

FN1. We have often described the process of informing the public as the core purpose of the constitutional guarantee of free speech and a free press. See, e.g., Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117; De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278; Smith v. California, 361 U.S. 147, 153, 80 S.Ct. 215, 218, 4 L.Ed.2d 205.

FN2. As I see it, a reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights or the associational rights of the newsman and the source are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants. 'The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationship. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by trong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the public interest is thus advanced by creating a zone of privacy that the individual can control. However, in the case of the reporter-informer relationship, society's interest is not in the welfare of the informant per se, but rather in creating conditions in which information possessed by news sources can reach public attention.' Note, 80 Yale L.J. 317, 343 (1970) (footnotes omitted) (hereinafter Yale Note).

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, [FN3] and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment ***727** by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press 'has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . ..' Estes v. Texas, 381 U.S. 532, 539, 85 S.Ct. 1628, 1631, 14

L.Ed.2d 543; Mills v. Alabama, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484; Grosjean, supra, 297 U.S. at 250, 56 S.Ct. at 449. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

FN3. See generally Z. Chafee, Free Speech in the United States (1941); A. Meikeljohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, Toward a General Theory of the First Amendment (1963).

A

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. Grosjean, supra, at 250, 56 S.Ct. at 449; New York Times, supra, 376 U.S. at 270, 84 S.Ct. at 720.

A corollary of the right to publish must be the right to gather news. The **2673 full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. We have, therefore, recognized that there is a right to publish without prior governmental approval, Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, a right to distribute information, see, e.g., Lovell v. Griffin, 303 U.S., 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Grosjean, supra, and a right to receive printed matter, Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398.

*728 No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist. Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179. [FN4] Note, The Right of the Press to Gather Information, 71 Col.L.Rev. 838 (1971). As Madison wrote: 'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.' 9 Writings of James Madison 103 (G. Hunt ed. 1910).

FN4. In Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179, we held that the Secretary of State's denial of a passport for travel to Cuba did not violate a citizen's First Amendment rights. The rule was justified by the 'weightiest considerations of national security' and we concluded that the 'right to speak and publish does not carry with it the unrestrained right to gather information.' Id., at 16--17, 85 S.Ct. at 1281 (emphasis supplied). The necessary implication is that some right to gather information does exist.

B

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality--the promise or understanding that names or certain aspects of communications will be kept off the record--is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power--the absence of a constitutional right protecting, in any way, a confidential relationship from compulsary process--will either deter sources from divulging information or deter reporters from gathering and publishing information.

*729 It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called 'news' is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of 'newsmakers.' [FN5]

FN5. In Caldwell v. United States, 434 F.2d 1081, the Government claimed that Caldwell did not have to maintain a confidential relationship with members of the Black Panther Party and provide independent reporting of their activities, since the Party and its leaders could issue statements on their own. But, as the Court of Appeals for the Ninth Circuit correctly observed: '(I)t is not enough that Black Panther press releases and public addresses by Panther leaders may continue unabated in the wake of subpoenas such as the one here in question. It is not enough that the public's knowledge of groups such as the Black Panthers should be confined to their deliberate public pronouncements or distant news accounts of their occasional dramatic forays into the public view. 'The need for an untrammeled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.' Citing Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 89 L.Ed. 2013; Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093. Id., at 1084--1085.

****2674** It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox ***730** views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public. Cf. Talley v. California, 362 U.S. 60, 65, 80 S.Ct. 536, 539, 4 L.Ed.2d 559; Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488. [FN6]

FN6. As we observed in Talley v. California, 362 U.S 60, 80 S.Ct. 536, 4 L.Ed.2d 559, 'Anonymous pamphlets, leaflets, brochures and even books have played an important rule in the progress of mankind. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.' Id., at 64--65, 80 S.Ct., at 538. And in Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398, we recognized the importance to First Amendment values of the right to receive information anonymously.

In Caldwell, the District Court found that 'confidential relationships . . . are commonly developed and maintained by professional journalists, and are indispensable to their work of gathering, analyzing and publishing the news.' [FN7] Commentators and individual reporters have repeatedly noted the importance of confidentiality. [FN8] ***731** And surveys among reporters and editors indicate that the promise of nondisclosure is necessary for many types of news gathering. [FN9]

FN7. Application of Caldwell, 311 F.Supp. 358, 361.

FN8. See, e.g., F. Chalmers, A Gentleman of the Press: The Biography of Colonel John Bayne MacLean 74--75 (1969); H. Klurfeld, Behind the Lines: The World of Drew Pearson 50, 52--55 (1968); A. Krock, Memoris: Sixty Years on the Firing Line 181, 184--185 (1968); E. Larsen, First with the Truth 22--23 (1968); R. Ottley, The Lonely Warrior--The Life and Times of Robert S. Abbott 143--145 (1955); C. Sulzberger, A Long Row of Candles; Memoirs and Diaries 241 (1969). As Walter Cronkite, a network television reporter, said in an affidavit in Caldwel: 'In doing my work, I (and those who assist me) depend constantly on information, ideas, leads and opinions received in confidence. Such material is essential in digging out newsworthy facts and, equally important, in assessing the importance and analyzing the significance of public events.' App. 52.

FN9. See Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources,

64 Nw.U.L.Rev. 18 (1969); V. Blasi, Press Subpoenas: An Empirical and Legal Analysis, Study Report of the Reporters' Committee on Freedom of the Press 20--29 (hereinafter Blasi).

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to 'self-censorship.' Smith v. California, 361 U.S. 147, 149--154, 80 S.Ct. 215, 216--219, 4 L.Ed.2d 205; New York Times Co. v. Sullivan, 376 U.S., at 279, 84 S.Ct., at 725. The uncertainty arises, of course, because the **2675 judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965). See also Part II, infra.

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a *732 subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics [FN10] and impairing his resourcefulness as a reporter if he discloses confidential information. [FN11]

FN10. The American Newspaper Guild has adopted the following rule as part of the newsman's code of ethics: '(N)ewspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigating bodies.' G. Bird & F. Merwin, The Press and Society 592 (1971).

FN11. Obviously, if a newsman does not honor a confidence he will have difficulty establishing other confidential relationships necessary for obtaining information in the future. See Siebert & Ryniker, Press Winning Fight to Guard Sources, Editor & Publisher, Sept. 1, 1934, pp. 9, 36--37.

Again, the commonsense understanding that such deterrence will occur is buttressed by concrete evidence. The existence of deterrent effects through fear and self-censorship was impressively developed in the District Court in Caldwell. [FN12] Individual reporters [FN13] and commentators [FN14] have noted such effects. Surveys have verified that an unbridled subpoena power will substantially *733 impair the flow of news to the public, especially in sensitive areas involving governmental officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting. [FN15] And the Justice Department has recognized that 'compulsory process in some circumstances may have a limiting effect on the exercise of First Amendment right.' [FN16] No evidence **2676 contradicting the existence of such deterrent effects was offered at the trials or in the briefs here by the petitioner in Caldwell or by the respondents in Branzburg and Pappas.

FN12. The court found that 'compelled disclosure of information received by a journalist within the scope of . . . confidential relationships jeopardizes those relationships and thereby impairs the journalist's ability to gather, analyze and publish the news.' Application of Caldwell, 311 F.Supp., at 361.

FN13. See n. 8, supra.

FN14. Recent commentary is nearly unanimous in urging either an absolute or qualified newsman's privilege. See, e.g., Goldstein, Newsmen and Their Confidential Sources, New Republic, Mar. 21, 1970, pp. 13--14; Yale Note, supra, n. 2; Comment, 46 N.Y.U.L.Rev. 617 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand.L.Rev. 667 (1971); Note, The Right of the Press to Gather Information, 71 Col.L.Rev. 838 (1971); Comment, 4 U.Mich.J.L.Ref. 85 (1970); Comment, 6 Harv.Civ.Rights-Civ.Lib.L.Rev. 119

(1970); Comment, The Newsman's Privilege; Government Investigations, Criminal Prosecutions and Private Litigation, 58 Calif.L.Rev. 1198 (1970). But see the Court's opinion, ante, at 2660 n. 29. And see generally articles collected in Yale Note, supra, n. 2. Recent decisions are in conflict both as to the importance of the deterrent effects and, a fortiori, as to the existence of a constitutional right to a confidential reporter-source. relationship. See the Court's opinion, ante, at 2658--2659, and cases collected in Yale Note, at 318 nn. 6--7.

FN15. See Blasi 6--71; Guest & Stanzler, supra, n. 9, at 43--50.

FN16. Department of Justice Memo. No. 692 (Sept. 2, 1970).

The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand. Obviously, not every news-gathering relationship requires confidentiality. And it is difficult to pinpoint precisely how many relationship do require a promise or understanding of nondisclosure. But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist; we have never before required proof of the exact number of people potentially affected by governmental action, who would actually be dissuaded from engaging in First Amendment activity.

Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterrence or ***734** impairment of First Amendment activity), and (2) whether the effect would occur with some regularity, i.e., would not be de minimis. See, e.g., Grosjean v. American Press Co., 297 U.S., at 244--245, 56 S.Ct., at 446--447; Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098; Sweezy v. New Hampshire, 354 U.S. 234, 248, 77 S.Ct. 1203, 1210, 1 L.Ed.2d 1311 (plurality opinion); NAACP v. Alabama, 357 U.S., at 461--466, 78 S.Ct., at 1171--1174; Smith v. California, 361 U.S., at 150--154, 80 S.Ct., at 217--219; Bates v. City of Little Rock, 361 U.S., at 523--524, 80 S.Ct., at 416--417; Talley v. California, 362 U.S., at 64--65, 80 S.Ct., at 538--539; Shelton v. Tucker, 364 U.S. 479, 485--486, 81 S.Ct. 247, 250--251, 5 L.Ed.2d 231; Cramp v. Board of Public Instructions, 368 U.S. 278, 286, 82 S.Ct. 275, 280, 7 L.Ed.2d 285; NAACP v. Button, 371 U.S. 415, 431--438, 83 S.Ct. 328, 337--341, 9 L.Ed.2d 405; Gibson v. Florida Legislation Investigation Committee, 372 U.S. 539, 555--557, 83 S.Ct. 889, 898--899, 9 L.Ed.2d 929; New York Times Co. v. Sullivan, 376 U.S., at 277--278, 84 S.Ct., at 724--725; Freedman v. Maryland, 380 U.S. 51, 59, 85 S.Ct. 734, 739, 13 L.Ed.2d 649; DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; Elfbrandt v. Russell, 384 U.S. 11, 16--19, 86 S.Ct. 1238, 1240--1242, 16 L.Ed.2d 321. And, in making this determination, we have shown a special solicitude towards the 'indispensable liberties' protected by the First Amendment, NAACP v. Alabama, supra, 357 U.S., at 461, 78 S.Ct. at 1171; Bantam Books, inc. v. Sullivan, ,372 U.S. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584, for '(f)reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' Bates, supra, 361 U.S., at 523, 80 S.Ct., at 416. [FN17] Once this threshold inquiry has been satisfied, we have then examined the competing interests in determining whether ***735** there is an unconstitutional infringement of First Amendment freedoms.

FN17. although, as the Court points out, we have held that the press is not free from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws, or nondiscriminatory taxation, ante, at 2657, these decisions were concerned 'only with restraints on certain business or commercial practices' of the press. Citizen Publishing Co. v. United States, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148. And due weight was given to First Amendment interests. For example, 'The First Amendment, far from providing an argument against application of the Sherman Act . . . provides powerful reasons to the contrary.' Associated Press v. United States, 326 U.S., at 20, 65 S.Ct., at 1424.

For example, in NAACP v. Alabama, supra, we found that compelled disclosure of the names of those in Alabama who belonged to the NAACP 'is

likely to affect **2677 adversely the ability (of the NAACP) and its members to pursue their . . . beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.' Id., at 462--463, 78 S.Ct., at 1172. In Talley, supra, we held invalid a city ordinance that forbade circulation of any handbill that did not have the distributor's name on it, for there was 'no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.' Id., 362 U.S., at 64, 80 S.Ct., at 538. And in Burstyn, Inc., supra, we found deterrence of First Amendment activity inherent in a censor's power to exercise unbridled discretion under an overbroad statute. Id., 343 U.S., at 503, 72 S.Ct., at 781.

Surely the analogous claim of deterrence here is as securely grounded in evidence and common sense as the claims in the cases cited above, although the Court calls the claim 'speculative.' See ante, at 2662. The deterrence may not occur in every confidential relationship between a reporter and his source. [FN18] But it will certainly *736 occur in certain types of relationships involving sensitive and controversial matters. And such relationships are vital to the free flow of information.

FN18. The fact that some informants will not be deterred from giving information by the prospect of the unbridled exercise of the subpoena power only means that there will not always be a conflict between the grand jury's inquiry and the protection of First Amendment activities. But even if the percentage of such informants is relatively large compared to the total 'universe' of potential informants, there will remain a large number of people in 'absolute' terms who will be deterred, and the flow of news through mass circulation newspapers and electronic media will inevitably be impaired.

To require any greater burden of proof is to shirk our duty to protect values securely embedded in the Constitution. We cannot await an unequivocal--and therefore unattainable--imprimatur from empirical studies. [FN19] We can and must accept the evidence developed in the record, and elsewhere, that overwhelmingly supports the premise that deterrence will occur with regularity in important types of news-gathering relationships. [FN20]

FN19. Empirical studies, after all, can only provide facts. It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions. And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

FN20. See, e.g., the uncontradicted evidence presented in affidavits from newsmen in Caldwell, Appendix to No. 70--57, pp. 22--61 (statements from Gerald Fraser, Thomas Johnson, John Kifner, Timothy Knight, Nicholas Proffitt, Anthony Ripley, Wallace Turner, Gilbert Noble, Anthony Lukas, Martin Arnold, David Burnham, Jon Lowell, Frank Morgan, Min Yee, Walter Cronkite, Eric Sevareid, Mike Wallace, Dan Rather, Marvin Kalb).

Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury's subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer *737 justice fairly and effectively. The grand jury serves two important functions: 'to examine into the commission of crimes' and 'to stand between the prosecutor and the accused, and to **2678 determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.' Hale v. Henkel, 201 U.S. 43, 59, 26 S.Ct. 370, 373, 50 L.Ed. 652. And to perform these functions the grand jury must have available to it every man's relevant evidence. See Blair v. United States, 250 U.S 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979; Blackmer v. United States, 284

U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment, [FN21] the Fourth Amendment, [FN22] and the evidentiary privileges of the common law. [FN23] So it was that in Blair, supra, after recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that 'some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.' Id., 250 U.S. at 281, 39 S.Ct. at 471 (emphasis supplied). And in United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 844, the Court observed that any exemption from the duty to testify before the grand jury 'presupposes a very real interest to be protected.' Id., at 332, 70 S.Ct. at 731.

FN21. See Blau v. United States, 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170; Quinn v. United States, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964; Curcio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

FN22. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

FN23. See Committee on Rules of Practice and Procedure of Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (1971); 8 J. Wigmore, Evidence ss 2290--2391 (McNaughton rev. 1961).

Such an interest must surely be the First Amendment protection of a confidential relationship that I have discussed above in Part I. As noted there, this protection does not exist for the purely private interests of the *738 newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the news-gathering relationship. [FN24] Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public, and it serves, thereby, to honor the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U.S., at 270, 84 S.Ct., at 721.

FN24. Although there is a longstanding presumption against creation of common-law testimonial privileges, United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884, these privileges are grounded in an 'individual interest which has been found . . . to outweigh the public interest in the search for truth' rather than in the broad public concerns that inform the First Amendment. Id., at 331, 70 S.Ct., at 730.

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their 'delicate and vulnerable' nature, NAACP v. Button, 371 U.S., at 433, 83 S.Ct., at 338, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

A

This Court has erected such safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association. [FN25] In no previous case have **2679 we considered the extent to which the First Amendment limits the grand jury subpoena power. But the *739 Court has said that '(t)he Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press . . . or political belief and association be abridged.' Watkins v. United States, 354 U.S. 178, 188, 77 S.Ct. 1173, 1179, 1 L.Ed.2d 1273. And in Sweezy v. New Hampshire, it was stated: 'It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.' 354 U.S., at 245, 77 S.Ct., at 1209 (plurality opinion).

FN25. The protection of information from compelled disclosure for broad purposes of public policy has been recognized in decisions involving

police informers, see Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639; United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745, 13 L.Ed.2d 684; Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723; McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62, and military and state secrets, United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727.

The established method of 'carefully' circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired. The decisions of this Court have 'consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' NAACP v. Button, 371 U.S., at 438, 83 S.Ct., at 341. And 'it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.' Gibson v. Florida Legislative Investigation Committee, 372 U.S., at 546, 83 S.Ct., at 894 (emphasis supplied). See also DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; Sweezy, supra; Watkins, supra.

Thus, when an investigation impinges on First Amendment rights, the government must not only show that *740 the inquiry is of 'compelling and overriding importance' but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought.

Governmental officials must, therefore, demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. Watkins, supra; Sweezy, supra. [FN26] They must demonstrate that it is reasonable to think the witness in question has that information. Sweezy, supra; Gibson, supra. [FN27] And they must **2680 show that there is not any means of obtaining the information less destructive of First Amendment liberties. Shelton v. Tucker, 364 U.S., at 488, 81 S.Ct., at 252; Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296--297, 81 S.Ct. 1333, 1335--1336, 6 L.Ed.2d 301. [FN28]

FN26. As we said in Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273, '(W)hen First Amendment rights are threatened, the delegation of power to the (legislative) committee must be clearly revealed in its charter.' 'It is the responsibility of the Congress . . . to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out the group's jurisdiction and purpose with sufficient particularity. . . . The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress.' Id., at 198, 201, 77 S.Ct., at 1186.

FN27. We noted in Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311: 'The State Supreme Court itself recognized that there was a weakness in its conclusion that the menace of forcible overthrow of the government justified sacrificing constitutional rights. There was a missing link in the chain of reasoning. The syllogism was not complete. There was nothing to connect the questioning of petitioner with this fundamental interest of the State.' Id., at 251, 77 S.Ct. at 1212 (emphasis supplied).

FN28. See generally Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969).

These requirements, which we have recognized in decisions involving legislative and executive investigations, serve established policies reflected in numerous First *741 Amendment decisions arising in other contexts. The requirements militate against vague investigations that, like vague laws, create uncertainty and needlessly discourage First Amendment activity. [FN29] They also insure that a legitimate governmental purpose will not be pursued by means that 'broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton, supra, 364 U.S. at 488, 81 S.Ct. at 252. [FN30] As we said in Gibson, supra, 'Of course, a legislative investigation--as any investigation--must proceed 'step by step,' . . . but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and

severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights.' 372 U.S., at 557, 83 S.Ct., at 899.

FN29. See Watkins, supra, 354 U.S. at 208--209, 77 S.Ct. at 1189--1190. See generally Baggett v. Bullitt, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322, 12 L.Ed.2d 377; Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460; Ashton v. Kentucky, 384 U.S. 195, 200--201, 86 S.Ct. 1407, 1410--1411, 16 L.Ed.2d 469; Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22; Smith v. California, 361 U.S., at 150--152, 80 S.Ct., at 217--218; Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; Stromberg v. California, 283 U.S., at 369, 51 S.Ct., at 535. See also Note, The Chilling Effect in Constitutional Law, 69 Col.L.Rev. 808 (1969).

FN30. See generally Zwickler v. Koota, 389 U.S. 241, 249--250, 88 S.Ct. 391, 396--397, 19 L.Ed.2d 444; and cases cited therein; Coates v. Cincinnati, 402 U.S. 611, 616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214; Cantwell v. Connecticut, 310 U.S. 296, 307, 60 S.Ct. 900, 904, 84 L.Ed. 1213; De Jonge v. Oregon, 299 U.S., at 364--365, 57 S.Ct., at 259--260; Schneider v. State, 308 U.S. 147, 164, 60 S.Ct. 146, 152, 84 L.Ed. 155; Cox v. Louisiana, 379 U.S. 559, 562--564, 85 S.Ct. 476, 479--481, 13 L.Ed.2d 487. Cf. NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405. See also Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970).

I believe the safeguards developed in our decisions involving governmental investigations must apply to the grand jury inquiries in these cases. Surely the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law. We have long recognized the value of the role played by legislative investigations, see e.g., United States v. Rumely, ***742** 345 U.S. 41, 43, 73 S.Ct. 543, 544, 97 L.Ed. 770; Barenblatt v. United States, 360 U.S. 109, 111--112, 79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115, for the 'power of the Congress to conduct investigations is inherent . . . (encompassing) surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.' Watkins, supra, 354 U.S., at 187, 77 S.Ct., at 1179. Similarly, the associational rights of private individuals, which have been the prime focus of our First Amendment decisions in the investigative sphere, are hardly more important than the First Amendment rights of mass circulation newspapers and electronic media to disseminate ideas and information, and of the general public to receive them. Moreover, the vices of vagueness and overbreadth that legislative ****2681** investigations may manifest are also exhibited by grand jury inquiries, since grand jury investigations are not limited in scope to specific criminal acts, see e.g., Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771; Hendricks v. United States, 223 U.S. 178, 184, 32 S.Ct. 313, 316, 56 L.Ed. 394; United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546, and since standards of materiality and relevance are greatly relaxed. Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397. See generally Note, The Grand Jury as an Investigatory Body, 74 Harv.L.Rev. 590, 591--592 (1961). [FN31] For, as the United States notes in its brief in Caldwell, the ***743** grand jury 'need establish no factual basis for commencing an investigation, and can pursue rumors which further investigation may prove groundless.'

FN31. In addition, witnesses customarily are not allowed to object to questions on the grounds of materiality or relevance, since the scope of the grand jury inquiry is deemed to be of no concern to the witness. Carter v. United States, 9 Cir., 417 F.2d 384, cert. denied, 399 U.S. 935, 90 S.Ct. 2253, 26 L.Ed.2d 807. Nor is counsel permitted to be present to aid a witness. See In re Groban, 352 U.S. 330, 77 S.Ct. 510, 1 L.Ed.2d 376. See generally Younger, The Grand Jury Under Attack, pt. 3, 46 J.Crim.L.C. & P.S. 214 (1955); Recent Cases, 104 U.Pa.L.Rev. 429 (1955); Watts, Grand Jury: Sleeping Watchdog or Expensive Antique, 37 N.C.L.Rev. 290 (1959); Whyte, Is the Grand Jury Necessary, 45 Va.L.Rev. 461 (1959); Note, 2 Col.J.Law & Soc.Prob. 47, 58 (1966); Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965); Orfield, The Federal Grand Jury, 22 F.R.D. 343.

Accordingly, when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is

probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; [FN32] (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information. [FN33]

FN32. The standard of proof employed by most grand juries, federal and State, is simply 'probable cause' to believe that the accused has committed a crime. See Note, 1963 Wash.U.L.Q. 102; L. Hall et al., Modern Criminal Procedure 793--794 (1969). Generally speaking, it is extremely difficult to challenge indictments on the ground that they are not supported by adequate or competent evidence. Cf. Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397; Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98.

FN33. Cf. Garland v. Torre, 259 F.2d 545. The Court of Appeals for the Second Circuit declined to provide a testimonial privilege to a newsman called to testify at a civil trial. But the court recognized a newsman's First Amendment right to a confidential relationship with his source and concluded: 'It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. . . . The question asked . . . went to the heart of the plaintiff's claim.' Id., at 549--550 (citations omitted).

This is not to say that a grand jury could not issue a subpoena until such a showing were made, and it is not to say that a newsman would be in any way privileged to ignore any subpoena that was issued. Obviously, before the government's burden to make such a showing were triggered, the reporter would have to move to quash the subpoena, asserting the basis on which he considered the particular relationship a confidential one.

*744 B

The crux of the Court's rejection of any newsman's privilege is its observation that only 'where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.' See ante, at 2661 (emphasis **2682 supplied). But this is a most misleading construct. For it is obviously not true that the only persons about whom reporters will be forced to testify will be those 'confidential informants involved in actual criminal conduct' and those having 'information suggesting illegal conduct by others.' See ante, at 2661, 2662. As noted above, given the grand jury's extraordinarily broad investigative powers and the weak standards of relevance and materiality that apply during such inquiries, reporters, if they have no testimonial privilege, will be called to give information about informants who have neither committed crimes nor have information about crime. It is to avoid deterrence of such sources and thus to prevent needless injury to First Amendment values that I think the government must be required to show probable cause that the newsman has information that is clearly relevant to a specific probable violation of criminal law. [FN34]

FN34. If this requirement is not met, then the government will basically be allowed to undertake a 'fishing expedition' at the expense of the press. Such general, exploratory investigations will be most damaging to confidential news-gathering relationships, since they will create great uncertainty in both reporters and their sources. The Court sanctions such explorations, by refusing to apply a meaningful 'probable cause' requirement. See ante, at 2666--2667. As the Court states, a grand jury investigation 'may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors.' Ante, at 2666. It thereby invites government to try to annex the press as an investigative arm, since any time government wants to probe the relationships between the newsman and his source, it can, on virtually any pretext, convene a grand jury and compel the journalist to testify. The Court fails to recognize that under the guise of 'investigating crime' vindictive prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose. The secrecy of grand jury proceedings, affords little consolation to a news source; the prosecutor obviously will, in most cases, have knowledge of testimony given by grand jury witnesses.

*745 Similarly, a reporter may have information from a confidential source that is 'related' to the commission of crime, but the government may be able to obtain an indictment or otherwise achieve its purposes by subpoenaing persons other than the reporter. It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administration of justice and would only impair the flow of information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Both the 'probable cause' and 'alternative means' requirements would thus serve the vital function of mediating between the public interest in the administration of justice and the constitutional protection of the full flow of information. These requirements would avoid a direct conflict between these competing concerns, and they would generally provide adequate protection for newsmen. See Part III, infra. [FN35] No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, *746 is the function of courts of law. Better such judgments, however difficult, than the simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases. [FN36]

FN35. We need not, therefore, reach the question of whether government's interest in these cases is 'overriding and compelling.' I do not, however, believe, as the Court does, that all grand jury investigations automatically would override the newsman's testimonial privilege.

FN36. The disclaimers in Mr. Justice POWELL'S concurring opinion leave room for the hope that in some future case the Court may take a less absolute position in this area.

**2683 The error in the Court's absolute rejection of First Amendment interests in these cases seems to me to be most profound. For in the name of advancing the administration of justice, the Court's decision, I think, will only impair the achievement of that goal. People entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems. Obviously, press reports have great value to government, even when the newsman cannot be compelled to testify before a grand jury. The sad paradox of the Court's position is that when a grand jury may exercise an unbridled subpoena power, and sources involved in sensitive matters become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to investigate and publish information about issues of public import. I cannot subscribe to such an anomalous result, for, in my view, the interests protected by the First Amendment are not antagonistic to the administration of justice. Rather, they can, in the long run, only be complementary, and for that reason must be given great 'breathing space.' NAACP v. Button, 371 U.S., at 433, 83 S.Ct., at 338.

III

In deciding what protection should be given to information a reporter receives in confidence from a news source, the Court of Appeals for the Ninth Circuit affirmed the holding of a District Court that the grand *747 jury power of testimonial compulsion must not be exercised in a manner likely to impair First Amendment interests 'until there has been a clear showing of a compelling and overriding national interest that cannot be served by any alternative means.' Caldwell v. United States, 434 F.2d 1081, 1086. It approved the request of respondent Caldwell for specification by the government of the 'subject, direction or scope of the Grand Jury inquiry.' Id., at 1085. And it held that in the circumstances of this case Caldwell need not divulge confidential information.

I think this decision was correct. On the record before us the United States has not met the burden that I think the appropriate newsman's privilege should require.

In affidavits before the District Court, the United States said it was investigating possible violations of 18 U.S.C. s 871 (threats against the President), 18 U.S.C. s 1751 (assassination, attempts to assassinate, conspiracy to assassinate the President), 18 U.S.C. s 231 (civil disorders), 18 U.S.C. s 2101 (interstate travel to incite a riot), 18 U.S.C. s 1341 (mail fraud and swindles) and other crimes that were not specified. But, with one exception, there has

been no factual showing in this case of the probable commission of, or of attempts to commit, any crimes. [FN37] The single exception relates to the allegation that a Black Panther Party leader, David Hilliard, violated 18 U.S.C. s 871 during the course of a speech in November 1969. But Caldwell was subpoenaed two months after an indictment was returned against Hilliard, and that charge could not, subsequent to the indictment, be investigated by a grand jury. See In re National Window Glass Workers, D.C. 287 F. 219; United *748 States v. Dardi, 2 Cir., 330 F.2d 316, 336. [FN38] Furthermore, **2684 the record before us does not show that Caldwell probably had any information about the violation of any other federal criminal laws, [FN39] or that alternative *749 means of obtaining the desired information were pursued. [FN40]

FN37. See Blasi 61 et seq.

FN38. After Caldwell was first subpoenaed to appear before the grand jury, the Government did undertake, by affidavits, to 'set forth facts indicating the general nature of the grand jury's investigation (and) witness Earl Caldwell's possession of information relevant to this general inquiry.' In detailing the basis for the belief that a crime had probably been committed, the Government simply asserted that certain actions had previously been taken by other grand juries, and by Government counsel, with respect to certain members of the Black Panther Party (i.e., immunity grants for certain Black Panthers were sought; the Government moved to compel party members to testify before grand juries; and contempt citations were sought when party members refused to testify). No facts were asserted suggesting the actual commission of crime. The exception, as noted, involved David Hilliard's speech and its republication in the party newspaper, the Black Panther, for which Hilliard had been indicted before Caldwell was subpoenaed.

FN39. In its affidavits, the Government placed primary reliance on certain articles published by Caldwell in the New York Times during 1969 (on June 15, July 20, July 22, July 27, and Dec. 14). On Dec. 14, 1969, Caldwell wrote: "We are special,' Mr. Hilliard said recently 'We advocate the very direct overthrow of the Government by way of force and violence. By picking up guns and moving against it because we recognize it as being oppressive and in recognizing that we know that the only solution to it is armed struggle.' 'In their role as the vanguard in a revolutionary struggle, the Panthers have picked up guns. 'Last week two of their leaders were killed during the police raid on one of their offices in Chicago. And in Los Angeles a few days earlier, three officers and three Panthers were wounded in a similar shooting incident. In these and in some other raids, the police have found caches of weapons, including high-powered rifles.' App. in No. 70--57, p. 13. In my view, this should be read as indicating that Caldwell had interviewed Panther leaders. It does not indicate that he probably had knowledge of the crimes being investigated by the Government. And, to repeat, to the extent it does relate to Hilliard's threat, an indictment had already been brought in that matter. The other articles merely demonstrate that Black Panther Party leaders had told Caldwell their ideological beliefs--beliefs that were readily available to the Government through other sources, like the party newspaper.

FN40. The Government did not attempt to show that means less impinging upon First Amendment interests had been pursued.

In the Caldwell case, the Court of Appeals further found that Caldwell's confidential relationship with the leaders of the Black Panther Party would be impaired if he appeared before the grand jury at all to answer questions, even though not privileged. Caldwell v. United States, 434 F.2d, at 1088. On the particular facts before it, [FN41] the court **2685 concluded that the very *750 appearance by Caldwell before the grand jury would jeopardize his relationship with his sources, leading to a severance of the news-gathering relationship and impairment of the flow of news to the public: [FN42]

FN41. In an affidavit filed with the District Court, Caldwell stated: 'I began covering and writing articles about the Black Panthers almost from the time of their inception, and I myself found that in those first months . . . they were very brief and reluctant to discuss any substantive matter with me. However, as they realized I could be trusted and that my sole purpose was to collect my information and present it objectively in the newspaper and that I had no other motive. I found that not only were the party leaders available for in-depth interviews

but also the rank and file members were cooperative in aiding me in the newspaper stories that I wanted to do. During the time that I have been covering the party, I have noticed other newspapermen representing legitimate organizations in the news media being turned away because they were not known and trusted by the party leadership. 'As a result of the relationship that I have developed, I have been able to write lengthy stories about the Panthers that have appeared in The New York Times and have been of such a nature that other reporters who have not known the Panthers have not been able to write. Many of these stories have appeared in up to 50 or 60 other newspapers around the country. 'The Black Panther Party's method of operation with regard to members of the press is significantly different from that of other organizations. For instance, press credentials are not recognized as being of any significance. In addition, interviews are not normally designated as being 'backgrounders' or 'off the record' or 'for publication' or 'on the record.' Because no substantive interviews are given until a relationship of trust and confidence is developed between the Black Panther Party members and a reporter, statements are rarely made to such reporters on an expressed 'on' or 'off' the record basis. Instead, an understanding is developed over a period of time between the Black Panther Party members and the reporter as to matters which the Black Panther Party wishes to disclose for publications and those matters which are given in confidence. . . . Indeed, if I am forced to appear in secret grand jury proceedings, my appearance alone would be interpreted by the Black Panthers and other dissident groups as a possible disclosure of confidences and trusts and would similarly destroy my effectiveness as a newspaperman.' The Government did not contradict this affidavit.

FN42. 'Militant groups might very understandably fear that, under the pressure of examination before a Grand Jury, the witness may fail to protect their confidences . . .. The Government characterizes this anticipated loss of communication as Black Panther reprisal . . . But it is not an extortionate threat we face. It is human reaction as reasonable to expect as that a client will leave his lawyer when his confidence is shaken. . . . As the Government points out, loss of such a sensitive news source can also result from its reaction to indiscreet or unfavorable reporting or from a reporter's association with Government agents or persons disapproved of by the news source. Loss in such a case, however, results from an exercise of the choice and prerogative of a free press. It is not the result of Government compulsion.' Caldwell v. United States, 434 F.2d, at 1088.

'Appellant asserted in affidavit that there is nothing to which he could testify (beyond that which he has already made public and for which, therefore, his appearance is unnecessary) that is not protected by the District Court's order. If this is true--and the Government apparently has not believed it necessary to dispute it--appellant's response to the subpoena would be a barren performance-- *751 one of no benefit to the Grand Jury. To destroy appellant's capacity as news gatherer for such a return hardly makes sense. Since the cost to the public of excusing his attendance is so slight, it may be said that there is here no public interest of real substance in competition with the First Amendment freedoms that are jeopardized.
'If any competing public interest is ever to arise in a case such as this (where First Amendment liberties are threatened by mere appearance at a Grand Jury investigation) it will be on an occasion in which the witness, armed with his privilege, can still serve a useful purpose before the Grand Jury. Considering the scope of the privilege embodied in the protective order, these occasions would seem to be unusual. It is not asking too much of the Government to show that such an occasion is presented here.' Id., at 1089.

I think this ruling was also correct in light of the particularized circumstances of the Caldwell case. Obviously, only in very rare circumstances would a confidential relationship between a reporter and his source be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his news-gathering function. But in this case, the reporter made out a prima facie case that the flow of news to the public would be curtailed. And he stated, without contradiction, that the only nonconfidential material about which he could testify was already printed in his newspaper articles. [FN43] Since the United States has not attempted to *752 refute this assertion, the appearance of Caldwell would, on these facts, indeed be a 'barren performance.' But this aspect of **2686 the Caldwell judgment I would confine to its own facts.

As the Court of Appeals appropriately observed: '(T) he rule of this case is a narrow one. . . .' Caldwell, supra, at 1090.

FN43. Caldwell stated in his affidavit filed with the District Court, see n. 40, supra: 'It would be virtually impossible for me to recall whether any particular matter disclosed to me by members of the Black Panther Party since January 1, 1969, was based on an understanding that it would or would not be confidential. Generally, those matters which were made on a nonconfidential or 'for publication' basis have been published in articles I have written in The New York Times; conversely, any matters which I have not thus far disclosed in published articles would have been given to me based on the understanding that they were confidential and would not be published.'

Accordingly, I would affirm the judgment of the Court of Appeals in No. 70--57, United States v. Caldwell. [FN44] In the other two cases before us, No. 70--85, Branzburg v. Hayes and Meigs, and No. 70--94, In re Pappas, I would vacate the judgments and remand the cases for further proceedings not inconsitent with the views I have expressed in this opinion.

FN44. The District Court reserved jurisdiction to modify its order on a showing of a governmental interest which cannot be served by means other than Caldwell's grand jury testimony. The Government would thus have further opportunity in that court to meet the burden that, I think, protection of First Amendment rights requires.

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John S. ATLEE et al.
v.
Richard M. NIXON, Individually and as President of the United States, Melvin Laird, Individually and as Secretary of the Department of Defense.

Civ. A. No. 71-2324.

United States District Court,
E. D. Pennsylvania.

Jan. 20, 1972.

Suit wherein it was alleged that prosecution of war in Southeast Asia violated various provisions of Federal Constitution, treaties of United States and doctrines of international law. On "suggestion," of United States attorney, who had been granted leave to intervene as amicus curiae, that suit be dismissed as to President, the District Court, Joseph S. Lord, III, Chief Judge, held that absent indication, in such suit which was brought against both President and Secretary of Defense individually and in their official capacities, that plaintiffs would be denied remedy if President were dismissed as party, President would be dismissed as party without prejudice to rights of plaintiffs if it should appear that President was indispensable party.

Ordered accordingly.

[1] UNITED STATES ⇦ 26
393k26
United States President is not completely immune from judicial process merely because he is President.

[2] INJUNCTION ⇦ 75
212k75
Executive action may be restrained indirectly by enjoining a cabinet member from enforcing an executive order found to violate the law.

[3] UNITED STATES ⇦ 26
393k26
Purpose of doctrine of executive immunity is not to serve as a shield to completely bar constitutional review of presidential action but to insure that the President is not distracted from or hindered in performance of his tasks by being called into court to defend his actions.

[4] UNITED STATES ⇦ 135
393k135
Absent indication, in suit which was brought against United States President and Secretary of Defense individually and in their official capacities, and in which it was alleged that prosecution of war in Southeast Asia violated various provisions of Federal Constitution, treaties of United States and doctrines of international law, that plaintiffs would be denied remedy if President were dismissed as party, President would be dismissed as party without prejudice to rights of plaintiffs if it should appear that President was indispensable party.

***791** David Kairys, David Rudovsky, Kairys & Rudovsky, Philadelphia, Pa., for plaintiffs.

Louis C. Bechtle, U. S. Atty., Warren D. Mulloy, John T. Thorn, Asst. U. S. Attys., Philadelphia, Pa., for defendants.

OPINION

JOSEPH S. LORD, III, Chief Judge.

The plaintiffs in this suit are citizen taxpayers who bring this action on their own behalf, and as representatives of a class consisting of all those similarly situated, pursuant to F.R.Civ.P. 23. They allege that the prosecution of the war in Southeast Asia violates various provisions of the United States Constitution, Treaties of the United States, and doctrines of international law. They seek a permanent injunction against the allocation and expenditure of funds of the United States to prosecute the war. We have jurisdiction under 28 U.S.C. § 1331.

The defendants are Richard M. Nixon, President of the United States, and Melvin Laird, Secretary of the United States Department of Defense. The United States Attorney for the Eastern District of Pennsylvania has been granted leave to intervene as amicus curiae for the purpose of making suggestions. Now pending is its "suggestion" that the instant suit be dismissed as to defendant Nixon.

[1] At the outset, we reject the notion that defendant Nixon is completely immune from judicial process because he is the President of the United States. United States v. Burr, 25 F.Cas.P. 30, No. 14,692d (C.C.A.Va.1807) (Marshall, C. J.).

Nevertheless, at this time we have decided to dismiss the action as to defendant Nixon.

The doctrine of executive immunity from suit cannot be found in any particular provision of the United States Constitution, or in any federal law. It is a judicial creation founded in a proper respect for executive prerogative in a system of government which emphasizes a separation of powers between the various branches. This led the Court in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867) to conclude that a court has no jurisdiction of a bill to enjoin the President in the performance of his official duties. "The Congress is the Legislative Department of the government; the President is the Executive Department. Neither can be restrained in its action by the Judicial Department ***." Id. at 500.

Later decisions of the Court have strongly suggested that judicial restraint of the executive may no longer be absolutely prohibited. The doctrine of separation of powers itself may necessitate ***792** judicial action to restrain executive action which has invaded the province of Congress's lawmaking power.

[2] It is not open to doubt that executive action may be restrained indirectly by enjoining a cabinet member from enforcing an executive order found to violate the law. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). The decision in Youngstown was based on the finding that the President's executive order seizing the steel mills was not within the constitutional powers of the President. President Truman, however, was not a named party. The defendant was Secretary of Commerce Charles Sawyer who had been directed by the President to take temporary possession of the nation's steel mills. He was restrained from continuing the seizure and possession of the plants and acting under the authority of the executive order.

The question arises whether the Presidential immunity doctrine should apply in a situation where the President is alleged to be acting in violation of the Constitution, and there is no agent who participated in this action who may be restrained, as Mr. Sawyer in the Youngstown case. We need not decide this difficult issue now.

In the recent case of Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), the Court held that the Speech or Debate Clause of the Constitution, Art. I, § 6, [FN1] did not serve as a bar to judicial review of the constitutionality of the House decision to exclude Mr. Powell. The action was dismissed as to Congressmen defendants, but was allowed to be maintained against House employees such as the Sergeant at Arms and the Doorkeeper of the House. In dismissing the Congressmen as defendants, the Court made clear it was not laying down any flat rule prohibiting injunctive relief against Congressmen.

> FN1. Article I, § 6, provides: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

> "Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available." Id. at 506, footnote 26, 89 S.Ct. at 1956.

[3] The doctrine of executive immunity's purpose is not to serve as a shield to bar completely constitutional review of Presidential action. It does, though, serve a very important function, much like the Speech or Debate Clause.

> "The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." Id. at 505, 89 S.Ct. at 1955.

Of course, we should be even more reluctant to disturb the President in the performance of his duties than we are to distract any individual legislator.

[4] In the instant case, we note that the Secretary of Defense, Melvin Laird, is also a defendant. Therefore, we have no indication at this time that plaintiffs would be denied a remedy if defendant Nixon were to be dismissed as a party. Indeed, it would be a rare situation where executive action was not participated in by any other government

officials.

We have concluded that Richard M. Nixon should be dismissed as a party, without prejudice to the rights of plaintiffs to move at some future stage of this action that he is indeed a necessary party, if alleged prohibited conduct appears to the plaintiffs to be entirely unilateral. We of course at this time intimate no opinion as to the merits of this action.

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The MINNESOTA CHIPPEWA TRIBE et al., Plaintiffs,
v.
Frank C. CARLUCCI, etc., et al., Defendants.

Civ. A. No. 175-73.

United States District Court, District of Columbia.

April 25, 1973.

Action, inter alia, to require President of the United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act, wherein case came before court on Government's suggestion for dismissal of action as to the President. The District Court, June L. Green, J., held that the action was maintainable over objection of lack of standing, inasmuch as plaintiffs were intended beneficiaries of the Indian Education Act. The Court further held that, although, under the Act, the President had discretion to choose whom to appoint, inasmuch as he apparently had no discretion to decide whether the Council should or should not be constituted, the action was not subject to dismissal on basis that it related to executive, discretionary or political acts.

Suggestion for dismissal of action as to President denied.

Appointments to the National Advisory Council on Indian Education were made by the President of the United States May 5, 1973.

In a separate order of May 8, 1973, the Court dismissed the case as moot as to the President.

[1] FEDERAL CIVIL PROCEDURE ⇦ 656
170Ak656
Complaint must be construed liberally where plaintiff's assertion of subject matter jurisdiction is questioned by defendant.

[2] FEDERAL COURTS ⇦ 195
170Bk195
Formerly 106k284(3)
Federal district court had subject matter jurisdiction of complaint seeking to require President of the United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act. 5 U.S.C.A. §§ 701-706; 28 U.S.C.A. §§ 1331, 1337, 1361, 1362.

[3] UNITED STATES ⇦ 26
393k26
President of United States is not completely immune from judicial process for sole reason that he is President.

[4] UNITED STATES ⇦ 26
393k26
Judiciary has jurisdiction over President of United States to compel him to perform a nondiscretionary act required by law.

[5] MANDAMUS ⇦ 23(1)
250k23(1)
Intended beneficiaries of Indian Education Act had standing to maintain action to require President of United States to appoint members of National Advisory Council on Indian Education pursuant to Indian Education Act. Fed.Rules Civ.Proc. rule 12(h)(3), 28 U.S.C.A.; Indian Education Act, § 442(a), 86 Stat. 334.

[6] MANDAMUS ⇦ 76
250k76
Although, under Indian Education Act, President of United States had discretion to choose whom to appoint to National Advisory Council on Indian Education, inasmuch as he apparently had no discretion to decide if the Council should or should not be constituted, action brought to require him to appoint members of Council was not subject to dismissal on basis that the action related to executive, discretionary or political acts. Indian Education Act, § 442(a-c), 86 Stat. 334.

[7] MANDAMUS ⇦ 151(2)
250k151(2)
Where it appeared that only President of United States had been given power to appoint members of National Advisory Council on Indian Education, but he had neither made such appointments nor delegated his power to another and no implied delegation appeared, action to require President to appoint members of Council could be maintained over objection that joinder of President as party was unnecessary in that plaintiffs could be afforded complete relief by suing member of President's Cabinet. Fed.Rules Civ.Proc. rule 12(h)(3), 28 U.S.C.A.; Indian Education Act, § 442(a), 86 Stat.

334.

***974** L. Graeme Bell, III, Native American Rights Fund, Washington, D. C., Thomas W. Fredericks and David H. Getches, Native American Rights Fund, Boulder, Colo., Daniel M. Rosenfelt, Eric E. Van Loon, Center for Law and Education, Cambridge, Mass., for plaintiffs.

Harold H. Titus, Jr., U. S. Atty., Arnold T. Aikens and Michael A. Katz, Asst. U. S. Attys., Washington, D. C., for defendants.

ORDER

JUNE L. GREEN, District Judge.

In this action plaintiffs seek inter alia to require the President of the United States to appoint members of the National Advisory Council on Indian Education pursuant to The Indian Education Act, Title IV of Pub.L.No.92-318, 86 Stat. 334, approved by the President June 23, 1972. [FN1] In answering the complaint, the government admitted that the President is charged with duties and responsibilities under the statute in question. The answer further admitted that the President has heretofore neither made any appointments to the Council, nor delegated his power to another.

> FN1. Part D, § 442(a) of the Act provides, "There is hereby established the National Advisory Council on Indian Education ... which shall consist of fifteen members who are Indians and Alaska Natives appointed by the President of the United States. Such appointments shall be made by the President from lists of nominees furnished, from time to time, by Indian tribes and organizations, and shall represent diverse geographic areas of the country." The complaint does not refer to any lists.

The case is before the Court on the government's "Suggestion for Dismissal of Action as to Richard M. Nixon, President of the United States". Fed.R.Civ.P. 12(h)(3) provides,

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

[1] In determining whether the Court has jurisdiction over the subject matter, the Court is reminded that

> "... where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted [and not here relevant] must entertain the suit. ... Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy4)4B"B" Bell v. Hood, 327 U.S. 678, 681-682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

***975** Moreover, the complaint must be construed liberally where plaintiff's assertion of subject matter jurisdiction is questioned by defendant. Caserta v. Home Lines Agency, Inc., 154 F.Supp. 356 (S.D.N.Y.1957), aff'd., 273 F.2d 943 (2d Cir. 1959).

[2] A review of the complaint and plaintiffs' jurisdictional statement indicates that the Court has subject matter jurisdiction and that this case may eventually be decided on the merits. Plaintiffs have cited several statutes, e. g., 28 U.S.C. §§ 1331, 1337, 1361, 1362 and 5 U.S.C. §§ 701-706, and the Court is satisfied on the question.

Since the government contends that any claim against the person of the President is barred by the separation of powers doctrine, the Court now addresses itself to this issue.

[3][4] The President of the United States is not completely immune from judicial process for the sole reason that he is President. Atlee v. Nixon, 336 F.Supp. 790 (E.D.Pa.1972), (dictum); cited with approval in Meyers v. Nixon, 339 F.Supp. 1388 (S.D.N.Y.1972) (dictum). Chief Justice Marshall held long ago that the judiciary has jurisdiction over the President to compel him to perform a nondiscretionary act required by law. United States v. Burr, 25 Fed.Cas. p. 30, No. 14,692d (C.C.A.Va.1807) (subpoena duces tecum against the President held proper).

Suits against the President have generally been unsuccessful for several reasons, none of which appears present in the case sub judice.

[5] The first reason is lack of standing. E. g., Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972). In the case at bar, it appears plaintiffs have a personal

stake and interest in the outcome of the controversy and might suffer actual injury in fact. Plaintiffs are intended beneficiaries of the Indian Education Act. The National Advisory Council clearly was intended to play a key role in administration of the Act. It appears that the implementation of the Act may be impossible or impracticable unless the Council is constituted by the President. [FN2]

> FN2. The responsibilities of the Council are described in § 442(a)-(c) of the Act.

The second reason suits against the President have foundered is that they relate to "executive" or "discretionary" acts. Mississippi v. Johnson, 4 Wall (71 U.S.) 475, 18 L.Ed. 437 (1866). More recently, the Supreme Court has defined a question as "political" if it involves one of the following:

> "... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

[6] Based on the present record it appears that this case does not fall within the Baker definition, and that Mississippi is distinguishable. Plaintiffs do not pray that the Court determine whether Indians are recognized as tribes. They do not ask that the Court alter the special relationship between Indians and the United States. Their claim does not involve the President's role as Commander in Chief of our armed forces or as an architect of our foreign policy. They do not seek to enjoin the President from executing the law.

Plaintiffs' suit does not relate to ongoing supervisory acts which require the exercise of judgment, but to single specific "one-shot" acts, appointments to the Council. Although the President clearly has discretion to choose whom to appoint to the Council, he apparently has no discretion *976 to decide if the Council should or should not be constituted. The Indian Education Act, § 442(a) provides that "... appointments [to the Council] shall be made by the President. ..." (emphasis added). See McQueary v. Laird, 449 F.2d 608, 611 (10th Cir. 1971) (mandamus will issue to require the exercise of permissible discretion.)

[7] In the third place, joinder of the President as a party defendant is generally unnecessary: a plaintiff may be afforded complete relief by suing a member of the President's Cabinet. E. g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). In the instant case, however, it appears that plaintiffs' only remedy is to sue the President directly. Only the President is given the power to make appointments to the Council. As earlier noted, the President has neither made such appointments nor delegated his power to another. The record does not suggest any implied delegation.

For the foregoing reasons, it is by the Court, this 25th day of April 1973,

Ordered that the Suggestion for Dismissal of Action as to Richard M. Nixon, President of the United States, should be and the same hereby is denied.

END OF DOCUMENT

SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES et al., Plaintiffs,
v.
Richard M. NIXON, Individually and as President of the United States, Defendant.

Civ. A. No. 1593-73.

United States District Court, District of Columbia.

Feb. 8, 1974.

Senate committee applied for enforcement of subpoena duces tecum served on the President with respect to certain tapes. On motion of the committee for summary judgment and of the President for dismissal, the District Court, Gesell, J., held that the matter was justiciable but that the committee had not established that it was entitled at that particular time to injunction directing compliance with subpoena, in light of possible prejudicial effect of pretrial publicity with respect to pending criminal prosecutions.

Complaint dismissed without prejudice.

See also, D.C.Cir., 487 F.2d 700; D.C., 366 F.Supp. 51, D.C., 360 F.Supp. 1.

[1] CONSTITUTIONAL LAW ⊜ 68(1)
92k68(1)
Proceeding on application by Senate Committee to enforce subpoena duces tecum served on the President presented a justiciable controversy despite contention that it involved a political question.

[1] FEDERAL COURTS ⊜ 13.20
170Bk13.20
Formerly 106k281
Proceeding on application by Senate Committee to enforce subpoena duces tecum served on the President presented a justiciable controversy despite contention that it involved a political question.

[2] UNITED STATES ⊜ 23(4)
393k23(4)
On application by Senate committee to enforce subpoena duces tecum served on the President, it was the duty of the court to weigh the public interest protected by the President's claim of privilege against public interest that would be served by disclosure to the committee.

[2] UNITED STATES ⊜ 26
393k26
On application by Senate committee to enforce subpoena duces tecum served on the President, it was the duty of the court to weigh the public interest protected by the President's claim of privilege against public interest that would be served by disclosure to the committee.

[3] UNITED STATES ⊜ 23(4)
393k23(4)
President's unwillingness to submit to court, for in camera ex parte inspection, tapes sought by Senate committee pursuant to subpoena duces tecum, or to particularize in any other fashion his claim of executive privilege, precluded judicial recognition of that privilege on confidentiality grounds.

[4] UNITED STATES ⊜ 23(4)
393k23(4)
Court would not enforce subpoena duces tecum served by Senate committee on the President, seeking production of certain tapes, where committee did not demonstrate present need for the tapes in connection with further public hearings, and where nondisclosure was needed to safeguard pending criminal prosecutions from the possible prejudicial effect of pretrial publicity.

[5] UNITED STATES ⊜ 23(5.1)
393k23(5.1)
Formerly 393k23(5)
Senate committee in conducting inquest into governmental conduct may proceed only in aid of Congress' legislative function.

***521** Samuel Dash, Fred D. Thompson, James Hamilton, Ronald D. Rotunda, Washington, D. C., for plaintiffs.

J. Fred Buzhardt, James D. St. Clair, Charles Alan Wright, Robert T. Andrews, Thomas P. Marinis, Jr., Washington, D. C., for defendant.

MEMORANDUM AND ORDER

GESELL, District Judge.

The Senate Select Committee on Presidential Campaign Activities desires access to five tape recordings made by the President of conversations between himself and John Wesley Dean, III, then Counsel to the President. These tapes are relevant to the Committee's functions and are identified by date and time. The Committee duly served a subpoena duces tecum on the President demanding production of those portions of the taped conversations which deal with "alleged criminal acts occurring in connection with the Presidential election of ***522** 1972." [FN1] The President refused to comply. Deeming the Senate's own enforcement procedures inappropriate, the Committee sought judicial enforcement of the subpoena, but the Court (Sirica, J.) ruled that it lacked jurisdiction. At the instance of the Committee, Congress then passed a statute placing special jurisdiction in this Court to enforce the Committee's subpoenas, and accordingly the issues are again presented for judicial consideration. The Committee seeks a declaratory judgment clarifying its rights and an affirmative injunction directing compliance with the subpoena.

> FN1. The Committee originally issued two subpoenas duces tecum, but enforcement of the second subpoena was denied by this Court on January 25, 1974.

The Committee has moved for summary judgment and the President, through his counsel, resists and asks for dismissal. On the basis of the voluminous papers before the Court and a transcript of the oral argument before Judge Sirica during earlier proceedings in this case, the Court has determined that no further hearings are required and the case is ripe for resolution.

[1] The President at the outset contends that the issue before the Court "constitutes a non-justiciable political question," but the decision of the United States Court of Appeals for the District of Columbia Circuit sitting en banc in Nixon v. Sirica, 487 F.2d 700 (D.C.Cir., 1973), is squarely to the contrary and no extended discussion is required. The reasoning of that Court involving a grand jury subpoena is equally applicable to the subpoena of a congressional committee. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), establishes the tests for determining the existence of a "political question," and application of these tests leaves no doubt that the issues presented in the instant controversy are justiciable. See id. at 217, 82 S.Ct. 691. See also Powell v. McCormack, 395 U.S. 486, 518-550, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

[2] Given this determination, it becomes the duty of the Court to weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance. Nixon v. Sirica, supra, 487 F.2d at 716-718. This is a difficult but necessary task. The circumstances are unique in our constitutional history. To aid the final determination, the Court requested the Watergate Special Prosecutor to indicate what effect, if any, public disclosure of the subpoenaed tapes by the Committee at this juncture would have on his responsibilities in carrying forward criminal prosecutions. The Court also requested the President to particularize and to update his claim of privilege as it relates to the five tapes, since substantial time and many events have intervened since the original issuance of the subpoena. The President's response is attached. The Committee has also elaborated upon its need for the tapes in recently filed papers. The Court has carefully weighed these conflicting assertions of public interest in the light of the respective requirements of the parties.

[3][4] It has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest. Conversely, the Court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over all Presidential communications, see Nixon v. Sirica, supra, at 719-720, and the President's unwillingness to submit the tapes for the Court's in camera ex parte inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds. Cf. United States v. Burr, 25 Fed.Cas. 187 (Case No. 14,694), 192 (1807).

On the other hand, both the President and the Special Prosecutor have advanced ***523** another factor bearing upon the public interest which the

Court finds to be of critical importance-the need to safeguard pending criminal prosecutions from the possibly prejudicial effect of pretrial publicity.

At this juncture in the so-called Watergate controversy, it is the responsibility of all three branches of the Federal Government to insure that pertinent facts are brought to light, that indictments are fairly and promptly tried, and that any accusations involving the conduct of the President or others are considered in a dignified manner and dealt with in accordance with established constitutional processes. The President, the Congress and the Courts each have a mutual and concurrent obligation to preserve the integrity of the criminal trials arising out of Watergate. The public has been subjected to a mass of information that is both conflicting and uncertain in its implications. Clearly the public interest demands that the charges and countercharges engendered be promptly resolved by our established judicial processes. Thus the Court is compelled to weigh the effect that disclosure of the subpoenaed portions of these tapes might have upon criminal trials scheduled or soon to be scheduled on the calendar of this Court.

Three grand juries are now engaged on matters under the Special Prosecutor's jurisdiction. A number of indictments and informations have already been filed and more are expected by the end of this month. The cases will be promptly scheduled for trial. The first trial is set for April 1, with pretrial hearings later this month, at which Mr. Dean will testify. The Special Prosecutor has indicated to the Court his intention of introducing at least four of the five subpoenaed tapes into evidence at some of the trials. All five tapes are now in his possession, and at least four have been played before a grand jury.

No one can doubt that, should the President be forced to comply with the subpoena, public disclosure of these tapes would immediately generate considerable publicity. While it is impossible, as the Special Prosecutor points out, to assess the precise impact of such publicity on the forthcoming judicial proceedings, the risk exists that it would bolster contentions that unbiased juries cannot be impaneled for trial. This is, moreover, in the nature of a test case and should the Committee prevail, numerous additional demands might well be made. [FN2]

FN2. A sweeping subpoena seeking some 500 items has apparently been served on the President more recently, but it has not been brought into this litigation.

The President has a constitutional mandate to see that the laws are faithfully executed and should therefore quite properly be concerned with the dangers inherent in excessive pretrial publicity. That the President himself may be under suspicion does not alter this fact, for he no less than any other citizen is entitled to fair treatment and the presumption of innocence. The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system. Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations. But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration.

The Court wishes to emphasize the special circumstances of this particular case which support this conclusion. The five tapes at issue are sought principally for the light that they might shed on the President's own alleged involvement ***524** in the Watergate coverup. "[A]llegations involving the President" are among those specifically assigned to the Special Prosecutor for investigation and, if appropriate, for prosecution. The President has, however reluctantly, now provided the Special Prosecutor with all of the information he requires with regard to the five conversations at issue. The tapes themselves have been delivered to the grand juries; all the President's aides participating in the conversations have been permitted to testify under oath concerning the conversations, and the President has invoked neither his Fifth Amendment nor his attorney-client privilege with regard to any of the conversations or related materials he has furnished. To suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has not been or will not be effective in this matter. All of the evidence at hand is to the

contrary.

[5] The Committee's role as a "Grand Inquest" into governmental misconduct is limited, for it may only proceed in aid of Congress' legislative function. The Committee has, of course, ably served that function over the last several months, but surely the time has come to question whether it is in the public interest for the criminal investigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings. The Committee itself must judge whether or not it should continue along these lines of inquiry, but the Court, when its equity jurisdiction is invoked, can and should exercise its discretion not to enforce a subpoena which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges.

The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture. To be sure, the truth can only emerge from full disclosure. A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected.

Accordingly, the Court declares that, while the controversy presented is justiciable, the Select Committee has not established by a preponderance of the evidence that it is entitled at this particular time to an injunction directing the President to comply with its subpoena for the five tape recordings. The application of the President's counsel for dismissal of the complaint is granted, and the complaint is dismissed without prejudice.

So ordered.

THE WHITE HOUSE

WASHINGTON
February 6, 1974

Dear Judge Gesell:

I have been advised by Special Counsel to the President of the order issued by you on January 25, 1974, in which you solicited my personal response with reference to five specified taped conversations.

*525 As indicated in the various briefs, pleadings and other papers filed in this proceeding, it is my belief that the issue before this Court constitutes a non-justiciable political question.

Nevertheless, out of respect for this Court, but without in any way departing from my view that the issues presented here are inappropriate for resolution by the Judicial Branch, I have made a determination that the entirety of the five recordings of Presidential conversations described on the subpoena issued by the Senate Select Committee on Presidential Campaign Activities contains privileged communications, the disclosure of which would not be in the national interest.

I am taking this position for two primary reasons. First, the Senate Select Committee has made known its intention to make these materials public. Unlike the secret use of four out of five of these conversations before the grand jury, the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President.

Second, it is incumbent upon me to be sensitive to the possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time. The dangers connected with excessive pre-trial publicity are as well-known to this Court as they are to me. Consequently, my Constitutional mandate to see that the laws are faithfully executed requires my prohibiting the disclosure of any of these materials at this time and in this forum.

Sincerely,

s/ Richard M. Nixon

The Honorable Gerhard A. Gesell

Judge

U. S. District Court for the District of Columbia

Washington, D. C.

END OF DOCUMENT

Exhibits – Pres Subpoena Memo.

Facsimile Cover Sheet

To: Erik Jaso (cc: Alex Azar)
Company: OIC
Phone:
Fax: 501-221-8707

From: Rajeev Duggal
Company:
Phone: 301-907-9415
Fax:

Date: 07/04/95
Pages including this cover page: 12

Comments:

Attached is the first response from the Carter library. They seem to have misunterstood what we were looking for, so I will follow up with them on Wednesday. Let me know if you have any comments. Thanks.

Jimmy Carter Library
One Copenhill Avenue Atlanta, Georgia 30307-1498

June 29, 1995

Rajeev Duggal
5914 Wisconson Ave.
Chevy Chase, MD 20815

Dear Mr. Duggal:

In response to your telephone call, I have looked in file locations readily accessible for information on the preparation of President Carter's testimony regarding the Robert Vesco investigation. I have enclosed a computer search of the Library's open material on "Vesco." The number of pages mentioned in the search is approximately 650, the majority of which appears to be newspaper articles.

In a cursory review of the material mentioned in the search, I found little information as to President Carter's testimony. I have enclosed a newspaper article on his testimony. Also, I have included eight pages of what appear to be questions and answers on the subject; however, whether or not they were intended for President Carter's use I cannot tell as they do not include the name of the individual.

If you wish to order copies of any of the pages mentioned above, the charge is twenty-five cents per page. Please make your check payable to the National Archives Trust Fund.

Please contact us again if we may be of further assistance.

Sincerely,

Jim Herring
Archivist

enclosures

DESCRIPTION FILE 15:16:42 06-29-95
SEEK Strategy: TTL = VESCO

HIT.	LOCATION.....	BOX....	TITLE..... PAGE COUNT
1	4	*******	WHITE HOUSE OFFICE OF COUNSEL TO THE PRESIDENT
2		48	Vesco, Robert
3		114	Vesco, Robert
4	4	*******	PRESS -- GRANUM
5		94	Vesco Case
6		94	Vesco Files -- Extra Notes
7		94	Vesco Files -- Reporters 1
8		94	Vesco Files -- Reporters 2
9		94	Vesco Files -- Statements & Transcripts
10		94	Vesco Files -- Top Staff 1
11		94	Vesco Files -- Top Staff 2
12	AV	*******	AUDIO-VISUAL COLLECTION -- MIMS
13		52	10/23/80, Senate Judiciary Committee on Vesco (T-46527)n

President Testifies on Videotape For Grand Jurors in Vesco Case

3-11 3/3/80 Vesco F.R.E.

By EDWARD POUND
Special to The New York Times

WASHINGTON, March 1 — President Carter spent more than an hour answering questions on videotape last month for a Federal grand jury investigating allegations that Robert L. Vesco, the fugitive financier, attempted to have his legal problems "fixed" in the Carter Administration.

Sources familiar with the interview said that Mr. Carter offered no major new information about the case when he was questioned at the White House by three Federal prosecutors. His videotaped interview was shown to the grand jury on Feb. 21, the sources said.

They declined to comment on Mr. Carter's testimony other than to say that it was not damaging to anyone in his Administration, including an aide who is under investigation for possible perjury. The President, the sources said, often responded by saying that he could not recall matters about which the Government lawyers were inquiring.

It was the first time that a President had answered grand jury questions on videotape, though Mr. Carter has provided testimony in different forms at least twice before in criminal investigations.

Carter Aide Is Reticent

Lloyd N. Cutler, the White House counsel, declined to confirm that the President had been questioned. But he said: "The President always cooperates with the proper law enforcement investigation. He has and he will cooperate with this investigation."

Government lawyers who questioned Mr. Carter refused to discuss the session. However, they were known to have focused their questioning on a meeting Mr. Carter held in the White House on Feb. 15, 1977, with Richard M. Harden, a special assistant.

The lawyers wanted the President's account of the meeting to determine whether it corroborated or contradicted Mr. Harden's testimony before the grand jury in December 1978. Sources in the Justice Department said last summer that Mr. Harden was under investigation for possible perjury in his account of his conversation with Mr. Carter and an earlier one with W. Spencer Lee 4th, a lawyer from Albany, Ga., who was representing Mr. Vesco's interests and who is a close friend of Mr. Harden.

Mr. Harden reportedly told the grand jury that he talked Mr. Lee out of continuing to represent Mr. Vesco's interests when they met on Feb. 8, 1977. He was also reported to have testified that he briefed Mr. Carter on the Vesco situation a week later and informed him that Mr. Lee was withdrawing from the arrangement.

Some Jurors Dissatisfied

Sources close to the grand jury investigation said that jurors submitted some of the questions that were put to the President by Government lawyers. No jurors were present for the interview and, the sources said, several jurors were dissatisfied with the procedure because it prevented them from asking followup questions. They were also reportedly displeased because they believed the President should have testified in person.

Evidence in the case is being presented to the grand jury by the office of the United States Attorney here. Government lawyers have not indicated whether the investigation will continue after the grand jury's 18-month term expires in early April.

At one point, Ralph E. Ulmer, the grand jury's foreman, tried to resign, charging the Justice Department with directing a "cover-up" to protect the Carter Administration. His charges were denied by Mr. Carter's spokesmen and the Justice Department.

John T. Kotelly, deputy chief of the fraud division in the United States Attorney's office, declined to comment on the investigation.

The investigation began after R. L. Herring, a businessman in Albany, Ga., charged that Mr. Vesco wanted to bribe Carter Administration officials to resolve his legal problems. Mr. Vesco fled the United states nearly a decade ago after he was charged with defrauding stockholders of millions of dollars in an international swindle.

Mr. Herring, who was convicted on unrelated fraud and racketeering charges and is in a Federal prison in Miami, has said that he retained Mr. Lee, the Albany lawyer, to act in Mr. Vesco's behalf.

In a telephone interview yesterday, Mr. Herring said that he was scheduled to take a polygraph, or lie-detector, test on March 6 and that he planned to release the test results to the press.

Ex-Soviet Spy Agrees To Discuss Techniques For Press, F.B.I. Says

By ROBERT PEAR
Special to The New York Times

WASHINGTON, March 2 — A former Soviet spy who is now working for the United States will be presented to reporters tomorrow by the Federal Bureau of Investigation, Government officials said tonight. The officials said that the agent would discuss Soviet intelligence techniques in a news conference at the bureau's headquarters here.

The scheduled appearance follows by just three days an F.B.I. official's disclosure that the United States quietly expelled five diplomats from Soviet bloc countries in the last year for alleged espionage activities. William O. Kriegar, assistant director of the F.B.I. in charge of the intelligence division, made the disclosure in an interview Friday, the day before his retirement.

President Carter praised Mr. Kriegar's integrity Thursday at a gathering of law-enforcement officials in the White House.

The recent publicity about foreign espionage activities in the United States is a departure from the normal Federal practice. The Government rarely publicizes intelligence or counter-intelligence operations. Intelligence experts suggested that the latest disclosures were personally approved and perhaps orchestrated by President Carter.

Carter Anger Reported

A former top-ranking counter-intelligence official said he believed that President Carter had reached a point of disgust and anger with Soviet intelligence operations similar to that of the British when they expelled more than 100 Soviet diplomats in the late 1960's.

"It is the mood of the President to narrow the size of the target," said the official, suggesting that Mr. Carter wanted to focus a spotlight on the suspected Soviet agents.

Other officials said that the news conference tomorrow was a signal of an increase in the espionage war to match the recent chill in diplomatic relations between the United States and the Soviet Union.

It was not immediately possible to gauge the importance of the agent who is to appear tomorrow. An Administration official said that the disclosure "will not blow a major Soviet intelligence network in this country," although the former spy has been a "productive" asset for the United States.

Canadian Shipping Aide Drowns

SORRENTO, Me., March 2 (AP) — Robert A. Cushman, the president of a Canadian shipping concern, drowned when his small boat capsized in the ocean near an island he owned off Maine, the authorities said today. Mr. Cushman, 58 years old, Pointe Claire, Quebec, was the president of Saguenay Shipping Ltd. of Montreal. He died yesterday at Ingall's Island.

A

From -

Press - Granum, Box 94

Folder "Vesco Files -- Reporter [1]"

September 27, 1978

Well, I'm at a bit of a disadvantage in discussing what I may have said to Richard Harden and the thinking behind my note to the Attorney General since, no matter how hard I've tried, I simply don't remember the conversation.

As best my staff has been able to determine, I talked with Richard very briefly for four or five minutes in the early evening of February 15, 1977 -- a few weeks after taking office. The logs indicate that was the last appointment of a long day that began at 6:30 in the morning and included at least 18 meetings with at least 55 persons.

insert A

The Department of Justice has recently said publicly that this overall matter has been the subject of an investigation for the past several months, and I understand that it is ongoing at this time. I will cooperate in any possible way I can with the investigation, as I have with investigations in the past. I think it is inappropriate to speculate or comment on hypotheticals, especially so when an investigation by the Department of Justice is ongoing.

Q: What is the Administration now doing to secure Vesco?

A: As a matter of policy, we are pursuing every possible means to secure the return of Mr. Vesco to the United States to stand trial on the charges he faces. My own policy is clear -- even before Mr. Vesco left Costa Rica in May of this year for the Bahamas, I know of at least 5

From - Press - Graham, Box 94

different times I personally encouraged efforts to secure the return of Mr. Vesco to the United States to stand trial, & my staff will be happy 2 supply more detail on those times.

I have discussed our ~~efforts~~ efforts to secure Vesco's return with the Attorney General and the Secretary of State both before and after the current news stories, but to discuss now specifics of our current efforts would be inappropriate and unwise.

Q: Why did you write such a vague note to the Attorney General, one that does not spell out any connection whatsoever with Vesco, and to be quite honest could be interpreted maliciously as far as your intentions?

A: As I've said, I have no recollection of the brief conversation, so I'm really at a disadvantage in trying to answer that question.

IF PRESSED:

I certainly understand the legitimacy of the questions. But I simply do not remember that brief conversation or writing the note. I think it would be a disservice both to you and to myself to ascribe motives for doing something I don't remember doing.

In any case, I have made my pos. on the note very clear — Have no 5 sec. motive else. — —

insert (B)

Q: Have you talked with Richard Harden since these stories came out?

A: No.

Q: Why did Harden come to the President of the United States instead of Lipshutz, Jordan, or the Attorney General himself?

A: I really couldn't tell -- you'll have to ask him.

Q: Have you been interviewed by the FBI?

A: No.

Q: Will you be?

A: It has always been my very firm belief, and I know it is one shared by Griffin Bell and William Webster, that every citizen has an obligation to provide any information that may be relevant in any investigation. I've given such interviews before, the requests from them have routinely gone through my Legal Counsel's office, and if there is a

request in this instance, I assume it will go to my Counsel, and I will certainly cooperate.

Q: Do you know Spencer Lee?

A: I know him as a friend of Hamilton Jordan and as a campaign worker.

B

Q. Do you believe there was a cmapaign by ~~Phor~~ Robert Vesco to influence some of yo[u]r clo[s]sest associates?

~~A. There's certainly the appearance of a cmapaign.~~

~~A. Tant's the~~

~~A. That's among the prurposes of the Justice Department investigation---to dete--~~

A. Determing whether there was such a campaign is among the ~~ap~~ purposes of the Justice Department investigation, which as I've said ~~on~~ has been ongoing for se~~veral~~ ~~m~~ ~~months.~~

Smile

I cert. don't know 1st hand. —what I've ... many ... —affect ... staff ... improper camp. + improper campaign

Lapdogs

A. I certainly don't know firsthand----I only know that I've read.

~~I'm sure that every fuguitive~~ I'm sure that many fugitives would like to affect their fugutive status. But one of the ~~p~~ purposes of the Justice Department investigation, which as I said has been going on for several months, is whethere there was a campaign and if so whether it was improper or illegal.

~~Q Do you mean then that there could could be a "proper" campaign directed towards the Adminisratoin.~~

~~A I suppolse~~

(A)

Q. What does Richard Hardin say he remembers about his conversation with you.

According to my staff, he simply states that he came to let me know that a potential problem - that is Mr. Lee asking Mr. Jordan to meet with someone representing Mr. Visco - ~~to have~~ had not not taken taken place ~~at all~~ because Mr. Lee had realized that this would be inappropriate. Mr. Hardin ~~told my staff~~ ~~stated~~ was his feeling and mine that any further discussions on this subject ~~with~~ should take place with the Justice Dept, not at the White House, and that My note was ~~that~~ to make sure that if Mr. Lee called he would be able to get through.

(B)

Q. Why did your note say "when he calls" rather than "if he calls"?

A. ~~obviously can't to try to why I chose a particular word~~ Normally when you write an informal note to make sure a phone call gets returned you don't word it as carefully as if you were writing a legal document.

UNITED STATES
v.
BURR. [FN1]

FN1 For references to the various cases in this series, which, together, embrace a full report of the entire proceedings against Aaron **Burr,** see note to Case No. 14,692a.

Circuit Court, D. Virginia.

Sept. 3, 1807.

At law. Trial of Aaron Burr for a misdemeanor, in beginning, setting on foot, and providing the means of, a military expedition against the dominions or territory of the king of Spain.

At the meeting of the court on Wednesday, the 2d of September, 1807, Mr. Hay stated that according to his understanding of the opinion of the court delivered in the trial for treason [Case No. 14,693], the evidence of the transactions on Blennerhassett's Island did not come up to the constitutional crime of levying war; and so it would be improper to press the prosecution against Blennerhassett and Israel Smith. Under these circumstances he should enter a nolle prosequi as to the indictments for treason, and move to commit them, and also Mr. Burr, in order that they should be tried in the place where it should appear that the crime had been committed. He moved that Blennerhassett and Smith might be brought into court; and an order was made accordingly.

Mr. Burr then said that the motions were distinct against the several individuals, and they could not be combined. He insisted on a separate examination as to himself, and required a specification of the time and place when and where the offence was said to have been committed, that he might have an opportunity of meeting the testimony.

A debate of considerable length ensued on this motion.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

1. Where a person, after acquittal on an indictment for treason, is in the custody of the marshal, bound to answer an indictment for a misdemeanor, the court has no authority to send him to another district for trial for treason in the place where the crime was committed.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

2. The laws of the several states cannot be regarded as rules of decision (Judiciary Act, s 34, 1 Stat. 92) in trials for offenses against the United States. Cited in Clark v. Sohier, Case No. 2,835; U. S. v. New Bedford Bridge, Id. 15,867.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

3. The circuit court of the United States, under section 4 of the judiciary act, has power to devise the process for bringing any person before it who has committed an offense of which it has cognizance, without reference to the process given by the state law. Cited in Re Sheazle, Case No. 12,734.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

4. A capias is the proper process to bring an accused in to answer to an indictment for an offense against the laws of the United States.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

5. Where the accused is already in court, an order of the court will supply the place of a capias.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

6. It is sufficient, in an affidavit, for the production of a paper in the possession of the prosecution, to aver that it 'may be material' in the defense.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

7. On a motion to compel the production of a letter written to the president of the United States, and in the hands of the prosecuting attorney, averred to be material to the defense, parts of it cannot be withheld, in the discretion of the prosecuting attorney, on the ground of public interest. The president alone may decide as to the propriety of withholding them, and he cannot delegate his discretion.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

8. On the trial of an indictment for a misdemeanor, in beginning or setting on foot a military expedition against a nation at peace with the United States, containing no allusion to a conspiracy, the declarations of third persons, not forming a part of the transaction, and not made in the presence of the accused, are not admissible in evidence.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

9. In such case the acts of accomplices, except so far as they prove the character or object of the expedition in question, are not admissible in evidence.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

10. The acts of the accused in a different district, which constitute, in themselves, substantive causes for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment.

CRIMINAL LAW--ARREST AND REMOVAL OF ACCUSED--PROCESS--STATE LAWS--PRODUCTION OF PAPERS--LETTERS TO PRESIDENT--AFFIDAVIT--MILITARY EXPEDITION AGAINST NATION AT PEACE--EVIDENCE--ACTS OF CO-CONSPIRATORS--ACTS IN OTHER DISTRICTS.

11. Any legal testimony which shows the expedition in question to be military, or to have been designed against the dominions of the nation, as charged, is admissible.

***187** MARSHALL, Chief Justice.

MARSHALL, Chief Justice, finally remarked that as Col. Burr was now in custody of the marshal, and bound to answer an indictment for a misdemeanor,

the court had no authority to send him to another district.

Mr. Hay said that all three were in the same situation, and the same difficulty applied to all. He regretted that the difficulty had not been adverted to at an earlier period, which would have saved much trouble; that he did not wish to disturb the opinion of the court, but would proceed with the trial of Col. Burr for a misdemeanor. He requested the clerk to read the indictment in the usual way, that they might proceed without issuing process to take the accused into custody, as he was in court.

The clerk was about to proceed, when Mr. Burr interrupted him, and said that he ought not to be arraigned, but to be permitted to plead by attorney. He said he was in court, not on that indictment, but because he had not moved to be discharged since his acquittal on the first indictment for treason. In this case he wished certain land-marks to be set up, in order to direct in future cases.

A protracted debate ensued, occupying the remainder of the day, in which Mr. Botts made a very long speech, and several of the counsel, on both sides, made shorter ones; all about the question whether a capias or a summons was the proper process to bring Col. Burr before the court, he being all the time in court, and participating in the debate.

[FN2]MARSHALL, Chief Justice, said, that if ***188** a capias should be determined to be the proper process, he should consider the situation of the party, and direct that he should not be discharged till the cause was finally decided. If a capias should be considered not to be the proper process, a venire facias must be awarded. There was another consideration: If a venire facias issued, it would involve the right to a continuance of the cause till another term. He would consider that with the principal question.

FN2 From 2 Robertson's Report of the Trial of Aaron Burr, 481.

THE COURT.

THE COURT took time to consider; and adjourned till to-morrow.

Thursday, September 3, 1807.

MARSHALL, Chief Justice.

The question now before the court is whether bail be demandable from a person actually in custody, against whom an indictment for a misdemeanor has been found by a grand jury. As conducting directly to a decision of this point, the question has been discussel whether a summons or a capias would be the proper process to bring the accused in to answer the indictment, if, in point of fact, he were not before the court. It seems to be the established practice of Virginia in such cases to issue a summons in the first instance; and if by any act of congress the laws of the several states be adopted as the rules by which the courts of the United States are to be governed in criminal prosecutions, the question is at an end; for I should admit the settled practice of the state courts as the sound construction of the state law under which that practice has prevailed. The 34th section of the judicial act, it is contended, has made this adoption. The words of that section are 'that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.'

It might certainly be well doubted whether this section (if it should be construed to extend to all the proceedings in a case where a reference can be made to the state laws for a rule of decision at the trial) can comprehend a case where, at the trial in chief, no such reference can be made. Now in criminal cases the laws of the United States constitute the sole rule of decision; and no man can be condemned or prosecuted in the federal courts on a state law. The laws of the several states therefore cannot be regarded as rules of decision in trials for offences against the United States. It would seem to me too that the technical term, 'trials at common law,' used in the section, is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits, as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty. The provision of this section would seem to be inapplicable to original process, for another reason. The case is otherwise provided for by an act of congress. The 14th section of the judicial act

empowers the courts of the United States 'to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' This section seems to me to give this court power to devise the process for bringing any person before it who has committed an offence of which it has cognisance, and not to refer it to the state law for that process. The limitation on this power is, that the process shall be agreeable to the principles and usages of law. By which I understand those general principles and those general usages which are to be found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state.

Upon general principles of law it would seem to me that in all cases where the judgment is to affect the person, the person ought to be held subject to that judgment. Thus in civil actions, where the body may be taken in execution to satisfy the judgment, bail may be demanded. If the right of the plaintiff be supported by very strong probability, as in debt upon a specialty, bail is demandable without the intervention of a judge. If there be no such clear evidence of the debt, bail is often required upon the affidavit of the party. Now, reasoning by analogy from civil suits to criminal prosecutions, it would seem not unreasonable, where there is such evidence as an indictment found by a grand jury, to use such process as will hold the person of the accused within the power of the court, or furnish security that the person will be brought forward to satisfy the judgment of the court. Yet the course of the common law appears originally to have been otherwise. It appears from Hawkins that the practice of the English courts was is issue a venire facias in the first instance, on an indictment for a misdemeanor. This practice however is stated by Blackstone to have been changed. He says (volume 4, p. 319), 'And so in the case of misdemeanors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of capias immediately, in order to bring in the defendant.'

It is then the English construction of the common law, that although in the inferior courts the venire facias might be the usual course, and although it had prevailed, yet that a judge of the king's bench might issue a capias in the first instance. This subject has always appeared to me to be in a great measure governed by the 33d section of the judicial act. That section provides, that for any crime or offence against the United States, the offender may, agreeably to the usual mode of process against offenders in that ***189** state where he is found, be arrested and imprisoned or bailed as the case may be. This act contemplates an arrest, not a summons; and this arrest is to be, not solely for offences for which the state laws authorize an arrest, but 'for any crime or offence against the United States.' I do not understand the reference to the state law respecting the mode of process as overruling the preceding general words, and limiting the power of arrest to cases in which according to the state laws a person might be arrested, but simply as prescribing the mode to be pursued. Wherever, by the laws of the United States, an offender is to be arrested, the process of arrest employed in the state shall be pursued; but an arrest is positively enjoined for any offence against the United States. This construction is confirmed by the succeeding words: the offender shall be imprisoned or bailed as the case may be. There exists no power to direct the offender, or to bind him without bail, to appear before the court; which would certainly have been allowed had the act contemplated a proceeding in such a case which should leave the person at large without security. But he is absolutely to be imprisoned or bailed as the case may be.

In a subsequent part of the same section it is enacted 'that upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death.' There is no provision for leaving the person at large without bail; and I have over construed this section to impose it as a duty on the magistrate who proceeds against any offender against the United States to commit or bail him. I perceive in the law no other course to be pursued. This section, it is true, does not respect the process upon an indictment. But the law would be inconsistent with itself if it required a magistrate to arrest for any offence against the United States, if it commanded him on every arrest to commit or to bail, and yet refused a capias and permitted the same offender to go at large, as soon as an indictment was found against him. This section therefore appears to me to be entitled to great influence in determining the court on the mode of exercising the power given by the 14th section in relation to process. On the impeachment which has been mentioned, this point

was particularly committed to Mr. Lee, and the law upon it was fully demonstrated by him. The only difficulty I ever felt on this question was produced by the former decision of Judge Iredell. If the state practice on this subject had been adopted I should have held myself bound by that adoption. But I do not consider the state practice as adopted. Mundell's Case [Case No. 15,834] was a civil suit; and the decision was that the state rule respecting bail in civil actions must prevail. Sinclair's Case [unreported] was indeed a case similar to this; and in Sinclair's Case a venire facias was issued. But I am informed by the clerk that this was his act, at the instance of the attorney, not the act of the court. The point was not brought before the court.

In U. S. v. Callender [Case No. 14,709] a capias, or what is the same thing, a bench warrant was issued. This was the act of the court; but, not having been an act on argument, or with a view of the whole law of the case and of former decisions, I should not have considered it as overruling those decisions if such existed. But there has been no decision expressly adopting the state practice; and the decision in Callender's Case [supra] appears to me to be correct. I think the capias the more proper process. It is conformable to the practice of England at the time of our Revolution, and is, I think, in conformity with the spirit of the 33d section of the judicial act. I shall therefore adopt it. To issue the capias to take into custody a person actually in custody would be an idle ceremony. In such a case the order of the court very properly supplies the place of a capias. The only difference between proceeding by capias and by order, which I can perceive, would be produced by making the writ returnable to the next term. [FN3]

FN3 From 2 Robertson's Report of the Trial of Aaron Burr, 481.

Mr. Hay then said he would proceed to the trial of the indictment for a misdemeanor.

Mr. Burr then referred to the letter which had been demanded of the president, which had often been promised but not yet produced. He wished to know whether that letter was in court.

Mr. Hay said he did not know whether the original letter was among his papers or not. He had searched for it, but had not been able to find it. He had a copy, which was ready to be produced.

Mr. Burr said the president had promised that the letter should be produced, and it was strange that it was not here. He was not disposed to admit a copy.

After some further remarks by counsel, the CHIEF JUSTICE said, unless the loss of the original be proved, a copy cannot be admitted.

Mr. Burr then called the attention of the court to the subject of bail, (made necessary by the decision that a capias was the proper process to bring him before the court.)

After some discussion, the CHIEF JUSTICE fixed the amount of the bail at five thousand dollars.

The counsel for the prosecution here took the alarm, that taking bail might entangle the motion intended subsequently to be made to commit for treason in another state. A debate on this subject of considerable length ensued, in the course of which the CHIEF JUSTICE remarked that those who prosecuted had the choice of making the motion to commit for a greater crime by discontinuing the prosecution for a misdemeanor, or of persevering in the latter.

At the close of this discussion, resulting in ***190** nothing, Mr. Burr observed that he had discovered that a letter written by General Wilkinson on the 12th of November, 1806, to the president of the United States, was material to his defence.

Mr. Hay said he had that letter, and would produce it. But there were some matters in the letters of General Wilkinson which ought not to be made public. It would be extremely improper to submit the whole of his letters to public inspection. He was willing to put them in the hands of the clerk confidentially, and he could copy all those parts which had relation to the cause.

The counsel for Colonel Burr were not satisfied with this proposal. They demanded the whole letters.

Mr. Hay said he was willing that Mr. Botts, Mr. Wickham, and Mr. Randolph should examine them. He would depend on their candor and integrity to make no improper disclosures; and if there should

was particularly committed to Mr. Lee, and the law upon it was fully demonstrated by him. The only difficulty I ever felt on this question was produced by the former decision of Judge Iredell. If the state practice on this subject had been adopted I should have held myself bound by that adoption. But I do not consider the state practice as adopted. Mundell's Case [Case No. 15,834] was a civil suit; and the decision was that the state rule respecting bail in civil actions must prevail. Sinclair's Case [unreported] was indeed a case similar to this; and in Sinclair's Case a venire facias was issued. But I am informed by the clerk that this was his act, at the instance of the attorney, not the act of the court. The point was not brought before the court.

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Mr. Hay said he was willing that Mr. Botts, Mr. Wickham, and Mr. Randolph should examine them. He would depend on their candor and integrity to make no improper disclosures; and if there should

be any difference of opinion as to what were confidential passages, the court should decide.

Mr. Martin objected to this as a secret tribunal. The counsel had a right to hear the letters publicly, without their consent.

Mr. Burr's counsel united in refusing to inspect anything that was not also submitted to the inspection of their client.

The CHIEF JUSTICE saw no real difficulty in the case. If there were any parts of the letters confidential, then a public examination would be very wrong; otherwise they ought to be read.

Mr. Hay said the president wrote to him when he understood the process had been awarded, that he had reserved to himself the province of deciding what parts of the letters ought to be published and what parts required to be kept secret; that they wished everything to be as public as possible except those parts which were really confidential. The discussion continued till the court adjourned.

Friday, September 4, 1807.

Colonel Burr renewed his application for the production of the two letters from General Wilkinson to the president of the United States, for one of which a subpoena duces tecum had been awarded. He said that the president was in contempt, and he had a right to demand process of contempt against him; but as it would be unpleasant to resort to such process, and it would produce delay, he hoped the letters would be produced. It might, perhaps, suffice to produce a copy, if duly authenticated, of that of October 21st, which was said to be lost or mislaid. As to the letter of the 12th of November, he had reason to believe that the whole letter had been shown to others to injure him, and as the whole letter had been used against him, the whole ought to be produced.

Mr. Hay said he did not know what was meant by the expression of such a belief or suspicion.

Mr. Burr said he would be more explicit; and asked whether this letter had not been used against him before the grand jury.

Mr. Hay said he could not be certain whether it was produced before the grand jury or not. He was not as well acquainted with what passed before the grand jury as some other gentlemen were.

A long and excited debate ensued, in which Mr. Burr's counsel insisted on the production of the whole letter, and Mr. Hay insisted on withholding certain passages. He said there were two passages in the letter which he could not submit to public inspection; and he did not know that they could be extorted from him under any circumstances. Finally, the counsel of Colonel Burr applied for a subpoena duces tecum to Mr. Hay, which was awarded. To this Mr. Hay made a return, tendering a copy of the letter of 12th November, 1806, 'excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined; the parts excepted being communicated to the president, and he having devolved on me the exercise of that discretion which constitutionally belongs to himself. The accuracy of this opinion I am willing to refer to the judgment of the court, by submitting the original letter to its inspection. I further certify, in order to show more clearly the irrelevancy of the parts excepted to any defence which can be set up in the present case, that these parts contain a communication of the opinion of the writer concerning certain persons, about which opinion, or the fact of his having communicated it, the writer, if a witness before the court, could not legally, as I conceive, be interrogated; and about which no evidence could legally be received from other persons.'

The CHIEF JUSTICE asked if there were any objections to this return.

Mr. Burr said he could not be satisfied with a copy of part of the letter.

Mr. Botts said it would be a matter of the deepest regret if an attachment should go against Mr. Hay, and nothing would give him greater pain than to be under the necessity of making such a motion. To avoid this, there was another alternative, but which was, also, extremely disagreeable, as it would produce delay, viz: To move that the cause should be continued until the letter should be produced. He made that motion, and supported it by a speech of considerable length.

Other counsel followed, in a protracted debate on the motion. When the discussion ended the CHIEF JUSTICE delivered the following opinion:

MARSHALL, Chief Justice. [FN4]It is not without regret that I find myself constrained to deliver an opinion on the present application. To overrule the motion may, at least, have the appearance of imposing a hardship ***191** on the prinsoner, and to grant it may occasion delay in a case which all must desire to terminate. It is with regret that I decide a question under such circumstances, because it is probable that those parts of the letter which are withheld, are of much less importance than gentlemen suppose; and that the effect of their production would be to dissipate suspicions which are now entertained, and to show that the subject of the controversy is by no means proportioned to the zeal with which it has been maintained. Upon an affidavit made by the accused, a subpoena duces tecum has been awarded to the president of the United States, requiring the production of this letter. In consequence of this process the letter was transmitted to the attorney for the United States, accompanied with a communication from the president, authorizing the attorney to exercise his discretion in the case. In the exercise of this discretion, he has selected certain parts of the letter which he has determined to withhold, because he believes them to be confidential, and therefore such as ought not to be exhibited in public. If this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power, which contain evidence pertinent to the issue. In this respect the courts of law are invested with the power of a court of chancery, and if the order be disobeyed by the plaintiff, judgment as in the case of a nonsuit may be entered against him.

FN4 From 2 Robertson's Report of the Trial of Aaron Burr, 533.

Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? If the opposite party be required to produce his books on a particular subject, it is not necessary that the entries on those books should be stated in order to entitle the applicant to his motion. He cannot be expected to make such a statement. It has always been deemed sufficient to describe the paper required, to express its general purport, and to state its materiality to the case in some degree, even when its contents are known. When a paper is in possession of one party, it is completely in his power, and is required by the other, very strong reasons must be given to justify its being withheld, if it have any relation to the case. Before a court would make a decisive order in such a case it certainly ought to receive reasonable satisfaction of the probable materiality of the evidence asked for and refused, and of its relation to the pending controversy; but the information to be required must depend on the nature of the case.

Criminal cases, it is true, are not provided for; but courts will always apply the rules of evidence to criminal prosecutions so as to treat the defence with as much liberality and tenderness as the case will admit. The prosecutor is the representative of the government, and the government acts as a party through the agency of the attorney, who directs and manages the prosecution on behalf of government. If there be a paper in the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual who possesses a paper which might be required for the defence. If the executive possess a paper which is really believed by the accused to be material to his defence, ought it to be withheld? The question will recur, is it really material to his defence? The only evidence that can be received on this point is from the party himself, and he has made his affidavit to its materiality. But that is said to be insufficient; and why? Because the averment is, that the letter 'may be material' in the defence. Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor. But there were two indictments: the one for treason and the other for a misdemeanor, and the allegation of materiality made in the affidavit may, it is said, refer to either indictment. But the prosecution for treason is terminated, and was terminated before the affidavit was made. Consequently it can relate only to the indictment for a misdemeanor. It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the

letter itself is withheld? Or how can their applicability be shown without requiring the accused prematurely to disclose his defence?

Let it be supposed that the letter may not contain anything respecting the person now before the court. Still it may respect a witness material in the case, and become important by bearing on his testimony. Different representations may have been made by that witness, or his conduct may have been such as to affect his testimony. In various modes a paper may bear upon the case, although before the case be opened its particular application cannot be perceived by the judge. That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted. I cannot, however, on this point, go the whole length for which counsel have contended. The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. I do not think precisely with the gentlemen on either side. I can readily conceive that the president might receive a letter which it would be improper to exhibit *192 in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on. I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description. The reason is this: Letters to the president in his private character, are often written to him in consequence of his public character, and may relate to public concerns. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view.

Yet it is a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances. I cannot precisely lay down any general rule for such a case. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case. On the present occasion the court would willingly hear further testimony on the materiality of the paper required, but that is not offered.

In no case of this kind would a court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and so obvious, that all must acknowledge them. But to induce the court to take any definite and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper, for reasons stated by himself, the materiality of that paper ought to be shown. In this case, however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others, which must be respected by the court. They must therefore be approved by himself, and not be the mere suggestions of another for him. It does not even appear to the court that the president does object to the production of any part of this letter. The objection, and the reasons in support of the objection, proceed from the attorney himself, and are not understood to emanate from the president. He submits it to the discretion of the attorney. Of course, it is to be understood that he has no objections to the production of the whole, if the attorney has not. Had the president, when he transmitted it, subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation. As to the use to be made of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used. The declarations therefore made upon that subject can have no weight. Neither can any

argument on its materiality or immateriality drawn from the supposed contents of the parts in question. The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced, or the cause be continued. In regard to the secrecy of these parts which it is stated are improper to give out to the world, the court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition, and that no use shall be made of it but what is necessarily attached to the case. After the accused has seen it, it will yet be a question whether it shall go to the jury or not. That question cannot be decided now, because the court cannot say whether those particular passages are of the nature which are specified. All that the court can do is to order that no copy shall be taken; and if it is necessary to debate it in public, those who take notes may be directed not to insert any part of the arguments on that subject. I believe, myself, that a great deal of the suspicion which has been excited will be diminished by the exhibition of this paper. [FN5]

FN5 From 2 Robertson's Report of the Trial of Aaron Burr, 533.

Mr. Hay said he would consult Gen. Wilkinson, and if he consented, he would produce the letter under the restrictions suggested by the court--preferring that to a continuance of the cause.

On Saturday, the 5th of September, Mr. Hay stated to the court that he would immediately send an express to Monticello (where the president then was) for instructions in relation to producing the letter, and that he would probably get a return by Tuesday evening.

On Wednesday, the 9th of September, a ***193** jury was empanneled and sworn, just one week having been consumed in the preliminary proceedings hereinbefore briefly noticed.

On the same day, Mr. Hay presented a certificate from the president, annexed to a copy of Gen. Wilkinson's letter, excepting such parts as he deemed he ought not to permit to be made public.

The clerk read the indictment, consisting of seven counts, all charging the defendant in slightly variant forms, with beginning, setting on foot, or providing the means of a military expedition against the dominions or territory of the king of Spain.

In all the counts the offence was charged to have been committed at Blennerhassett's Island, in the county of Wood, and district of Virginia.

The trial then proceeded, and in the course of it the counsel for the prosecution offered in evidence declarations of Blennerhassett tending to implicate Colonel Burr, and endeavored to support it by alleging: 1st, a conspiracy between these two and others; and that the declarations of one conspirator were evidence against the others; or, 2d, that they were accomplices. They also offered in evidence acts of the nature laid in the indictment, committed by the defendant in Ohio and Kentucky, all of which was objected to.

The argument on the admissibility of the testimony lasted several days, at the close of which

[FN6]MARSHALL, Chief Justice, delivered the following opinion:

FN6 From 3 Carpenter's Report of Burr's Trial, 93.

The present motion is particularly directed against the admission of the testimony of Neale, who is offered for the purpose of proving certain conversations between himself and Herman Blannerhasset. It is objected that the declarations of Herman Blannerhasset are at this time inadmissible on this indictment. The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice. I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might

be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important. This rule as a general rule is permitted to stand, but some exceptions to it have been introduced, concerning the extent of which a difference of opinion prevails, and that difference produces the present question.

The first exception is, that in cases of conspiracy, the acts, and it is said by some, the declarations of all the conspirators, may be given in evidence on the trial of any one of them, for the purpose of proving the conspiracy, and this case it is alleged, comes within the exception. With regard to this exception, a distinction is taken in the books between the admissibility and operation of testimony, which is clear in point of law, but not at all times easy to practice in fact. It is, that although this testimony be admitted, it is not to operate against the accused, unless brought home to him by testimony drawn from his own declarations or his own conduct. But the question to be considered is, does the exception comprehend this case? Is this a case of conspiracy according to the well-established law meaning of the term? Cases of conspiracy may be of two descriptions. 1st. Where the conspiracy is the crime, in which case the crime is complete although the act should never be performed, and in such cases if several be indicted, and all except one be acquitted, that one cannot, say the books, be convicted, because he cannot conspire alone. 2d. Where the crime consists in the intention, and is proved by a conspiracy, so that the conviction of the accused may take place upon evidence, that he has conspired to do an act which manifests the wicked intention. In both these cases an act is not essential to the completion of the crime, and a conspiracy is charged in the indictment as the ground of accusation. If the conspiracy be the sole charge, as it may be, the question to be decided, is, not whether the accused has committed any particular fact, but whether he has conspired to commit it. Evidence of conspiracy in such a case goes directly to support the issue. It has therefore been determined that the nature of the conspiracy may be proved by the transactions of any of the conspirators in furtherance of the common design; the degree of guilt, however, of the particular conspirator upon trial, must still depend on his own particular conduct.

In the case at bar, the crime consists not in intention but in acts. The act of congress does not extend to the secret design, if not carried into open deed, nor to any conspiracy, however, extensive, if it do not amount to a beginning or setting on foot a military expedition. The indictment contains no allusion to a conspiracy, and of consequence the issue to be tried by the jury is not whether the conspiracy has taken place, but whether the particular facts charged in the indictment have been committed. I do not mean to admit, that by any course which might ***194** have been given to the prosecution, that could have been converted into a case of conspiracy; but most assuredly if it was intended to prove a conspiracy, and to let in that kind of testimony which is admissible only in such a case, the indictment ought to have charged it. I have not been able to find in the books a single decision, or a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons, made in the absence of the person on trial, under the idea of a conspiracy, where no conspiracy is alleged in the indictment. The researches of the counsel for the prosecution have not been more successful. But they suppose this case, though not within the letter, to come clearly within the reasoning of those cases where this testimony has been allowed. It has been said, that wherever the crime may be committed by a single individual, although in point of fact more than one should be concerned in it, as in all cases of felony, the prosecution must be conducted in the usual mode, and the declarations of third persons cannot be introduced at a trial; but whenever the crime requires more than one person, where from its nature it cannot be committed by a single individual, although it shall consist, not in conspiracy, but in open deed, yet it is in the nature of a conspiracy, and evidence of the declarations and acts of third persons connected with the accused may be received whether the indictment covers such testimony or not. I must confess that I do not feel the force of this distinction. I cannot conceive why, when numbers do in truth conspire to commit an act, as murder or robbery, the rule should be, that the declaration of one of them is no evidence against another, and yet, if the act should require more than one for its commission, that the declarations of one person engaged in the plot would immediately become evidence against another. I cannot perceive the reason of this distinction; but, admitting its solidity, I know not on what ground to dispense

with charging in the indictment the combination intended to be proved. If this combination may be proved by the acts or declarations of third persons made in the absence of the accused, because he is connected with those persons; if in consequence of this connection the ordinary rules of evidence are to be prostrated, it would seem to me that the indictment ought to give some notice of this connection. When the terms used in the indictment necessarily imply a combination, it will be admitted that a combination is charged and may be proved. And where A., B., and C. are indicted for murdering D., yet in such a case the declarations of one of the parties made in the absence of the others have never been admitted as evidence against the others. If then this indictment should even imply that the fact charged was committed by more than one person, I cannot conceive that the declarations of a particeps criminis would become admissible on the trial of a person not present when they were made, unless those declarations form a part of the very transaction charged in the indictment.

If in all this I should be mistaken, yet it remains to be proved that the offence charged may not be committed by a single individual. This may, in some measure depend on the exposition of the terms of the act; and it is to be observed that this exposition must be fixed. It cannot vary with the varying aspect of the prosecution at its different stages. If, as has been said, a military expedition is begun or set on foot when a single soldier is enlisted for the purpose, then unless it be begun as well by the soldier who enlists, as by the officer who enlists him, a military expedition may be begun by a single individual. So if those who engage in the enterprize follow their leader from their confidence in him, without any knowledge of the real object, there is no conspiracy, and the criminal act is the act of an individual. So, too, if the means are any means, the crime may unquestionably be committed by any individual. Should the term be even so construed as to imply that all the means must be provided before the offence can be committed, still all the means may, in many cases, be provided by a single individual. The rule then laid down by the counsel for the prosecution, if correct in itself, would not comprehend this case.

Secondly, there are also cases in the books where acts are in their nature joint, and where the law attaches the guilt to all concerned in their commission, so that the act of one is in truth the act of others, where the conduct of one person in the commission of the fact constitutes the crime of another person; but this is distinct from conspiracy. If many persons combine to commit a murder, and all assist in it, and are actually or constructively present, the act of one is the act of all, and is sufficient for the conviction of all. So in acts of levying war, as in the Cases of Damane and Purchase, the acts of the mob were the acts of all in the mob whose conduct showed a concurrence in those acts, and in the general design, which the mob were carrying into execution. But these decisions turn on a distinct principle from conspiracy. The crime is a joint crime, and all those who are present aiding in the commission of it participate in each other's actions, and in the guilt attached to those actions. The conduct of each contributes to shew the nature of this joint crime; and declarations made during the transaction are explanatory of that transaction; but I cannot conceive that in either case declarations unconnected with the transaction would have been evidence against any other than the person who made them, or persons in whose presence they were made. If, for example, one of several men who had united in committing ***195** a murder should have said, that he with others contemplated the fact which was afterwards committed, I know of no case which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken. So if Damane had previously declared that he had entered into a confederacy for the purpose of pulling down all meeting houses, I cannot believe that this testimony would have been admissible against a person having no knowledge of the declaration and giving no assent to it. In felony the guilt of the principal attaches to the accessory, and therefore the guilt of the principal is proved on the trial of the accessory. In treason, all are principals, and the guilt of him who has actually committed the treason does, in England, attach to him who has advised, aided or assisted that treason. Consequently the conduct of the person who has perpetrated the fact must be examined on the trial of him who has advised or procured it. But in misdemeanors by statute, where the commission of a particular fact constitutes the only crime punished by the law, I believe there is no case where the declaration of a particeps criminis can affect any but himself.

Thirdly. The admission of the declarations of Mr.

Blannerhasset may be insisted upon under the idea he was the agent of Col. B. How far the acts of one man may affect another criminally, is a subject for distinct consideration, but I believe there is no case where the words of an agent can be evidence against his principal on a criminal prosecution. Could such testimony be admissible, the agency must be first clearly established, not by the words of the agent, but by the acts of the principal, and the word must be within the power previously shown to have been given.

The opinions of the circuit court of New York in trials of Smith and Ogden have been frequently mentioned. [Case No. 16,342.] Although I have not the honor to know the judge who gave those decisions, I consider them as the determination of a court of the United States, and I shall not be lightly induced to disregard them, or unnecessarily to treat them with disrespect. I do not, however, in the opinions of Judge Talmadge, perceive any expression indicating that the declarations of third persons could be received as testimony against any individual who was prosecuted under this act. If he has given that opinion, it has certainly escaped my notice, and has not been suggested to me by counsel. He unquestionably says in page 113 of the trial 'that the reference which was made to the doctrine of conspiracy did not apply in that case.' The reference alluded to was the observation of Mr. Emmet, who had said 'that, if the object was to charge Col. Smith with the acts of Capt. Lewis, they ought to have laid the indictment for a conspiracy.' The opinion of the judge that the doctrine of conspiracy had no application to the case, appears to me to be perfectly correct.

I feel, therefore, no difficulty in deciding, that the testimony of Mr. Neale, unless he can go further than merely stating the declarations made to him by Blannerhasset, is at present inadmissible. But the argument has taken a much wider range. The points made, comprehend the exclusion of their testimony suggested by the attorney for the United States, and the opinion of the court upon the operation of testimony. As these subjects are entirely distinct, and as the object of the motion is the exclusion of testimony supposed to be illegal, I shall confine my observations to that part of the argument which respects the admissibility of evidence of the description of that proposed by the attorney for the United States. The indictment charges the accused in separate counts with beginning, with setting on foot, with preparing, and with providing the means for a military expedition to be carried on against a nation at peace with the United States. Any legal testimony which applies to any one of these counts is relevant. That which applies to none of them must be irrelevant. The expedition, the character and object of that expedition, that the defendant began it, that he set it on foot, that he provided and prepared the means for carrying it on, are all charged in the indictment, and consequently these charges may be all supported by any legal testimony. But that a military expedition was begun and set on foot by others, or that the means were prepared or provided by others, is not charged in this indictment, is not a crime which is or can be alleged against the defendant, and testimony to that effect is therefore not relevant. All testimony which serves to show the expedition to have been military in its character, as, for instance, testimony respecting their arms and provisions, no matter by whom purchased, their conduct, no matter by whom directed, or who was present, all legal testimony which serves to show the object of the expedition, as would be either actually marching against Mexico, any public declarations made among themselves stating Mexico as their object, any manifesto to this effect, any agreement entered into by them for such an expedition, these or similar acts would be received to show the object of the expedition.

In trials of Smith and Ogden they were received. Whether the particular acts of the accused on which his guilt or innocence depends, must precede this species of testimony or may be preceded by it, is a question which merely respects the order of evidence. There can be no doubt but that at some stage of the prosecution, either before or after the particular part performed by the accused has been shown, the character and object of the expedition may be shown, and that by any legal testimony calculated to develope that character and object. Whether this testimony is admissible before the proof which particularly applies to the part performed by the accused, or ought to be introduced by first proving that ***196** part, is a question which is not made in this case, and which was not made in the case of Smith and Ogden. In that case it was certainly entirely unimportant, and it is probably not less so in this. It has been also contended that the acts no more than the declarations of third persons can be given in evidence on this indictment. It has

been already said that those acts of equipment which go to show the character of the expedition may be given in evidence. If, for example, Blannerhasset, Tyler, Smith, or any other persons, provided arms, ammunition or provisions which were applied to the armament, this would be evidence, because it would show the character of the expedition. This was done in the case of Smith and Ogden, without enquiring who provided the arms, for they belonged to the expedition. Captain Lewis, for instance, purchased several military equipments. It was not deemed necessary to show that Smith was connected with Lewis, for these purchases were made for the expedition, and Smith was not charged with providing them. He was charged with providing other means; and the means provided by Lewis served to show the character of the expedition. But although the acts of all persons providing means applied to the expedition may be given in evidence upon the same principle that the state of the expedition may be shown, it does not follow that other acts of third persons may be given in evidence. It has also been contended that no transactions out of the district are testimony. This position is correct to a considerable extent, but not to the extent in which it is laid down. A declaration of Mr. Burr, for example, made in Kentucky or elsewhere, that he did not set on foot a military expedition on Blannerhasset's Island to be carried on against the dominions of the king of Spain while the United States were at peace with that power, would I think be evidence. So would the actual marching of the troops proved to be raised by him against the province of Mexico. Testimony which goes directly to prove the indictment may, I think, be drawn from any place. But I do not understand this to be the point really in contest. I understand the counsel of the United States to insist that providing means in Kentucky, that enlisting men in Kentucky, that joining the expedition in Kentucky, may be given in evidence to show that the accused did begin and set on foot the expedition in Blannerhasset's Island, or did provide the means at that place as charged in the indictment. This I understand to be the great question which divides the prosecution and defence.

It is I believe a general rule in criminal prosecutions that a distinct crime for which a prosecution may be instituted cannot be given in evidence in order to render it more probable that the particular crime charged in the indictment was committed. If gentlemen think me wrong in this, I will certainly hear them upon the point, but I believe the position to be correct. Now providing the means for a military expedition in Kentucky to be carried on against the dominions of a prince with whom the United States are at peace, is certainly in itself a distinct offence, upon which an indictment may be as well supported as it can be for providing means for the same or a similar expedition in Virginia. According to the rule laid down then, this testimony cannot be received unless it goes to prove directly the charges contained in the indictment. But how can it go directly to prove those charges? Does it follow that the man who has provided the means in Kentucky has also provided the means in Virginia? Certainly it does not follow; and consequently the acts alleged in Kentucky do not prove the charges contained in the indictment. They would prove the defendant to have been connected in the enterprize, and gentlemen argue as if they thought this sufficient for their purpose. I shall be excused if I employ a few moments in stating my reasons for thinking it not sufficient. I have already said, and surely no man will deny, that two distinct persons may at different places furnish different means for the same enterprize. It will, I presume, not be contended that one of them may be indicted for the means provided by the other. So, too, if the same man shall provide means for the enterprize at different places, as in Virginia and Kentucky. I do not imagine that an indictment for providing arms in Virginia could be supported by proving that he provided ammunition in Kentucky. They are distinct offences, for either of which he may be punished, and the commission of one may render more probable, but does not prove, the commission of the other. How do gentlemen mean to make this testimony more relevant? It is by making the acts of Blannerhasset, Tyler and Smith, the acts of Burr, by insisting that their acts show an unlawful expedition to have been begun by him in Virginia, or that the means for that expedition were provided by him in Virginia. This being accomplished, his acts in Kentucky may be adduced to corroborate or confirm the testimony which discloses his conduct in Virginia. As preliminary then to this testimony, such proof of the specific charges contained in the indictment must be given, as may be left to the consideration of the jury. This proof relates to place as well as to fact. 'Of whatsoever nature an offence indicted may be,' says Hawkins (2 Hawk. P. C. c. 25, § 35), 'whether local or transitory, as seditious words or battery, &c., it seems to be agreed that if,

upon not guilty pleaded, it shall appear that it was committed in a country different from that in which the indictment was found, the defendant shall be acquitted.' This rule is the stronger in the United States, where it is affirmed by the constitution itself, and where the jurisdiction of the court is limited to offences within the district. Its obligation therefore is complete. If there be any direct testimony that an expedition was begun, or set on foot, or that the ***197** means were provided or prepared in Virginia, that testimony has not yet been heard, so far as I recollect. If there be such testimony it must also be shown that the expedition was begun, or that the means were prepared by the accused. No single act of his in Virginia has been offered in evidence. He made a contract in the state of Ohio for boats and provisions, which may have been intended as a part of the expedition, but no contract appears to have been made in Virginia, nor were the boats constructed or provisions procured in Virginia. How then is it to appear that he begun or set on foot a military expedition in Virginia, or that he provided or prepared the means for such an expedition? It is said, that if he gave orders from Kentucky or elsewhere, and in consequence of those orders the means were provided in Virginia, the accused is within the letter of the act, as well as its spirit, and has himself provided the means in Virginia. If these orders were in proof, the court as well as the counsel would be enabled to view the subject with more accuracy, and to treat it with more precision. Since those orders are not adduced, nor accurately stated, and the question has been argued without them, the court must decline giving any opinion, or consider the orders as offered, and say what orders would be admissible and what inadmissible. The latter course may save the bar the trouble of another argument. To whom are orders supposed to have been given, and who are supposed to have executed them? They must have been given to accomplices or to those who had no share in the expedition.

The accomplices, under the direction of Col. Burr, have provided the means. Can their liability to the penalties of the law be doubted? I presume not. If persons engaged in the expedition have provided the means for carrying it on, it will, I presume, be admitted that they are within the letter and the spirit of the act. Each man has himself provided and prepared those particular means which he has furnished. If Col. Burr, as was the case with Col. Smith, has supplied money for the expedition, then money may be charged as the means provided by him; but, if that money was advanced to an accomplice, its investment in means for the expedition is the act of the accomplice, for which, being a free agent, he is himself responsible. The accomplice has committed the very act which the law punishes. Has the accused, by suggesting or procuring that act, also committed it? I will not say how far the rule, that penal laws must be construed strictly, may be carried without incurring the censure of disregarding the sense of the legislature. It may, however, be safely affirmed that the offence must come clearly within the description of the law according to the common understanding of the terms employed, or it is not punishable under the law. Now, to do an act, or to advise or procure an act, or to be connected or leagued with one who does that act, are not the same in either law, language, or in common parlance; and, if they are not the same, a penalty affixed to the one is not necessarily affixed to the other. The penalty affixed to the act of providing the means for a military expedition is not affixed to the act of advising or procuring those means to be provided, or of being associated with the man who has provided them. The distinction made by the law between these persons is well settled, and has been too frequently urged to require further explanation. The one is a principal, the other an accessory. In all misdemeanors punishable only by a statute which describes as the sole offender the person who commits the prohibited act, the one is within and the other not within the statute. In passing the act under consideration, congress obviously contemplated this distinction. I presume that in a prosecution under the 3d section, for fitting out a privateer, it would not be alleged that a person who was concerned with the man who actually fitted out the privateer, but who performed no act himself, could be convicted on an indictment, not for being concerned in fitting out the privateer, but for actually fitting her out. These are stated in that section as separate offences. This distinction taken in the law is well understood, and cannot be considered as overlooked by those who frame penal acts. They cannot be considered as intending to describe one offender when they describe another, and, if experience suggests defects in the Penal Code, the legislature exclusively judges how far those defects are to be remedied. While expounding the terms of the act, it may not be improper to notice an argument advanced by the attorney for the

United States which was stopped by my observing that he had not correctly understood the opinion delivered in the case of treason. He understood that opinion as approving the doctrine laid down by Keeling and Hale, that an accessory before the fact might plead, in bar of an indictment as accessory, that he had been acquitted as principal, whence it was inferred that, on an indictment for doing an act, evidence of advising or producing that act might be received. I was certainly very far from approving this doctrine. On the contrary, I declared it to contradict every idea I had ever formed on the subject. But, if it were correct, I endeavored to show that it could not affect that case. My disapprobation of the doctrine induced me to look further into it, and my persuasion that it is not law is confirmed. 2 Hale, P. C. p. 292, says: 'If A. and B. be indicted of the murder of C., upon their evidence it appears that A. committed the fact and B. was not present but was accessory before the fact by commanding it, B. shall be discharged.' In 2 Hawk. P. C. c. 85, § 11, Hawkins discusses the subject, shows in a note the contradiction in those authorities which maintain the doctrine, cites the opposing authorities, and obviously approves the opinion which is here given. It is apparent, then, that the law never considers the ***198** commission and the procurement of an act, even where both are criminal, as the same act.

I cannot, therefore, consider means provided by those who are his accomplices in the expedition, as means provided by Col. Burr. If the means were provided by order of the accused, by persons not accomplices and not guilty under the act, the law may be otherwise. I shall not exclude such testimony. There is, however, some doubt whether the place of trial should be where the orders were given, or where they were executed. At common law, if an act was procured or advised at one place, and executed at another, it was doubted whether the procurer could be tried at either place, because the offence was not complete at either. This difficulty was removed by a statute made in the reign of Edward VI. If there be testimony showing, by orders from the accused, means were provided in Virginia by a person not an accomplice, it may be received, and the question respecting the scene of trial put in way for a final decision. The question whether all the means must be provided before the offence described in the statute has been committed, relates to the effect rather than to the exclusion of the testimony. I shall certainly not reject any evidence which shows that any means were provided by the accused in the place charged in the indictment. Upon the subject of beginning and setting on foot a military expedition or enterprize, it would be unnecessary at this time to say anything, were it not on the account of the question respecting the introduction of testimony of the district. What is an expedition? What is an enterprize? An expedition, if we consult Johnson, is 'a march or voyage with martial intentions.' In this sense, it does not mean the body which marches, but the march itself. The term is, however, sometimes employed to designate the armament itself, as well as the movement of that armament. An enterprize is 'an undertaking of hazard, an arduous attempt.' The proper meaning of this word also describes the general undertaking, and not the armament with which that undertaking is to be accomplished.

The first count in the indictment charges that Burr began the expedition in 'Blannerhassett's Island; the second and third, that he set on foot the enterprize on Blannerhassett's Island. If the term expedition is to be taken in its common and direct sense,--that is, to mean a march or voyage with martial intentions,--it began where that march or voyage begun; and it must have been begun by the accused to bring him within the act. If the term be taken in its figurative sense to designate the armament instead of the movement of the armament, then I cannot readily conceive an act which begins an expedition, unless the same act may also be said to provide the means of an expedition. The formation of the plan in the mind is not the commencement of the expedition, within the act. Our laws punish no mental crimes not brought into open deed. The disclosure of that plan does not begin it. If it did, the first disclosure would be the beginning. I find a difficulty in conceiving any act which amounts to providing the means for an expedition. However, if there can be such an act, and it has been committed in Virginia, it may certainly be given in evidence. The same observations apply to setting on foot an enterprize. These remarks are made to show what it will be necessary to prove in order to let in corroborative proof.

It is then the opinion of the court, that the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence in this case.

That the acts of accomplices, except so far as they prove the character or object of the expedition, cannot be given in evidence. That the acts of the accused, in a different district, which constitute in themselves substantive causes for a prosecution, cannot be given in evidence unless they go directly to prove the charges laid in the indictment. That any legal testimony which shows the expedition to be military, or to have been designed against the dominions of Spain, may be received. Gentlemen well know how to apply these principles. Should any difficulty occur in applying them, the particular case will be brought before the court and decided.

After the opinion was delivered, Mr. Hay requested a copy of it, and made some observations as to its effect upon the future progress of the trial. He considered that the man who had the supreme command and direction of this military enterprize (which they could prove it to be) did provide the means and set it on foot. This was a question he thought proper for the consideration of the jury, and this idea would be strengthened by evidence which could be produced, if permitted.

Mr. Wirt. The fact is, that Mr. Belknap can prove (as well as others) that he sent orders and did other acts showing that he was at the head and command of the whole.

The CHIEF JUSTICE. But suppose the connection was proved (which I have no doubt could be), and suppose the enterprize originated with Col. Burr (which is very probably the case), others might have provided the means, from what could be made to appear. He is not indicted for being connected with the enterprize, but for providing certain specific means. If the party under Tyler is to be considered as of a military nature, and that an expedition began at Beaver, or where not, if the movement is to be considered as an enlistment of men, then, wherever the first movement was made, there the expedition began. I do not think that his taking the command at Cumberland can be considered as a count in the indictment; it might go to render it more probable (if ***199** there was any doubt as to the transaction) that what was done was under his control; but the act itself must be proved on Blannerhasset's Island; and there the intention with which that act was done would come in by proving that he took the command afterwards. But how can he be charged with beginning there, if it should appear that he began in Pennsylvania? The question of 'beginning' I do not mean to take from the jury; of the place of beginning and of the acts themselves, they must decide. An abstract, independent question will arise, however, which is, whether the witnesses proved the indictment or not? Now I do not think that they did prove the indictment. What might be done is a future question.

Mr. Wirt. Am I to understand, sir, that the acts of accomplices, out of the district, tending to prove the acts laid in the indictment, may be given in evidence?

The CHIEF JUSTICE. Any act which shows the character of the transaction itself, in my opinion, may be given.

Mr. Wickham. I understand the opinion of the court to be that we cannot be liable for the acts of others, though done within the district; no auxiliary acts can be given against us, and they are not entitled to go out of the district to show acts done elsewhere, against us?

Mr. M'Rae. If we shall offer evidence that will be proper to submit to a jury, to prove where he did commence this enterprize, at any period whatever, it is not necessary that we should show that he remained on Blannerhasset's Island all the time. But seeing the enterprize was actually commenced, we shall be able to satisfy a jury that, when Burr was on the island, he did there actually project it, and did agree with Blannerhasset as to its progress, which was afterwards carried on, we ought certainly then to be at liberty to go out of the district to show that he was the principal person concerned in it. I do not suppose it necessary for us to show that all the means were provided by him.

The CHIEF JUSTICE. There is no doubt which I had at the commencement of this case (which I do not now suggest to make a question of) it relates to the indictment, and consequently to a particular part of the evidence, particularly to the words of the statute 'beginning and setting on foot an expedition.' I do doubt whether it is not necessary to show in the indictment how the expedition was begun. I do not know that it is necessary to set forth the principal means in the indictment. It is in itself, an extremely vague term, but if it is a

necessary one, surely the particular manner of beginning must be showed. I think, however, it ought to be laid in the indictment, and if so, that is a strong reason why it ought to be shown by evidence.

The counsel on both sides were ordered to be furnished with copies of the opinion, and the court adjourned to Tuesday, ten o'clock.

Tuesday, September 15.

Mr. Hay said, that the counsel for the prosecution had agreed to go on as well as they could, for that they had drawn such a construction from the opinion as to excite them to suppose that they had sufficient evidence yet remaining to produce a conviction of the person accused, without interfering with the opinion of the court. He was stating some of the points laid down by the court, as far as we were able to hear him (which was extremely difficult), when Mr. Botts interfered to explain what were the limits set by the court, upon which he dwelt at some length, and repeated most of the arguments before used, as to the absence of Mr. Burr, and the evidence offered respecting conversations held between him and others. Indeed, he took a brief review of the whole opinion, and concluded, upon the whole, that the absence of Mr. Burr rendered all evidence which it appeared could be produced irrelevant; none had been offered, and he defied the prosecution to offer a particle,--for, from the whole review of the opinion, it was not within the compass of the heart of man to produce a conviction.

Mr. Martin offered a few observations favorable to the production of any evidence which the prosecution could produce: if they exceeded the bounds which the court had justly prescribed, it would then be due time to make objections, on which the court would determine.

Much desultory conversation ensued, when Richard Neale was again called, and asked whether he was on the island on the night of Blannerhasset's departure. 'A. I was not. I left the country in October, and know nothing of it.'

James McDowell was then called and sworn.

Mr. Burr stated that this witness was introduced for the purpose of proving an interview between him and the accused at the mouth of Cumberland river, where the accused stated to him the object of the expedition. The witness commenced his evidence by saying that he should begin up at Wheeling and proceed downwards to Cumberland where he first saw Col. Burr, when Col. Burr interrupted him by observing that he understood that this was offered as corroborative or auxiliary testimony, but auxiliary to what? They ought first to demonstrate acts done at the island, before they attempt to prove what was done, or (what is worse) said, out of the district.

Mr. Wirt went into a review of the opinion to support the propriety of offering this species of evidence, and contended that, before they could come to the substantive charge, they ought to be permitted to show the parts so nearly attached as this was. On this ground was General Eaton's testimony admitted, because it bore direct on the charge laid in the indictment, and equally intimate ***200** were the acts at Cumberland. Under the act of congress, the charge is, providing means, &c. Now, was not the assumption of the command of those engaged in this expedition a material article in the means provided or providing? Here was the right to command acknowledged. It is not our meaning to say that there he began the expedition; he provided most of his means elsewhere, but there he met with his men, and there he headed them (he referred to Vaughan's case.) The mouth of Cumberland transaction was one link in the great chain; it commenced perhaps with what occurred between him and General Eaton, and proceeded by degrees till men, arms, &c., were procured, but the superintendence of Burr was discoverable everywhere; he projected and hastened on the scheme, as will appear. The transactions at Cumberland cannot be abstracted more than others of equal importance. Such corroborative testimony as that now offered, he contended, was even let in in capital cases, and could not be excluded without manifest injustice to the prosecution, because of its very intimate connection with the whole. There was a wide difference between a mere connection, and a man having the sovereign command of a criminal transaction (as was now attempted to be proved). The beginning was with General Eaton,--the consummation was to be somewhere else. It would be proved that Burr not only began, but brought the thing about so far as it went; he was the life and prime mover of the whole. Mr. Wirt went into some reasoning and elucidation of the propriety of this evidence; though it was no positive proof of his guilt under the indictment, yet he insisted it was

strong circumstantial evidence that these means were his means, and that the evidence was within the meaning of the court, as far as he understood the opinion.

Mr. Botts expressed his extreme surprise at the light in which the gentlemen had represented the opinion of the court: he made some strong strictures on Mr. Wirt's representations of it, and admired the judge's patience to sit there and hear it. He then quoted some parts of the opinion, and made some strong eulogistic remarks upon it, after which he compared it with the point in dispute; as to Burr's presence, &c. (which has so often been the topic). It was stated to be one continued act. Be it so; let it be supposed to be an act of unanimity and continuity, and how would it then stand? A distinct offence was charged to have been committed by Col. Burr on the island, but, instead of its being done by him, on the island, it appeared to have been done by others, and evidence of words used elsewhere were brought as corroborative, to prove what was done where he was not! By what kind of ingenuity could anything done in Cumberland be transported to Blannerhasset's Island, when the act, though laid there, was already disproved.

MARSHALL, Chief Justice. I certainly should not have sat so patiently to hear the elaborate arguments which were offered, if I had not had a hope that the opinion which was afterwards delivered would have settled the point; an opinion which I thought was given so clear as to render it unnecessary to give another opinion upon the same point. It appears to me now that it would be unnecessary were it not for the vaguity of the law, and different understandings of gentlemen as to the terms 'beginning and setting on foot' an expedition. They vary in opinions amazingly on those terms. Now, what is 'beginning'? There must be some definite meaning affixed to the word, or I do not know how a court is to act upon the law. It means something, or else it is too vague for a court to punish those who have committed the act, or are the subjects of prosecution. As I before stated, an 'expedition' must mean one of two things; it must indicate the march of a military force or army from one place to another, or it must be considered as a military armament substantively. Now, its natural and direct meaning must be the movement of a military armament, and not the armament itself. Now, when this movement takes place the expedition is said to begin; the march is said to have commenced. But the word also means an armament that moves, rather than the movement of that armament. However, I did not undertake to decide this question of the meaning, because I wished not to fix a positive meaning to terms when they relate to a law that may possibly undergo a revision, particularly when I had no precedent nor assistance in it. But if it be the movement of an armament itself, when that armament existed as such, then as I said before I could not distinguish between providing the means of that armament and the beginning of it. I cannot conceive what it is, nor can I conceive any fact that will amount to a 'beginning' this armament, unless it is in the provision of the means, or of some means. Furnishing money or enlisting men may be considered as providing means. This, then, must be beginning the expedition. It must either mean this, or it must mean the march. If it means the march, then the expedition was brought down by Mr. Tyler from Beaver, where they first assembled, and afterwards rested at Blannerhasset's Island, whence they proceeded lower down. If it be expedition, and the meaning of the word is the march of the armament, then the proof is positive that it did not begin at Blannerhasset's Island. If the meaning is the provision of the armament, then the beginning of the expedition is the place where the first means were provided. Taking then, the word in one or the other meaning, it certainly appears to me that the testimony produced by the attorney of the United States disproves his own charge, for that it was not begun on Blannerhasset's Island, where the charge is ***201** laid in the indictment. The beginning, then, is out of the question.

The question then is whether the means were provided or not on Blannerhasset's Island. If there be any testimony that goes to prove this, I certainly am not at liberty to refuse it. But gentlemen will consider whether they are not wasting the time and money of the United States, and of all those persons who are forced to attend here, whilst they are producing such a mass of testimony which does not bear upon the cause. Any arguments on the principle which was stated, that the testimony respecting means provided elsewhere, supporting this charge, I am willing to hear. If the opinion of the court before given can be proved to be erroneous, I shall be very happy to hear it pointed out, because I wish to be as correct as possible; but,

if these principles are not erroneous, why do gentlemen bring witnesses forward in direct opposition to them? I can ascribe no other reason to it, than because the law does not give definite ideas on the subject of its own provisions. The truth is, the words of the law must be taken to retrospect to the origination of the plan. For instance, General Eaton states that in Washington the accused laid before him a certain plan, when he said that he had sufficient means, &c. Now, if those means could be discovered, it certainly shows that the beginning of this expedition was in Washington, but the indictment states it to be on Blannerhasset's Island. Now, unless the fact itself shall be proved, how can there be evidence given of motives, yet undiscovered? [FN7]

FN7 From 3 Carpenter's Report of Burr's Trial, 93.

It is, then, the opinion of the court that the declarations of third persons not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence in this case. That the acts of accomplices, except so far as they prove the character or object of the expedition, cannot be given in evidence. That the acts of the accused, in a different district, which constitute in themselves substantive causes for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment. That any legal testimony which shows the expedition to be military, or to have been designed against the dominions of Spain, may be received.

THE COURT.

The attorney of the district finding in the progress of the cause that this decision excluded almost the whole of his testimony, on the 15th of September moved the court to discharge the jury. This was objected to by the defendant, who insisted upon a verdict. THE COURT being of opinion that the jury could not, in this stage of the case, be discharged without mutual consent, and that they must give a verdict, they accordingly retired, and not long after returned with a verdict of 'Not guilty.'

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54TH STORY of Focus printed in FULL format.

The Associated Press

December 5, 1979, Wednesday, AM cycle

SECTION: Washington Dateline

LENGTH: 476 words

BYLINE: By JAMES H. RUBIN, Associated Press Writer

DATELINE: WASHINGTON

BODY:

President Carter is expected to submit videotape testimony rather than appear in person before a federal grand jury investigating alleged White House influence-buying involving fugitive financier Robert L. Vesco.

Sources familiar with the investigation said Wednesday that no date has been set for Carter's testimony and some details remain to be worked out.

The sources, who asked not to be identified, said some members of the grand jury wanted to be able to submit follow-up questions to Carter personally, but were outvoted by other grand jury members who agreed to the videotape arrangement.

The sources said the minority grand jurors contended the president could be afforded special security precautions if he agreed to be questioned in person, and that the special videotape treatment was uncalled for.

Under the arrangement, Carter will be interviewed by government lawyers outside the presence of the grand jury.

The grand jury is investigating charges that shortly after Carter took office in January 1977, attempts were made on Vesco's behalf to quash extradition proceedings against the financier. Vesco fled the country while under indictment for stock fraud and is believed to be living in the Bahamas.

The Carter administration has denied taking part in any effort to quash extradition.

But a White House aide, Richard M. Harden, was approached in February 1977 by W. Spencer Lee IV, a Georgia lawyer allegedly acting in Vesco's behalf.

Both Lee and Harden have said Harden talked the lawyer out of pursuing the matter.

But Harden said he went to Carter after meeting with Lee, and that the

president sent a note to then-Attorney General Griffin B. Bell which said "please see Spencer Lee from Albany (Ga.) when he requests an appointment."

Justice Department officials said the memo was placed in a file folder for potential job-seekers, and Lee never appeared for an appointment.

R.L. Herring, an Albany, Ga., businessman who was convicted last year on unrelated federal fraud and racketeering charges, has said he hired Lee for $10,000 to plead Vesco's case with the Carter administration.

The Justice Department refused all comment Wednesday on the proposed arrangement for taking Carter's testimony.

If Carter videotapes answers for the grand jury, the department believes it would be the first time a president has answered grand jury questions in this manner.

Carter was interviewed for four hours on Sept. 5 by Paul J. Curran, the special counsel who investigated the Carter family's peanut business in Georgia. Curran concluded there was no evidence of any criminal wrongdoing in that case.

Also, in April 1978, the president provided 51 minutes of videotape testimony in a federal court in Macon, Ga., at the trial of Georgia state Sen. Culver Kidd, who was acquitted of gambling and conspiracy charges.

LANGUAGE: ENGLISH

4TH STORY of Level 1 printed in FULL format.

The Washington Post

January 1, 1989, Sunday, Final Edition

SECTION: FIRST SECTION; PAGE A7

LENGTH: 893 words

HEADLINE: Subpoenaing the President: Not Without Precedent;
In 1807, Jefferson Refused to Appear, but the Issue Has Never Been Clearly Decided

BYLINE: Ruth Marcus, Washington Post Staff Writer

BODY:

When Aaron Burr stood trial for treason in 1807, he employed an unprecedented tactic: subpoenaing the president of the United States, Thomas Jefferson, under whom Burr had served four years as vice president.

Burr sought to have Jefferson appear in court and testify about a letter written to the president by one of Burr's alleged coconspirators. Chief Justice John Marshall, presiding over the trial, declared that the president, unlike a king, was subject to the law. Eventually, Jefferson finessed the matter. He refused to appear but provided a certified copy of the letter, with sensitive parts deleted, and insisted he was doing so voluntarily.

Now, lawyers for former White House aide Oliver L. North are employing a similar tactic. On Friday, they served on the Justice Department subpoenas seeking the testimony of President Reagan and President-elect George Bush at North's trial, scheduled to start Jan. 31.

The administration is expected to contest the subpoenas. Administration lawyers -- citing the Jefferson example -- have argued that no sitting president has ever testified in court in a criminal trial. "Jefferson made it very clear that he thought it was improper to bring presidents into a trial proceeding, and that precedent has been followed in every other case that I know of," said one Justice Department official.

Between 1807 and now, however, the issue has never been squarely decided.

In 1974, the Supreme Court, in the Watergate tapes case, ruled 8 to 0 that President Richard M. Nixon had to comply with the special prosecutor's subpoena to turn over the White House tapes.

In an opinion by then-Chief Justice Warren E. Burger, the court rejected Nixon's claim that the doctrine of separation of powers and the need for confidential government communications gave him absolute privilege to refuse to release the tapes. The court ruled that the need for the evidence in the Watergate case outweighed the "presumptive privilege" protecting disclosure of presidential communications.

"The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," the court said.

The tapes case, however, did not involve a subpoena seeking the president's appearance in court.

In 1975, President Gerald R. Ford gave a videotaped deposition as a defense witness -- later played in court -- in the trial of Lynette (Squeaky) Fromme, who was convicted of attempting to assassinate Ford. Administration lawyers lost a bid to have the court accept a written statement by the president.

Likewise, President Jimmy Carter, while in office, twice gave videotaped testimony, once as a government witness in the perjury and gambling trial of a Georgia state senator, and a second time before a federal grand jury investigating allegations that fugitive financier Robert Vesco sought to bribe members of the Carter administration.

Nixon, after leaving office, was scheduled to testify at the 1974 Watergate cover-up trial of his former aides, but was suffering from phlebitis and the trial proceeded without him. Six years later, Nixon voluntarily complied with a subpoena to testify at the conspiracy trial of two former FBI agents.

In the current case, legal experts said there will be a heavy burden on North's lawyers to show why they need the testimony.

In the Watergate tapes case, said R. Stan Mortenson, one of Nixon's lawyers, "what the court clearly said was, if the president has relevant evidence, then the criminal justice system and the need for evidence in criminal cases will overcome any privilege . . . but that it's not something to be lightly undertaken . . . . "

Justice Department officials have argued that Bush, who will have been sworn in as president by the time the North trial begins, cannot be hauled into court, away from his presidential duties. They said that Reagan, although he will be out of office by then, will still have knowledge of sensitive national security information and the right to assert executive privilege.

The Watergate tapes case, in which the court emphasized that it was not dealing with a claim of privilege based on national security grounds, offers "a fairly strong precedent" for fighting the subpoenas, one department official said.

As to Reagan, the official said, "I think the claim for this former president in light of the timing [so close to his departure from office] is still very powerful and so the distinction between a President Bush and former president Reagan is not going to be, in my judgment, constitutionally significant," the official said.

But other legal experts said that, particularly with regard to Reagan, if North can show a need to question the former president -- who has already answered written questions submitted by independent counsel Lawrence E. Walsh -- the subpoena could be upheld.

The president, "like any other witness, can refuse to divulge national security information unless ordered by the court," said Alan B. Morrison of

Public Citizen Litigation Group.

But Morrison said, "My tentative view is that [claim of privilege] would be overruled. Looking at U.S. v. Nixon [the tapes case] and the 6th Amendment right to call witnesses in your behalf, assuming that conversations were material to the defense, I think it would be very hard to keep that out."

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

The Washington Post

January 1, 1989, Sunday, Final Edition

SECTION: FIRST SECTION; PAGE A7

LENGTH: 893 words

HEADLINE: Subpoenaing the President: Not Without Precedent;
In 1807, Jefferson Refused to Appear, but the Issue Has Never Been Clearly Decided

BYLINE: Ruth Marcus, Washington Post Staff Writer

BODY:

When Aaron Burr stood trial for treason in 1807, he employed an unprecedented tactic: subpoenaing the president of the United States, Thomas Jefferson, under whom Burr had served four years as vice president.

Burr sought to have Jefferson appear in court and testify about a letter written to the president by one of Burr's alleged coconspirators. Chief Justice John Marshall, presiding over the trial, declared that the president, unlike a king, was subject to the law. Eventually, Jefferson finessed the matter. He refused to appear but provided a certified copy of the letter, with sensitive parts deleted, and insisted he was doing so voluntarily.

Now, lawyers for former White House aide Oliver L. North are employing a similar tactic. On Friday, they served on the Justice Department subpoenas seeking the testimony of President Reagan and President-elect George Bush at North's trial, scheduled to start Jan. 31.

The administration is expected to contest the subpoenas. Administration lawyers -- citing the Jefferson example -- have argued that no sitting president has ever testified in court in a criminal trial. "Jefferson made it very clear that he thought it was improper to bring presidents into a trial proceeding, and that precedent has been followed in every other case that I know of," said one Justice Department official.

Between 1807 and now, however, the issue has never been squarely decided.

In 1974, the Supreme Court, in the Watergate tapes case, ruled 8 to 0 that President Richard M. Nixon had to comply with the special prosecutor's subpoena to turn over the White House tapes.

In an opinion by then-Chief Justice Warren E. Burger, the court rejected Nixon's claim that the doctrine of separation of powers and the need for confidential government communications gave him absolute privilege to refuse to release the tapes. The court ruled that the need for the evidence in the Watergate case outweighed the "presumptive privilege" protecting disclosure of presidential communications.

"The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," the court said.

The tapes case, however, did not involve a subpoena seeking the president's appearance in court.

In 1975, President Gerald R. Ford gave a videotaped deposition as a defense witness -- later played in court -- in the trial of Lynette (Squeaky) Fromme, who was convicted of attempting to assassinate Ford. Administration lawyers lost a bid to have the court accept a written statement by the president.

Likewise, President Jimmy Carter, while in office, twice gave videotaped testimony, once as a government witness in the perjury and gambling trial of a Georgia state senator, and a second time before a federal grand jury investigating allegations that fugitive financier Robert Vesco sought to bribe members of the Carter administration.

Nixon, after leaving office, was scheduled to testify at the 1974 Watergate cover-up trial of his former aides, but was suffering from phlebitis and the trial proceeded without him. Six years later, Nixon voluntarily complied with a subpoena to testify at the conspiracy trial of two former FBI agents.

In the current case, legal experts said there will be a heavy burden on North's lawyers to show why they need the testimony.

In the Watergate tapes case, said R. Stan Mortenson, one of Nixon's lawyers, "what the court clearly said was, if the president has relevant evidence, then the criminal justice system and the need for evidence in criminal cases will overcome any privilege . . . but that it's not something to be lightly undertaken . . . . "

Justice Department officials have argued that Bush, who will have been sworn in as president by the time the North trial begins, cannot be hauled into court, away from his presidential duties. They said that Reagan, although he will be out of office by then, will still have knowledge of sensitive national security information and the right to assert executive privilege.

The Watergate tapes case, in which the court emphasized that it was not dealing with a claim of privilege based on national security grounds, offers "a fairly strong precedent" for fighting the subpoenas, one department official said.

As to Reagan, the official said, "I think the claim for this former president in light of the timing [so close to his departure from office] is still very powerful and so the distinction between a President Bush and former president Reagan is not going to be, in my judgment, constitutionally significant," the official said.

But other legal experts said that, particularly with regard to Reagan, if North can show a need to question the former president -- who has already answered written questions submitted by independent counsel Lawrence E. Walsh -- the subpoena could be upheld.

The president, "like any other witness, can refuse to divulge national security information unless ordered by the court," said Alan B. Morrison of Public Citizen Litigation Group.

But Morrison said, "My tentative view is that [claim of privilege] would be overruled. Looking at U.S. v. Nixon [the tapes case] and the 6th Amendment right to call witnesses in your behalf, assuming that conversations were material to the defense, I think it would be very hard to keep that out."

LANGUAGE: ENGLISH

63RD STORY of Focus printed in FULL format.

The Associated Press

August 17, 1979, Friday, BC cycle

SECTION: Domestic News

LENGTH: 221 words

DATELINE: ATLANTA

BODY:

A federal investigation into the operation of President Carter's peanut warehouse in Plains, Ga., is close to completion, according to the probe's special counsel.

"We've completed a good part of it and we hope to finish soon," Special Counsel Paul Curran said Thursday.

He indicated that the bulk of the data for the investigation has been gathered, but he added: "We've got a lot of analyzing and a lot of reviewing to do and some decisions to make."

Curran said he has set no deadline for completion of the work.

Curran was appointed last March by then-Attorney General Griffin Bell to investigate allegations concerning the warehouse, including one that loans to the business may have been diverted to Carter's 1976 presidential campaign.

Curran would not say whether he plans to seek indictments in the case. He has the option of seeking indictments and prosecuting them himself or turning any indictments in the case over to the Justice Department for prosecution.

Whether or not there are indictments, Curran said he expects to make public a report of his findings.

A special grand jury has heard testimony from several witnesses in the case, including Billy Carter, the president's brother, who managed the warehouse until 1977.

The warehouse is owned by the president, his brother and their mother.

LANGUAGE: ENGLISH

57TH STORY of Focus printed in FULL format.

The Associated Press

October 15, 1979, Monday, PM cycle

SECTION: Domestic News

LENGTH: 241 words

BYLINE: By CHARLES CAMPBELL, Associated Press Writer

DATELINE: ATLANTA

BODY:
Paul J. Curran, the special counsel appointed in March to investigate loans to President Carter's peanut warehouse, said today he would hold a news conference Tuesday in Washington.

Curran refused to specify the purpose of the news conference. He said several weeks ago, however, that he expected to wind up his investigation in October.

There was no immediate White House comment on Curran's announcement.

The federal grand jury that convened in Atlanta under Curran's direction has taken testimony from a number of witnesses, including President Carter's brother Billy Carter, part owner of the warehouse.

While there has been some published speculation about Curran seeking testimony from the president, it was not known whether Curran attempted to talk directly to President Carter or whether the grand jurors heard testimony from the president.

Curran has steadfastly said he would not comment on the probe until it was complete. He has not called a news conference since he selected his staff, shortly after his appointment by then-Attorney General Griffin Bell.

The grand jury has not filed presentments or issued any indictments during the eight-month probe, which grew out of the investigation into the banking practices of former federal budget director Bert Lance.

Curran's probe has centered on loans to the warehouse from the National Bank of Georgia during the time that Lance was president of that Atlanta bank.

LANGUAGE: ENGLISH

56TH STORY of Focus printed in FULL format.

Newsweek

October 29, 1979, UNITED STATES EDITION

SECTION: NATIONAL AFFAIRS; Pg. 35

LENGTH: 445 words

HEADLINE: THE PEANUT PROBE: CASE CLOSED

BYLINE: ALLAN J. MAYER with ELAINE SHANNON in Washington

BODY:

Did Jimmy Carter's peanut business in Plains, Ga., illegally funnel millions of dollars into his 1976 Presidential campaign? Last week, Justice Department special counsel Paul Curran delivered what should be the final answer: no. After an intensive six-month investigation -- including four hours of testimony from the President himself -- Curran issued a 239-page report that exonerates the Carter family. "No evidence whatsoever was discovered that any moneys were diverted from the warehouse into the campaign," Curran said. "Based on all the evidence and the applicable law, no indictment can or should be brought against anyone."

The investigation grew out of a Federal probe last year of the National Bank of Georgia, which once was headed by Carter's friend and former budget chief Bert Lance. Last March, after an FBI report questioned NBG's dealings with the Carter business, the then Attorney General Griffin Bell appointed Curran to investigate how the Carter warehouse handled nearly $9.9 million in loans from NBG between 1975 and 1977. Curran, a Republican lawyer and former Federal prosecutor, reported that he had traced "every nickel and every peanut into and out of the warehouse" and found that "no funds were unlawfully diverted."

OVERDUE: Curran said that an NBG loan to Carter media adviser Jerry Rafshoon had not been illegally used to float the campaign through a spring 1975 cash crisis. When Federal matching funds were briefly shut off, Rafshoon's ad agency let nearly $700,000 in overdue campaign bills pile up. NEWSWEEK has learned that a separate Justice inquiry -- to determine whether this practice violated the ban on corporate loans -- has been closed with no charges recommended.

But though the family business was cleared of any criminal wrongdoing, Curran criticized it for sloppy business practices during the time it was run by the President's brother, Billy. According to Curran, the Carter warehouse was continually strapped for cash -- and NBG repeatedly allowed Billy to repay the bank loans with checks drawn on insufficient funds. Instead of depositing the rubber checks, the bank held them until the Carter account was large enough to cover the amount due. The bank also permitted the warehouse to release the peanuts that had been pledged as collateral for one of the loans -- a direct violation of the loan agreement.

Finally, Curran's accountants concluded that the peanut business understated its net income in 1977 and overstated it in 1975 and 1976. The net result, he

said, is that the business may owe more Federal income taxes. Apart from that, the case now appears to be closed.

GRAPHIC: Picture 1, Billy and Jimmy in 1976, Ron Sherman -- Nancy Palmer; Picture 2, prober Curran: Tracing every nickel and peanut, AP

LANGUAGE: ENGLISH

53RD STORY of Focus printed in FULL format.

The Associated Press

December 7, 1979, Friday, AM cycle

SECTION: Washington Dateline

LENGTH: 683 words

BYLINE: By JAMES H. RUBIN, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Attorney General Benjamin R. Civiletti disclosed Friday he has removed himself from any role in the government's investigation into allegations of White House influence-buying on behalf of fugitive financier Robert L. Vesco.

At the same time, Civiletti told an impromptu news conference he believes it is proper that President Carter be allowed to give videotaped testimony to a grand jury. Carter plans to give the testimony to a federal grand jury that has been investigating the Vesco case for more than a year.

Civiletti said he is taking no part in the investigation because of his role in the Carter administration's decision in 1977 to abandon efforts to extradite Vesco in favor of using diplomatic channels to have him deported.

There has been no evidence the decision was made to benefit Vesco, who is believed to be living in the Bahamas.

Civiletti said, nonetheless, it would be "inappropriate for me" to take part in the investigation "since I was involved in contemporaneous actions" relating to extradition proceedings against Vesco.

Civiletti said he was not consulted about the plans disclosed this week for Carter to testify by videotape rather in person before the grand jury.

The attorney general said he learned of the plans unofficially. "I may have heard about it second or third hand," he said.

According to sources close to the investigation, some grand jurors complained that the videotaping procedure would prevent them from asking follow-up questions.

Asked if a president should be given special treatment when called to testify, Civiletti said, "Certainly. Only in the most compelling circumstances should a president have to provide information directly to a court or investigation."

He said that if high public officials were forced to appear in court every time someone subpoenaed them, in civil as well as criminal cases, "you'd have nothing but (the officials) sitting around courtrooms all day."

Civiletti said he regards the videotaping procedure as direct testimony. He said he had not considered what conditions would ever require a president to appear in person before a grand jury.

A District of Columbia grand jury is investigating allegations that shortly after Carter took office in January 1977, an attempt was made to pay off high administration officials to quash extradition proceedings against Vesco, who fled the country nearly 10 years ago after his indictment on stock fraud charges.

R.L. Herring, a Georgia businessman who has been convicted on unrelated federal fraud and racketeering charges, has said he paid $10,000 to a Georgia attorney, W. Spencer Lee IV, to act in Vesco's behalf.

Lee has said he met with a White House aide, Richard M. Harden, in February 1977, and was persuaded by Harden not to pursue the matter further.

Harden subsequently met with Carter, who sent a note to then-Attorney General Griffin B. Bell which said, "Please see Spencer Lee from Albany (Ga.) when he requests an appointment."

The Justice Department said the memo was placed in a file folder for potential job-seekers, adding that Lee never appeared for an appointment.

It is believed that Carter's videotaped answers for the grand jury in the Vesco case would mark the first time a president has answered grand jury questions in this manner. Carter has provided testimony in different forms at least twice before criminal investigations since he became president.

On another subject, Civiletti said he wasn't aware of any tension between himself and the White House that has developed from his decision to recommend a special prosecutor investigate allegations that White House Chief of Staff Hamilton Jordan used cocaine.

On Civiletti's recommendation, a special three-judge federal appeals court appointed a New York lawyer, Arthur Christy, to investigate the case.

Asked if his decision had caused strained relations with the White House, Civiletti said, "Not to my knowledge."

Civiletti said he met this week with Christy for about 15 or 20 minutes to offer Justice Department office space and staff for the investigation.

LANGUAGE: ENGLISH

52ND STORY of Focus printed in FULL format.

Facts on File World News Digest

December 14, 1979

SECTION: U.S. AFFAIRS; Vesco Case

PAGE: Pg. 943 C2

LENGTH: 494 words

HEADLINE: Carter to Tape Testimony

BODY:
President Carter was to videotape testimony for a federal grand jury investigating an alleged plan to fix legal problems of fugitive financier Robert Vesco, government sources told the Associated Press Dec. 5. [See p. 725F2-E3]

Several members of the grand jury reportedly objected to the proposed arrangement for questioning Carter on the ground that they would be unable to submit follow-up questions to the President.

The grand jury was investigating allegations that in 1977 there was an attempt to quash extradition proceedings against Vesco, who fled the country after being indicted on stock fraud charges, through White House influence-buying.

The questions for Carter were likely to center on a Feb. 15, 1977 meeting Carter had with a White House aide, Richard M. Harden.

A Georgia lawyer, W. Spencer Lee 4th, who allegedly acted as an intermediary in Vesco's behalf, had contacted Harden with a bribe offer. [See p. 725A3]

Harden and Lee had both said Harden talked the lawyer out of pursuing the Vesco matter.

The New York Times reported Dec. 4 that after President Carter met with Harden, he sent a note to then Attorney General Griffin B. Bell urging him to see Lee. Justice Department officials had said that Bell never received the note and never met with Lee.

Bell Testifies -- Former Attorney General Griffin B. Bell Dec. 4 testified for some 90 minutes before a Washington, D.C. federal grand jury investigating possible White House influence-buying attempts by fugitive financier Robert L. Vesco. [See above]

Based on the questions he encountered, Bell told the New York Times Dec 5, he felt the government lawyers and members of the grand jury appeared to be "wrapping up loose ends" in their probe.

Bell said of Vesco and his intermediary, convicted businessman R. L. Herring: "This was just a group of con artists working each other. That goes on every

day. But the question is, did they ever get to the government? The answer to that is emphatically no."

Bell said he did not know what had happened to a note sent to him by President Carter in 1977 urging him to see W. Spencer Lee 4th, a Georgia lawyer representing Vesco. Bell said he never received the note and did not meet with Lee.

Civiletti Withdraws from Probe -- Attorney General Benjamin R. Civiletti Dec. 7 said he had removed himself from any role in the government investigation of Vesco.

Civiletti cited as a reason his role in the Carter Administration's 1977 decision to end efforts to extradite Vesco to the U.S. in favor of using diplomatic channels to have him deported from countries in which he sought refuge.

Civiletti said that while there had been no evidence that the decision was made to benefit Vesco, he believed it would be "inappropriate" for him to take part in the probe. Civiletti also said he was "involved in contemperaneous actions" relating to extradition proceedings against Vesco.

LANGUAGE: ENGLISH

22ND STORY of Focus printed in FULL format.

The Associated Press

March 26, 1989, Sunday, AM cycle

SECTION: Washington Dateline

LENGTH: 900 words

HEADLINE: Last President Subpoenaed Less Than 15 Years Ago

BYLINE: By HARRY F. ROSENTHAL, Associated Press Writer

DATELINE: WASHINGTON

BODY:
History is repeating itself rather quickly in the demand by Oliver North that former President Reagan come from his home in California to testify for North at his criminal trial.

There was a gap of 167 years between the time Thomas Jefferson was subpoenaed and the 1974 summons to Richard Nixon, by then an ex-president. Less than 15 years passed before the subpoena for Reagan.

During the 1974 Watergate cover-up trial, former aide John D. Ehrlichman almost succeeded in his request for Nixon's appearance. It would have happened, too, had the former president not fallen critically ill following surgery.

"I would have loved to have Nixon in court, I had a few questions I wanted to ask him myself," U.S. District Judge John J. Sirica wrote in his memoirs.

But at the time, a team of court-appointed doctors determined that Nixon would be in no condition to travel for some time, which would have delayed the trial. "I ruled reluctantly," Sirica remembered of his decision that the former president would not have to appear. "I did feel that no matter how anxious many of us were to see Nixon face the lawyers and testify under oath, having him in court was not really critical to Ehrlichman's defense."

Had he gone on the witness stand, Nixon would have been the first ex-president to do so under subpoena. That dubious distinction will fall to Reagan if U.S. District Judge Gerhard Gesell accedes to North's request.

The debate whether a president must obey subpoenas and other court orders dates to the beginning of the republic, and it is just as volatile today as it was then.

President Thomas Jefferson received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr,

Jefferson's first vice president.

Burr wanted Jefferson to appear in court and testify about the letter written to the president by one of Burr's alleged co-conspirators. Chief Justice John Marshall, presiding over the trial, declared that the president unlike a king was subject to law.

Jefferson cited the independence of the executive branch of government from the judicial branch and refused, at first, to release the letter. Eventually, he turned it over but made clear that his decision was voluntary and not in response to the subpoena.

From then until Watergate, the concept of executive privilege was never tested. No sitting president ever has testified in court in a criminal trial, although several have provided testimony or what might be considered an equivalent.

It is not difficult to see why North's lawyers want Reagan to testify. Defense attorney Brendan Sullivan has attempted to show, in his cross examination of prosecution witnesses, that Reagan was much more involved in the secret aid to the Contra rebels than was known publicly before.

The jury heard that Reagan personally approved an NSC-recommended deal in 1985 to give Honduras $$110 million in covert economic and military aid as an inducement to support the Contras.

The jury also heard that Reagan apparently approved a plan from North and others in the government to airdrop intelligence data and recoilless rifles to the Contras for the purpose of destroying ships carrying arms to the Nicaraguan government.

Those actions all were at a time when Congress had banned U.S. military aid to the Contras.

The closest the Supreme Court has come to ruling on so-called executive privilege was in the Watergate tapes case of 1974. The special prosecutor had subpoenaed the White House for tapes of 64 conversation and Nixon didn't want to give them up.

In the case called Nixon v. U.S. the court ruled unanimously that Nixon had to comply with the subpoena. The specific need for evidence in a criminal case, the court said, outweighed the president's rights in the matter.

In 1975, President Gerald Ford gave a videotaped deposition as a defense witness in the trial of Lynette (Squeaky) Fromme who was convicted of attempting to assassinate Ford. Lawyers for the administration tried unsuccessfully to have the court accept a written statement by the president. The videotape was played in court.

Jimmy Carter, too, as president, gave videotaped testimony - twice. Once was as a government witness in the perjury and gambling trial of a Georgia state senator. The second time he taped testimony for a federal grand jury that was investigating allegations that fugitive financier Robert Vesco sought to bribe members of the Carter administration.

Reagan was served with the subpoena while he was still president, along with then-Vice President Bush. Both men sought to quash the subpoenas.

Attorney General Dick Thornburgh argued in a Jan. 13 court filing that the summonses "raise profound constitutional concerns ... regarding the authority of the courts to compel appearances by a former or sitting president."

He added that "The spectacle of a former or sitting president being subjected to peremptory judicial process may chill foreign governments in the way they deal with the president now and in the future."

On the day before the North trial started, Gesell ruled the defendant had not shown that Bush had "relevant and material" testimony to give and squashed the subpoena against the new president.

But Gesell left the decision on Reagan open. He'll probably make it this week when the defense starts presentation of its case.

LANGUAGE: ENGLISH

19TH STORY of Focus printed in FULL format.

The Washington Times

February 6, 1990, Tuesday, Final Edition

SECTION: Part F; COMMENTARY; Pg. F1

LENGTH: 1037 words

HEADLINE: Skewed to the plebian

BYLINE: Bruce Fein

BODY:

Last Tuesday, U.S. District Judge Harold H. Greene commanded former President Reagan to deliver more than a score of personal diary entries made during his presidency to the indicted former National Security Adviser John M. Poindexter. Judge Greene found that Mr. Reagan's entries "contain information of significance" to Adm. Poindexter's defense to five charges of misleading Congress and obstructing its probe of the Iran-Contra affair.

The defense seems to rest on these strained linkages:

* That Reagan knew of and authorized Adm. Poindexter's activities on behalf of the Nicaraguan resistance, the Contras.

* That such knowledge and authorization is shown by Mr. Reagan's abbreviated and elliptical diary references to a Poindexter trip to Central America in 1985 on behalf of the Contras,

* A discussion of Iranian arms sales.

* Mr. Reagan's intervention with Honduras to obtain release of a shipment of arms to the Contras that was seized by the Honduran military.

* U.S. military assistance to a Central American nation arguably to assist the military arm of the Contras or to oppose the Sandinistas.

* That Mr. Reagan's knowledge and authorization of these pro-Contra activities led Adm. Poindexter to believe all of his actions to bolster the Contras militarily were legal; that Adm. Poindexter thus lacked any self-interested motive to deceive Congress in its Iran-Contra investigation; and, that any actions or communications by Adm. Poindexter that misled Congress thus were committed without criminal intent.

Judge Greene's order will probably be opposed by Mr. Reagan on the grounds of executive privilege. But even if that opposition prevails, Judge Greene's embroilment of a former president in litigation on behalf of Adm. Poindexter's contrived and attenuated theory of defense is dismaying. The judicial order culminates the rapid emergence of the plebeian presidency and the stunning fall of the imperial presidency that began with the 1974 Supreme Court decision in United States vs. Nixon, ordering disclosure of presidential tapes to assist

prosecution of the Watergate cover-up defendants.

Until the Nixon case, an unbroken political custom of almost two centuries ordinarily shielded presidents from the coercion of either Congress or the judiciary. In 1796, President George Washington refused a House request for correspondence related to the controversial Jay Treaty with Great Britain. In 1843, President John Tyler withheld from Congress portions of reports regarding alleged Indian frauds that would have interfered with executive-branch discretion, disclosed confidential sources or exposed officials to malicious publicity. In 1948, President Harry Truman refused a congressional demand for the loyalty file of the director of the Bureau of Standards. President Dwight Eisenhower, in 1954, forbade testimony during the Army-McCarthy hearings regarding a meeting between Attorney General Herbert Brownwell and Army counsel John Adams.

Judges treated presidential claims of privilege with exceptional deference until the onset of the plebeian presidency. President Thomas Jefferson was subpoenaed to provide documents to aid the defense in the treason trial of Aaron Burr. But Jefferson's delivery of material to the trial court was expressly voluntary, and he redacted portions of a letter that he believed should be kept secret. Moreover, Burr then dropped his demand for the materials. President James Monroe volunteered to answer interrogatories for use in a court-martial. Until the Nixon tapes case, no other presidents had been entangled by the courts in criminal prosecutions or private civil litigation.

After that landmark ruling, former President Nixon was required to appear and be deposed in several civil cases and was subpoenaed to testify in the Watergate criminal trial (but was excused because of ill health). President Ford testified by videotape in the Squeaky Fromm criminal trial. President Carter provided videotaped testimony as a prosecution witness in a federal trial and a videotaped deposition to a grand jury investigating alleged White House efforts to quash extradition proceedings against an international fugitive.

Prior to the Poindexter case, former National Security Council aide Oliver North had abortively sought the testimony of President Reagan to develop a defense. Panama's former strongman, Gen. Manuel Antonio Noreiga, predictably will seek President Bush's testimony or records in his impending criminal trial.

The torrent of judicial orders directed to the plebeian presidency is improvident. If the incumbent or a former president legitimately invokes executive privileges, an appearance of a cover-up is generated and unjustified cynicism of the office is promoted. If a privilege claim is denied, instant appeals endlessly delay already lead-footed justice.

To defend executive privilege, former presidents must incur hefty legal fees; and, if the defense is overruled, the appearance of a president or presidential papers at trial creates a circus atmosphere fostered by the media that disturbs the sobriety indispensable to legal fairness.

In addition, the perception abroad of hemorraging presidential confidentiality will confound full and forthright presidential communications with foreign leaders pivotal to charting enlightened United States policies. And presidents will resist personal diaries - a treasure trove for students of politics and political practitioners - because of a pervasive fear that

premature and embarrassing disclosures may be demanded by court order.

A president uniquely makes momentous and knotty decisions affecting countless people and frequently arousing strong antagonisms. Lawsuits generated because of the ripple effects of presidential action are legion. If a president must expect routine entanglement with such litigation, irresolution, timidity and flaccidity will become permanent fixtures of the Oval Office.

The nation needs a presidency that sits midway between the plebeian and the imperial. At present, it is skewed toward the plebeian.

Bruce Fein is a lawyer and free-lance writer specializing in legal issues.

LANGUAGE: ENGLISH

12TH STORY of Focus printed in FULL format.

Los Angeles Times

February 17, 1990, Saturday, Home Edition

SECTION: Part A; Page 1; Column 2; National Desk

LENGTH: 1346 words

HEADLINE: REAGAN TAPES TESTIMONY FOR POINDEXTER CASE

BYLINE: By NORMAN KEMPSTER, TIMES STAFF WRITER

BODY:

Former President Ronald Reagan testified behind closed doors for about six hours here Friday, facing some of the most detailed questions he has ever had to answer about his role in the Iran-Contra affair that rocked the closing years of his second term.

Called as a defense witness by former White House National Security Adviser John M. Poindexter, Reagan's appearance was videotaped so his testimony can be scrubbed clean of any diplomatic and military secrets that may have been mentioned. The tape will then be made public, perhaps as early as next week.

U.S. District Judge Harold H. Greene, scheduled to preside over Poindexter's trial in Washington, starting March 5, brought his court -- lawyers, clerks and others -- to Los Angeles to make it as convenient as possible for Reagan to appear. Poindexter's lawyers plan to play the videotape for the jury once the prosecution completes its case, making Reagan the star witness for the defense of his former aide.

Reagan spent six hours and 40 minutes in Courtroom 8 on the second floor of the Federal C Courthouse in the Civic Center, answering the initial batch of the 154 specific questions that Greene earlier authorized Poindexter's lawyers to ask. The 79-year-old former President is scheduled to return this morning for more questioning.

Reporters were kept more than 100 yards from the courtroom, which was guarded by a contingent of U.S. marshals, when Reagan, accompanied by lawyers and Secret Service bodyguards, walked across the hall from a stairwell to the court in the morning and back in the afternoon. He gave a somewhat tentative wave each time but said nothing.

There were no such restrictions when Greene, Poindexter, lawyers and other participants departed for the day. But they provided little information about the extraordinary session.

Greene said the hearing would resume at 9:45 a.m. today. When asked how many of the 154 questions were asked Friday, the judge would say only that the taping will conclude today, apparently indicating that much of the ground had been covered.

Poindexter's only comment as he left the courtroom was: "You'll have to ask someone else."

Facing five felony counts of obstruction of Congress, making false statements and conspiracy, Poindexter sought Reagan's testimony to bolster his contention that his activities were authorized by the former President. Greene ruled that the retired rear admiral could not get a fair trial unless he was allowed to call Reagan as a witness.

Richard W. Beckler, Poindexter's lawyer, originally submitted a list of 183 questions that he hoped to ask. Greene threw out 29 of them because he said they had no relevancy to the case or touched too closely on military or diplomatic secrets. However, he said that Beckler could ask the others, following up if necessary but introducing no new subjects.

Dan K. Webb, the chief prosecutor for Iran-Contra independent counsel Lawrence E. Walsh, cross-examined Reagan.

The hearing posed something of a tactical dilemma for Webb. In the context of the Poindexter case, his chief objective is to discredit the suggestion that Reagan authorized the activities of his national security adviser. But from a larger standpoint, the hearing provides the independent counsel's office with the best chance it may ever get to assess Reagan's role in the affair, which involved the sale of arms to Iran and the diversion of profits to the Contras in Nicaragua.

Although the judge did not make public the precise questions, he said they fell into several broad categories, such as the extent of Reagan's knowledge of the shipment of missiles to Iran and the former President's understanding of legislation which for a time barred U.S. assistance to the Contras.

Reagan originally asked to be excused from testifying on the grounds that a subpoenaed court appearance would diminish the dignity of the office of the presidency. But Greene ruled earlier this month that Reagan would have to testify unless he invoked the doctrine of executive privilege, something the former President declined to do.

"Although (Poindexter) might not have a valid defense based directly on the claim that his illegal activities, if any, were known to the President, the fact of the President's knowledge of, and apparent acquiescence in, such activities -- if that is what occurred -- would be material evidence, for it would bear on (Poindexter's) specific intent to commit various offenses," Greene said in ordering Reagan to provide the taped testimony.

Reagan and some other participants had lunch brought to the courtroom that is usually presided over by Manuel L. Real, chief judge of the Central District of California. However, Poindexter and a few others left the courtroom for lunch, delaying the taping by about an hour.

With no matters of substance leaking out of the courtroom, a swarm of reporters interviewed whomever they could. When Steve Preoteasa, a Romanian immigrant who runs the International Deli in the Los Angeles Mall across the street from the courthouse, arrived with a tray of turkey, ham, roast beef and chicken salad sandwiches, he briefly became the center of attention.

Preoteasa, an outspoken anti-Communist, said he wanted to tell Reagan that he was a longtime admirer. But the marshals would not let him into the courtroom, choosing instead to carry in the sandwiches and an order of Chinese food that arrived shortly after.

The Reagan drama was played out in one of several large courtrooms on the second floor of the 17-story 1930s-era building. It is frequently referred to as "the ceremonial courtroom" because many of the court's most formal functions take place there.

The walls are decorated with 14 large oil paintings of the men who have been the chief judge of the central district.

Three cameras were used to tape the hearing, one trained on Reagan, one on the judge and one on the lawyer asking the questions.

Security in the courthouse is usually very heavy with metal detectors regularly used to screen all visitors. Samuel Cicchino, chief deputy U.S. marshal, said his agents sealed off Courtroom 8, permitting entry only to authorized people. He said everyone who goes into the courtroom is photographed.

"Everything is going rather smoothly," he told reporters a few hours after the hearing began.

Staff writer Henry Weinstein contributed to this story.

PRESIDENTIAL COURT TESTIMONY

Former President Ronald Reagan waived his right of executive privilege to give videotaped evidence Friday that will be used in the defense of former National Security Adviser John M. Poindexter. Poindexter faces criminal charges arising from the Iran-Contra scandal. Reagan is not the first to provide court testimony:

1807: President Thomas Jefferson provided a sworn statement for the treason trial of Aaron Burr, who was accused of trying to foment a rebellion in part of the newly acquired Louisiana Purchase. Supreme Court Chief Justice John Marshall originally ruled that Jefferson could be compelled to appear in court but agreed on the precedent-setting compromise allowing the statement alone.

1870s: President Ulysses S. Grant gave a deposition in the criminal trial of his confidential secretary.

1975: President Gerald R. Ford presented testimony on videotape at the trial of his would-be assassin Lynette (Squeaky) Fromme.

1978: President Jimmy Carter provided on videotape testimony at a criminal trial in Georgia in which two state officials were charged with conspiracy to protect gambling interests. Carter had been Georgia's governor.

1980: President Jimmy Carter also presented videotape testimony for a grand jury investigating Robert Vesco, the fugitive financier.

1980: Former President Richard M. Nixon, after leaving office, appeared voluntarily as a witness at the trial of two ex-FBI agents, who were found guilty of authorizing illegal break-ins in search of fugitive members of the radical Weather Underground. Nixon also provided depositions in some Watergate-related trials.

Compiled by Times Researcher Aleta Embrey

GRAPHIC: Photo, COLOR, Former President Ronald Reagan leaves Los Angeles federal courthouse after first day of testimony. KEN LUBAS / Los Angeles Times

LANGUAGE: ENGLISH

11TH STORY of Focus printed in FULL format.

Chicago Tribune

February 23, 1990, Friday, NORTH SPORTS FINAL EDITION

SECTION: NEWS; Pg. 1; ZONE: C

LENGTH: 1407 words

HEADLINE: Reagan hazy on Iran-contra
Knowledge of diversion is denied

BYLINE: By Janet Cawley and Linda P. Campbell, Chicago Tribune

DATELINE: WASHINGTON

BODY:

Former President Ronald Reagan, in testimony made public Thursday, said he had no recollection of ever being told that profits from Iran weapons sales were diverted to the Nicaraguan contras, and that he "never had any inkling" White House aide Oliver North was secretly helping the guerrillas.

Reagan, who was subpoenaed by the defense in the upcoming trial of his onetime national security adviser, John Poindexter, neither clearly exonerated Poindexter nor critically undermined his defense. Nor did his videotaped testimony do much to answer questions about who authorized the diversion at a time when such aid to the contras was illegal.

But his deposition did reveal startling gaps in the memory of the 79-year-old former president. In all, Reagan said "I don't recall" or "I can't remember" 88 times in the eight hours of testimony taken Feb. 16-17 in Los Angeles.

At one point, Reagan said he could not identify Gen. John Vessey, who served for more than three years as his chairman of the Joint Chiefs of Staff. At other times, he said he could not identify a picture of contra leader Adolfo Calero, could not recall a shipment of Hawk missiles to Iran in November 1985, had no memory of signing one presidential finding relating to the shipment of weapons to Iran and had only the slightest recollection of signing a second such finding.

He also appeared hazy on the identity of Eugene Hasenfus, an American whose shooting down over Nicaragua helped precipitate the unraveling of the then-secret Iran-contra operation. And Reagan seemed totally unable to recall what the Tower Commission - a panel he appointed in December 1986 to investigate the affair - said in its report three months later.

Despite concerns that some material would have to be withheld from the public because of national security considerations, the judge released the entire transcript of the deposition once the Bush administration said it saw no need for deletions.

In defense of his sporadic recollections, Reagan said that he had been told

by statisticians that he met on the average with about 80 people a day for eight years and that 50 million pieces of paper accumulated during his presidency.

Reagan was clear and emphatic, however, on his dedication to the anti-communist contras, explaining his belief that the Soviet Union planned to "take Eastern Europe . . . organize the hordes of Asia and . . . move on to Latin America. And once having taken that . . . the United States would fall into their outstretched hand like overripe fruit."

The deposition was the former president's first testimony under oath about his knowledge of the Iran-contra affair.

The testimony also represents the first time a U.S. president has testified about his own conduct in office in connection with a criminal trial. President Gerald Ford provided videotaped testimony in the trial of Lynette "Squeaky" Fromme, who tried to assassinate him, and President Jimmy Carter gave videotaped depositions in two criminal trials and a grand jury investigation.

Wearing a dark suit with white shirt and dark tie, Reagan looked much like his presidential days, his hair grown back from minor brain surgery last year but showing a gray patch near the right temple.

Reagan was sworn in and, like any other witness, spelled his last name for the court reporter. He looked mildly nervous when U.S. District Judge Harold Greene thanked him for appearing despite the inconvenience, but seemed to relax when he recounted his background as a former president, California governor and actor.

"Prior to working in the movie business, I was a sports announcer in radio," he said.

Despite the objections of all parties in the case, Greene ordered the release of a 293-page transcript of the deposition and allowed reporters and members of the public to view a videoptape of it before the trial. But the judge said news organizations could not have copies of the videotapes until after they were played at the trial, because premature widespread showing could jeopardize Poindexter's right to a fair and impartial jury.

Poindexter, who testified during the 1987 Iran-contra congressional hearings that he never told Reagan about the diversion scheme to allow the president "plausible deniability," sat in the courtroom during Reagan's deposition.

Poindexter, who is charged with lying to Congress, obstruction of Congress and conspiracy, is scheduled to go on trial March 5. His defense appears to rest on the theory that Reagan either approved of or knew about his aides' secret activities on the contras' behalf.

Reagan denied any knowledge of the diversion. But he also emphasized that he repeatedly told his staff he wanted to help the contras in any way possible as long as no one broke the law.

There was a certain deference throughout the deposition proceedings, with Greene and the lawyers addressing Reagan as "Mr. President." Richard Beckler, Poindexter's lead attorney, who can be combative in court, was generally low-key

in his questioning.

But Dan Webb, the former U.S. attorney in Chicago who is prosecuting the case for the independent counsel's office, sparred with Reagan several times over whether he knew about or approved the diversion of funds to the contras or the destruction of government records about the scheme.

At one point, a clearly agitated Reagan said, "for heaven's sake, no!" when Webb asked if he had approved or authorized a diversion of funds in violation of a law banning any such aid. But, he added, "no one has proven to me that there was a diversion."

He also said Poindexter should have told him about any diversion "if he knew about it . . . unless maybe he thought he was protecting me from something."

Reagan said he did not recall the Tower Commission's reporting that North and the National Security Council were providing military aid to the contras, who were waging war against Nicaragua's Sandinista government. When asked whether the panel ever explained how the U.S. received more than $12.2 million it was owed for a shipment of TOW anti-tank missiles to Iran, and how excess profits might have been diverted, he said he didn't think it was explained.

When Webb said the answer was "completely unresponsive," Reagan shot back, "I don't think it is unresponsive to state what I appointed the commission to do and what I tried to get from them, and they could not supply that information until this day."

Reagan said prosecutors for the first time were bringing to his attention the Tower Commission's reference to a diversion.

"This is the first time I have ever seen that," Reagan said.

President Bush's national security adviser, Brent Scowcroft, who also was a member of the Tower Commission, said Thursday that Reagan had been briefed on the report at the time. White House reporters recalled that when the report was released in February 1987, Reagan held a copy aloft and said he planned to take it to Camp David to study.

As for North's participating in the illegal scheme to aid the contras, Reagan said, "I never had any inkling" such a thing was going on.

He also said he and North "did not meet frequently or anything of that kind, nor do I remember ever having a single meeting with him, as has been hinted at times by others."

In trying to explain his faulty memory, Reagan said at one point that his administration was concerned with more than "this Iranian issue."

"That was just one of many things that were going on," he said. "The government was involved in things of great import, not only having to do with domestic problems, but with the Cold War and things of that kind, and trying to arrive at treaties with regard to nuclear weapons and so forth."

Perhaps the most startling lapse in Reagan's memory involved Vessey, who was

chairman of the Joint Chiefs of Staff from 1982 to 1985.

His name arose when Beckler referred to a Central American trip made by Vessey and then asked Reagan to explain who Vessey was.

"Oh, dear," the former president said. "I could ask for help here. The name I know is very familiar . . ."

At Vessey's retirement in 1985, Reagan said to the army general, "A career like yours, combining as it does heroism, patriotism, competence, wisdom and kindness, doesn't need elaboration from commanders in chief or presidents. It speaks enough all by itself, and today I'll let history be your valedictorian, not me."

LANGUAGE: ENGLISH

IC investigation of Carter peanut business – transcripts given to GJ

4TH STORY of Focus printed in FULL format.

THE ARIZONA REPUBLIC

June 14, 1994 Tuesday, Final Chaser

SECTION: FRONT; Pg. A6

LENGTH: 577 words

HEADLINE: CLINTON WHITEWATER TESTIMONY IS MORE GRIST FOR SCHOLARS TO MILL

BYLINE: By Ann McFeatters, Scripps Howard

DATELINE: WASHINGTON

BODY:

President Clinton's testimony under oath before the Whitewater prosecutor Sunday was not unprecedented, but it is one more issue added to a legal pad full of presidential legal problems that have stirred debate among constitutional scholars.

For a presidency that is only 18 months old, the list of constitutional issues is surprisingly long.

No specifics were released Monday of what Clinton provided independent counsel Robert Fiske about Whitewater, the suicide of White House legal aide Vincent Foster, or a possible White House cover-up of Whitewater.

The session in the White House residence lasted 90 minutes, and a stenographer took notes.

Hillary Clinton had a separate hourlong interview.

The very act of their testifying has raised questions.

Can a president perjure himself if he lies under oath administered by a court reporter? The answer is decisively yes, constitutional lawyers say.

Less certain is whether a president can be indicted for something he says under oath or fails to say.

Some legal scholars say he can, but others say that is what the impeachment process is all about. The uproar over President Gerald Ford's pardon of his predecessor, Richard Nixon, was all about allowing the former president to escape a possible indictment.

Special White House counsel Lloyd Cutler issued a statement Monday saying that the Clintons voluntarily decided to give their testimony under oath to Fiske because they want to cooperate fully.

It would have been a messy predicament for everyone if the Clintons had refused. They have steadfastly said they would not invoke executive privilege,

as Nixon did during Watergate.

Jimmy Carter was the first sitting president to provide sworn testimony in a criminal investigation. He testified under oath for four hours at the White House to independent counsel Paul Curran, who was investigating the handling of loans to Carter's family peanut business. Curran handed the testimony over to a federal grand jury in Atlanta, and his final report found unequivocally no illegality.

Ronald Reagan testified to the Tower Commission about the Iran-contra scandal, and so did his vice president, George Bush. There were strong hints by Iran-contra independent counsel Lawrence Walsh in his final report that he believed that both Reagan and Bush had lied about the extent of their knowledge about the sale of arms to Iran and the diversion of funds to the Nicaraguan contras and the subsequent cover-up.

No personal legal action was ever brought against either man. Bush also testified under oath as president, denying a plot for an "October surprise" to free 52 Americans held hostage in Iran as an election-year benefit for Reagan.

Another unresolved question is whether the Clintons will pay the entire legal bill they will owe when the Whitewater issue is finally resolved. Just the appearance of their Whitewater lawyer, David Kendall, at the White House residence Sunday will result in a bill of about $1,000, let alone his preparation time. Also present Sunday was Cutler, who is temporarily serving as White House lawyer without pay.

Eventually, according to Mrs. Clinton, the Clintons could owe hundreds of thousands of dollars in legal fees.

The White House has floated a trial balloon of setting up a legal-defense fund to raise money through private channels. That has made many people uneasy because of the potential for conflicts of interest.

LANGUAGE: ENGLISH

LOAD-DATE: June 20, 1994

1ST STORY of Level 1 printed in FULL format.

The New York Times

April 1, 1989, Saturday, Late City Final Edition

SECTION: Section 1; Page 1, Column 1; National Desk

LENGTH: 1023 words

HEADLINE: JUDGE WON'T ORDER REAGAN TESTIMONY ✓

BYLINE: By DAVID JOHNSTON, Special to the New York Times

DATELINE: WASHINGTON, March 31

BODY:

The judge in the trial of Oliver L. North today emphatically rejected an attempt to force Ronald Reagan to appear as a witness, declaring that no written evidence had yet been found to suggest that Mr. Reagan authorized the illegal acts Mr. North is accused of committing.

The ruling by Federal District Judge Gerhard A. Gesell dealt a blow to Mr. North, whose attorneys wanted the former President summoned as their first witness when the defense began its case Monday.

''There has been no showing that President Reagan's appearance is necessary to assure Lieutenant Colonel North a fair trial,'' the order read. ''Accordingly, the subpoena is quashed.''

Mr. Reagan, in response to the judge's order, told a California television station that he would have resisted efforts to force his appearance.

''I made up my mind I wasn't going,'' the former President told KESQ-TV, an ABC affiliate in Palm Springs. ''I think it would have set a precedent that the next President doesn't have a right to impose on other Presidents. No President has ever been subpoenaed.'' While no President has been ordered to testify about decisions he made in office, subpoenas have been issued in criminal cases to chief executives.

Judge Gesell also turned down a defense motion to dismiss all 12 criminal charges against the former aide to the National Security Council. The charges include making false statements to Congress and obstructing an Attorney General's investigation into the Iran-contra affair.

In announcing his decision, the judge said sufficient evidence had been produced by the prosecution to warrant submitting all the charges to the jury. He said his determination was based on his belief that there was sufficient evidence for a jury to decide whether ''the defendant is guilty on all of the counts.'' The jury was not in the courtroom at the time.

No 'Generalized Inquiry'

As the judge uttered the word ''guilty,'' Mr. North's resolutely impassive countenance seemed to crack. He looked up, his face creased as if in pain, and slowly shook his head. After a few seconds, he assumed the same grave demeanor

he has displayed throughout the trial, staring toward a far wall and slowly tapping a felt tip pen on a pad.

Without Mr. Reagan, it is not clear whom Mr. North's lawyers will present in his defense. The chief defense lawyer, Brendan V. Sullivan Jr., has said he would ask the judge to show the jury a four-hour videotape of John M. Poindexter's testimony before the Iran-contra Congressional committees. Mr. Poindexter, the former national security adviser, testified that he had approved some of Mr. North's activities.

The order waiving Mr. Reagan's appearance appeared to foreclose the possibility that he would soon be asked under oath to clarify his role in the Iran-contra affair, the central unanswered question.

The judge acknowledged a widespread desire to know more about Mr. Reagan's actions, but he rejected public interest as a reason to compel Mr. Reagan's appearance. ''While there is understandable public interest in what a President may have known or may have done, the focus of North's trial does not involve any necessity for such a generalized inquiry,'' the judge said.

The former President has emerged in the trial as the central offstage character in the drama. Defense lawyers have said repeatedly that he was the ultimate inspiration and authority for Mr. North's actions.

But the judge concluded that there was no written evidence to suggest that Mr. Reagan authorized any of the activities that are the subject of the charges against Mr. North.

''The written record has been exhausted in this regard,'' the judge said, in material presented so far in the trial, in the secret documents furnished to the court in any public records, in an extensive written statement given by Mr. Reagan in late 1987 in response to questions from Government prosecutors or in portions of Mr. Reagan's personal diary obtained by prosecutors.

The judge said, however, that Mr. Reagan's approval of the broad policies under which Mr. North operated was clear from the former President's public statements, previous investigations and the trial record.

Mr. Reagan encouraged his subordinates to support the Nicaraguan rebels in spite of a Congressional ban on Government assistance from 1984 to 1986 and in Janurary 1986 authorized covert arms sales to Iran, the proceeds of which were diverted to aid the rebels.

The specific charges against Mr. North stem in large part from his efforts to conceal his activities in the arms sales and in behalf of the contras.

Judge Gesell said his decision was rooted squarely in the failure of the defense to show that Mr. Reagan's testimony was needed, rather than on legal theories that contend former Presidents are immune from appearing at criminal trials.

Jefferson Subpoenaed

No sitting President has ever testified in court in a criminal trial, although a few Presidents and former Presidents have provided testimony or its

equivalent in criminal trials and grand jury proceedings.

Thomas Jefferson received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr, Mr. Jefferson's first Vice President.

Chief Justice John Marshall, who presided over the trial, declared that the President was subject to law. After first resisting, Mr. Jefferson submitted the letter, making clear that his decision was voluntary.

During the 1974 trial in the cover-up of the Watergate affair, John D. Ehrlichman, a domestic policy adviser at the Nixon White House, sought Mr. Nixon's appearance. But the President was too ill to appear.

In 1975, Gerald R. Ford consented to a videotaped interview for use in the trial of Lynette Fromme, who was convicted of attempting to assassinate him. In 1980, Jimmy Carter answered questions on a videotape in a grand jury investigation of Robert L. Vesco, the fugitive financier.

In 1980, Mr. Nixon appeared as a witness in the trial of two former officials of the Federal Bureau of Investigation who had been accused of conducting illegal break-ins.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

March 31, 1989, Friday, AM cycle

LENGTH: 473 words

HEADLINE: ALLOWING PRESIDENT'S TESTIMONY WOULD BREAK U.S. PRECEDENT

BYLINE: By Deborah Zabarenko

DATELINE: WASHINGTON, March 31

BODY:
Friday's ruling by a judge against forcing Ronald Reagan to testify in Oliver North's defense is in line with two centuries of U.S. history.

No president or former president has ever been compelled to testify in open court, according to the Justice Department.

The issue of executive privilege -- the privilege of chief executives to refuse to testify -- was first raised by Thomas Jefferson, who received a subpoena in 1807 demanding that he turn over a letter sought by defense lawyers in the treason case against Aaron Burr, Jefferson's first vice president.

Jefferson cited the independence of the executive branch from the judicial branch and refused, at first, to release the letter. Eventually, he turned it over, but made it clear his decision was voluntary and not in response to the subpoena.

President James Monroe was served with a subpoena to testify at a criminal trial, but based on his attorney general's advice, he declined, saying his presidential duties were paramount.

He said he would submit to a deposition -- in which attorneys would interview him outside court -- but the court instead submitted written questions to him, called interrogatories, which he answered.

Reagan has already answered interrogatories submitted to the grand jury that ultimately returned the indictment against fired White House aide North. Judge Gerhard Gesell ruled Friday that Reagan need not testify to guarantee North a fair trial.

Abraham Lincoln voluntarily appeared before a congressional committee.

Ulysses S. Grant at first volunteered to testify at a criminal trial, but after consulting with his staff chose to give a deposition instead.

Richard Nixon, the only president to resign, was ordered to produce the Watergate tapes in response to a subpoena after the tapes were shown to be necessary to the fair administration of justice.

Gerald Ford gave a deposition for the trial of Lynette "Squeaky" Fromme, who attempted to assassinate him, but his statement concerned only his eyewitness account of the attempt on his life, not the way he carried out his presidential duties.

Reuters, March 31, 1989

Former presidents John Tyler and John Quincy Adams appeared before congressional committees in response to subpoenas in the investigation of whether their Secretary of State Daniel Webster improperly disbursed funds from a confidential fund.

And Nixon gave several depositions after he resigned.

The Justice Department claims that in the case of presidents and former presidents, a "high threshhold of relevance" is required to compel testimony. That is, litigants must make absolutely clear that the president's testimony or deposition is essential to assure a fair trial.

When Nixon claimed executive privilege, the court denied it only because of "the demonstrated, specific need for evidence in a pending criminal trial."

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

Los Angeles Times

March 25, 1989, Saturday, Home Edition

SECTION: Part 1; Page 14; Column 1; National Desk

LENGTH: 976 words

HEADLINE: NORTH LAWYERS RENEW BID FOR REAGAN TO TESTIFY;
JUDGE DECLINES TO RULE BUT LEGAL SOURCES SAY EX-PRESIDENT MAY HAVE TO APPEAR

BYLINE: By ROBERT L. JACKSON, Times Staff Writer

DATELINE: WASHINGTON

BODY:
Attorneys for Oliver L. North renewed their request Friday to compel former President Ronald Reagan to testify at the fired White House aide's trial, amid growing indications that the former President eventually will have to take the witness stand in the Iran-Contra case.

U.S. District Judge Gerhard A. Gesell declined to make an immediate ruling on the brief motion by North's defense but legal sources close to both sides of the case said that they expect Reagan will be required to appear at some point.

The six weeks of testimony in the trial have provided more substantial grounds for questioning the former President about his instructions to subordinates on aid for the Nicaragua's Contra rebels at a time when it was banned by Congress, the sources said.

Defense Given Latitude

During the trial, Gesell has shown his willingness to give North's lawyers broad latitude in questioning witnesses.

Brendan V. Sullivan Jr., North's principal attorney, said in his motion that "the importance of Mr. Reagan's testimony to the defense of this case is clear."

A spokesman for independent counsel Lawrence E. Walsh's office, which is prosecuting the case, said that prosecutors probably will remain neutral on the issue, but a Justice Department spokesman said that the agency "will pursue" its pending court motion to block an earlier defense subpoena for Reagan.

Theodore B. Olson, a Washington attorney who is representing Reagan, declined immediate comment.

In January, Gesell quashed North's subpoena for the testimony of President Bush but refused to quash a similar subpoena for Reagan. The judge hinted that he might order Reagan's appearance later if testimony at the trial showed it to be necessary.

May Call Hearing

One lawyer in the case, who asked to remain anonymous, predicted that Gesell would call a hearing next week before reaching a decision. The lawyer said he doubts, in any event, that Reagan will have to appear as early as March 31 as requested in Sullivan's latest motion.

In presenting the government's case, prosecutor John W. Keker has elicited extensive testimony that the retired Marine officer and former National Security Council aide made false statements to Congress and obstructed congressional inquiries into his secret efforts to support the Contras. Those are the principal allegations among 12 felony counts on which North is being tried.

But in cross-examination of key prosecution witnesses, Sullivan has attempted to show that North had top-level authorization for his efforts to aid the rebels and that Reagan had a greater role than previously known.

Trial testimony has shown that the former President, for example, passed instructions to his subordinates that they should, in the words of former National Security Adviser Robert C. McFarlane, "keep the Freedom Fighters (Contras) together, body and soul," after Congress cut off military aid in 1984.

Not to Share Information

McFarlane, who testified for five days, also said that Reagan approved soliciting funds from U.S. allies to make up for the lost funding and warned that the existence of this effort was "not to be shared" with Congress.

Reagan underscored this admonition by telling his top aides that "we'll all be hanging by our thumbs in front of the White House" if Congress found out that his Administration was seeking Contra funds from other nations, according to McFarlane and official minutes of a June 25, 1984, meeting.

Witnesses have suggested that Reagan thought Congress would refuse ever to resume aid if it learned of this unofficial substitute assistance.

No testimony or evidence introduced to date has countered the allegation that North deliberately misled Congress. But Sullivan hopes to convince the jury that the retired Marine lieutenant colonel, following the directions of his commander-in-chief, had "no criminal intent" in his actions and that this should be considered a key mitigating factor, legal sources said. To that end, they said, direct testimony from Reagan seems highly relevant.

Deference to Presidents

Legal precedent protects a sitting President from being compelled to testify at a trial in all but the most extreme circumstances, attorneys say. But such deference may no longer shield him after he leaves office, they said.

During the Watergate scandal, U.S. District Judge John J. Sirica agreed with a request of former White House aide John D. Ehrlichman that former President Richard M. Nixon should be called to testify as a defense witness.

Nixon, suffering from phlebitis at his home in San Clemente, objected that he was too ill to travel to Washington. Sirica, however, was so insistent that he sent a panel of court-appointed doctors to examine the former President and only relented after the doctors reported that Nixon was seriously ill.

If Reagan is compelled to testify in the trial's remaining two months, the former President likely would be pressed about his instructions to his staff and the extent of his knowledge of their activities.

Statements by Reagan

In his statements on the Iran-Contra scandal, Reagan has said that he did not know North was directly advising and assisting the Contras and that he did not approve or direct any illegal actions.

Asked by Keker if Reagan ever recommended lying to Congress, McFarlane simply answered in the negative. He did not say that Reagan counseled against lying, however, and other prosecution witnesses suggested that North is not the kind of person who would understand the subtle difference between lying and not sharing information.

North has been portrayed by these witnesses, called by the prosecution, as a deeply religious, dedicated, high-energy military officer with a "can do" attitude toward any order given him by a superior officer, especially his commander-in-chief.

LANGUAGE: ENGLISH

4TH STORY of Level 1 printed in FULL format.

The Associated Press

January 4, 1989, Wednesday, PM cycle

SECTION: Washington Dateline

LENGTH: 577 words

HEADLINE: North Tactic Revives Old Debate: Can A President Be Forced To Testify?

DATELINE: WASHINGTON

BODY:

The effort by Oliver North to compel President Reagan and President-elect Bush to testify at his Iran-Contra trial has renewed a debate, almost as old as the Union, over "executive privilege."

Can a president, or a former one, be forced to testify in a legal case? Courts have provided little guidance, but constitutional experts said Tuesday that North's legal tactic may succeed.

No sitting president ever has testified in court in a criminal trial, but several have provided testimony or what might be considered the equivalent.

The personal stakes are high for North. The former White House aide is charged with theft, conspiracy to defraud the government and several other felonies in the case involving the support of Nicaraguan rebels with money from the sale of U.S. weapons to Iran.

His trial is scheduled to begin Jan. 31 - just 11 days after Bush is to succeed Reagan. Besides Reagan and Bush, subpoenas also have been issued for other key figures in the Reagan administration, including Secretary of State George P. Shultz and four other State Department officials.

The man who first tried to force a president to testify was Aaron Burr, a former vice president who stood trial in 1807 on charges of treason.

Burr sought to force Thomas Jefferson, the president under whom he had served, to testify at the trial.

Jefferson resisted. But Chief Justice John Marshall, presiding over the trial, ruled against Jefferson. The president eventually avoided having to appear by releasing some information Burr had sought.

The closest the Supreme Court has come to ruling on the issue presented by North's subpoena came in the Watergate tapes decision of 1974, in a case called Nixon vs. U.S.

The court then ruled, 8-0, that President Richard M. Nixon had to comply with a special prosecutor's subpoena seeking the surrender of White House tape recordings.

"The general assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial," the high court ruled 15 years ago.

Jerome Barron, a law professor at George Washington University here, said Tuesday the 1974 decision is a strong precedent for North.

"Whether Mr. Reagan or Mr. Bush can be subpoenaed was resolved in Nixon vs. U.S., and the answer is yes," Barron said.

"If the evidence (sought by North) is material, I think Reagan and Bush can be required to appear," Barron said.

On the other hand, unnamed Justice Department sources were quoted by The Washington Post as saying that Nixon vs. U.S. offers support for fighting subpoenas of Reagan and Bush. They said the Supreme Court emphasized that its Watergate-tapes decision did not deal with a claim of privilege based on national security grounds.

Justice Department and White House officials have said they will try to have the subpoenas thrown out.

Stanley Brand, a Washington lawyer who once served as general counsel to the House of Representatives, said North may succeed.

"My sense is North has a good claim. The president was involved in the process, and one of North's defenses is that he was serving the president by following orders," Brand said.

In 1975, then-President Gerald R. Ford gave a videotaped deposition in the trial of Lynette "Squeaky" Fromme, who was convicted of trying to assassinate Ford. The videotape was played for jurors at Fromme's trial.

While in office, President Jimmy Carter provided videotaped testimony in two criminal prosecutions.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

The Associated Press

August 25, 1982, Wednesday, AM cycle

SECTION: Domestic News

LENGTH: 366 words

HEADLINE: Lawyer Says Can't Get Past Door to Serve Nixon With Subpoena

BYLINE: By BOB SPRINGER, Associated Press Writer

DATELINE: SPRINGFIELD, Ill.

BODY:
Process servers have been unable to get past U.S. Secret Service agents to serve former President Richard M. Nixon with a subpoena seeking written testimony, the lawyer for an Illinois couple suing Ford Motor Co. said Wednesday.

Nixon's written deposition is sought along with ones from Henry Ford II and Chrysler Corp. Chairman Lee Iacocca in a $4.5 million damage suit brought by Donald and Peggy Sweet of rural Mechanicsburg.

The couple contends the three men met in the White House in 1971 and discussed relaxation of federal regulations on fuel tank safety. Ford was chairman of the No. 2 U.S. automaker, and Iacocca was president of Ford at the time.

Mrs. Sweet suffered third-degree burns over most of her body, and the couple's child also was injured, when the gas tank of their 1969 Ford station wagon exploded after the vehicle was hit in the rear by a truck near Litchfield, Ill., about 35 miles south of Springfield.

Thomas Tobin of Chicago, attorney for Ford Motor Co., has called the depositions a "fishing expedition." He said last week that the Sweets don't know if the alleged conversation between the former president and the two auto company officials took place or, if it did, the date and time of such a meeting.

Thomas Londrigan, the Sweets' attorney, said in an interview Wednesday that private process servers have been blocked so far from delivering the subpoena on Nixon. He said the former president either has been away from his New Jersey home or New York City office, or Secret Service agents have blocked the servers' path to his door.

Londrigan said he may ask a federal judge in New York to use U.S. marshals to deliver the subpoena if the private servers' efforts continue to be unsuccessful.

Londrigan spoke after a hearing in which U.S. District Judge Harold Baker denied a request by lawyers for Henry Ford that the deposition not be required

of him.

Baker upheld last Friday's denial by a U.S. magistrate of an identical request to quash the subpoena for Ford, and set Sept. 7 for taking written testimony from him.

A federal judge in Detroit has not ruled on a request by Iacocca's lawyers that the subpoeana for his deposition be quashed.

LANGUAGE: ENGLISH

2ND STORY of Level 1 printed in FULL format.

January 30, 1989, Monday, Late Final Edition

SECTION: Part 1; Page 1; Column 6; Late Final Desk

LENGTH: 502 words

HEADLINE: BUSH EXCUSED FROM NORTH TRIAL; REAGAN PUT ON CALL; PRESIDENT'S SUBPOENA QUASHED

BYLINE: From Times Wire Services

DATELINE: WASHINGTON

BODY:
The federal judge in the Iran-Contra case threw out Oliver L. North's subpoena of President Bush but ruled today that former President Ronald Reagan can be compelled to testify in the case against his former aide.

U.S. District Judge Gerhard A. Gesell, clearing one of the last obstacles to the scheduled start of North's trial Tuesday, ruled that the former White House aide had made no showing that Bush "has any specific information relevant and material" to the charges against North.

Gesell said Reagan "shall remain subject to call" to testify in the case but said in his three-page order that there would be further proceedings if it is found necessary to summon the former President as a witness.

Gesell also quashed, with "one narrow exception," North's subpoena for Reagan's personal diary.

The judge said portions of the diary might become part of the trial "if at some point" North's defense team "supports a claim that President Reagan ordered, directed, requested or, with advance knowledge, condoned any of North's" alleged criminal activities in the diversion of Iranian arm-sales profits to the Contra rebels in Nicaragua.

'Production Procedure'

In that event, Gesell said, "an appropriate production procedure" must be developed for reviewing the former President's diary and determining whether any of the entries support North's assertions.

North contended in testimony at the congressional Iran-Contra hearings in 1987 that all of his activities were authorized by superiors in the Reagan Administration and that he reported to former national security advisers Robert C. McFarlane and John M. Poindexter.

Government lawyers had challenged the subpoena for testimony by Reagan and Bush as unprecedented.

They argued on constitutional grounds that Reagan and Bush enjoyed executive privilege and could not be forced to testify on sensitive national security

issues.

Gesell's order implemented a tactic he had indicated at a hearing Friday that he would use with regard to Reagan's testimony. Gesell said then that circumstances may change as evidence is introduced at the trial and that testimony of certain individuals may become relevant.

The 12 counts against North include obstruction of Congress, destruction of documents and acceptance of illegal gifts.

2 Counts Thrown Out

The two key counts returned against North March 16 -- conspiracy to defraud the government and theft of government property -- were thrown out earlier this month. An interagency committee of intelligence experts feared that trial on those two charges could expose so much classified information that the national security would be jeopardized.

If convicted on all counts, North faces a maximum 60 years in prison and $3 million in fines.

Independent prosecutor Lawrence E. Walsh has turned over trial duties to his chief deputy, John Keker.

Jury selection is expected to take about two weeks, and lawyers for both sides have predicted that the trial will take about five months.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

June 16, 1989, Friday, AM cycle

LENGTH: 496 words

HEADLINE: BUSH, REAGAN TO BE SUBPOENAED AT POINDEXTER IRAN-CONTRA TRIAL

BYLINE: By James Vicini

DATELINE: WASHINGTON, June 16

BODY:

Attorneys for former White House aide John Poindexter said on Friday they plan to subpoena President George Bush and former President Ronald Reagan at his Iran-Contra trial.

But prosecutors announced that they would move to drop the must serious charges against Poindexter, just as they had been forced to do in the case against his onetime White House aide, Oliver North. They said they were concerned that national security secrets might be revealed.

If the charges are dropped, it may not be necessary to subpoena Bush and Reagan, the prosecutors said.

The charges go to the heart of the Iran-Contra scandal, alleging wrongdoing in the secret scheme to sell weapons to Iran and divert millions of dollars in profits to the Nicaraguan Contra rebels in 1985-86, when Congress had banned military aid to them.

The disclosure of the subpoenas at a pre-trial hearing raised the prospect of new problems for Bush and Reagan, both of whom have been trying to put the Iran-Contra scandal behind them.

"My client had substantial contact with both individuals during the events outlined in the indictment," defence attorney Richard Beckler said.

Poindexter, the White House national security adviser under Reagan, has taken responsibility for authorising the covert activities conducted during the Iran-Contra affair. Bush was vice president at the time.

Both Reagan and Bush received defence subpoenas at North's Iran-Contra trial, but the judge in that case ruled that their testimony was not necessary or relevant.

During the North trial, there was damaging evidence and testimony showing that Bush and Reagan had been actively involved in the efforts to support the Nicaraguan Contra rebels.

Independent special prosecutor Lawrence Walsh said he plans to seek next week the dismissal of the two most serious charges involving theft of government property and fraud and the narrowing of the conspiracy charge against Poindexter.

Reuters; June 16, 1989

He said the defence was seeking documents of the "utmost sensitivity."

The same conspiracy and theft charges had to be dropped against North after the Bush administration in January refused to make publicly available at the trial classified documents demanded by the defence.

The prosecutors previously had hoped to salvage the three charges against Poindexter, arguing that the North trial showed that the case could go forward without jeopardising national security.

The four other charges against Poindexter allege obstruction of Congress and making false statements about the scandal. No trial date has been set.

North, who was an aide to Poindexter, is scheduled to be sentenced on June 23 after being found guilty of helping to obstruct Congress in its efforts to learn about the scandal in 1986, shredding secret documents and accepting an illegal gratuity in the form of a 14,000-dollar home security fence.

North, who was acquitted on nine other counts, faces up to 10 years in prison and 750,000 dollars in fines.

LANGUAGE: ENGLISH

LOAD-DATE: 061689

1ST STORY of Level 1 printed in FULL format.

The Associated Press

February 6, 1990, Tuesday, AM cycle

SECTION: Washington Dateline

LENGTH: 627 words

HEADLINE: Appeals Judge Questions Why Reagan Didn't Testify for North

BYLINE: By PETE YOST, Associated Press Writer

DATELINE: WASHINGTON

BODY:
A federal appeals judge hearing Oliver North's Iran-Contra case Tuesday questioned why North wasn't allowed to call former President Reagan as a defense witness at his trial.

During nearly 2 hours of arguments, U.S. Court of Appeals Judge Laurence Silberman noted that Reagan's written answers to questions in the Iran-Contra affair were submitted to a grand jury, but were never provided to North's lawyers.

Silberman, one of three judges who will rule on North's appeal of his conviction on three felony counts, asked why, "as a matter of basic fairness" Reagan's written answers weren't turned over to the defendant.

Government attorney Gerard Lynch said the judgment was made that Reagan's written answers would not have been "helpful" to North and so weren't turned over.

"But our system ... is based on" giving someone accused of a crime wide latitude in obtaining information for his defense, responded Silberman.

The appeals court panel consists of Silberman and David Sentelle, both Reagan administration appointees, and Carter administration appointee Patricia Wald, chief judge of the appeals court.

Indicating that Reagan's written answers in the Iran-Contra inquiry may have been more general than specific, Silberman said that "what troubles me is we don't have a very good idea" of what Reagan might have said as a defense witness for North.

If North had worked in the State Department and Reagan had been secretary of state, there would have been no question that he would have been called to testify, said Silberman.

North, who was convicted of aiding and abetting an obstruction of Congress, altering and destroying National Security Council documents and accepting an illegal gratuity, argued that all his activities were approved by his

superiors, national security adviser John Poindexter and Reagan.

Silberman also questioned whether Poindexter's videotaped testimony on Capitol Hill should have been admitted as evidence at the North trial.

"Only two people were north of North ... the president and Admiral Poindexter," said Silberman.

Lynch emphasized that "North's own testimony" was that he never met alone with Reagan, and that North "never said the president told him to do anything."

Silberman said that even if Reagan didn't specifically authorize the actions for which North was convicted of crimes, the ex-president's testimony might have been helpful to North.

"Suppose the ex-president says that 'I never gave specific authorization' (but) 'I did indicate that I didn't wish this information to be revealed," said Silberman.

Defense attorney Barry Simon said Reagan should have been called to confirm that he authorized keeping secret from Congress the U.S. connection to a November 1985 shipment of Hawk missiles from Israel to Iran.

Lynch conceded that North may have gotten the "impression" from Poindexter that the U.S. role was to be kept secret. But Lynch argued that North knew he was committing a wrongful act when he obstructed Congress from learning of the issue.

"We're not talking about keeping secrets from enemies of the United States" or "even the public," said Lynch.

At North's trial, U.S. District Court Judge Gerhard Gesell quashed a subpoena for Reagan's appearance. The judge ruled there was no evidence in the record to suggest that the former president authorized any illegal activities by North.

Gesell also rejected a request to admit as evidence portions of Poindexter's congressional testimony on videotaped segments which were prepared by North's trial team.

Gesell on July 5 placed North on probation for two years, fined him $$150,000 and sentenced him to 1,200 hours of community service. North is performing the community service while appealing the convictions and fine.

LANGUAGE: ENGLISH

1ST ITEM of Level 1 printed in FULL format.

58 U.S.L.W. 1126

February 20, 1990

LENGTH: 360 words

SECTION: SUMMARY AND ANALYSIS.

TITLE: Former President Reagan Must Give Taped Testimony In Iran-Contra Trial.

TEXT:

The great majority of some 183 questions Iran-Contra defendant John Poindexter proposes to ask former President Reagan are material to his defense, the U.S. District Court for the District of Columbia held Feb. 5 as it ordered Reagan to give testimony via videotaped deposition for use at the defendant's trial. Historical practice and precedent from the Watergate era led the court to reject the argument that a president can never be compelled to testify in a criminal proceeding; however, concerns about national security and trial administration supported the videotape procedure, the court said. (U.S. v. Poindexter, DC DC, No. 88-0080-01 (HHG), 2/5/90)

As of this decision, the former president had not yet asserted executive privilege in opposition to the defendant's subpoena. Nevertheless, the court said, Reagan's testimony should be required only if it meets a "meticulous standard" of materiality and is "necessary" in the sense of being a more logical and persuasive source of evidence than available alternatives.

Most of the questions proposed by the defendant--dealing with private conversations between Reagan and the defendant, Reagan's understanding of the "Boland Amendment," which barred intelligence agencies from providing support to the Contras, and courses of action discussed in the event Congress restricted military aid to the Contras--satisfy this heightened standard, the court said, since they go to the heart of the defendant's contention that he lacked the specific intent to engage in criminal conduct.

There is no precedent for compelled in-court testimony by a former president, the court noted; on the other hand, written answers to interrogatories cannot fulfill the essence of the defendant's Sixth Amendment right. However, taking Reagan's testimony by videotape has the virtue of permitting him to fully exercise his right to claim executive privilege, if he so chooses, while at the same time eliminating the inevitable disruptions repeated claims of privilege would cause at trial. Moreover, the court said, national security concerns argue in favor of taking Reagan's testimony in a private setting.

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

February 26, 1990

SECTION: THE POINDEXTER TRIAL; Pg. 1

LENGTH: 1673 words

HEADLINE: Reagan Testimony Takes Center Stage

BYLINE: BY FRED STRASSER, National Law Journal Staff Reporter; An *NLJ* News Analysis

DATELINE: WASHINGTON

BODY:

It began as a clash among the branches of government over control of foreign policy. And five years after the events that bloomed into the Iran-Contra affair occurred, the tumultuous constitutional battle continues as former national security adviser John M. Poindexter prepares to go on trial next month.

Legally, the case is a knot of fascinating issues, but the questions of fact are fairly unexciting. Attorney General Dick Thornburgh saw to that last year when he pressured prosecutors not to use classified information needed to support the central conspiracy charges of the original indictment.

So what's left is largely the same question jurors faced with Mr. Poindexter's far more subordinate, Oliver L. North. Did Mr. Poindexter, the president's right-hand man, intentionally lie to Congress about arms sales to Iran and deceive Capitol Hill about the administration's militant support of Nicaraguan Contras at a time Congress had banned military aid? And did he conspire with others to carry out the deception and destroy documents to derail efforts to uncover it?

The answers will include some replay of Mr. North's case. What has breathed new energy into this fading political scandal, however, is defense witness Ronald Reagan, who, for the first time in the Iran-Contra affair, is being forced to testify under oath and whose personal diaries -- if surrendered -- could become important evidence for the defense.

There is every indication from the defense attorneys' moves that Mr. Poindexter, who good-soldiered for his boss during immunized testimony before Congress in 1987, is now ready to point upward to the last rung in the Iran-Contra affair and argue that Mr. Reagan had the final responsibility for Mr. Poindexter's acts.

The Role Mr. Reagan will play in the case, however, remains in doubt. Indeed, his failure to play a significant one could lead to dismissal of the charges altogether, observers say.

Softened Stance

In the ongoing battle of the branches, Mr. Reagan dropped his relatively weak claim of executive privilege with respect to any appearance as a witness and

agreed to give a videotaped deposition. But he has offered no assurances about what he will say in response to the 154 questions approved by U.S. District Judge Harold H. Greene, or whether he will assert the executive privilege claim of presidential privacy on key questions. It would then be up to the judge to rule on each item as to whether Mr. Reagan's interest in the privilege outweighed Mr. Poindexter's need for the information to obtain a fair trial.

In addition, the Bush administration has not taken a final position on Mr. Reagan's executive privilege claims yet -- a decision that could be critical. As Judge Greene has made clear, the sitting president represents the institution of the presidency and presumably knows better than the former president what impact a breach of customary confidentiality would have. President Bush, therefore, is entitled to assert executive privilege over Mr. Reagan's testimony or diaries on the grounds of protecting state secrets or serving foreign policy goals.

With the ghost of Richard Nixon and Watergate hanging over even the term "executive privilege," Mr. Reagan's lawyers demurred on its use until Judge Greene demanded it. The administration presumably is no more inclined toward pursuing the claim and could simply argue the information Mr. Poindexter wants from the former president is classified and cannot be used -- a decision the attorney general has the power to make.

Then, if Judge Greene decides Mr. Poindexter cannot get a fair trial without it, the charges would be dismissed, as happened in federal court in Alexandria, Va., last November with the indictment of Joseph Fernandez, the former CIA station chief in Costa Rica who assisted Mr. North's resupply operation.

With respect to the 33 diary entries that Judge Greene ordered turned over to the defense and for which Mr. Reagan asserted executive privilege, the judge seems to be less intent on demanding compliance now that Mr. Reagan has agreed to testify. At a hearing Feb. 13, the judge pressed the defense attorneys, led by Richard W. Beckler of the Washington office of Houston's Fulbright & Jaworski, on why the diaries were necessary when Mr. Reagan himself would testify. Mr. Beckler responded that they were important to help prepare for Mr. Reagan's interrogation.

And problems with classified information are not confined to the evidence Mr. Poindexter is seeking from the former president. Although the trial had been scheduled for Feb. 20, Judge Greene changed the date to March 5 after it was disclosed publicly for the first time during the same hearing that prosecutors and defense lawyers are locked in dispute over the handling of more than 150 classified documents proposed for use as evidence. Again, if Judge Greene finds they are necessary to Mr. Poindexter's defense and the attorney general refuses to make them available -- or summaries or redacted versions are not sufficient -- some or all of the charges could be dismissed.

If the prosecution clears the remaining hurdles, it appears likely Mr. Poindexter will build his defense by showing Mr. Reagan was active and involved in setting and executing policy rather than being the aloof, distant figure he described during immunized testimony before the congressional Iran-Contra Investigating committee in July 1987.

In that testimony, Mr. Poindexter portrayed his commander in chief as someone who was not "a man for great detail." As a result, Mr. Reagan knew nothing

whatsoever about the diversion of proceeds from the Iranian arms sales and understood only in the most general terms the Contra support efforts of his National Security Council aides, Mr. Poindexter said.

But now, Mr. Poindexter has changed his tune. Instead, court papers show, , he will argue he routinely received private direction from the president on both the arms sales and the secret Contra support operation.

In changing the tune, however, Mr. Poindexter must stick at least to the theme. While he received immunity for his congressional testimony, he is not immune to perjury charges if he contradicts it too sharply. But most observers think the military bureaucrat covered himself adequately by speaking in generalities.

'Spirit and Letter'

As Mr. Beckler struggled to make clear at pretrial hearings, the ex-admiral does not claim that President Reagan authorized him to break the law. Rather, they argue, Mr. Reagan authorized certain actions -- and as a result, Mr. Poindexter assumed they were not a legal problem.

For example, it appears Mr. Poindexter will argue that he did not intend to lie on Congress when he assured three congressional committees during July 1986 that the administration was in compliance with the "spirit and letter" of the Boland Amendment banning military aid to the Contras. He may well contend that his sincere belief -- and thus lack of criminal intent -- was based on the president's assurance that the restrictions did not apply to the NSC staff.

Mr. Reagan's testimony could help because the then-president publicly stated he shared that belief.

Whatever Mr. Reagan says -- or doesn't say -- is likely to be the political, legal and historic highlight of the case.

"This will be the first time a president has been compelled to appear in a court proceeding for adversarial questioning on his own conduct in office," notes Prof. Paul. F. Rothstein of the Georgetown University Law Center, a criminal law expert who was closely followed the Iran-Contra proceedings. "It is really quite an event."

And in terms of the type of conduct and the claim of executive privilege, experts say it is hard to picture a tougher case.

In U.S. v. Nixon, the U.S. Supreme Court held that a president may use his office as a shield against subpoena for documents or testimony but the claim is limited and can be overcome. There, the stakes were the truth of the Watergate scandal and a bid to make the president a prosecution witness. In the case of Mr. Poindexter "the interest of the defense is arguably of greater weight," observed Prof. Peter M. Shane of the University of Iowa College of Law, an authority on separation of powers. "Mr. Poindexter has a due process right at work to demonstrate a lack of criminal culpability."

But limitations on the claim depends on circumstances. The privilege is virtually absolute when a sitting president can legitimately claim privilege with respect to foreign affairs or military matters, said Professor Shane. It

is perhaps weakest when, as in Mr. Reagan's case, a former president asserts "presidential privacy," a claim based on the rationale that if presidents are discouraged from keeping accurate, personal memorandums it will impede effective decision-making.

But if the current administration joins Mr. Reagan's claim, the balance would shift again, said Prof. Peter L. Strauss, Columbia University School of Law, another separation-of-power authority. "Here, you are talking about the national security adviser discussing military and foreign affairs with the president," he said.

So while the importance of the Iran-Contra affair's political dimension has abated, the waves of constitutional contention have not. First it was the extent to which Congress can use appropriations to limit presidential action in foreign affairs. Later, the extent to which congressional overseers were entitled to pry into White House communications. Later still, the constitutionality of independent counsel was challenged; and then the struggle moved to a battle between the independent counsel and the attorney general over use of classified information.

Now the trial of the former rear admiral has stripped the Iran-Contra affair down to its long-avoided essence, the role President Ronald Reagan played in the actions of his subordinates -- passive observed or active instigator?

GRAPHIC: Photo, BETTER DAYS: President Reagan confers with Chief of Staff Donald Regan and security adviser John M. Poindexter in Reykjavik, Iceland, during talks with Soviet leader Mikhail Gorbachev. AP/Wide World Photos

LANGUAGE: ENGLISH

1ST STORY of Level 1 printed in FULL format.

The Washington Times

January 24, 1990, Wednesday, Final Edition

SECTION: Part A; NATION; Pg. A4

LENGTH: 432 words

HEADLINE: Poindexter lawyers must put questions to Reagan in writing

BYLINE: Jay Mallin; THE WASHINGTON TIMES

BODY:

A federal judge ordered attorneys yesterday to write out the questions they would ask former President Reagan should he be required to testify at retired Rear Adm. John Poindexter's trial.

U.S. District Judge Harold H. Greene issued his ruling after a hearing in which Adm. Poindexter's attorneys asked the judge to allow them to subpoena Mr. Reagan for the trial, set to begin Feb. 20. Attorneys for Mr. Reagan and the Justice Department opposed the request.

"The only thing Mr. Reagan is concerned about is not having to take the stand himself and tell what he knows" about the Iran-contra affair, charged Frederick Robinson, one of Adm. Poindexter's attorneys.

Adm. Poindexter, a former national security adviser, faces trial on five felony counts: one count of conspiracy to obstruct Congress, two counts of actual obstruction of Congress and two counts of lying to Congress. The charges stem from statements he made to Congress during its investigation of the Iran-contra affair, a scheme to sell arms to Iran and divert the proceeds to assist the Nicaraguan resistance when Congress had banned such assistance.

Adm. Poindexter's attorneys have sought testimony and documents from Mr. Reagan in order to bolster their defense that Adm. Poindexter acted at least partly under direction of the president.

Courts going back to the early 1800s have ruled that presidents may be forced to testify in a criminal case. However, no president or former president actually has been forced to testify under subpoena.

"Everybody says it [can be done] but nobody has done it," remarked Judge Greene during yesterday's hearing.

"That just means that your honor gets the first opportunity," replied Mr. Robinson.

Theodore B. Olson, a former assistant attorney general who is representing Mr. Reagan, agreed yesterday that a former president theoretically could be forced to testify. But he argued that Mr. Reagan can be subpoenaed only if Adm. Poindexter's attorneys prove the testimony would be central to their defense and that there is no other way to present the information.

The Washington Times, January 24, 1990

The defense attorneys had already listed for Judge Greene 67 categories of information they may need Mr. Reagan's testimony on. Judge Greene called the list "far too opaque," and ordered the lawyers to submit specific questions.

The judge said copies of those questions would be given to Mr. Reagan's attorney and the Justice Department, but not to the special prosecutors handling the case in order to avoid tipping them off to Adm. Poindexter's defense strategy.

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LANGUAGE: ENGLISH

Harvard Law Review

January, 1995

Commentaries

*701 EXECUTIVE PRIVILEGES AND IMMUNITIES: THE NIXON AND CLINTON CASES

Akhil Reed Amar [FNa1]
Neal Kumar Katyal [FNaa1]

In 1978, Ernest Fitzgerald sued Richard Nixon, and in 1994, Paula Jones sued Bill Clinton. In a landmark but closely divided 1982 opinion, Nixon v. Fitzgerald, the Supreme Court sided with Nixon and against Fitzgerald. [FN1] What does this mean for Jones and Clinton today? [FN2] Ed Meese speaks for many when he insists that Nixon protects Presidents only for presidential conduct and that extending immunity to Clinton's pre-presidential conduct would be a huge and unprincipled stretch that would place Bill Clinton above the law. [FN3] Other commentators aren't so sure that Nixon itself was rightly decided but are sure that Clinton's claim is much weaker. Terry Eastland has argued *702 that, if you reject Nixon's immunity claim, you presumably must reject Clinton's a fortiori. [FN4]

We will show that all of this is dead wrong. Bill Clinton's claim for immunity is actually much stronger than Richard Nixon's -- supported by crisper arguments from constitutional text and structure, by more historical evidence from the Founding and early Republic, and by better modern-day policy arguments. Nixon sought absolute and permanent immunity from a civil damage action after he left office; Clinton seeks only temporary immunity from litigating a civil damage suit while he serves as President. We will show that the Arrest Clause of Article I, Section 6 and the democratic structural principles underlying this Clause cast light on Article II, and provide a sturdy constitutional basis for temporary presidential immunity. In the process of elaborating the best argument for Clinton, we will also show how all nine Justices in Nixon missed the point and in particular misread a key quote from the great Justice Joseph Story. We will outline a new theory of limited executive immunity that protects a sitting President and (most importantly) the American people he serves, yet does not put the President above the law, as Nixon did, despite the Court's protestations to the contrary.

I. UNTANGLING IMMUNITY

The Constitution nowhere explicitly describes what litigation immunity, if any, the President merits by dint of his unique constitutional role. The document does, however, explicitly describe certain governmental immunities. Article I, Section 6 provides that:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. [FN5]

A. Expressio Unius?

At first glance, this Clause seems to be powerful ammunition for the presidential immunity skeptics. After all, no such explicit provision exists for the President. Didn't our Founders clearly mean to say, by expressio unius, [FN6] that the President is not entitled to immunity?

***703** But this expressio unius argument is far weaker than it looks. In light of the explicit reference to "Speech or Debate" in Article I, let's look at the Constitution's other free speech clause: "Congress shall make no law . . . abridging the freedom of speech." [FN7] By similar expressio unius logic, shall we say that the First Amendment limits only Congress--that the President may propound censorship edicts and the federal courts may issue gag rules without regard to First Amendment principles? Or shall we say under expressio unius that, in the absence of the First Amendment, only Senators and Representatives, but not ordinary citizens, would enjoy constitutional freedom of speech or debate?

Surely not. Even if the First Amendment did not exist, the Constitution's overall structure and its commitment to democratic self-government would require a broad freedom of speech and debate for citizens on issues of public concern. [FN8] Article I, Section 6 had its roots in England, where Parliament was sovereign, and, as a self-governing body, needed wide freedom to debate public issues. [FN9] (The very word Parliament -- from the French parler, to speak -- emphasizes the central role of speech and debate.) But in America, "We the People" are sovereign and must enjoy an analogous (though not necessarily identical) freedom of speech and debate on public, political issues. [FN10] So, if the First Amendment had never been adopted, we clearly would not read Article I, Section 6, by expressio unius, to say that Senators and Representatives enjoy freedom of speech, but citizens do not. Even if the scope of freedom were only analogous and not identical, [FN11] it would be odd to say that Section 6 meant that no other immunities for speech existed; that such immunities were unconstitutional or extra-constitutional; or that to recognize such immunities in the teeth of the words inside Section 6 and the silence outside it would be to "make things up."

So too with the words of the First Amendment explicitly prohibiting only congressional censorship. The general theory of popular sovereignty frowns on all suppressions of citizens' free speech, whether by ***704** congressional law, presidential edict, or judicial decree. [FN12] If the President and federal courts cannot censor citizens with a congressional law, it would be odd to think they can do so without such a law. As with Section 6, the First Amendment is best read not to bar, by expressio unius, citizen freedoms against courts and executives, but rather to invite, by analogy, these unenumerated freedoms implicit in constitutional structure.

It might be argued that the structural reasoning outlined thus far should go no further. Ordinary citizens, the people, may well enjoy unenumerated rights, especially if collective self-government is at stake -- this principle is the heart of the Ninth Amendment's affirmation of the people's unenumerated rights. [FN13] But, it might be said, unenumerated rights and immunities for governmental officials qua officials are a very different kettle of fish.

Are they really? Always? Consider a federal judge who, in the course of her published judicial opinion, criticizes some person who then brings a libel suit. Our judge is not a Senator or Representative; nor is she speaking "in either House." Must we read Section 6 by expressio unius to imply that our judge enjoys no analogous immunity in performing her public function and doing the people's business? Must we reject even a "constitutional common law" immunity that might be modifiable at the margins by statute? [FN14] Surely expressio unius does not require this rigidity; and we should note that, since our nation's Founding, courtroom litigants have enjoyed absolute common law immunity from libel -- an immunity arguably constitutionalized in the First Amendment Petition Clause. [FN15] Should a judge have less freedom of speech than a litigant? [FN16] In a working democracy under law, judges -- like Senators, Representatives, and ordinary citizens § ***705** must have a wide zone of freedom to speak and print. Though the idea is not textually specified in Article I, Section 6, or in Article III, federal judges need absolute or near absolute freedom "of Speech [and] Debate." The very notion of jurisdiction is the power to speak the law, [FN17] the power, in John Marshall's immortal phrase, "to say what the law is." [FN18] To do their job, and to serve the people, judges must be free to enter declaratory judgments of law and fact, judgments that may criticize and anger powerful people. Libel suits against judges interfere with these judicial functions and thus offend our basic constitutional structure. [FN19] Regardless of the specific words of Section 6, its deep structural logic applies to judges as well as legislators.

Now consider a presidential speech (say, on health care legislation pending in Congress) criticizing some group

(say, pharmaceutical companies). Is it sensible to argue that, because of expressio unius, the President has no absolute immunity from libel suits? [FN20] Even if this immunity is merely a matter of constitutional common law, a la Justice Jackson's Youngstown Category Two? [FN21] To perform his role in a constitutional democracy, the President --like Senators, Representatives, judges, and ordinary citizens -- must be free to speak out on issues of public concern. Indeed, the Constitution explicitly invites the President to make State of the Union speeches, to recommend legislation ***706** to Congress, and to give a statement of reasons for any veto he hands down. [FN22] In performing his high constitutional duties of democratic deliberation, the President may need to speak in ways that criticize and anger powerful people. In this situation too, libel suits would offend the basic structure of the Constitution -- for precisely the same reasons as would libel suits against Senators, Representatives, and judges. [FN23] It would be downright silly to argue by expressio unius that the President lacks absolute immunity from libel merely because the clauses governing State of the Union messages, recommendations, and vetoes are less explicit than Article I, Section 6; so too, it would be obtuse to recognize absolute immunity for these and only these three communications (under expressio unius) while muzzling the President the rest of the time under penalty of libel lawsuits.

This examination of the Speech or Debate Clause suggests that it is best read not to bar analogous immunities of coordinate branches but rather, if anything, to invite them. And the same holds true, we shall argue, for its companion, the Article I, Section 6 Arrest Clause. If Representatives and Senators should not be impeded ("arrested") by certain private litigation while performing the people's business (while "at session"), this Arrest Clause immunity should not bar, and if anything might invite, analogous immunities for members of coordinate branches while performing the people's business. [FN24]

***707** Nor does any of this analysis violate the language or history of Section 6 or even the formal rule of expressio unius, properly understood. Section 6 nowhere explicitly rejects coordinate immunities -- statutory, common law, or constitutional. The Framers simply provided more details about the legislature in their prolix Article I than about coordinate branches; so more must be left to sensible structural inference when dealing with the sparser Articles II and III. Textual specification of legislative immunities might have been especially important to some Framers because the practical protection of these immunities would be committed to the other two branches in enforcing and adjudicating concrete cases. Whatever implicit immunities were appropriate for those other branches, it might have been thought, were effectively self-executing -- effected by the President's refusal to enforce certain processes against himself, and judges' refusal to entertain certain suits against judges -- and so perhaps needed less textual emphasis. [FN25] And even under a stringent expressio unius theory, Section 6 could be read merely to set out those governmental immunities that Congress cannot in any way qualify by statute.

Supreme Court case law also emphatically rejects the notion that Section 6 precludes implied immunities for coordinate branches. The Court, for example, has held judges and prosecutors immune for their official duties. [FN26] These immunities, it can be argued, do not violate the central tenet of Marbury v. Madison, and of Anglo-American law more generally, that "every right . . . must have a remedy." [FN27] Rather, the notion of judicial and prosecutorial immunity may be that one's ***708** remedy for intra-litigation wrongs occurs within the lawsuit itself--by appeal--rather than by a collateral damage action. [FN28]

B. Separating the Two Tiers of Immunity

In a lengthy and important footnote, the Nixon v. Fitzgerald majority properly rejected a wooden expressio unius reading of Article I, Section 6, arguing that "a specific textual basis has not been considered a prerequisite to the recognition of immunity." [FN29] But the Court's desire to find a quick answer to Nixon's problem blinded it to the architecture of Section 6. To see this, we must carefully pull apart the two types of immunity mentioned in Article I. One type is "Immunity From Arrest": legislators' temporary immunity from litigating even private lawsuits while "at the Session" of Congress as public officers. The other type is "Immunity For Speech or Debate": permanent immunity from liability in lawsuits that arise out of the performance of public duties of democratic deliberation. This latter form is what all nine Justices in Nixon conceptualized as "immunity." [FN30]

I. Permanent Immunity. -- The Court's application of permanent immunity in Nixon was hard to justify by analogy to the Speech or Debate Clause or by other basic structural principles of constitutional law. Richard Nixon did not speak out against Ernest Fitzgerald in public debate; Nixon fired Fitzgerald from a civil service position. Worse still, Fitzgerald alleged that Nixon fired him because of Fitzgerald's speech activities -- whistleblowing testimony before the Congress. A broad commitment to the constitutional ideals of democratic self-government and citizen speech argued against Nixon's immunity, not for it. According to Fitzgerald's complaint, Richard Nixon violated the Constitution itself (the First Amendment no less), [FN31] and yet the Court shielded Nixon with permanent immunity.

***709** The five-Justice majority in Nixon prominently relied on an important quotation from Justice Joseph Story's classic Commentaries on the Constitution and, less prominently, on the words of Thomas Jefferson and John Adams. [FN32] But as we shall show, all of these sources were badly misread in Nixon. [FN33] The Nixon five also dismissed, too quickly, the concern that permanent immunity for Richard Nixon would leave Ernest Fitzgerald with a constitutional right without an adequate legal remedy. [FN34] The Court pointed to longstanding judicial immunities, [FN35] but as we suggested earlier, these immunities do not necessarily violate Marbury's bedrock teaching that every right must have a remedy. [FN36]

The Nixon five also trotted out various newfangled executive immunities to blunt the message of Marbury. [FN35] But the Framers would have been shocked by the notion that, as a general matter, executive officials could violate the Constitution and yet be held permanently immune. The modern judicial proliferation of various qualified immunities for constitutional torts is a twentieth century betrayal of founding principles. These immunities should be sources of concern -- things to be minimized or, ideally, eliminated -- rather than springboards for further violations of Marbury. The Nixon five's complacent apologetics here are embarrassing, at least to those who value the Framers' first principles. [FN38]

The only real argument left in Nixon was the claim that Ernest Fitzgerald had alternative remedies -- remedies against the government itself rather than Nixon personally -- that would fully vindicate his constitutional rights. [FN39] If true, this would indeed satisfy Marbury, for the government may limit a plaintiff's choice of constitutional remedies as long as those remaining suitably vindicate the right at stake. [FN40] Marbury and the rule of law demanded constitutional justice for Fitzgerald [FN41] but not necessarily a pound of flesh from Nixon himself. The ***710** government, after all, could have directly indemnified Nixon for any judgment that he owed to Fitzgerald, and a Fitzgerald suit against the government itself would simply accomplish this result more directly. But the Nixon dissenters denied the adequacy of alternative remedies, [FN42] and the Nixon majority spent little time defending its claim of adequate alternatives.

2. Temporary Immunity. -- The other half of immunity, temporary immunity akin to Article I immunity from arrest, went wholly unnoticed by Nixon's nine Justices. As Article I makes clear, members of Congress are privileged from arrest while Congress is in session. The Framers intended "Arrest" in this Clause to mean civil arrest, not criminal arrest. The Arrest Clause explicitly exempts cases of "Treason, Felony and Breach of the Peace"; and both the clear language of Blackstone's Commentaries and English debates well known to the Framers stressed that this exempting phrase was a term of art encompassing all crimes. [FN43]

***711** The real question is whether civil arrest should be understood strictly and formally, or more functionally. Technical civil arrest -- commencing a lawsuit by seizing the civil defendant's person -- is all but dead today, and so the Arrest Clause, when strictly construed, shrinks to a virtual nullity. But "Arrest" may also be understood more functionally as extending to various civil cases that interfere with -- that arrest -- a person's performance of her duties in public office. [FN44] ***712** This functional immunity avoids undemocratic results: functional civil arrests of members of Congress while it is in session might skew votes in Congress and penalize innocent third parties, namely, the American people. As Joseph Story put the point in his Commentaries, explicitly building on Thomas Jefferson's famous Congressional Manual:

> When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their

> voice in debate and vote . . . . When a senator is withdrawn by summons, his state loses half its voice in debate and vote . . . . The enormous disparity of the evil admits of no comparison. [FN45]

But Article I prohibits civil arrests only while Congress is in session; it implicitly permits the arrests when Congress is not in session. (And here we see a less wooden and more proper application of the expressio unius maxim.) Arrest Clause immunity is thus temporary immunity -- ***713** stopping the clock on a lawsuit until litigation can occur without disruption of the defendant's public duties. [FN46]

Though a strict expressio unius reading might limit the Arrest Clause to "Senators and Representatives," structural considerations tug the other way. Consider, for example, the Vice President. Surely he is not a "Senator or Representative," strictly speaking, [FN47] and yet under the Constitution, he is empowered to preside over the Senate and cast a tie-breaking vote. [FN48] If he were subject to civil arrest while Congress was in session, he could be wrenched away from these weighty constitutional duties of democratic deliberation by a single private plaintiff, in clear violation of the spirit and logic -- but not the letter -- of the Arrest Clause.

The structural constitutional logic undergirding temporary immunity applies with even greater force to the President. Unlike federal lawmakers and judges, the President is at "Session" twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people: prosecute wars, command armed forces (and nuclear weapons), protect Americans abroad, negotiate with heads of state, and take care that all the laws are faithfully executed. We should hesitate before arming each citizen with a kind of legal assault weapon enabling him or her to commandeer the President's time, drag him from the White House, and haul him before any judge in America.

What's more, the President is the only person for whom the entire nation -- We the People of the United States -- votes. There are over 500 federal lawmakers -- the House and Senate can function if one member is absent, as the quorum rules of Article I, Section 5 make clear [FN49] -- but there is only one President, in whom all executive power is vested by Article II. [FN50] Thus, the democratic skew that can result if civil suits impede -- arrest --the President is far more dramatic ***714** than for a typical Representative or Senator. To be sure, the Vice President always remains at hand, ready to step in for the President in emergency situations, but the elaborate provisions of the Twenty-Fifth Amendment and past practice indicate that these emergencies should be the exception, not the rule. [FN51] Yet they could well become the rule if a handful of citizens -- acting independently or in concert [FN52] --could functionally arrest the President in his performance of the people's business and trigger his temporary inability "to discharge the Powers and Duties of . . . Office" under Article II and the Twenty-Fifth Amendment.

This approach does not mean that the President is above the law. It simply means that, in cases seeking compensation for past wrongs, a President should be able to request temporary immunity to avoid interference with his duties. [FN53] Whereas Nixon eliminated all remedies against the President, at least for constitutional torts committed qua President, arrest immunity would only "toll" -- stop the clock on -- a lawsuit and would preserve the plaintiff's ultimate remedy and vindicate the ideal of Marbury. [FN54] Because of the Twenty-Second Amendment, ***715** the Constitution itself assures that plaintiffs will not have to wait more than eight years. [FN55]

But eight years is a long time -- much longer than any "Session" of Congress under Article I, Section 6 -- and so perhaps the Section 6 analogy breaks down at precisely that point. On the other hand, eight years is a lot shorter than eternity, which is how long the Nixon Court said Ernest Fitzgerald had to wait. On this point, at least, it may be politically awkward for the Court to distinguish Nixon: aren't Democratic Presidents entitled to the same solicitude as Republican Presidents? (And on the facts of the Jones case, one may well ask if Paula Jones can equitably complain about delay after she waited three years to file her complaint.) [FN56]

If sensible structural inferences lead us to think that a President, under the logic of Article II, merits an

immunity akin to Section 6 "Arrest" immunity, it becomes important to refine further the functional concept of civil arrest. Our legal order has long distinguished between damage suits for past, discrete wrongs, and injunctive suits to end ongoing harm. In effect, we should distinguish between civil damage arrests and ongoing harm injunctions. In arrest scenarios, plaintiffs may be obliged to wait, but interest payments presumably can make up for lost time. Civil actions arising out of ongoing harms -- continuing possession of a steel mill in Youngstown, [FN57] or a hypothetical divorce or child custody suit involving a sitting President -- are quite different. [FN58] Putting the point more textually, perhaps one could say that an ongoing harm is functionally one kind of "Breach of the Peace" and thus lies outside the proper scope of arrest immunity. [FN59]

C. Nixon Revisited

Not only does temporary immunity from "civil arrest" make good sense from the perspective of constitutional structure and policy, but it also makes the most sense of the historical evidence offered up by the ***716** Nixon majority. The best evidence that the Nixon five had for their position, Justice White's dissent conceded, was from Justice Story. But now that we have tipped our hand and identified two types of immunity, listen to Story's words with fresh ears:

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. [FN60]

Let us note carefully Story's moves. First, Story believes that Section 6 does not exclude immunities for coordinate federal branches. In particular there are "incidental" presidential powers, not textually spelled out but "necessarily implied" by the spare words of Article II. Next, Story hints that these immunities should be understood functionally, not formally -- they are deducible from the nature of presidential "functions." Third, Story articulates presidential immunity as an immunity from "arrest" -- obviously conjuring up an analogy to the Arrest Clause of Article I, rather than the Speech or Debate Clause. [FN61] Fourth, this immunity is explicitly temporary, once again in keeping with arrest immunity rather than speech or debate immunity. It is immunity "while he is in the discharge of the duties of his office" -- while he is in "Session," in the analogous language of Section 6. Fifth, it is immunity even for certain lawsuits based on a President's private conduct -- immunity for his "person." Once again, this tracks arrest immunity rather than speech or debate immunity. Finally, Story carefully limits this immunity to "civil cases" -- just as the Arrest Clause (but not the Speech or Debate Clause) is limited to civil cases.

This quote from Story could be challenged, or narrowly construed, were we writing on a clean slate. Perhaps Story is referring only to technical civil arrests, rather than to broader litigation impediments. In any event, Story is not speaking in his judicial capacity, but only as a commentator on the Constitution (though perhaps its most distinguished commentator), and is writing almost fifty years after the document's ratification.

Today, however, we do not write on a clean slate. We write in the wake of Nixon. A very broad reading of Story is inscribed in the United States Reports -- it is the rock on which Nixon is built. If ***717** Story was enough to win for Nixon, why not for Clinton? (Nixon was a Republican, and Clinton is a Democrat, but of course this should make no difference.) [FN62] Indeed, as should be clear by now, a careful reading of Story does not support the result in Nixon, [FN63] contrary to Justice White's glib concession in dissent. [FN64] But a close reading of Story does support Clinton and our Arrest Clause methodology today.

The Nixon majority had a couple of other high cards up its sleeve, a pair of quotations from Thomas Jefferson and John Adams featured in a long and important footnote that addressed the Article I, Section 6 expressio unius argument. Here are Jefferson's words:

> ***718** But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? [FN65]

And here are the thoughts attributed to Adams and Senator Oliver Ellsworth: "[T]he President, personally, was not the subject to any process whatever . . . . For [that] would . . . put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government." [FN66]

As with the Story quote, these passages support Clinton far more than Nixon. Jefferson is clearly concerned about litigation that would "withdraw" a President from his current "constitutional duties" -- a concern inapplicable to Nixon in 1982 but very much relevant to Clinton today. As Jefferson put the point three days earlier in words that obviously apply only to sitting Presidents: "To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function." [FN67] Note also how Jefferson's later reference to "imprisonment for disobedience" conjures up arrest, not speech or debate.

As Adams and Ellsworth's last six words suggest, they too are referring to a sitting President, not a former one: only suits against a sitting President would "stop the whole machine of Government." Significantly, Adams and Ellsworth's language goes beyond technical civil arrest and defines temporary immunity functionally to subsume "any process whatever." Their sweeping quote thus encompasses both civil and criminal prosecutions, yet surely they are not claiming, in light of the Article I, Section 3 Impeachment Clause, [FN68] that a former President may not be criminally punished for offenses in office. Indeed, in language that all of the Nixon opinions overlooked, Adams and Ellsworth explicitly concede as much moments later and thus make clear that ***719** they are not talking about suits against ex-Presidents. [FN69] So here too, the Court badly misread the historical evidence. [FN70]

The stunning part of Nixon is not only the majority's hands-off attitude towards an ex-President, but also the fact that none of the nine Justices seemed to understand what Story, Jefferson, and Adams were really saying. [FN71] We can now understand why Eastland and others might question the Court's view that "[t]he best historical evidence clearly supports the Presidential immunity we [the Court] have upheld." [FN72] But the fact that the evidence fails to support Nixon ***720** doesn't mean that the same goes for Clinton. On the contrary, even if Nixon is a twisted stretch of history and text, the historical evidence does provide sturdy support for temporary immunity from arrest. [FN73] ***721** Despite what the pundits are saying, Clinton has a far stronger case than Nixon had.

II. POSSIBLE PRIVILEGES

The concept of a President's immunity from functional "Arrest" while in "Session" is a modest one -- waivable, temporary, and perhaps subject to congressional modification. Yet from another perspective, arrest immunity is absolute and categorical -- it does not balance or weigh the unique features of a given case. It does not distinguish between a case likely to arrest the President in litigation for two hours, and one likely to arrest him for two months. It does not focus on the equities of a particular plaintiff or her special need for speedy adjudication. It does not reflect the fact that some claims are more difficult than others to revive and to adjudicate after a long delay.

For some, the bright-line quality of arrest immunity -- supported by a textual analogy to the bright-line rule of Article I, Section 6, [FN74] by the categorical language of Story, Jefferson, and Adams, [FN75] and by the prospect that political pressure can be trusted to induce presidential waiver in appropriate cases -- will count as a juridical virtue. For others, the medicine of absolute arrest immunity will taste too strong. For those in this second group -- scholars, lawyers, and judges -- we shall briefly provide a catalogue of weaker prescriptions: presidential privileges attentive to the structural arguments and historical evidence presented above but packaged

in lower dosages and blended with other general legal principles.

A. Equitable Tolling

In some situations, arrest immunity may work a grave injustice against a worthy and diligent plaintiff. Imagine a pedestrian crushed by a transition team bus (with Clinton at the wheel) one week before the Clinton inauguration. Obviously there is no time to file suit, conduct discovery, litigate the case, and pursue an appeal before Inauguration Day. This plaintiff might have to pay huge out-of-pocket hospital bills and yet, under absolute arrest immunity, may be forced to wait eight years to be made whole.

A more flexible, "equitable" version of presidential immunity would distinguish between cases in which a plaintiff could have brought suit before Inauguration Day and cases in which a plaintiff could not. The structural logic here is the same one that drives arrest immunity: a suit against a sitting President in effect impleads innocent third parties -- the American people --whose democratically chosen leader is obstructed in discharging his unique and awesome constitutional duties. ***722** But the application in this situation is more flexible and equitable. [FN76] Only those cases in which plaintiffs themselves choose to sue while the President is in session are automatically tolled. Other cases (like our hypothetical pedestrian's) could be selectively tolled, depending on factors such as the likely amount of intrusion on a President's time, the practical freezability of a case, and the extent of out-of-pocket losses that call for quick recoupment.

With this rule in place, plaintiffs who have claims against would-be Presidents would have strong incentives to bring suit well before Inauguration Day. [FN77] Pre-inaugural suits are exactly what constitutional structure and history counsel. The constitutional evil to be avoided is distracting --arresting -- litigation while the President is at session. Litigation after --or before -- a President's term is just fine. A bonus of equitable tolling is that pre-presidential litigation may bring information to light for the American people, as well as the courts, before We the People make our momentous choice on Election Day.

Under a regime of equitable tolling, Paula Jones's case looks rather different from our hypothetical pedestrian's. Jones saw the metaphoric Inauguration Bus coming; she was not blindsided. She did not suddenly wake up one day and discover -- mirabile dictu -- that Bill Clinton had become President. Why then, did Jones not bring suit much earlier, when the American people would not have been involuntarily dragged into litigation as de facto third party defendants and when litigation would not have disrupted constitutional government? Unless she can answer this question persuasively, an equitable tolling approach would put her lawsuit on hold. [FN78]

B. Equitable Dismissal

An equally flexible but more emphatic approach would dismiss Jones's suit with prejudice, unless she can persuasively explain why she sat on her claims until after Inauguration. Like tolling, dismissal would of course create strong incentives for future plaintiffs like Jones to bring suit before presidential elections rather than after them. Like tolling, dismissal is more flexible and less categorical than arrest immunity: dismissal would be case-specific, and could, for example, distinguish between Jones's suit and our hypothetical pedestrian's.

The idea here is that litigation delay -- temporary immunity or tolling -- at times hurts defendants and not just plaintiffs. A President's ***723** memory of the facts of any one case will no doubt fade over eight years, while she is preoccupied by many and weighty matters of state, whereas a single-minded plaintiff may be able to rehearse his story over the years. This concern can vividly arise in a case turning on facts more than on law, especially if testimonial credibility is a key issue. By strategically manipulating the timing of a lawsuit -- delaying without good reason until after Inauguration --a plaintiff may place a President who deserves to win the suit in a cruel trilemma: drop vital affairs of state to litigate now and prevail (the "betray the people/waiver" option), or pay off unmeritorious claims (the "nuisance value/extortion floodgates" option), or wait until out of office and defend at a disadvantage (the "can't remember/look like a liar or a dope" option). To discourage precisely this kind of strategic manipulation, Anglo-American law has long recognized the general doctrine of laches. [FN79]

Laches is a defense that allows a case to be dismissed if the plaintiff cannot explain why he sat on his claims and if his delay substantially prejudices the defendant. [FN80] For example, the Supreme Court held over a century ago that a plaintiff alleging fraud could not needlessly delay a suit until after the alleged defrauder's death and thereby prevail more easily against the alleged defrauder's successors in interest. [FN81] This logic could easily be blended with arguments from constitutional ***724** structure to impose an analogous duty on plaintiffs today to litigate (if possible) before a person's "death" as an ordinary citizen and "birth" as a President.

Historically, as an "equity" doctrine, laches did not apply to cases "at law" governed by explicit statutes of limitation. After the historic merger of law and equity in 1938, however, those old distinctions should matter little here. [FN82] Other formerly "equitable" defenses, such as estoppel and fraud, have long been allowed to defeat actions "at law"; [FN83] and the Federal Circuit, at least, has squarely held en banc that laches may be invoked to prevent strategic manipulation in a "law" case even if an explicit statute of limitation applies and has not run. [FN84] In any event, even if the technical equitable doctrine of laches is unavailable, its underlying logic can apply when understood in light of the dictates of constitutional structure and packaged as a matter of constitutional common law. [FN85]

C. The Venue Variant

Even if constitutional structure and history are not strong enough to freeze a civil suit against a sitting President, they might be strong enough to influence where and how the suit unfolds. Disruption of the President's duties should be minimized. A good argument can thus be made that, if a sitting President may be sued for damages, suit should ***725** lie only in Washington D.C.: no other court should have personal jurisdiction or venue against an unconsenting [FN86] sitting President.

Several things point this way. First, the language of Article III and of the Judiciary Act of 1789 provided that suits against foreign Ambassadors be tried in the original jurisdiction of the Supreme Court, which would of course sit in the nation's capital. [FN87] The underlying logic here was geographic: ambassadors would operate out of the nation's capital, and suit in that city would minimize disruption of their duties. [FN88] If foreign dignitaries enjoy this litigation privilege, should not the President a fortiori (at least in the absence of an express congressional statute to the contrary)?

Of course, our old friend expressio unius might argue that, if the Framers had meant for the President to enjoy an analogous venue privilege, they would have explicitly so provided in Article III alongside the Ambassador Clause. But perhaps the Framers were simply not thinking about the unusual case of a civil damage action against a sitting President. When they did think about suits against the President, they explicitly provided that impeachment trials would take place in the Senate, again in the nation's capital. The Federalist Papers explicitly emphasized the geographic logic that underlay this choice. [FN89]

Recall also Jefferson's obviously geographic concern that litigation in "the several courts" (note the plural) would "bandy [the President] from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him" from the district and thus from "his constitutional duties." [FN90] Few at the Founding would have thought that any court on the continent could use newfangled longarm statutes to reach out and grab the President of the United States. [FN91] Jefferson summed it up nicely, in words that also sum up nicely much of our overall argument:

> As to our personal attendance in Richmond [at the Burr trial], I am persuaded the Court is sensible, that paramount duties to the nation at large control the obligation of compliance with their summons in this case; as ***726** they would, should we receive a similar one, to attend the trials of Blennerhasset and others, in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place, other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function. It could not then mean that it should be withdrawn

from its station by any co-ordinate authority. [FN92]

III. CONCLUSION

In the end, we suggest that temporary immunity from arrest is the constitutionally preferable reading of executive immunity in many situations. This immunity, which essentially tolls cases against a sitting President, avoids the twin dangers of making all Americans pay for the President's sins and of putting Presidents above the law. Our "arresting" conclusion is that a proper judicial holding in Clinton's favor could limit rather than extend the mischief of Nixon.

FNa1. Southmayd Professor, Yale Law School.

FNaa1. Student, Yale Law School. At the time this Commentary was written, Mr. Katyal was working in the Office of the Solicitor General, United States Department of Justice. He had no involvement with the brief filed by the Solicitor General in the Paula Corbin Jones litigation.

An earlier version of this Commentary was presented on September 22, 1994 as the Hardy Cross Dillard Lecture at the University of Virginia School of Law; on October 19, 1994 as part of the Scholar-in-Residence Program at Hofstra University School of Law; and on October 26, 1994 as part of the Edward L. Barrett, Jr. Lecture Program at the University of California at Davis School of Law. For helpful comments on earlier drafts, we thank Bruce Ackerman, Vik Amar, Ian Ayres, Jack Balkin, Susan Low Bloch, Steve Calabresi, Betsy Cavendish, Owen Fiss, Joseph Goldstein, Harold Koh, John Langbein, Burke Marshall, Vinita Parkash, Mike Paulsen, Jeff Rosen, Jed Rubenfeld, Peter Swire, Laurence tribe, and Eugene Volokh.

FN1. 457 U.S. 731 (1982). The suit alleged that Nixon had unlawfully fired Fitzgerald in retaliation for his testimony before Congress about military aircraft cost overruns.

FN2. Jones's suit raises four claims. She asserts violations of 42 U.S.C. §§ 1983 and 1985 that stem from Clinton's alleged conduct while Governor of Arkansas, a state law intentional infliction of emotional distress claim that arises from the same alleged action, and a state law claim alleging that Clinton and his aides defamed her while he was President. See Jones v. Clinton, Complaint, Civ. No. LR-C-94-290 (E.D. Ark. May 6, 1994).

Editors' Note: As this Commentary went to press, the U.S. District Court for the Eastern District of Arkansas ruled that no trial should occur until after the end of President Clinton's tenure, but that pretrial discovery could proceed now. This ruling may be appealed. See Jones v. Clinton, 1994 WL 721905 at *7-*8 (E.D. Ark. Dec. 28, 1994).

FN3. Nightline: Presidential Immunity (ABC television broadcast, June 13, 1994) (transcript on file with the Harvard Law School Library); Crossfire: Justice Delayed for the President? (CNN television broadcast, May 25, 1994) (transcript on file with the Harvard Law School Library); Morning Edition: Sexual Harassment Suit Questions Presidential Immunity (National Public Radio broadcast, June 15, 1994) (transcript on file with the Harvard Law School Library).

FN4. See Terry Eastland, No Immunity for Clinton from Paula Jones's Charges, WALL ST. J., June 8, 1994, at A17.

FN5. U.S. CONST. art. I, § 6.

FN6. The legal maxim expressio unius est exclusio alterius means that the expression of one thing (here, congressional arrest and speech or debate immunities) by implication excludes other things (here, presidential or judicial immunities, or other congressional immunities). The maxim is in many contexts sound, but as we shall show, must not be applied clumsily or mechanically.

FN7. U.S. CONST. amend. I. On the connection between these two clauses, see Akhil Reed Amar, The Bill of Rights

as a Constitution, 100 YALE L.J. 1131, 1151 (1991) [hereinafter Bill of Rights]; Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 141 (1992); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255-56.

FN8. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 35-50 (1969); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 101-24 (1960).

FN9. See Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193, 1267 (1992) [hereinafter Fourteenth Amendment].

FN10. See id. The citizen's freedom of speech might be only analogous rather than identical in that it might be, say, less absolute than the legislator's freedom.

FN11. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 269-80 (1964) (recognizing broad, though not absolute, freedom of speech for citizens on issues of public concern).

FN12. See Fourteenth Amendment, supra note 9, at 1273-74.

FN13. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. For discussion of the connection between this amendment and collective self-government, see Bill of Rights, cited above in note 7, at 1200.

FN14. "Constitutional common law" here refers to judicially recognized principles that are deducible from the Constitution and designed to implement the Constitution's structure and fill in its gaps but that may nevertheless be subject to statutory modification. We are indebted here to Professor Henry Monaghan. See Henry P. Monaghan, The Supreme Court, 1974 Term -- Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 10-17 (1975).

FN15. "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. For an excellent analysis of the protection the Clause was designed to afford litigants, see Eric Schnapper, "Libelous" Petitions for Redress of Grievances -- Bad Historiography Makes Worse Law, 74 IOWA L. REV. 303, 343-47 (1989).

FN16. See Spalding v. Vilas, 161 U.S. 483, 497 (1896) ("The authorities . . . are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.") (quoting Dawkins v. Lord Rokeby, 8 Q.B. 255, 263 (1873)) (internal quotation marks omitted).

FN17. See THE FEDERALIST No. 81, at 489 n.* (Alexander Hamilton) (Clinton Rossiter ed., 1961).

FN18. Marbury v. Madison, 5 U.S. (I Cranch) 137, 177 (1803) (emphasis added).

FN19. Our reasoning on this point tracks the Court's:

> [A] series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, established the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice . . . . "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. . . ."
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> Spalding, 161 U.S. at 495 (quoting Scott v. Stansfield, 3 L.R.-Ex. 220, 223 (1868)).

FN20. Consider the following Supreme Court passage:

> The law of privilege as a defense by officers of government to civil damage suits for defamation and kindred torts has in large part been of judicial making, although the Constitution itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session. This Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher, 13 Wall. 335, and that a like immunity extends to other officers of government whose duties are related to the judicial process. Yaselli v. Goff, 12 F.2d 396, aff'd per curiam, 275 U.S. 503, involving a Special Assistant to the Attorney General. Nor has the privilege been confined to officers of the legislative and judicial branches of the Government and executive officers of the kind involved in Yaselli.
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> Barr v. Matteo, 360 U.S. 564, 569-70 (1959) (footnotes omitted).

FN21. In his famous Youngstown concurrence, Justice Jackson outlined three categories of presidential power under the Constitution. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Category Two is the functional equivalent of constitutional common law --powers enjoyed by the President under the Constitution that are subject to modification and diminution by congressional statute.

FN22. See U.S. CONST. art. II, § 3; art. I, § 7.

FN23. Once again, our logic tracks the Court's:

> [T]he same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.
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> Spalding, 161 U.S. at 498. Consider also the words of Framer James Wilson:
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> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.
>
> JAMES WILSON, Of the Constitutions of the United States and of Pennsylvania --of the Legislative Department, in I THE WORKS OF JAMES WILSON 399, 421 (Robert G. McCloskey ed., 1967). Wilson saw members of all three branches as representatives of the public. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 597 (1969).

FN24. We do not here address what, if any, immunities might be appropriate for state officials under the federal Constitution. These immunities raise different issues, because unlike the President and federal judiciary, state officials are not coordinate to Congress.

We also bracket the issue whether state governors should enjoy immunity under state constitutions from state law suits. Although many state constitutions feature clauses for state legislators analogous to Article I, § 6, these constitutions differ from the federal template in two key respects. First, most have historically lacked a strongly unitary executive analogous to the one created by Article II. See Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 47 ARK.L.REV. (forthcoming 1994); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM.L.REV. I, 49-50 (1994). Second, in no state does the governor enjoy foreign affairs duties akin to the President's. As will become clear below, the unitary language of Article II and the centrality

of the President's foreign affairs duties are key features of our structural analysis of the federal Constitution.

Finally, we do not analyze the issue of what, if any, Arrest Clause-like immunity should be enjoyed by federal judges. Compared with Presidents, see infra pp. 713-14, and members of Congress, see infra pp. 711-12, judges may be more fungible from the perspective of democratic representation and democratic skew. Unlike a President, a judge is not always in session, twenty-four hours a day, every day; and unlike Congress, judges can reschedule their hearings and sessions with relative ease.

FN25. In the absence of Article I, § 6, legislators could have tried to enact similar statutory immunity, but an unpopular legislative minority might have been at the mercy of a partisan majority. The President might have vetoed such a law, and until such a law passed, members of the First Congress would have been vulnerable. Partisanship was seen as much less likely among a cadre of professional judges. See THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 224-28 (1985) [hereinafter Two Tiers].

On the self-protective powers of executive and judicial branches, see THE FEDERALIST No. 51, at 320-23 (James Madison) (Clinton Rossiter ed., 1961); 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION, ON THE ADOPTION ON THE FEDERAL CONSTITUTION 245-46 (Jonathan Elliot ed., 1830) (remarks of James Wilson at Pennsylvania Ratifying Convention); and Bill of Rights, supra note 7, at 1194.

FN26. See Butz v. Economou, 438 U.S. 478, 511-12 (1978); supra note 20.

FN27. 5 U.S. (I Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

FN28. See Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 781 (1994) [hereinafter Fourth Amendment].

FN29. 457 U.S. 731, 750 n.31 (1982); see also United States v. Nixon, 418 U.S. 683, 705 n.16 (1974) ("Nixon tapes case") (rejecting explicitly an expressio unius reading of the Speech or Debate Clause and embracing the notion of implicit presidential privileges).

FN30. The opinions in the case are rife with references to the Speech or Debate Clause as a benchmark for assessing presidential immunity. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731, 750 n.31 (1982); id. at 759 (Burger, C.J., concurring); id. at 771 (White, J., dissenting). Justice White's dissent alone refers no less than six times to the Speech or Debate Clause. See id. at 765, 769, 771 & n.6, 777 n.22, 781.

FN31. See Nixon, 457 U.S. at 740. Note that our commonplace description of Nixon as a "First Amendment case" is based on the idea, taken for granted by virtually the entire legal community, that mere presidential action can violate the First Amendment notwithstanding the Amendment's reference to "Congress" and the expressio unius maxim. See supra Part I.A. In New York Times Co. v. United States, 403 U.S. 713 (1971), a case involving unilateral presidential attempts to suppress publication of the so-called Pentagon Papers, no Justice argued that the absence of a congressional law meant that the First Amendment was inapplicable or irrelevant.

FN32. See Nixon, 457 U.S. at 749, 751 n.31.

FN33. See infra Part I.C.

FN34. See Nixon, 457 U.S. at 754 n.37, 758 n.41.

FN35. See id. at 745-46.

FN36. The idea here may be that, in order to bring the outside world under the rule of law, courts must exist and

function; but in order to function, they must adopt special rules for in-court wrongs. One can also argue that a judicial action, even if egregiously wrong, is not "unconstitutional" so long as the erring judge has "jurisdiction." Jurisdiction is the right to decide --either way -- and thus, in effect, the right to be "wrong."

FN37. See, e.g., Nixon, 457 U.S. at 745-47 (relying on "good faith" immunity cases).

FN38. For a very different view of immunity and Marbury than Nixon's, see Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1484-92 (1987) [hereinafter Of Sovereignty].

FN39. See Nixon, 457 U.S. at 736-39 & n.17, 754 n.37.

FN40. See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1366-70 (1953).

FN41. Impeachment provided a remedy against Nixon but not one for Fitzgerald --not one that fully compensated him for the deprivation of his personal constitutional rights. The Nixon majority's emphasis on impeachment, see 457 U.S. at 757, 758 n.41, was thus unresponsive to the guiding principle of Marbury. Contrary to the Nixon five's intimations, see id. at 754 n.37, the Marbury Court did give William Marbury a remedy rather akin to the commission he sought: the Court's opinion was itself, like a commission, an official government document that declared that Marbury was indeed a justice of the peace. In addition, the Court's opinion on the merits supporting Marbury could serve as guidance to any other court in which Marbury might choose to refile. Marbury in word and deed upheld a plaintiff's right to a judicial remedy; Nixon did not.

FN42. See id. at 797 (White, J., dissenting).

FN43. For an excellent discussion, see Williamson v. United States, 207 U.S. 425, 436-46 (1908). See also Gravel v. United States, 408 U.S. 606, 614 (1972) ("History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only."); United States v. Brewster, 408 U.S. 501, 521 (1972) (arguing that treason, felony, and breach of the peace encompass all crimes); Long v. Ansell, 293 U.S. 76, 83 (1934) ("When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." (footnote omitted)); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 862 (Boston, Hilliard, Gary & Co. 1833) ("Now, as all crimes are offences against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses . . . .").

Williamson relied in part on Blackstone:

> It is to be observed that there is no precedent of any such writ of privilege, but only in civil suits . . . . And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or, as it has been frequently expressed, of treason, felony and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any crime whatsoever, for all crimes are treated by the law as being contra pacem domini regis.

Williamson, 207 U.S. at 439-40 (quoting I WILLIAM BLACKSTONE, COMMENTARIES * 166). Despite Williamson's correct use of Blackstone, the Court elsewhere quoted language that first appeared in the 1773 fifth edition and was refined in the 1783 ninth edition, not in 1765, as the Court claimed. Compare I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (4th ed. 1770) (Oxford, Clarendon Press 1765) (omitting key sentence) with I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (5th ed. 1773) (Oxford, Clarendon Press 1765) (adding key sentence) and I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (8th ed. 1778) (Oxford, Clarendon Press 1765) (reprinting key sentence from fifth edition) and I WILLIAM BLACKSTONE, COMMENTARIES ON THE CONSTITUTION OF ENGLAND 165 (Richard Burn ed., 9th ed. 1783) (Oxford, Clarendon Press 1765) (revising key sentence).

FN44. Despite a narrow interpretation of this Clause in Justice Brandeis's short opinion in Long, 293 U.S. at 82-83, a broader reading may square better with the understanding of the Clause at the Founding. In Geyer's Lessee v. Irwin, 4 U.S. (4 Dall.) 107, 197 (Pa. 1790), the Pennsylvania Supreme Court decided that a member of the Philadelphia General Assembly was "undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. . . . [H]is suits cannot be forced to a trial and decision, while the session of the legislature continues." Id. at 107. In Bolton v. Martin, I U.S. (I Dall.) 296 (C.P. Phila. 1788), a delegate to the Philadelphia Constitutional Convention was served with a summons. He pled privilege, and the plaintiff's counsel responded by arguing that "the protection of a member of the House of Parliament, extended only to the case of arrests, or personal restraint, and not to the service of a Summons." Id. at 297 (citations omitted). The court disagreed in language that is clear support for temporary immunity:

> [M]embers of Parliament were privileged from arrests, and from being served with any process out of the Courts of law . . . during the sitting of Parliament . . . . The act further directs, that where any plaintiff shall by reason of privilege of Parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by the statute of limitations, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall, upon the rising of Parliament, be at liberty to proceed.
>
> . . . . We cannot but consider our Members of Assembly, as they have always considered themselves, intitled by law to the same privileges. They ought not to be diverted from the public business by law suits, brought against them during the sitting of the House; which, though not attended with the arrest of their persons, might yet oblige them to attend to those law suits. . . .
>
> The Defendant, therefore, must be discharged from the action.

Id. at 303-05. Functional reasons led this court to stretch immunity along another axis -- by protecting members of the Philadelphia Convention, who had no explicit textual provision to protect them: "The members of Convention, elected by the people, and assembled for a great national purpose, ought to be considered in reason, and from the nature, as well as dignity, of their office, as invested with the same or equal immunities with the members of General Assembly . . . ." Id. at 303. Fifty years later, another court agreed with the idea of temporary immunity from all civil process:

> For, antecedent to this statute, [sitting] members of parliament were not only privileged from arrest, but also from being served with any process out of the courts of law . . . . [The statute provides] what may be a just construction of the rule in this country -- "that the plaintiff is not to be barred by the statute of limitations" in the time consumed by the privilege, but is at liberty to proceed de novo after the cessation of privilege, which, being a public right, enjoyed for the benefit of the public, only so far interferes with private right as to secure the public good, on the termination of which the private right re-commences, unimpaired by the time of privilege, the statute of limitations ceasing to run when privilege commenced. . . .
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> . . . [The privilege] is consistent with, nay, necessary to the universal equality established in a republic. It is inseparably connected with the fundamental maxim in all free governments, that where the public exigency renders it necessary, for common preservation, private right shall yield to public good.
>
> . . . . The privilege . . . protects them, while in attendance upon their public duties from arrest, summons, or any other civil process.

Lyell v. Goodwin, 15 F. Cas. 1126, 1127-30 (C.C.D. Mich. 1845) (No. 8,616). Lyell explicitly supported the temporary immunity idea, noting that the plaintiff could bring suit when the defendant had ceased his public duties:

> For the time being, while engaged in the public service, he is divested of self and of private concernment, and, as it were, dedicated in time and mind to the public service. Nor need there be private injury as a necessary consequence. There may be a time, when the privilege of these functionaries ceases, -- when the special duty, that

> sets them apart to the public service has been performed, and their return to private life is clear and unquestioned, when the public interest no longer demands their protection, and the private right to their attention can commence, and they be held answerable as any other citizen.
>
> Id. at 1131.

The Wisconsin Supreme Court put a similar gloss on Article I, § 6:

> In order to render this provision available to the extent of its necessity, it will not do to construe the words privilege from arrest in a confined or literal sense. A liberal construction must be given to these words upon principle and reason. It is just as necessary for the protection of the rights of the people that their representative should be relieved from absenting himself from his public duties during the session of congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution. If the people elect an indebted person to represent them, this construction of the constitution must also be made to protect his rights and interests, although it may operate to the prejudice of his creditors; but the claims of the people upon his personal attendance are paramount to those of individuals, and they must submit.
>
> Doty v. Strong, I Pin. 84, 87 - 88 (Wis. 1840). Doty, in the spirit of Bolton, stretched Article I's immunity to cover delegates to Congress from territories. See id. at 88; see also Juneau Bank v. McSpedan, 14 F. Cas. 51, 52 (C.C.D. Wis. 1860) (No. 7,582) ("In England, the privilege from arrest has always been construed to include the service of a summons. So in this country from a very early period."); Nones v. Edsall, 18 F. Cas. 296, 297 (C.C.D.N.J. 1848) (No. 10,290) (Grier, Cir. J.) ("Members of congress are privileged from arrest both on judicial and mesne process, and from the service of a summons or other civil process while in attendance on their public duties."); Anderson v. Rountree, I Pin. 115, 117, 124 (Wis. 1841) (following Doty).

Later courts, in decisions such as Long v. Ansell, rejected this early broad reading of arrest. Long properly noted that the court in Bolton had quoted language from an early edition of Blackstone that had been changed in post-1773 editions. See Long, 293 U.S. at 82 n.3. But Long simply sidestepped the broader functional vision underlying all the early cases rooted in the democratic public interest served by the privilege.

FN45. 2 STORY, supra note 43, § 857 (footnote omitted). Note that Story explicitly extended the functional logic of the Arrest Clause beyond arrests to various "summons[es]," see id., as did Jefferson's Manual. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE 15-22 (New York, Clark & Maynard 1873).

FN46. For many explicit expressions of this point, see note 44 above.

FN47. See Richard D. Friedman, Some Modest Proposals on the Vice-Presidency, 86 MICH.L.REV. 1703, 1720-21 (1988).

FN48. See U.S. CONST. art. I, § 3, cl. 4.

FN49. See id. art. I, § 5, cl. 1 ("[A] Majority of each [House] shall constitute a Quorum to do Business").

FN50. See id. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President") (emphasis added). On the importance of the vesting mandate and the unitary executive it creates, see Two Tiers, cited above in note 25, at 231-32 & n.92, 251-52 & n.151 (1985); and Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153, 1175-79 (1992). See also Memorandum For the United States Concerning the Vice President's Claim of Constitutional Immunity, In Re Proceedings of the Grand Jury Impaneled December 5, 1972, at 18 (Civ. No. 73-965) (Brief filed by Solicitor General Robert Bork in Maryland District Court) ("[T]he President is the only officer whose temporary disability while in office incapacitates an entire branch of government.").

FN51. Because of the common practice of "balancing" a ticket with presidential and vice-presidential candidates from different "wings" of a party, a shift of presidential power from President to Vice President can cause a serious democratic skew. For historical examples and discussion, see Akhil Reed Amar & Vik Amar, President Quayle?, 78 VA.L.REV. 913, 938-39 & n.76 (1992). For a general discussion of succession issues and the Twenty-Fifth Amendment, see Akhil Reed Amar, Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap, 47 ARK.L.REV. (forthcoming 1994).

FN52. The issue raised by the Jones suit thus radiates far beyond Jones herself. The issue is one of precedents and slippery slopes: we must ask not merely what would happen if Jones's suit goes forth but what would happen if suits like hers can go forth and multiply.

FN53. This immunity is of course waivable. Surely the President in whatever spare time he has should be allowed to litigate civil damage actions -- or to watch basketball for that matter -- but he should not be legally obliged to do either. As a practical matter, politics may sometimes create strong pressure to litigate now -- or, again, to watch a basketball game -- but political pressure should not be confused with legal obligation. In a civil damage action in the early 1960s, then-President John Kennedy asserted litigation immunity under a statute. When that failed, he settled the case instead of asserting presidential immunity -- a choice wholly consistent with our analysis. See Memorandum in Support of President Clinton's Motion to Dismiss on Grounds of Presidential Immunity at 29 n.19, Jones v. Clinton (E.D. Ark. July 21, 1994) (No. LR-C-94-290).

FN54. Beyond Marbury's vision that the ideal of "a government of laws, and not of men" entails that "the laws furnish [a] remedy for the violation of a vested legal right[,]" 5 U.S. (1 Cranch) 135, 163 (1803), there is perhaps another basic element of the rule of law: the idea of no "special treatment" based on status. But temporary immunity for a sitting President comports with this norm too: Bill Clinton can toll a suit not because of who he is, but because of what he does -- what he is now doing for the American people in serving them as their elected President. (Richard Nixon, by contrast, sought a lifetime pass from legal accountability even when he was serving no one but himself.) Presidential arrest immunity simply applies a general functional principle to the unique circumstances of a sitting President preoccupied with weighty affairs of state. Temporary tolling occurs in many other contexts in which similar hardship would be created by immediate litigation -- for example, cases involving military officers on duty, persons temporarily beyond the jurisdiction, and persons with temporary illnesses. See, e.g., Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-525 (1988 & Supp.1994).

FN55. U.S. CONST. amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice . . . ."). In rare cases, the Amendment would allow a person to serve as President for ten years. See id.

FN56. See infra Part II.

FN57. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

FN58. The circle of potential plaintiffs in a divorce or child custody case is, of course, much smaller than the circle of potential plaintiffs who might seek damages for any past act, public or private. Injunctive suits arising out of a sitting President's private business concerns are also imaginable -- consider, for example, a tort injunction to abate an alleged nuisance on land owned by the President. But if a sitting President deemed such nuisance suits a nuisance, he might well be able to place his business affairs in a blind trust and thereby free himself from distraction. This is not a realistic option for damage suits that arise out of past discrete acts rather than alleged ongoing harms.

FN59. See supra p. 710 (discussing the breach of the peace language of the Arrest Clause). Obviously, mere refusal to pay damages for a past discrete harm during the tolling of a suit should not be seen as an "ongoing harm."

FN60. 3 STORY, supra note 43, § 1563.

FN61. In light of the rather precise parallels of language and logic between Justice Story's discussion of the Arrest Clause in §§ 856-62 and his discussion here in § 1563 of implicit presidential immunities, it is hard to see the parallels as wholly unconscious or coincidental. The same structural vision informs both passages. See 2 id. §§ 856-62; 3 id. 1563.

FN62. Nixon recognized presidential immunity in the absence of an express congressional statute to the contrary. See Nixon v. Fitzgerald, 457 U.S. 731, 748 & n.27 (1982). So too, we today propose only a Category Two arrest immunity. See supra note 21. Like the Nixon Court, we do not reach the question of the precise scope of congressional power to restrict this immunity.

FN63. The Nixon Court should have been aware of the real argument in the Story quote. Fitzgerald's brief declared:

> Mr. Nixon's countervailing citation from the 1830's, like his other authorities, concerns the amenability of an incumbent President to process in a civil suit. The "official inviolability" that Justice Story referred to in his Commentaries was, by its own terms, limited to acts -- arrest, imprisonment, and detention -- that would obstruct or impede the President "while he is in the discharge of his duties of his office." Neither Story nor any other source cited by Mr. Nixon supports the proposition that a former President, when out of office, is immune from civil liability for his acts while President.
>
> The distinction between an incumbent and a former President is important. It was recognized at the time the Constitution was ratified. And it was strenuously argued to this Court in 1867. Attorney General Stanbery then asserted on behalf of President Andrew Johnson that the President "is above the process of any court to bring him to account as President." But Stanbery acknowledged that this immunity ended with the President's removal from office. When "he no longer stands as the representative of the government," Stanbery said,
>
> > then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.
> >
> > Brief for Respondent at 19, Nixon (Nos. 79-1738 and 80-945) (footnotes omitted). Fitzgerald's brief acknowledged that a suit against an incumbent President would be altogether different:
>
> Nixon's arguments obscure a crucial fact about the lawsuit at issue in this case. It was not brought against an incumbent President. Mr. Nixon was named as a defendant in July, 1978, nearly four years after he resigned as President. Whatever drain on his time and resources the suit has caused occurred long after he left office; it had no effect on his performance of public duties.
>
> Id. at 26.

Indeed, Fitzgerald's brief conceded tolling: "The burdens of litigation are not as onerous for the President or a former President as petitioner claims. With respect to the incumbent, the district court can stay all proceedings until he leaves office." Id. at 28; see also Memorandum of Justice Powell, 6th Draft at 22 n.27, Kissinger v. Halperin, 452 U.S. 713 (1981) (No. 79-880), April 6, 1981 (unpublished draft opinion in pre-Fitzgerald case from Thurgood Marshall Papers, Library of Congress, Box 268, folder 2) (acknowledging in a footnote discussing Story, Ellsworth, Adams, and Jefferson that "[t]he statements quoted here concerning a President's amenability to process apply only to sitting Presidents").

FN64. See Nixon, 457 U.S. at 776 (White, J., dissenting) (conceding that the Story passage "clearly supports [Nixon's] position but it is of such a late date that it contributes little to understanding the original intent").

FN65. Nixon, 457 U.S. at 750 n.31 (quoting letter from Thomas Jefferson to George Hay (June 20, 1807), in I0 THE WORKS OF THOMAS JEFFERSON 404 (Paul L. Ford ed., 1905)).

FN66. Id. (quoting WILLIAM MACLAY, THE JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA, 1789-1791 167 (Edgar S. Maclay ed., 1890)).

FN67. Letter from Thomas Jefferson to George Hay (June 17, 1807), in II THE WRITINGS OF THOMAS JEFFERSON 232 (Andrew A. Lipscomb ed., 1905).

FN68. U.S. CONST. art. I, § 3, cl. 6 ("[B]ut the Party convicted [in an impeachment court] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.").

FN69. In response to Maclay's statement that, "altho, President he was not above the laws," Ellsworth and Adams "declared You could only impeach him. [sic] and no other process Whatever lay against him." THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling & Helen E. Vett eds., 1972). Maclay then "put the Case suppose the President commits Murder in Streets. . . . But You can only remove him from Office on impeachment." Id. Listen carefully to Adams and Ellsworth's response: "Why When he is no longer President, You can indict him." Id. (emphasis added).

As with the Story quote, the Nixon Court ignored Fitzgerald's admonition about the applicability of the quote from Adams and Ellsworth:

> The statements made in the course of framing and ratifying the Constitution do not support Nixon's position. Nor do the observations of John Adams and Oliver Ellsworth . . . . These observations . . . addressed a question that is not before the Court in this case: namely, whether an incumbent President is amenable to process in a civil suit.
>
> Brief for Respondent at 18, Nixon (Nos. 79-1738 and 80-945).

FN70. See Nixon, 457 U.S. at 751 n.31. The Court introduced the Adams/Ellsworth quote with the -- embarrassingly untrue -- claim that Adams had served as a delegate at the Philadelphia Convention. See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 14-41 (1913) (discussing the delegates); id at 39 (noting that John Adams was in London).

FN71. In essence, all three were arguing for litigation immunity rather than substantive immunity for sitting Presidents -- immunity from claims made while President rather than for conduct occurring while President. (As Ian Ayres has pointed out to us, the distinction is akin to the claims-made/occurrence distinction in modern insurance policies.) Litigation immunity protects a worthy plaintiff (because it merely postpones suit), whereas substantive immunity does not (because it bars suit). Litigation immunity deters conduct while in office -- but conduct that is by hypothesis unconstitutional and should be deterred by the prospect of a later damage suit. Substantive immunity does not chill this conduct; instead it immunizes even clearly unconstitutional actions -- and that is why the Founders rejected it. See Of Sovereignty, supra note 38, at 1484-92 .

If we are concerned that mere litigation immunity will lead to a flood of frivolous lawsuits (or even nonfrivolous but ultimately unworthy ones) against ex-Presidents, we should not recognize a substantive immunity that bars worthy and unworthy claims alike. Instead we should provide for fee-shifting, which discourages plaintiffs with weak claims and yet fully preserves remedies for plaintiffs with winning claims. See id. at 1514 n.346. If Congress fears that the threat of liability for good faith mistakes will overdeter and paralyze Presidents (or other officials, for that matter), Congress need only provide for indemnification for good faith mistakes, for which government is in effect the better risk bearer than its employees in a Coasean world. See id. at 1515; Fourth Amendment, supra note 28, at 812.

In light of this analysis the real timing difference between Nixon and Clinton is not Eastland's and Meese's occurrence-based difference that favors Nixon, see supra pp. 701-02, but a claims-made difference that favors Clinton.

FN72. Nixon, 457 U.S. at 752 n.31. It is also worth noting that Justice White's dissent argued that United States v.

Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692), demonstrates that the **President** is "subject to judicial process." Nixon, 457 U.S. at 781 (White, J. dissenting). The majority did not disagree with this conclusion. See Nixon, 457 U.S. at 753-54. These Nixon opinions overlooked the fact that **Burr** was not an unavoidable intrusion on the **President,** for the **President** had the power to dismiss the prosecution at any time if he considered **Burr's** request for exculpatory material too onerous. Put another way, by continuing to hold **Burr** in detention, Jefferson voluntarily incurred certain duties, the disregard of which would be a kind of ongoing breach of the peace as long as Jefferson insisted on holding **Burr** in jail for trial. Any **subpoena** against Jefferson would have been a true negative injunction -- provide evidence in your possession or let **Burr** go -- that could have been enforced, Marbury-like, without an awkward coercive order against Jefferson. Chief Justice Marshall could simply quash the indictment and let **Burr** free, much as he simply refused to take jurisdiction in Marbury itself.

Nor does the Nixon tapes case, United States v. Nixon, 418 U.S. 683 (1974), preclude temporary immunity. As in Burr, the President could have avoided any court-ordered mandate merely by ending the ongoing prosecutions, via a Caspar Weinberger-like pardon or by formally rescinding via the Attorney General an executive regulation and dismissing both the special prosecutor and the underlying prosecutions, as the Nixon tapes Court explicitly allowed. See id. at 694-96. (Of course, these actions might have created a huge political backlash, but so might insisting on arrest immunity rather than waiving it; once again, we must distinguish between legal obligation and political pressure. See supra note 53.) The Nixon tapes case is also of course distinguishable from the Jones litigation because the former involved allegations of presidential criminal wrongdoing, Nixon, 418 U.S. at 687, which would overcome any arrest immunity deducible by analogy to the § 6 Arrest Clause, see supra p. 710. Thus, the Nixon tapes case is an awkward springboard for any assault on implicit presidential arrest immunity. See also supra note 29 (noting that the Nixon tapes case explicitly an rejects expressio unius reading of Article I, § 6 and affirms implicit presidential immunity).

The Nixon tapes case does contain some loose language, but all this must now be read in light of the later decision in Nixon v. Fitzgerald. Frankly, some of the loose language simply cannot be taken at face value today. See, e.g., Nixon, 418 U.S. at 694-96 & n.8 (1974) (treating as having "the force of law" a regulation that gave a kind of legislative veto to certain key congressional officials -- a regulation that, as a binding law, rather than a political promise, would plainly violate basic constitutional principles acknowledged a few pages later, id. at 704, and resoundingly affirmed a few years later in I.N.S. v. Chadha, 462 U.S. 919, 945-46 (1983)); Nixon, 418 U.S. at 709-13 (glossing over key differences between case at hand, in which the prosecutor was seeking to pierce presidential privilege to find inculpatory evidence and Burr-like cases in which defendant with due process rights sought exculpatory evidence). In the end, the Nixon tapes Court acquiesced in an untidy opinion by Chief Justice Burger that, on the facts of the case, reached the obviously right result. Richard Nixon was the head of an ongoing conspiracy to obstruct justice and was using the Oval Office itself as the hub of that conspiracy; and the Court had evidence under seal that made all this clear. See Nixon, 418 U.S. at 687 & n.4, 689, 700. The Court's occasionally strained readings of the Constitution, case law, and regulations must be analyzed in light of what the Court delicately described as the "unique setting" and "unique facts of this case." Nixon, 418 U.S. at 691, 697; see also id. at 700 (stressing material under seal as the basis for the Court's conclusion); Id. at 687-88, 701 (relying subtly on Nixon's status as an unindicted co-conspirator); id. at 712 n.20 (invoking by analogy a case in which the strong presumptive privilege of jury deliberation proceedings yielded in the face of credible claims of criminal misconduct).

FN73. To put the point slightly differently, we are suggesting that President Clinton's immunity should not turn on whether his alleged conduct towards Jones was an "official" duty or not (a holdover of viewing immunity through the prism of the Speech or Debate Clause), but rather should turn on whether the Jones suit and others like it, see supra note 52, could functionally "Arrest" the President while at "Session."

FN74. See supra p. 702.

FN75. See supra Part I.C.

FN76. One reason for a more flexible application of presidential arrest immunity stems from the greater potential

hardship on plaintiffs than in the Article I context, since presidential "sessions" run much longer than congressional ones. See supra pp. 714-15.

FN77. "Well before" allows the case to be tried before Inauguration. Aware of the significance of Inauguration, the parties and the judges would probably expedite judicial proceedings.

FN78. Jones's case does not appear to be one of a repressed memory; her complaint claims that she told others about the alleged encounter with then-Governor Clinton within days of its occurrence. See Jones v. Clinton, Complaint, Civ. No. LR-C-94-290 (E.D. Ark. May 6, 1994).

FN79. See JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §1520 (4th ed. 1846) (Boston, Hilliard, Gray & Co. 1836) ("Courts of Equity . . . sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere, where there has been gross laches in prosecuting rights . . . .").

FN80. The doctrine is used to "aid[] the vigilant and not those who slumber on their rights." NAACP v. NAACP Legal Defense & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir.1985), cert. denied, 472 U.S. 1021 (1985). To prove laches, President Clinton would have to show that Jones delayed in asserting her claims, that the delay was not excusable, and that her delay unduly prejudiced Clinton. See AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1545 (11th Cir.1986), cert. denied, 481 U.S. 1041 (1987). Laches is not based "merely on time. Rather, laches is based upon changes of conditions or relationships involved with the claim." Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir.1987) (citations omitted). The laches period begins to run when the plaintiff discovers the facts that create her cause of action. See Coleman v. Corning Glass Works, 619 F.Supp. 950, 953 (W.D.N.Y. 1985), aff'd, 818 F.2d 874 (Fed. Cir.1987); see also Grant Airmass Corp. v. Gaymar Indus., 645 F.Supp. 1507, 1515 (S.D.N.Y. 1986) (explaining that courts consider whether a plaintiff had actual or constructive knowledge of the relevant facts in determining whether a claim is barred from laches).

President Clinton's laches claim is buttressed by the lack of an explicit federal statute of limitations for Jones's civil rights claims; rather, federal law provides that state statutes and the common law should govern. See 42 U.S.C. § 1988 (Supp. V 1993); cf. Nixon v. Fitzgerald, 457 U.S. 731, 748 & n.27 (1982) (distinguishing Nixon's case from one in which "Congress expressly had created a damages action against the President of the United States").

FN81. In Mackall v. Casilear, 137 U.S. 556 (1890), the Court opined:

> The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence.
>
> The time for this son to have attacked his father on the ground of fraud was prior to that father's death . . . .
>
> Id. at 566 (citations omitted).

FN82. See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 430-31 (4th ed. 1992) ("[A]n equitable defense or counterclaim may be interposed to an action presenting only legal issues or vice versa.").

FN83. Federal Rule of Civil Procedure 8(c) explicitly recognizes the affirmative defenses of estoppel and fraud, as well as of laches. FED. R. CIV. P. 8(c).

FN84. In A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir.1992) (en banc), the court

stated:

> [Plaintiff] is in error in its position that, where an express statute of limitations applies against a claim, laches cannot apply within the limitation period. In other areas of our jurisdiction, laches is routinely applied within the prescribed statute of limitations period for bringing the claim.
>
> . . . . . .[W]e are unpersuaded that the technical distinction between application of laches against legal damages and an equitable accounting which [plaintiff] asks us to draw should be made.
>
> Id. at 1030-31 (citations and emphasis omitted); see also Technitrol Inc. v. NCR Corp., 513 F.2d 1130, 1130 (7th Cir.1975) (adopting the district court opinion in Technitrol Inc. v. Memorex Co., 376 F.Supp. 828, 831 (N.D. Ill. 1974), which applied laches to damage suits).

FN85. Once again, we need go no further than to recognize a Category Two presidential privilege that Congress may perhaps have power to modify. See supra p. 705.

FN86. Venue and personal jurisdiction defenses are of course waivable. See FED. R. CIV. P. 12(h)(I).

FN87. See U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors . . . the supreme Court shall have original Jurisdiction"); Judiciary Act of 1789, § 13, 1 Stat. 73, 80 (1789) (declaring that the Supreme Court "shall have exclusively all . . . jurisdiction of suits or proceedings against ambassadors, or other public ministers").

FN88. See Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 469-78 (1989); Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499, 1560 n.222 (1990).

FN89. See THE FEDERALIST NO. 65, at 400 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

FN90. See supra p. 718

FN91. Until the appearance of the 1945 "minimum contacts" language of International Shoe v. Washington, 326 U.S. 310, 320 (1945), suits against D.C. officials were hard to bring because longarm jurisdiction did not exist. See Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

FN92. Letter from Thomas Jefferson to George Hay, supra note 67, at 232. To be sure, improved transportation technology facilitates travel and makes long distance litigation infinitely more feasible than at the Founding; but why should the presidential mountain be obliged to come to plaintiff Muhammad rather than vice versa? Until Congress speaks clearly to the contrary, should not litigation against a sitting President accommodate his unique need to operate from the nation's capital, supervising the government, and attending to the people's business -- at least if a plaintiff is responsible for the timing of a lawsuit and purposefully chooses to sue a President in session?

If the suit were brought in D.C., Jones's case may be dismissed. District of Columbia courts in such cases apply the District's statute of limitations, even if the underlying cause of action occurred elsewhere. See Steorts v. American Airlines, 647 F.2d 194, 197 (D.C. Cir.1981). However, Jones could argue that a transfer of venue motion will allow her to carry the Arkansas statute of limitations with her to Washington. If the reason for transfer of venue is based on forum non conveniens and 28 U.S.C. § 1404(a), she may be successful. See Van Dusen v. Barrack, 376 U.S. 612, 639 (1964). But if President Clinton phrases the argument in terms of personal jurisdiction and venue (as we suggest), the D.C. statute of limitations may be used: an Arkansas transferor court lacking personal jurisdiction and venue could not support transfer under Van Dusen, and transferee law would apply. See PAUL M. BATOR, DANIEL J. MELTZER, PAUL T. MISHKIN & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1744-45 (3d ed. 1988); 15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3827, at 261-67 (2d ed. 1986). The D.C.

statute of limitations for intentional torts in violation of § 1983, such as assault, is one year. See D.C. CODE ANN. § 12-301 (4) (1993); Hobson v. Wilson, 737 F.2d 1, 32 (D.C. Cir.1984) (distinguishing assault cases, which have a one-year statute of limitations, from First Amendment claims, which have a three-year limitations period), cert. denied, 470 U.S. 1084 (1985); Williams v. District of Columbia, 676 F.Supp. 329, 332 (D.D.C. 1987). The one-year limitation also includes actions for "libel." See D.C. CODE ANN. § 12-301 (4) (1993).

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gave sufficient evidence of a special contract by which payment for her services was postponed until the death of the decedent, James Pollock. The services for which she claimed to be paid were rendered to him before 1861, when she left his house. Of course, if there was no such special contract as alleged her demand was clearly barred by the Statute of Limitations.

Claims of this character against the estates of decedents, resting on mere oral testimony of declarations or admissions, are very dangerous, and ought certainly not to be favored by the courts. "The danger attendant upon the assertion of such claims requires, as was said by Chief Justice GIBSON, in reference to a somewhat similar contract, that a tight rein should be held over them, by making the quality, if not the sum of the proof, a subject of inspection and governance by the court, and by holding juries strictly to the rule prescribed." Per STRONG, J., in Graham *v.* Graham's Ex'rs, 10 Casey 481.

We think that both the quality and *sum* of the evidence in this case were entirely insufficient. The question ought not to have been submitted to the jury. All the declarations proved were only indicative of an intention to leave the plaintiff a legacy—to provide for her by will. Mrs. Gordon testified that Pollock said: "We intend to do as well by her as we do by our own child." He said, "if she lived after him he would do well by her at his death." Mrs. Ayers testified: "He said he intended to leave her and do as well by her as his own." "He said he intended to do well by her, and at his death he would make her as good as an heir. He said he would will it; did not use the word 'will' or 'heir;' he said he would do as well by her as his own; that is what he said. He just said he intended to leave her and do as well by her as his own." "I heard Esquire Pollock say he would do well by her, or he would pay her wages."

If the declarations had been to the effect that if the plaintiff would remain with him until his death he would then do well by her or pay her wages, there would be some plausibility in the contention that there was a mutual contract; she to serve him until his death, and he either to provide for her by will or pay her wages. It might possibly have been sustained under the case of Thompson *v.* Stevens, 21 P. F. Smith 161. This was not, however, pretended to have been the contract. Had she remained until his death it might perhaps have been implied. But in point of fact she left his service ten years before his death. There was no engagement on her part to remain a day. She might have left immediately and her case would have stood as strong on the evidence as it is now. There is not a scintilla of proof that she assented and agreed to postpone her claim until his death. Had she commenced an action in 1861, for wages then claimed to be due, it would scarcely be contended that the evidence given upon this trial would have prevented her immediate recovery.

There was manifest error in the admission of the evidence as to the amount of the estate of the decedent, and in that part of the charge in which the court instructed the jury, "if he promised to do as well by her as by his own child, his meaning might be that he designed to put her on an equality with his son, Nathaniel. In this view we have received evidence of the value of the decedent's property and leave it to you to say what plaintiff should have, regarding what Nathaniel might have received as the only heir of his father if he had survived him." As Mr. Justice STRONG has said, in Graham *v.* Graham's Ex'rs, 10 Casey 475, "what less is the result than the establishment of a parol will?" "It is a palpable error to say that the damages are to be regarded as a debt or liability of the estate. They are a distributive share and are claimed and recovered as an equivalent for an inherited portion or a legacy. If they are the fruit of a legal liability of the decedent, then the rule which the plaintiff invokes leads to a still greater absurdity than even a parol will; for under the contract which she sets up, she is only entitled to a share of what remains after all legal liabilities are discharged, and if those liabilities absorb the whole estate, she is entitled to nothing. The extent of her right varies with the residuum of the estate and is incapable of measurement until the residuum be ascertained; there is no possible meter for it." It is clear that if the plaintiff had succeeded in making out a clear and positive contract between her and the decedent that the payment of her claim should be postponed until his death, all that she could have recovered would have been what she was entitled to on a *quantum meruit* when she left his service.

Judgment reversed.

Appeal of John F. Hartranft, Governor of the Commonwealth, *et al.*

1. The Governor is the absolute judge of what official communications, to himself or his department, may or may not be revealed, and is the sole judge not only of what his official duties are but also of the time when they should be performed.
2. The Governor is exempt from the process of the courts whenever engaged in any duty pertaining to his office, and his immunity extends to his subordinates and agents when acting in their official capacity.
3. The powers and duties of grand juries and the essentials of a *subpœna ad testificandum* discussed.

November 1st 1877. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD and STERRETT, JJ.

[Appeal of Hartranft *et al.*]

Certiorari sur appeal to the Court of Quarter Sessions of *Allegheny county:* Of October and November Term 1878, No. 14.

This was the appeal of John F. Hartranft, Governor of the Commonwealth; M. S. Quay, Secretary of the Commonwealth; James W. Latta, Adjutant-General of the Commonwealth; General R. M. Brinton, and Major A. Wilson Norris, from the order of the Court of Quarter Sessions of the Peace of Allegheny county, allowing and directing attachments to issue against them in the matter of the investigation of the grand jury into the riots at Pittsburgh, of July 21st and 22d 1877.

The riots of July 1877 were inaugurated by a strike of the train-men in the employ of the Pennsylvania Railroad Company, who proceeded to take possession of the trains of the company, and to stop all traffic over the road. Portions of the "National Guard" of the state were sent, under the charge of their regular officers, to open the road, and a collision took place between them and a mob led by the strikers, in which a number of persons were killed and wounded. Shortly thereafter large accessions were made to the mob, and a great riot ensued, in which all the buildings of the railroad company were burned, and thousands of cars, with their contents, were pillaged and destroyed. During the progress of this riot, a number of persons and several soldiers were killed and wounded.

At the next term of the Court of Quarter Sessions of Allegheny county, the court, Kirkpatrick, J., in charging the grand jury in relation to their duties, inter alia, said:—

"Secondly, you are 'diligently to inquire and true presentment make, * * * as well of those things which you know of your own knowledge.' By this is meant, that if of your own knowledge as a grand jury, or of the knowledge of either of you individually, or from the examination of witnesses in other cases, or if, from any source, offences and crimes are discovered by you, or any other matter by you deemed worthy of investigation, touching which no formal complaint has been made or indictment submitted to you, it is your duty to advise the court thereof, in writing, together with your wishes in the premises. This paper is called a *presentment*, and if, upon its submission and consideration, the court should be of opinion that your wishes should be complied with, they will direct a bill of indictment to be prepared accordingly and submitted to you, and it will be disposed of by you as if it had come before you in the usual and ordinary way. In the submission of your presentment * * * it is sufficient if it indicate your wishes and the substantial grounds on which they are predicated."

On the 1st of October 1877, the grand jury of Allegheny county presented a petition to the Court of Quarter Sessions, setting forth "that the citizens of said county are greatly concerned in having a careful investigation made of the riots of July 21st

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and 22d 1877, and all facts and particulars incident and relative thereto and connected therewith, and the grand jury do respectfully pray your Honor to give the said matter in charge to them to inquire concerning, and to furnish them compulsory process to secure the attendance of such witnesses as they may consider necessary to examine."

Upon this application was endorsed, "And now, 1st October 1877, the within presentment considered, approved, and ordered to be filed. *Per curiam.*"

On the same day a subpœna issued to several witnesses, and among them the parties to this writ. The subpœna was as follows: "We command you, that laying aside all business and excuses whatsoever, you and each of you be and appear in your proper persons before our grand jury, at Pittsburgh, at our Court of Oyer and Terminer and Quarter Sessions, there to be held for the county aforesaid, forthwith, to testify all and singular those things which you shall know touching a certain investigation now being had on formal presentment by and before the said grand jury, relating to the late riots of July last in our said county, in our said court depending, and then and there to be tried, between the Commonwealth and ——, defendant, on the part of the ——. And hereof fail not, under penalty of one hundred pounds."

On October 12th 1877, after service of the above subpœna, the grand jury presented a petition to the court, stating that the witnesses had failed to appear after due notice, and praying the court "to adjudge the said parties and witnesses in contempt, and that further and compulsory process be awarded to said grand jury for the purpose of bringing the said recalcitrant witnesses to testify."

The court appointed the 15th of October to hear an argument on the application for an attachment, and at that time the following answer was filed:

"And now, October 15th 1877, George Lear, Attorney-General of the Commonwealth of Pennsylvania, comes into court, representing the said Commonwealth, and says, that the Governor, as commander-in-chief of the army and navy of the state, Adjutant-General Latta, General R. M. Brinton, and Major A. Wilson Norris, against whom attachments have been applied for to compel their obedience to a subpœna to appear and testify before said grand jury, have no knowledge of the late riots in Allegheny county, except that which they learned in their military and official capacities, and which are privileged communications; and that he has learned this by an examination of their knowledge of the subject made personally of each of them on behalf of the Commonwealth; that, in their capacity of civil and military officers, they declare to him that, in the exercise of their official discretion, an examination into their acts in connection with said riots would be detrimental to the public service and injurious to the interests of the Common-

wealth; that they disavow any disrespect to the court or its process, and absent themselves on the ground that such matters as they could testify to are privileged communications, and not the subject of inquiry before a grand jury; that John F. Hartranft, Governer of the Commonwealth, and James W. Latta, Adjutant-General, are in constant correspondence with the army in the field in the disorderly and riotous regions of the state, and in daily expectation of being required at the front, and to be called to a distant county would endanger the interests of the public service; that all of said witnesses reside in counties remote from Allegheny, and not within the jurisdiction of process to answer, except in a matter or cause depending before the court. And the said Attorney-General further avers, that in the interest of public justice, and on behalf of the Commonwealth, he has, as the chief law officer of the state, examined the nature of the inquiry and the value of the testimony which these witnesses could give, and he is of the opinion that the interests of the state will be best subserved by their absence, and, therefore, he respectfully withdraws the application for attachment on behalf of the Commonwealth."

After the argument on the application for attachments, the court made the following order:—

"And now, 20th October 1877, after argument and upon consideration, the application is allowed, and attachments are hereby directed to be issued for and against the following named persons, being the same indicated by the grand inquest as in default, to wit: His Excellency John F. Hartranft, Governor of the Commonwealth; the Honorable M. S. Quay, Secretary of the Commonwealth; General James W. Latta, Adjutant-General of the Commonwealth; General R. M. Brinton, and Major A. Wilson Norris."

A writ of certiorari was thereupon taken in behalf of all against whom attachments were directed to be issued, and the following errors were assigned:—

1. The court erred in issuing a subpœna for witnesses beyond the limits of the county of Allegheny, to appear before the grand jury and not before the court, and in a matter not depending before the court.

2. In issuing a subpœna for witnesses to appear before the grand jury and testify in a matter touching a certain investigation now being had on formal presentment, by and before the said grand jury, relating to the late riots of July last, in our said county.

3. In allowing the attachments and directing them to be issued for and against the persons named by the grand jury, as in default upon a matter not depending before the court, or legally given in charge to the grand jury.

4. In issuing attachments against the Governor of the Commonwealth, Secretary of the Commonwealth, Adjutant-General, and other military officers of the state, in their official capacities, to testify

before the grand jury in an investigation touching riots which had occurred prior to the investigation, and in which no prosecution was pending before the court or grand jury.

5. In issuing an attachment against the chief executive of the Commonwealth.

Thomas M. Marshall, *Lyman D. Gilbert*, Deputy-Attorney-General, and *George Lear*, Attorney-General, for appellants.—This was not a matter or cause depending before the judges or any of them, but an investigation before the grand jury. The subpœna commands the witnesses to appear before the grand jury. But the record shows that it was not on formal presentment, and that it was not depending in court.

There is no allegation, in the paper presented to the court, that the grand jury possesses any personal knowledge on the subject, nor averment against any parties as being identified with the riots. The investigation was at the instance of the citizens, and not under the direction of the court. The paper was approved and ordered to be filed, but there was no direction or order for process to bring witnesses before the court, to be sworn, and sent before the grand jury, which would have been the regular mode, if the court had power to institute a prosecution in that manner, which is not admitted. The prayer of the petition is not for such witnesses as the court may designate, but for such as the grand jury "may consider necessary to examine."

In this state the better opinion is that the grand jury can act only upon and present offences of public notoriety, and such as are within their own knowledge; such as are given to them in charge by the court, and such as are sent up to them by the district-attorney; and in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the Bill of Rights: 1 Whart. Cr. Law, ed. 1868, § 458, and note.

If the object of this proceeding is to establish crime and to punish criminals, it is irregular, for the following reasons: There has been no arrest, and there is no prosecution returned to court to which the subpœna is applicable. The grand jury cannot inculpate in such cases by presentment. They cannot subpœna witnesses to appear before them in any case, but the witnesses must be required to appear in court, and be sent before the grand jury: Respublica *v.* Shaffer, 1 Dall. 236.

The proceeding by which a court of its own motion gives a matter in charge to a grand jury is to be resorted to only in extraordinary cases, and to existing evils, those in progress, in which the evil is to be corrected by preventive, rather than punitive justice: Lloyd *v.* Carpenter, 3 Clark 188; Citizens' Association, 8 Phila. Rep. 478; Grand Jury *v.* Public Press, 4 Brewster 313.

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The Governor and other officials are subpœnaed not as citizens, but by their official titles. Under these circumstances they cannot be compelled to testify.

The legislative, executive, and judicial departments of the government are distinct and independent, and each one should protect itself from the encroachments of the others: De Chastellux *v.* Fairchild, 3 Harris 18; Greenough *v.* Greenough, 1 Jones 489; Ervine's Appeal, 4 Harris 256; Burns *v.* Clarion County, 12 P. F. Smith 422; Richards *v.* Rote, 18 Id. 248; Commonwealth *ex rel.* Johnson *v.* Halloway, 6 Wright 446; Bagg's Appeal, 7 Id. 512.

Every department of the government has its secrets of state, or privileged comunications, which it is not only the right of the officers to refuse to disclose, but his duty to withhold; 1 Greenl. on Evidence, § 250, 251. The official transactions between the heads of the departments of state and their subordinate officers are in general treated as privileged communications. Thus, communications between a provincial governor and his attorney-general on the state of the colony, or the conduct of its officers; or between the governor and a military officer under his authority; the report of a military commission of inquiry, made to the commander-in-chief, and the correspondence between an agent of the government and a secretary of state, are confidential and privileged matters, which the interests of the state will not permit to be disclosed. The president of the United States, and the governors of the several states, are not bound to produce papers or disclose information communicated to them when, in their own judgment, the disclosure would, on public considerations, be inexpedient;" Gray *v.* Pentland, 2 S. & R. 23; Yoter *v.* Sanno, 6 Watts 156.

And the officers are themselves the judges of the question whether such disclosure would be prejudicial to the public interests: 1 Burr's Trial 186; Gray *v.* Pentland, 2 S. & R. 23; Cooper's Case, 1 Wharton St. Tr. 662; Beatson *v.* Skene, 5 Hurlst. & N. Rep. 837. It is not a question for the court, but for the officers themselves to determine; and the officers in this case having been subpœnaed by their official titles, it is to be presumed they are to testify in that capacity. The nature of the inquiry having been disclosed in the subpœna, the presumption is that the testimony required is concerning official action in reference thereto, and, in their answer filed for them, they say that such testimony would be prejudicial to the public service. They being the judges, that was a complete answer to the application for the attachment. Whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and, at the same time, contemplates that the act is to be carried into effect, through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, *quoad hoc*, a

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judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to his agents; and it is not their duty or business to investigate the facts thus referred to their superior, and to rejudge his determination. In a military point of view, the contrary doctrine would be subversive of all discipline; and as it regards the safety and security of the United States and its citizens, the consequences would be deplorable and fatal: Vanderheyden *v.* Young, 11 Johns. 150, 158.

The courts cannot compel the Governor to perform any duties appertaining to his office; nor can they interfere with his discharge of them, nor control him in any matter of executive discretion: State of Louisiana, *ex. rel. v.* Warmouth, Governor *et. al.*, 22 La. Ann. Rep. 1; Mauran, Adjutant-General, *v.* Smith, Governor, 8 R. I. Rep. 192; The People, *ex. rel. v.* Bissell, Governor, 19 Illinois 229; The State, *ex. rel. v.* Towns, Governor, 8 Georgia 360; Hawkins *v.* The Governor, 1 Arkansas 570. Mott, *et. al. v.* Pennsylvania Railroad Co., *et. al.*, 6 Casey 33.

In the case of Thompson *v.* The German Valley Railroad Company, 22 New Jersey Eq. 111, the chancellor said: "An order to testify is an unusual, if not unheard of practice. Such order ought not to be made against the executive of the state, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty in protecting the right and dignity of his office, he will not comply even if directed by an order. And in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed that the chief magistrate intends no contempt, but that his action is in accordance with his views of his official duty. And in the present case, that presumption amounts to a certainty. Chief Justice Marshall, on the trial of Burr, vol. 2, p. 536, remarks: 'In no case of this kind would a court be required to proceed against the President, as an ordinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them.'"

The Governor can be punished in but one way for an abuse or misuse of his power, and that is by impeachment. If he can be subpœnæd into any Court of Quarter Sessions or before any grand jury to testify in behalf of the Commonwealth, and in his discretion, under the advice of the legal department of the state, concludes that the interests of the state in the administration of the criminal law, will not be subserved by answering, and especially where he is summoned to appear as Governor of the Commonwealth, and, if for his default he can be attached for contempt, then the barriers between the executive and judiciary are broken down, and one department will be shorn of its independence of the others.

If the executive can be called into one county, he can be called

into them all; and, unlike the other departments, his is continually in session, and he is always on duty. If he can be called into any county as Governor, not to testify to what occurred in the county, but in the executive chamber, which no court or grand jury can inquire into, it will be greatly to the detriment of the public service. If he can be arrested, fined, and imprisoned for not obeying a subpœna in this case, it will be a great scandal on republican institutions, and will shake public confidence in the permanency of our government.

E. A. Montooth, District-Attorney, *Morton Hunter*, Assistant District-Attorney, *S. A. McClung*, and *George Shiras, Jr.*, *contra*.—Judge Kirkpatrick, in his charge to the grand jury, gave them this matter in charge; but, if not, the riot was undoubtedly within their personal knowledge, and hence, under their oaths, they were bound to present it. This they did in accordance with the instructions of the court, and asked for special power to investigate it. That the grand jury meant this as their own official act, and not merely that of individual citizens, is clearly shown by the beginning and conclusion of the presentment itself. They wished, as a grand jury, to obtain additional facts, for the purpose of presenting the offenders for indictment. Thus is this case clearly distinguished from that of the memorial of the citizens' association (8 Phila. 478), cited by the other side.

The endorsement of the court upon their presentment, taken in connection with the other circumstances of this case, was certainly sufficient to empower the grand jury to make the investigations.

But this question is immaterial, for, as the subpœna was in the proper form and regularly issued under the seal of the court, and as the appellants were duly served therewith, they cannot answer it by questioning the proceedings of the grand jury.

Are the Governor and the other appellants subject to subpœna? Chief Justice Marshall says, that "it is not known ever to be doubted, but that the chief magistrate of a state might be served with a *subpœna ad testificandum:*" 1 Burr's Trial 177, *et seq.*; 2 Id. 535.

That the others are subject to subpœna will scarcely be doubted. It became their duty, therefore, when subpœnaed, to make a proper response; and, as the law makes no exception in their favor, they should have responded in person. Instead of this, however, the Attorney-General filed an answer in their behalf. If such answer be permissible in any case, it should, at least, be made by the person subpœnaed and verified by affidavit.

In this answer, and in the argument before this court, it is assumed that the appellants were subpœnaed in their official character. This nowhere appears. The title follows the name and may be regarded merely as *designatio personæ*. It is also assumed that it

was intended to examine them wholly in regard to their official acts, and upon privileged matters. This assumption is likewise gratuitous; but even if it were true, the answer is still insufficient. It was due to the dignity of the judiciary that they appear in person, and if any such question had been asked them, they could have availed themselves of their privilege in the ordinary way.

But are official communications in regard to this riot privileged? The only ground upon which such matters can be privileged is that of public policy, and it seems scarcely reasonable to suppose that the public interest would be injuriously affected by their disclosure several months after the riot occurred.

If, then, the appellants have failed to make a proper response to the subpœna, the right to attach them would seem to follow; and even if the Governor should be excused on account of his official duties, the others should certainly be required to appear in person, and submit themselves fully to the process of the court.

It is not intended to reflect upon the official conduct of the Governor or the other appellants, but if any question should be asked which might be made the basis of impeachment or prosecution, they could, of course, refuse to answer it.

On November 12th 1877, the chief justice announced that it was the judgment of the majority of the court that the order of the court below, granting the attachments, should be reversed. Opinion to be filed thereafter.

Mr. Justice GORDON delivered the opinion of the court, January 7th 1878.

Grand juries have the power to make presentment, not only of such criminal offences as may be laid before them by the district-attorney, in the form of bills of indictment, and of such as may come within the personal knowledge of individual members thereof, but, also, of all such matters as may be given them in charge by the court. Neither is there any doubt about the power of the court to direct that body to make inquiry concerning affairs which directly affect the public peace and society; among which affairs may be instanced great riots, such as those which recently disturbed the well-disposed citizens of Pittsburgh and its vicinity. Matters of this kind may properly be referred to the consideration of the grand inquest in order that the instigators thereof and the participants therein may be brought to justice; and this is the more necessary, because, in times of public tumult and alarm, private prosecutors may be overawed through fear of personal violence.

Doubtless the proceedings in the case before us are very irregular, since there seems to be a total inversion of the proper order of things. It was the duty of the court, not of the grand jury, first to move in the matter. In a subject of so much importance, and one requiring the exercise of so much care and discretion, the court

should have instructed this jury as to what it was to investigate, and in what manner the investigation was to be conducted. Nothing of the kind, however, was done; but the court, having approved its petition, suffered it to proceed to the adoption of its own subjects, after its own methods, and, by this sufferance, it allowed an important public investigation to pass from its own control to that of a body of men, which, as it was governed by no regular instructions, resembled more a committee for the general investigation of public affairs, than a lawful constituent of the Court of Quarter Sessions. This, however, is really of small importance to the matter in hand; neither can the appellants call in question the regularity of the proceedings as between the court and its grand jury; for if they have been properly subpœnaed, and can present no lawful excuse for their want of obedience to the mandate of the Quarter Sessions, they must stand convicted of a contempt, and we cannot help them. The subpœna is the process of the Commonwealth, and there is no doubt about the court's power to issue that process in proper cases.

Our inquiry, then, is limited to two propositions: Were the subpœnas regular, such as an ordinary citizen would be bound to obey? If so, were the appellants liable to attachment for disobedience to this process? The subpœna we have before us, like the other proceedings in this case, is very irregular. It is, indeed, but a general mandate of the court, ordering the appellants to appear, "to testify, all and singular, those things which they may know touching a certain investigation being had, on formal presentment, by and before the grand jury, relating to the late riots of July last, in said county, in said court depending." It sets forth no case, present or prospective, nor does it state for whom, or at whose instance, the defendants were to be subpœnaed. As this writ is a very arbitrary one, obliging the citizen to leave his home and abandon his business, however important it may be, and give his attendance at court, wherever that may be sitting, it is very important to know what parties are entitled to it; for if it be issued at the suit of one having no right thereto, it is no contempt to disobey it. The Commonwealth may have this process in any proceeding where its interest is apparent, whether as a suitor or a prosecutor, and so may parties in courts, either civil or criminal; but we have yet to learn that any such right exists in a court, in its mere character as a court, separated from the case which it has in hand. So this, as well as every other compulsory process, must show upon its face that it was issued for some person or party having a right thereto, otherwise it is nugatory and void, and disobedience to its mandate involves no penalty whatever. In the case before us, there was the use of the writ of subpœna, as a mere order of the court, without statement of party or case, commanding the defendants to appear before the grand jury, for the purpose of giving their testimony

touching the late riots. If there is any law authorizing such process, we have not been informed of it.

No doubt the court might have directed a subpœna to have issued for the Commonwealth, in any case where the Commonwealth was a party, or where it was apparent it was in some way interested in some case or transaction then depending. So might it have directed a warrant to have issued for the arrest of some one guilty of a crime or misdemeanor, but in such case, no one would contend, that the mere blank warrant of the court would, in itself be sufficient to detain a citizen for one moment; the authority for such warrant must appear upon its face or it is worthless. But the courts' subpœna is no more respectable than its warrant; if the subpœna exhibit no authority it may be disobeyed with impunity. Now, in the case before us, the Commonwealth was not a party in interest, or, if so, it is not now apparent. It seems, from the petition of the grand jury, that the citizens of the county of Allegheny "were greatly concerned in having a careful investigation of the late riots," but whether they were concerned in bringing the rioters to justice or not, is not stated, though this was the only matter in which the Commonwealth could be concerned. Moreover, as the grand jury was acting under no instruction, it was not possible, even for the court, to know what that jury was doing or intended to do, but, of this, the court should have been informed, before it undertook to interfere with the personal liberty of the citizen by its summary process of attachment, for, as the matter now stands, it is apparent that the subpœna was issued for no tangible cause or party and for no properly defined legal purpose; hence, no one was bound to obey it.

For the purposes of this case, however, we may admit the regularity of this subpœna and that, upon an ordinary citizen, it would have been binding and obligatory, for we regard the question of the liability of the appellants to attachment, in any event, as the prime one of this case. In order to resolve this, we must first understand who the persons are, against whom the court has directed its attachment and for what purpose they have been subpœnaed. They are the Governor of Pennsylvania, the Secretary of the Commonwealth, the Adjutant-General, chief officers of the Executive Department of the state government, and two officers of the National Guard; the latter subordinates acting under the orders of the former. The purpose, for which these officers are subpœnaed, is, that the grand jury may be put into possession of any information they may be possessed of, or that may be within the power of their several departments, concerning the military or other means used by them in the suppression of the late riots in the city of Pittsburgh. It will be observed that these persons are subpœnaed for the purpose of compelling a revelation of such things as have come to their knowledge in their official capacities, and which strictly belong to

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their several departments as officers of the Commonwealth. This is clearly set out in the answer, by the Attorney-General, to the application for the attachment, and there has been no denial thereof upon the argument before us. In order to simplify matters, we may treat this case just as though the process, first and last, were against the Governor alone; for if he is exempt from attachment because of his privilege, his immunity protects his subordinates and agents. The general principle is, that whenever the law vests any person with the power to do an act, at the same time constituting him a judge of the evidence on which the act may be done, and contemplating the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary powers, and is *quoad hoc* a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents: Vanderheyden *v.* Young, 11 Johns. 158, per Spencer J.

It follows, if the Governor, as supreme executive, and as commander in chief of the army of the Commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient and to produce the legitimate results of their exercise, can be accountable to none but him. In like manner, if he is constituted the judge of what things, knowledge or information, coming into his department through himself personally or from his subordinates, may or may not be revealed, then such subordinates, without his permission, cannot be compelled to disclose, in court, any such matters or information.

What, then, are the duties, powers and privileges of the Governor? In the language of the constitution, art. 4, sect. 2, "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed." Also, same article, sect. 7, "The Governor shall be commander-in-chief of the army and navy of the Commonwealth, and of the militia, except when they shall be called into the actual service of the United States." He is, also, invested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency and to approve, or veto, bills submitted to him by the General Assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, the *supreme executive power* is vested in the Governor and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who then shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where

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does the Court of Quarter Sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the Commonwealth? For it certainly is a logical sequence that if the Governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the Court of Quarter Sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one may be compelled to answer, to account and to act. In other words if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognise the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts. In the case of Oliver *v.* Warmouth, 22 La. 1, it was held (per Taliafero, J.), that, under the division of powers, as laid down in the federal and state constitutions, the judiciary department has no jurisdiction over or right to interfere with, the independent action of the chief executive, in the functions of his office, even though the act he is required to perform be purely ministerial. This is putting the matter on very high grounds, for, in such case, no other officer would be exempt from the mandatory power of the judiciary. No case could more forcibly exhibit the extreme reluctance of courts to interfere with the functions of the supreme executive, for the hypothesis put is the refusal of the Governor to perform a duty, cast upon him by law, of a character strictly ministerial. We think, however, that the ground upon which this decision stands, is substantial; for, as the learned justice well argues, the difficulty arises in the attempt to establish a distinction between ministerial and discretionary acts as applied to the Governor, and then to conclude that the former may be enforced by judicial decree; it is objected, however, that the doctrine is

unsound in this, that it gives to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive; that this would infringe his right to use his own discretion in determining the very same question; that he must, necessarily, have the unconditional power of deciding what acts his duties require him to perform, otherwise, his functions are trammelled and the executive branch of the government is made subservient to the judiciary. The principle, enunciated, in the above stated case, applies with greater force to that we now have under consideration; for if the Governor's discretion may not be interfered with, in a matter purely ministerial, much more may that discretion not be interfered with in a case which pertains to his office and duties as commander-in-chief, in the discharge of which, the constitution makes that discretion his peculiar and absolute prerogative.

Again, the Governor, having a proper regard for the dignity and welfare of the people of the Commonwealth, is not likely to submit himself to imprisonment, on the decree of the Court of Quarter Sessions, or to permit his officers and coadjutors to be thus imprisoned. Were we, then, to permit the attempt to enforce this attachment, an unseemly conflict must result between the executive and judicial departments of the government. We need not say that prudence would dictate the avoidance of a catastrophe such as here indicated. On this point, the case of Thompson *v.* The German Valley Railroad Co., 22 N. J. Eq. R. 111, furnishes us with a precedent well worthy of our consideration. In that case a *subpœna duces tecum* had been served on the Governor of New Jersey, commanding him, by his individual name, to appear and testify before an examiner of the Court of Chancery, and bring with him an engrossed copy of a private statute which had been passed by the legislature, and had been sent to him, as Governor, for his approval. He refused to obey the subpœna, informing the court, at the same time, that he did not refuse out of any disrespect to the court or to the law, *but because he thought his duty required him not to appear or produce the paper required, or to submit his official acts, as Governor, to the scrutiny of any court.* It will be seen that the case thus presented is quite as strong as that under discussion; for the Governor, upon his own opinion of duty, which, as it will appear, did not accord with that of the court, not only refused to appear or produce the required paper, but to submit any of his official acts to the scrutiny of the court. An order was granted on the Governor, to show cause why he should not appear and testify. After argument, Zabriskie, Chancellor, said: "The Governor cannot be examined as to his reasons for not signing the bill, nor as to his action, in any respect, regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him. That is a bare fact that includes no action on his part. To this extent, at least, I am of opinion

that he is bound to appear and testify. But I will make no order on him for that purpose. Such order ought not to be made against the executive of the state, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order; if he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply, even if directed by an order. And, in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty." If we adopt this opinion as a sound exposition of the law, the case before us is determined; for the matter is left to rest solely on the opinion of the executive, although his opinion be clearly contrary to that of the court. We are inclined to think the conclusion thus reached is wise and discreet; and it is supported by the best text writers of our times. These state the law to be, that the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. The doctrine that the officer must appear and submit the required information or papers to the court, for its judgment as to whether they are, or are not, proper matters for revelation, is successfully met and settled in the case of Beaton *v.* Skene, 5 Hurlst. & N. 838, per Pollock, C. B. It was there held, that if the production of a state paper would be injurious to the public interest, the public welfare must be preferred to that of the private suitor. The question then arose, how was this to be determined? It must be determined either by the judge or by the responsible crown officer who has the paper. But the judge could come to no conclusion without ascertaining what the document was or why its publication would be injurious to the public service. Just here, however, occurred this difficulty, that, as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. The conclusion reached was, that from necessity, if for no other reason, the question must be left to the judgment of the officer.

A like case is that of Gray *v.* Pentland, 2 S. & R. 23. A subpœna, had been issued from the court below and served upon Governor Snyder and Secretary Boileau, with a *duces tecum*; a rule was also entered for the purpose of taking their depositions in Harrisburg. They declined to appear in answer to the subpœna,

or to permit their depositions to be taken under the rule, and refused to produce the paper or deliver it to the plaintiff. This paper was of very great importance, inasmuch as its production was necessary for the maintenance of the suit pending, the Supreme Court holding that, though it was beyond the plaintiff's power, parol evidence of its contents was not admissible. A motion was then made, on the part of the plaintiff, for a special *subpœna duces tecum* to compel the production of the paper, but this was refused. On argument in the superior court this action of the court below in refusing compulsory process against the Governor and Secretary of the Commonwealth does not seem to have been questioned; on the other hand, it was approved in opinions delivered by TILGHMAN, C. J., and BRACKENRIDGE, J. The latter was, as he said, inclined to think that the Governor could not be compelled to produce the paper transmitted to him; that it was within his own discretion to furnish or refuse it; and this on the ground of public policy. The chief justice observed, inter alia, that the Governor, who best knew the circumstances under which the charge had been exhibited to him, and could best judge the motives of the accuser, must exercise his own judgment with respect to the propriety of producing the writing. Thus the matter is treated as quite beyond the power of the court, and the judgment of the executive is regarded as absolute and final.

We next refer to the celebrated trial of Aaron Burr. Here is the case of one charged with treason; one who, by the express terms of the constitution, was entitled to compulsory process for obtaining witnesses in his favor. The judge before whom the examination was conducted was John Marshall, Chief Justice of the Supreme Court; a man renowned, not only for his legal learning, but also for his judgment and sagacity as a statesman; and the President was Thomas Jefferson, one not likely unduly to exalt executive prerogative or to refuse to the judiciary its just tribute of respect. We may, therefore, presume that whatever was done by the principal actors in the remarkable judicial drama then in progress, was well done. At the request of the defence a *subpœna duces tecum* was awarded and directed to the President requiring him to appear, and bring with him a certain letter from General Wilkinson to himself. He refused either to appear or produce the paper required. On discussion of the question, not whether compulsory process should be awarded against the President, for that was not so much as proposed, but whether the attorney-general should permit the defence to have the examination of a copy of the required letter which had been put into his possession, the chief justice said (as we find it set down in vol. 3, p. 37, Burr's Trial, as published by Westcott & Co., Washington City, 1807): "I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the

court in consequence of his not having attended, notwithstanding the subpœna was awarded agreeably to the demand of the defendant; the court would, indeed, not be asked to proceed as in the case of an ordinary individual." We find, also, in vol. 2, p. 536, of the same trial, published by Hopkins & Earle, Philadelphia 1808, the following recorded as the utterance of the chief justice: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. * * * In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge."

Influenced by this and the other precedents we have cited, as well as by reason and necessity, we are in like manner disposed to conclude that the propriety of withholding the information required by the grand jury, must be determined by the Governor himself: and the weight of the reasons influencing him in the conclusion at which he has arrived, is for himself and not for the court to consider.

Furthermore, as the Governor is the chief executive of the Commonwealth, and as such embodies the power of the people, for the conservation of the peace and the protection of the rights and property of the citizens of the state, as he is also part of the legislative branch of the government, it must be obvious to every one that there are times when he must be excused from the ordinary process of the courts. We presume it will not be contended that he would be obliged to obey the mandate of a subpœna during the sessions of the legislature, when his presence at the capitol is constantly required, or whilst engaged in the suppression of an insurrection. These, however, do not embrace all his duties as Governor; we must, therefore, go one step further, and concede that he is exempt from such process whenever engaged in any duty pertaining to his office. Granting that there may be times when he is not so engaged, and when he might be free to answer to a subpœna, who is to be the judge of his engagements or disengagements? May he be compelled to appear before a court and submit himself to the judgment thereof as to whether his duties, just then, require him to be in his office at Harrisburg, or at the head of the army in the field, or whether he may not have a few days of leisure, during which he may await the will and pleasure of a grand jury? It will be conceded that in all ordinary cases, he must himself judge as to what things he must do and what things he must leave undone, and that this is a duty imposed upon him by the constitution. But how then shall a court at any time, step in and assume the power of judging for him? This cannot be done except by an unwarrantable assumption of

executive prerogative. The same reasoning which brings us to the conclusion that the Governor is the absolute judge of what official communications to himself or his department, may or may not be revealed, in like manner leads us to conclude that he must be the sole judge, not only of what his official duties are but also of the time when they should be attended to. The Governor, disavowing any disrespect to the court or its process, has answered that, in consequence of his constant communication with the state forces, now in the field, in the disorderly and riotous districts, his time is fully occupied in the discharge of the duties of his office, and that to leave his post would endanger the interests of the public service. This brings us face to face with the question, whether the executive, or the courts for him, are to determine the character of his official duties and the order in which they may be performed. For instance, is obedience to a subpoena one of his duties, and if so, shall he discharge that duty in preference to that which rests upon him as commander-in-chief? The answer to this question is easy, for if the courts can in any one instance or at any one time, control or direct the executive in the performance of his duties, they may do so in every instance and at all times. We need not waste time in the attempt to prove that this proposition is not allowable; that the Governor cannot thus be placed under the guardianship and tutelage of the courts. To the people, under the methods prescribed by law, not to to the courts is he answerable for his doings or misdoings. It is his duty from time to time, "to give to the General Assembly information of the state of the Commonwealth," but it is not his duty to render such an account to the grand jury of Allegheny or any other county. Whilst, therefore, the motives of the Court of Quarter Sessions in granting the process before us, are not to be lightly impugned, yet we have no doubt it exceeded its jurisdiction in attempting to interfere with the executive prerogative.

Let the attachment be set aside.

Chief Justice AGNEW and Mr. Justice STERRETT dissented, the chief justice filing the following opinion.

The question before us belongs to the enduring theme of civil liberty, and not to ephemeral interest, passion or feeling. It falls within the emphatic words of the Declaration of Rights that "all power is inherent in the people, and all free governments are founded on their authority and instituted for their safety, peace, and happiness:" Sec. 2. The question is, whether any citizen, private or official, is above the process of that law, which protects and enforces these essential rights of the people—rights "excepted out of the general powers of government" in order to "guard against transgressions of the high powers delegated" to the mere organs of government: Sect. 26.

It is therefore a misfortune that this question has been marred

by false issues. The course of the railroad company, or its men; the behavior of the troops, near or remote; the action of the citizens of Pittsburgh, and the conduct of the Governor and his officers, have nothing to do with the question we must consider—a question belonging solely to the realm of law, and only obscured when false issues intervene. Like the glass of the astronomer, cleared of all distorting and prismatic rays, the judicial mind should be free from every divergent influence and discoloring bias.

The 21st and 22d of July last were days of great alarm in this city, and a series of fearful riots bore terror to the hearts of its inhabitants. In the midst of the tumultuous mass an armed military appeared. Pistols and muskets were fired, many were wounded, and more than twenty lives of citizens and soldiers were taken. Two millions or more of property were destroyed. A hundred locomotives were ruined, the roundhouse, and other railroad buildings, the great hotel, the grain elevator, and many hundred cars were burned. Vast amounts of merchandise of distant owners were consumed or stolen, and for nearly a mile the railroad tracks were covered with car-wheels, bars, bolts, and iron machinery of every kind.

A monstrous crime was committed. Blood ran in streams. Was this murder, manslaughter, or excusable or justifiable homicide? Property was despoiled. Was this arson, robbery or theft? Whose was the crime? Wrongheaded men united to remedy grievances by conspiracy and violence. A military force intervened. Death and spoil ensued. Were they called thither by lawful authority; or did they come at private bidding? Did the military attack, or were they attacked? Did they fire at command or by individual will? These were the fearful questions to be answered by some competent lawful authority. The state and distant communities are involved in the answer. The laws of the state have been violated, the "peace" of the people broken, and their "safety and happiness" endangered. To whom is inquiry given to obtain the facts, and present the guilty for trial and punishment? Not to the legislature. It has no judicial power. Not to the Governor. His duty is to "take care that the laws shall be faithfully *executed.*" He can neither try nor punish crime. Even a coroner's inquest, *super visum corporis*, is totally inadequate to determine the full scope, character and purpose of a riot of this immense magnitude, and the various parts played by all the actors. No individual pursuit can suffice, for private prosecutors have neither the interest, the inclination, nor the ability to reach the breadth and scope of such a scene of bloodshed and ruin.

To the judiciary alone belongs this power and duty; to it only is the means given to summon juries and witnesses for both inquiry and trial. Under the constitution and laws of the land, it [illegible] the Act of 16th June 1836, "relating to

the jurisdiction and powers of the courts," and embracing all courts, commits to the Oyer and Terminer authority "to *inquire* by the oaths and affirmations of good and lawful men of the county of all crimes committed or triable in such county," and also "to hear, determine, and punish the same:" Sect. 14. To the Court of Quarter Sessions is given "the jurisdiction and power" "to *inquire* by the oaths or affirmations of good and lawful men of the county, of all crimes, misdemeanors, *and offences whatever*, against the laws of this Commonwealth, which shall be triable in the respective county:" Sect. 16. It is then empowered to certify into the Oyer and Terminer all offences cognizable there, and to try those over which it has jurisdiction. After the distribution of powers to the several courts—Common Pleas, Quarter Sessions, Oyer and Terminer and Orphans' Court—the act then gives to all alike certain powers, viz.: to levy and recover fines, forfeitures, &c.: Sect. 20. To make rules of practice, &c.: Sect. 21. The 23d section proceeds: "Each of said courts is empowered to issue writs of subpœna under their official seal into *any county* of this Commonwealth, to summon and bring before the respective court *any* person to give testimony in *any* cause or *matter* depending before them, under the penalties hitherto appointed and allowed, in any such case by the laws of this Commonwealth." The Act of 14th April 1834, "relating to the organization of the courts of justice," makes the grand, as well as the petit jury, a lawful part or arm of the court for the administration of justice. The power to compel witnesses to come before the grand jury is, therefore, precisely on the same footing, as to require them to appear before the petit. Both are derived from the same law, and stand on the same power, the act being careful to command *any* person to appear to testify in *any matter* as well as *any cause*. And if the law had not been so precise, the power would necessarily flow from the "jurisdiction and power" conferred to "*inquire* by the oaths and affirmations of good and lawful men of the county, of all crimes, misdemeanors, and offences whatever against the laws of this Commonwealth." There is common-law authority also. Says Hawkins, in his Pleas of the Crown (vol. i., ch. 6, p. 65): "It is also a high crime to disobey the king's lawful command or prohibition, as for refusing to give evidence to a grand jury concerning a crime, for which the court may impose an immediate fine." This was decided by Lord Holt in The King *v.* Lord Preston, committed by the Court of Quarter Sessions for refusing to give evidence to the grand jury: 1 Salk. 27–8. The same law is stated by Mr. Chitty, vol. i., Cr. Law 320. Another evidence that the source of this power arises in the jurisdiction of the court acting by means of its grand jury arm, is the fact that the court will, in delicate cases, direct the evidence to be heard in the court, so that the grand jury may be

better assisted in the performance of their duties: 1 Chitty Cr. Law 312, 313.

An immense riot, involving high crimes, and a multitude of persons whose identity, names, participation and guilt or innocence must be ascertained, in order to proceed to trial and punishment, can be brought to legal knowledge only by a grand jury charged with this duty. A riot is one of those great public offences which is conceded by the authorities to be the special subject of inquiry in this mode. If, then, the court can charge the grand jury as its legally appointed means, expressly given by the Act of Assembly, to make inquiry, it follows, as a necessary logical consequence, that the inquiry must be made *per testes* brought before them by due process of law; for the scope, and all parties to such a riot, cannot be a matter of personal knowledge.

This much said upon the grand jury as a constituent in the administration of criminal jurisprudence ought to be sufficient. But its powers have been denied, rendering something more necessary. It is one of the boasted bulwarks of English liberty handed down to us, and protected by the Declaration of Rights. No man can be tried for a crime except upon a bill of indictment duly found by a grand jury. Hence, the accused may challenge the array or individual jurors: Brown *v.* Commonwealth, 23 P. F. Smith 321; Id., 26 Id. 319; Lynch *v.* Commonwealth, 27 Id. 205. "Our laws (says a well-known writer) have therefore wisely and mercifully placed the strong twofold barrier of a presentment and a trial by jury between the liberties of the people and the prerogative of the crown:" 2 Tomlin's Law Dict. 307. Therefore the constitution declares: "The trial by jury shall be as heretofore, and the right thereof remain inviolate." Sect. 6. "Heretofore" means according to the course of the common law: Van Swartow *v.* Commonwealth, 12 Harris 131. The oath of the grand jury is, "diligently to inquire, and a true presentment make, as well of all such matters as shall be *given them in charge* as of those things which they *may* know of their own knowledge." "Grand juries (says Judge Addison) inquire only into crimes, but they inquire of *all* crimes." "No criminal charge can be brought into a court of justice in this state unless it have acquired the sanction of a grand jury:" App. 36. "To the grand jury (he says) is committed the preservation of the peace of the county, the care of bringing to light for examination, trial and punishment, all violence, outrage, indecency and terror, everything that may occasion danger, disturbance or dismay to the citizens. Grand juries are watchmen stationed by the laws to survey the conduct of their follow-citizens, and inquire where and by whom public authority has been violated, or our constitution and laws infringed:" App. Speaking of the judicial branch of the government, he says: "This branch consists of two superior parts, a court and

jury." * * * "Juries selected from the people by an officer of their own election are so numerous and so frequently changed, that they may well be considered as the people themselves exercising this branch of the administration:" App. 55.

A *charge* to a grand jury to inquire of a matter is either oral by the court, or in writing by the district-attorney in the form of a bill. The oral charge is where criminal courts (says Judge King) "of their own motion call the attention of grand jurors to, and direct the investigation of matters of general import, which from their nature and operation in the entire community justify such investigation." "Such (he says) as great riots that shake the social fabric, carrying terror and dismay among the citizens:" 1 Whart. Cr. Law, sect. 458, note.

Thus the constitutional power of the grand jury to inquire into the riots of July 21st and 22d being fully established, the inquiry implies evidence, evidence implies witnesses, and witnesses the process to bring them. Here I must notice two technical objections, one that the subpœna commands attendance before the grand jury itself. This is wholly unsubstantial. According to ancient practice the grand jury having no power to administer oaths, the witnesses came into open court, were sworn there, and then orally commanded to go before the grand jury: 1 Chit. Cr. Law 312, 313. This is noticed in the note to 7th Smith's Laws 686, and the practice of other states recommended to be adopted, of sending the witnesses at once before the grand jury, and saving the time of the court. Accordingly long ago a law was passed (now incorporated into the Criminal Procedure Act of 1860) authorizing the foreman to administer the oath. The witnesses are now sent immediately up. The subpœna, therefore, under the seal of the court, tested by the judge and signed by the clerk, was strictly correct in commanding the witnesses to appear before the grand jury. It is the written, instead of oral, order of the court.

Another objection is that it states no parties. This is made without adverting to the fact that it is process awarded upon an inquiry, and before parties are known. The very purpose of the inquiry is to ascertain the parties to be presented for indictment. It is strictly proper and fully to the purpose, viz: "To testify all and singular those things you shall know touching a certain investigation now being had on formal presentment by and before the said grand jury, relating to the late riot in July last in our said county." This is sufficient for the purpose of inquiry. The remainder of the printed form used by the clerk was necessarily left a blank, there being no parties to be named in it. It was necessarily on the part of the Commonwealth, for a defendant cannot appear with witnesses before the grand jury. It was asserted in argument that the grand jury had no special charge to ground the inquiry. This is wholly incorrect. I have read the able charge

of Judge Kirkpatrick, and find it direct and pointed upon these very riots, and very full of instruction upon the entire subject of riots, routs, and unlawful assemblies. But if it were not so clear and pointed, it was followed by a special written request of the grand jury, "to give the said matters (these riots) in charge to them, and to furnish them compulsory process to secure the attendance of such witnesses as they may consider necessary to examine." This paper was endorsed by the judge himself, "considered, *approved*, and ordered to be filed." Here then was a direct committal to the grand jury, and the process was issued accordingly.

Much space has been devoted to a vindication of the jurisdiction of the court and the province of a grand jury. But the lustre of this great common-law heritage for the protection and security of the people, aud the light it has borrowed from our own legislation, have been so dimmed by denial and obscured by doubt, it has seemed to be necessary. The labor, moreover, is not vain, for all this bears directly on the great question to be considered, to wit: the constitutional power of the court to require the Governor of the state to appear for examination before this arm of its jurisdiction.

We come now to this immediate question, and the first point to be noticed is the argument that he is exempt from a subpœna because he is a *co-ordinate* branch of the state government. What is co-ordination or *equality of rank*, under the constitution? It is not the absolute independence of each. If it were, the end would be disorder, conflict, and finally disorganization. It is not absolute superiority each over the others, for then they would not co-exist in unity, as essential parts of the same common whole. The constitution is the written will of the people, in its entirety, and all its parts must necessarily cohere without jarring, in order to effectuate that will. Equality of rank implies no superiority, except in the exercise of the particular function confided to that rank. Co-ordination is merely the vesting of the separate functions of making, determining and executing laws, in different persons, that thereby the union of all in one person or body may not work injury to the public welfare. The Assembly cannot try causes or execute process, the Governor cannot legislate or decide judicial controversies, and the Judges cannot make and execute laws. This is the general distribution of the powers of the government, yet the constitution itself does not strictly adhere to it. Thus the legislature may make certain inquiries, and try certain cases, *e. g.*, the election and qualification of members, contempts, expulsions. The Governor approves or vetoes bills, and the courts superintend and enforce the execution of process. But from the very nature of co-ordination in one and the same government, and the distribution to each branch of its appropriate functions, each is necessarily supreme in its own department, for neither can freely exercise its proper functions if obstructed by the other. For example, *the judiciary*

cannot control or interfere with the discretion of the Governor in the exercise of an executive function. And for the same reason the legislative and executive branches cannot control the appropriate functions of the judicial. If the legislative or executive can oppose or obstruct the exercise of an appropriate judicial power the purpose of separation is defeated; a practical union takes place in them, and the surrender by the judiciary is effected. One of the appropriate and exclusive functions of the judiciary is the detection, trial and punishment of offenders against the law. On the true principles of constitutional co-ordination, therefore, the Governor cannot obstruct this function, and must yield obedience to the judicial branch in this respect as the appropriate and superior repository of the power conferred by the people themselves. When arguments are properly drawn from the distribution of the powers of government among co-ordinate branches their force must be conceded. But when their use is inconsistent with the rights of the people who have made this distribution for their own benefit, the argument is fallacious. Then it flies in the face of the Declaration of Rights (sect. 2, already quoted), "that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness." This right being reserved by the 26th section out of the powers conferred in the constitution, it follows no use can be made of the distribution of powers prejudicial to their "peace, safety and happiness." The appropriate function of the judiciary being the detection, trial and punishment of offenders, and the inquiry for this purpose by witnesses being the constitutional and legal mode of procedure, it is equally clear the Governor, just as any other citizen, being subordinate to the judicial power *in this respect*, must yield his obedience to the process necessary for the exercise of this judicial function. Good government and the welfare of the people demand this.

This superior function of the judiciary is to be seen in another aspect. There never was a time when it has not been engaged in passing upon the acts of both the other branches, in resolving the constitutionality and interpretation of laws, and the regularity of executive acts. This needs no citation of authority. "It is idle," says C. J. GIBSON, "to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce its limitation." "From its very position it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency." "It has become," he adds, "the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small:" De Chastellux *v.* Fairchild, 3 Harris 18. How futile would be the judicial power to punish crime, or vindicate innocence, if the Governor, having exclusive knowledge of facts bearing upon either, could defy the process of the law at pleasure. To argue that his official character is a ground of denial of obedience, is to rob the people, whose servant he is, of their undeniable right to the due administration of justice, through that department of the government to which they have committed the right of judgment. To say he may be liable in an action for damages, is no response. If not bound to appear, no right of action can exist, for he is under no duty to the party. If it be a criminal prosecution, there is no party to whom he could respond. So impeachment cannot reach him, for that is no impeachable offence which is no violation of duty. An obligation to answer the subpœna is the postulate in either case. To say he must appear upon an indictment, and need not upon a legal inquiry, is equally unsound. For the inquiry of a grand jury is, as we have seen, the constitutional exercise of the power of the court, in order to try and punish offenders. To discriminate between inquiry and trial, as a question of power, is to emasculate judicial rights, and dethrone those of the people.

And now we may crave aid from other sections of the Declaration of Rights. "In all criminal prosecutions, the accused hath a right inter alia to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage:" Sect. 9. "All courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay:" Sect. 11. These may be taken in connection with the 6th sect.: "that trial by jury shall be as heretofore, and the right thereof remain inviolate." Trial as *heretofore*, we have seen, implies inquiry and indictment. Now, the private rights of individuals, as thus enforced, are manifestly not superior to the administration of public justice for the welfare of the people as set forth in the 2d sect. already quoted. Indeed, public rights are in many respects superior to individual rights, and the enforcement of the private right of a speedy trial implies the public duty, as well as right, to prosecute offenders, and consequently the means of doing so. Thus in every aspect the constitution, as the supreme law, commands the presence of every person, in private or official life, when his testimony is necessary for the due administration of justice. If, then, he be liable to process, and bound to appear, it is a necessary corollary, that he is liable to attachment for his disobedience to the command of the law.

The argument *ab inconveniente*, that it is necessary the Governor should always be at the seat of government, is preposterous, in view of frequent visits elsewhere, of business, courtesy, and pleasure. The absence of the Governor in the Rocky Mountains, on his way to California, at the time of these riots, is an apposite example

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When his presence is needed elsewhere, no court in the state would soil its ermine by a rude assault on his person. In all governments, composed of co-ordinate organs, there will be some friction; but right-minded men, mindful of their just powers, and their own dignity, are ever ready to pour oil on the points of contact.

Coming now to the practical test of the question, let us return to the facts. There were fearful crimes committed on the 21st and 22d of July. These are the undoubted subjects of judicial inquiry in the mode prescribed by law; to wit, through a grand jury. In that unknown and vast multitude of citizens and soldiers, who were guilty? Who were innocent? By the 22d section of the Declaration of Rights, it is declared that the "military shall in *all cases*, and *at all times*, be in *strict subordination* to the *civil* power." The military took many lives—the multitude some. Did the military act under the authority of the civil power? This is one of the first points of inquiry by a grand jury, for it involves the question, whether their acts were murder, manslaughter, excusable or justifiable homicide. Thus the evidence of civil authority becomes essential to the inquiry. Did the Governor, as commander-in-chief, command their presence, and aid in quelling the violence of the mob? Or was his authority assumed by unauthorized persons? These are questions which the Governor alone, as a witness, might be able to answer satisfactorily, by competent testimony in a common law proceeding. They are not state secrets, but acts of authority in their very nature public, and cannot be concealed from the inquiry of the law. The right of life and public safety are too sacred to be subordinated to any right to conceal the authority by which they are destroyed or jeoparded. If the executive authority was duly given, he neither can nor ought to withhold the knowledge which acquits of crime the military acting under his own orders. Indeed, from the character of our excellent Governor, he would not for a moment refuse to come to their rescue, if he believed his duty demanded it. On the other hand, if his authority was unlawfully assumed, or was simulated, or was exercised at the bidding of persons without right—an inference which his absence in California very naturally raises—and the military have been involved in an unlawful act, his duty and the rights of the people demand his testimony, that the parties who have thus misled them may be reached. This is no state secret as to them, but its concealment is a crime against society, which no one who knows the Governor would attribute to him, if aware of his duty.

At this point the case of Gray *v.* Pentland, 2 S. & R. 23, may be noticed. There the deposition sent to the Governor affecting Pentland's character was a privileged communication, and protected by the Governor's discretion, for otherwise he might be deprived of necessary information in the performance of official duty. Hence the court in an exercise of sound discretion would not compel its production. But, here, the authority of the Governor to call out

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the troops to aid in suppressing a riot is in its nature a public act, and his testimony is necessary to vindicate their rights, or to reach others if unauthorized by him. In every aspect of personal and official duty, the state has a right to the disclosure. A contrary doctrine strikes at the essential and fundamental principles of a free government as set forth in the Declaration of Rights.

Analogies also prove the truth of the general doctrine, that no officer, high or low, is above the demands of justice, or above the process of the law. For example, if the Governor's pardon, or other official acts be forged, or stolen, or procured by fraud or duress, is it possible he is not liable to be summoned before a jury, grand or petit, inquiring into the fact? His deposition cannot be taken in a criminal prosecution. Indeed there is no difference between a civil and a criminal issue, for the power to subpœna him to give his deposition is just as essential. So he is called to perform many acts of statutory duty. Is he exempt from subpœna when any of these acts become the subject of judicial inquiry? And if by courtesy he be permitted to be excused, on what principle does this apply to his chief officers of state? The cases in Pennsylvania abundantly prove that a *mandamus* will lie to them to compel the performance of ministerial duties: Griffith *v.* Cochran, 5 Binn. 87; Commonwealth *v.* Cochran, 6 Id. 456; Commonwealth *v.* Cochran, 1 S. & R. 473. So the court will restrain by injunction: Mott *v.* Pennsylvania Railroad Co., 5 Casey 33, 41. Doubtless this court cannot interfere with the *discretion* of the Governor in the performance of any proper executive function, for in that his province is superior. Argument is not needed to prove this, yet it is the great work of the opposite opinion, while no labor is bestowed to vindicate the power of the Governor to obstruct the punishment of crime, by a refusal to testify. A subpœna to testify is not an interference with that discretion. It has the force of a summons or notice, not an arrest. This has been decided in two cases: United States *v.* Cooper, 4 Dall. 341, and Respublica *v.* Duane, 4 Yeates 347. In the former, Judge Chase said he knew of no privilege to exempt members of Congress from the service of a subpœna, though by the constitution they are exempt from *arrest* in all cases except treason, felony, and breach of the peace. In the latter case, Judge Yeates, citing a similar provision in the constitution of the state, held that the service of a subpœna is not an arrest, and that the court may grant an attachment or not according to the existing circumstances. These decisions bear directly on the question before us, for as to members of the assembly there is an express provision against arrest in all cases except treason, felony, breach and surety of the peace, and violation of their oath of office. Now the constitution makes no exemption whatever of the Governor, and he is brought directly within the maxim *expressio vel designatio personæ est exclusio alterius:* Co. Litt. 210, a. The decision in Respublica *v.* Duane, *supra*, is, therefore, strongly in point. But

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a case exactly in point, decided by that great judge and statesman, Chief Justice Marshall, is found in the trial of Aaron Burr for high treason: vol. 1, pp. 177 to 188. The following points were adjudged: 1. That a subpœna to the President of the United States can be issued. 2. That it can go with a clause of *duces tecum* to bring a letter in the possession of the President. 3. That it can be issued before indictment found. 4. That the refusal of the President is a subject for the exercise of the sound discretion of the court. On page 181 the chief justice, after stating that he is not aware of any decision that a subpœna cannot issue to the President, says that "it is not known ever to be doubted, that the chief magistrate of a state might be served with a subpœna *ad testificandum.*" A prominent feature of that case was that Col. Burr was prosecuted with intense earnestness, I might say bitterness, by the most eminent counsel in the United States (friends also of President Jefferson), who conceded the power to issue the subpœna. The same question arose again on the subsequent trial for a misdemeanor, and the same decision was made. Said Chief Justice Marshall: "That the President of the United States may be subpœnaed and examined as a witness, and required to produce any paper in his possession is not controverted:" Burr's Trial, vol. 2, 535. He then discusses the question of the propriety of compelling the production of the letter of General Wilkinson, stating some reasons very similar to those in our case of Gray *v.* Pentland, *supra*, for which a court would refuse compulsory process.

But assuming a case where the court would decline to compel the production of a paper or an answer to an oral question, it does not dispense with the Governor's attendance for examination, unless no other ground were alleged. But how does the governor know in advance what will be the subject of his examination? *Non constat* that any question will be asked on a privileged matter. If such be asked, he can decline answering and refer the privilege to the court, which will decide it, just as it will the privilege of counsel, without requiring disclosure of the matter itself. Its nature is all the court need know.

Another point may be noticed. It is said the imprisonment of the Governor under the attachment would leave the state without a head. The case is hardly supposable, for when the Governor knows it is his duty to obey he will do so. Certainly Governor Hartranft is not a gentleman who would be guilty of a *voluntary* contempt. If *voluntarily* guilty, he would deserve attachment for the dereliction of the law, which his own oath requires him to see faithfully executed. Impeachment, which has been insisted upon, is a harsher remedy; for the undeniable fact of his refusal to obey the process, would be the inevitable ground of removal from office. If, however, his disobedience be *involuntary* in consequence of pressing official duties, a court which would disallow his excuse would be visited

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with the highest censure. But assuming a voluntary contempt and imprisonment still the position is untrue. The state is not without a head, for the 13th sect. of the 4th art. of the constitution provides: "in case of the death, conviction on impeachment, failure to qualify, resignation, or *other disability* of the Governor, the power, duties and emoluments of the office for the remainder of the term or *until the disability be removed*, shall devolve upon the Lieutenant-Governor." The 14th section provides for the disability of the Lieutenant-Governor, and devolves these duties on the Speaker of the Senate. It is said imprisonment is no disability, which is as much as to say the Governor may be in prison in Allegheny county and at the same time, at the seat of government, signing or vetoing bills or performing other duties. If no disability, then the state retains its head. But if the Governor be disabled from being in two places at the same time, then the disability brings the 13th sect. into play, and the state is provided with a constitutional substitute. *Quacunque via data*, there is a chief executive.

It is said the Governor is the representative of the people, and therefore not responsible. *This is true of executive duties*, for therein the constitution, the adopted will of the people, is his warrant of authority; but it is untrue of judicial powers, for therein the judiciary represents the people, by the same warrant of authority; and if he violate the law, which it is the province of the judiciary to enforce by their authority, he is liable to the law. In a government of law instituted by a free people for their own benefit, there is no royal prerogative to do nothing wrong; and therefore there can be no representation of their dignity such as can strike down their law and prevent its administration by its appropriate functionary.

On no ground of the constitution, law, public justice, state policy, or sound reason, can I discover any exemption of any officer in the state, high or low, from the common duty all citizens owe to the due administration of justice. With these views, I cannot consent to rob the judiciary of its constitutional powers, and exalt the executive above the demands of justice and the safety and welfare of the people. I cannot abnegate a power intrusted to me by the people, and will return to them a commission, soon to expire, unsullied by any dereliction of duty, or obeisance at the shrine of unwarranted power.[1]

[1] Note.

C. J. Agnew.—In my opinion I corrected the error of statement of counsel that there was no special charge to the grand jury committing to them the subject of the riots. Finding that the opinion of the court has followed the erroneous statement, I append hereto several paragraphs exhibiting the careful instruction of his Honor Judge Kirkpatrick, whose MSS. charge I have read, filling, on this particular subject, more than two columns of a newspaper closely printed in fine type, and containing the most special instructions on

[Appeal of Hartranft *et al.*]

the subjects of *strikes, conspiracy, arson, riotous arson, riot and riotous homicide.* It is but sheer justice to the judiciary and grand jury of Allegheny county that no such error should be perpetuated against them.

EXTRACTS.

"*A class of cases and offences, however,* to which as yet I have made no allusion, *compel themselves upon our attention,* and which very recent events would seem to indicate, *will of necessity have to be passed upon and considered by you.* I allude, of course, to such cases as have their origin in and grow out of the recent riots and disturbances with which we are all, unfortunately, too painfully familiar. It is a matter of most unenviable notoriety that, on the occasion referred to, our always heretofore peaceable and law-abiding community was shocked and startled as by 'a fire bell at night,' by the fact that upon the streets of this peaceful and peace-loving city a great riot was in full progress, which, in the numbers of its participants, the wide-spread extent of their operations, and in the absolutely appalling nature and character of its apparent results, was calculated to strike terror into the very heart of our community. It seemed, indeed, for a time at least, on that not soon to be forgotten mid-summer Sabbath day, as if the very rankest communism of Paris had been let loose in our midst, and that the bloused *petroleuse* of the faubourg San Antoine and the heights of Mont-Martre were at their work, and plying their terrible vocation in the very streets of Pittsburgh. Surely there are no terms and no forms of speech or expression too broad by which to speak of and denominate such crimes, and no punishment too severe which can possibly await their clearly proven guilty perpetrators."

* * * * * * * * *

"*Let me now call your attention to a still darker page in the history of this 'reign of terror,' and some of the crimes and consequences which followed from its brief existence.* I allude to the events transpiring about the Union depot, the round-houses, Twenty-eighth street and their adjacent neighborhood. In so calling it a 'reign of terror,' I speak advisedly and upon deliberation, for so to all who witnessed it, it certainly was. For if we had not with us in the flesh that triumvirate of infamy, Danton and Robespierre and Marat, we at least had them with us in spirit, brooding and hovering over our saturnalia of crime, and directing their most legitimate and bloody successors, whomsoever you may discover them to be, to destroy property, to commit pillage and riot, to light the incendiary's torch, and to cause (as did they in the highways and byways of Paris) the blood of innocent men and women, aye, and of children, too, to stain the stones and streets of this quiet and law-loving city."

* * * * * * * * *

"'This general duty, this universal obligation,' continues the same learned Judge King, from whom we have already quoted, 'extends to the *citizen soldiers,* who, in common with all other members of the community, are required to be assistant in the maintenance of the public peace on the call of the civil magistrate. They are subject to the same penalties in case of neglect or refusal to appear as any other citizen summoned by the sheriff. They do not on such occasions act in their technical character as military. *When assembled, they are but a part of the sheriff's posse, and act in subordination to and in aid of that officer,* who is the true and responsible chief of all forces summoned under his authority. If the soldiers act in any manner not authorized by law they are amenable for such acts, not to the military but the civil law. In brief, as to all rights and authorities they stand on the same footing with other citizens summoned by the sheriff, and compose, with them, his posse."

Appeal of C. G. Christie and R. P. Scott.

1. C. was the owner of a leasehold property of five acres with an oil-well and machinery, &c., on it, and leased it to D. for ten months, with conditions for a sale. D. paid two hundred dollars in cash, and agreed to pay the balance of the purchase-money in several payments, and when all were made C. agreed to make a bill of sale of the property to D. If D. failed to make the payments at the times specified his rights to the premises were to cease and determine and the payments made prior to such default were to be treated as liquidated damages. D. went into possession and made but one payment. The property at the suit of M. was levied upon and sold by the sheriff as the property of D. *Held,* that the agreement was a lease, with a condition for a sale at the end of the term, provided that the payments were made at the times specified, and a failure so to make them resulted in a forfeiture of D.'s rights and a reinvestment of the same in C., and that the sheriff's vendee took no title under the levy and sale as the property of D.

2. This case is distinguished from Martin *v.* Mathiot, 14 S. & R. 214, as the property in that case consisted of personal chattels and in this of chattels real.

November 13th 1877. Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD and STERRETT, JJ.

Appeal from the decree of the Court of Common Pleas of *Butler county:* Of October and November Term 1876, No. 226.

After the bill in equity and answer were filed in this case it was agreed to submit the whole case, as stated in the bill, and the title to the property, to the court, without the intervention of a jury, with the right of either party to take testimony. The bill was filed by Edward Bailey against the appellants, and averred that, on February 17th 1876, plaintiff purchased from one R. L. Carlin a certain leasehold, containing about five acres of land, situate in Butler county, together with machinery, &c., and an oil-well, known as "the Emery & Caldwell" well, for $1900 in cash, and received on that day from the vendor possession of the property so purchased; that on February 18th 1876, plaintiff was arrested at the instance of defendant, Christie, for forcible entry and detainer, and at the time of the arrest defendant, Scott, took possession of the property; that on February 2d 1876, defendant, Christie, purchased at a sheriff's sale, for $50, all the right and title of one Cranmer of, in, and to the said property; that all the right that he (Cranmer) had was under certain articles of agreement, dated December 10th 1875, in which said Carlin, in consideration of one dollar, leased for ten months to said Cranmer the said five acres, well and fixtures, &c.; $200 were to be paid at the time of the execution of the lease, $500 in two months from its date, $500 in four months, $500 in six months, $500 in eight months, and $175 in ten months. Upon the payment of the aggregate of said sums of money Carlin agreed to execute to Cranmer a bill of sale of said property. It was agreed that, upon a failure to pay at the times specified, all the right of Cranmer in the property should cease and determine, and that all payments previously made should be con-

UNIVERSITY OF ILLINOIS

Law Forum

VOLUME 1975

COLLEGE OF LAW — UNIVERSITY OF ILLINOIS

PRESIDENTS AND EX-PRESIDENTS AS WITNESSES: A BRIEF HISTORICAL FOOTNOTE

*Ronald D. Rotunda**

WHEN Richard Nixon resigned the Presidency, it was clear that his legal problems were only beginning. Although he has now been granted immunity from federal prosecution by President Ford's surprise pardon, Mr. Nixon remains subject to civil liability and state prosecution for past acts. He has already been subpoenaed to testify in a civil deposition. Assuming that his appearance is not excused because of ill health, he may well be called in other civil and criminal trials, as well as future grand jury or congressional investigations, although he was not a witness in the main Watergate trial.[1]

On the eve of Mr. Nixon's resignation, some political leaders urged that he be spared these legal obligations.[2] Even now, many people believe that subjecting Mr. Nixon to the burden of testifying before various judicial or congressional bodies would be vindictive, and demeaning both to him and to the institution of the Presidency. Such beliefs are groundless when placed in historical perspective. Several American Presidents and former Presidents have given testimony under oath in judicial or quasi-judicial settings. In the past, both former Presidents and sitting Presidents have submitted, either voluntarily or pursuant to subpoena, to questions under oath. In so doing they implicitly recognized the common law rule that

> . . . [t]he public (in the words of Lord Hardwicke) has a right to every man's evidence. Is there any reason why this right should suffer an exception when the desired knowledge is in the posses-

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1. United States v. Mitchell, Crim. No. 74-110 (D.D.C., filed May 20, 1974). In addition to Watergate-related matters, Mr. Nixon may be summoned for other investigations. Senator Baker has hinted Mr. Nixon may be called to testify in the probe of CIA domestic surveillance. Wash. Post, Jan. 28, 1975, at A11, col. 1.
2. *See, e.g.*, Wash. Post, Aug. 9, 1974, at A7, cols. 4-5, A23, col. 1.

sion of a person occupying at the moment the office of *chief executive* of a state?

There is no reason at all. His temporary duties as an official cannot overcome his permanent and fundamental duty as a citizen and as a debtor to justice.[3]

This article does not set out all the circumstances under which a former or sitting President may legally be compelled to give evidence before a congressional or judicial body. Rather the purpose is only to make some historical observations that should prove helpful to the debate. A collection of these historical examples,[4] many of which have heretofore been lost in the dust of the National Archives, should also serve to demythologize the Presidency. It is to this history that we now turn.

Several Presidents have appeared voluntarily as witnesses in a variety of contexts. One of the most interesting appearances before a congressional body occurred in the midst of the Civil War, when President Lincoln made a surprise visit to the House Judiciary Committee.

President Abraham Lincoln. Prior to delivery, one of Lincoln's messages to Congress was leaked to the *New York Herald* and promptly published. It was immediately alleged that Mrs. Lincoln, often suspected of being a Southern sympathizer, had given the speech to one Henry Wycoff, who telegraphed it to the *Herald*.[5] In an investigation conducted by the House Judiciary Committee, Wycoff admitted that he had sent part of the speech to the *Herald*, but refused to reveal his source. Then Lincoln, to still the rumors and protect his wife, appeared before the Committee. A newspaper of the day reported:

> Mr. Henri Wikof yesterday (Feb. 13, 1862) went before the Judiciary Committee, the President having previously been with the same Committee, and answered the question as to the person who surreptitiously furnished him with an advance copy of the President's Message. Though it is not certainly known what the answer was, it is understood that the White House gardener, Watt, was the delinquent.[6]

Unfortunately, the original hearings, which have never been published, are ambiguous on the question of Lincoln's presence.[7] Nevertheless, several other contemporary newspapers refer to the same incident, and this corroboration should suffice to establish its authenticity.[8] After Lincoln's appearance and Wycoff's accusation of the gardener, the matter was dropped.[9]

President Ulysses S. Grant. President Ulysses S. Grant once eagerly submitted to a criminal deposition to aid his confidential secretary and close friend, General Orville E. Babcock. In 1875, Grant's Secretary of the Treasury, Benjamin Bristow, uncovered extensive distillery rings that had been defrauding the federal government of millions of dollars. Two of Grant's closest friends, General John McDonald and General Babcock, were indicted as a result of these disclosures. McDonald was eventually convicted for his role in the so-called Whiskey Fraud Cases; but the President, perhaps out of misguided loyalty, was determined to aid Babcock. Grant announced to his Cabinet that he planned to go to St. Louis to testify on behalf of Babcock. Dissuaded of this plan, he gave a three hour deposition attended by the Chief Justice, the Attorney General, and Treasury Secretary Bristow. Grant testified that Babcock never talked to him about the Whiskey Frauds and that he knew of nothing connecting Babcock with the frauds.[10] Babcock was acquitted.

President Theodore Roosevelt. Theodore Roosevelt, quoted several times by the departing Nixon, twice testified before congressional committees investigating events that occurred during his Presidency. He testified in 1911 before a special House committee about a questionable acquisition by United States Steel, which he had allowed while he was President. In 1912 he testified before a Senate subcommittee about the propriety of certain corporate contributions to his 1902 presidential cam-

3. 8 WIGMORE, EVIDENCE § 2370(c) (McNaughton ed. 1961) (emphasis in original).

4. Excluded from this historical analysis are those instances in which selected Congressmen have met with the President at the White House or a similar place such as Camp David. In those instances, of which there are many, Congress is meeting at the call of the President; the President is not meeting at the call of the Congress. Similarly excluded are appearances by the President before Congress to deliver a formal address and appearances not intended to give evidence about factual matters. The most obvious example is the State of the Union Address. A less well-known incident is President Washington's only appearance before the full Senate in August 1789 for its advice and consent to some propositions respecting a treaty with the Southern Indians. *See* THE JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA 1789-1791, at 124-30 (1965); W. HOLT, TREATIES DEFEATED BY THE SENATE 28-33 (1933). Washington was displeased that the Senate did not approve the treaty forthwith, and aside from his reappearance the following Monday, "no President of the United States has since that day ever darkened the doors of the Senate for the purpose of personal consultation with it concerning the advisability of a desired negotiation." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 56-57 (3d rev. ed. 1948).

5. J. TURNER & L. TURNER, MARY TODD LINCOLN: HER LIFE AND LETTERS 97-98 (1972).

6. N.Y. Tribune, Feb. 14, 1862, at 4, col. 2.

7. *See* The Manuscript Hearings of the Judiciary Committee, National Archives Bldg., Record Group 233.

8. N.Y. Times, Feb. 14, 1862, at 8, col. 1; Philadelphia Inquirer, Feb. 14, 1862, at 1; N.Y. Herald, Feb. 14, 1862, at 1, col. 2; Boston Morning J., Feb. 18, 1862, at 4.

9. Popular history refers to other supposed appearances by Lincoln, but these have never been authenticated. President Ford's recent personal appearance before a House subcommittee to answer questions that had been raised concerning his pardon of Mr. Nixon should, like Lincoln's appearance, serve to allay the fears of those who believe a stigma attaches to a President or former President who assumes the role of an ordinary witness. Ford's appearance may thus serve to demythologize the Presidency.

10. *See* N.Y. Times, Feb. 13, 1876, at 1, col. 4; *id.*, Feb. 14, 1876, at 1, col. 7.

paign.[11] During the United State Steel hearings, he said that "an ex-President is merely a citizen of the United States, like any other citizen, and it is his plain duty to try to help this committee or respond to its invitation."[12] For a former President to testify voluntarily about the circumstances surrounding a questionable corporate acquisition or campaign contribution is hardly without precedent.

In several instances, the appearance or production of evidence by a President or former President has been involuntary. Nonetheless, compliance with the subpoena was effected without noticeable damage to the Office of the Presidency.

President Thomas Jefferson. Prior to the recent decision in *United States v. Nixon*,[13] perhaps the most famous case in which a President was required to give evidence was *United States v. Burr*.[14] In *Burr*, Chief Justice Marshall, sitting on circuit during the treason trial of Aaron Burr, held the President was subject to subpoena.[15] The treason trial of the former Vice President was in its third week when Burr announced that he intended to "issue a subpoena to the President of the United States, with a clause requiring him to produce certain papers; or in other words to issue the subpoena duces tecum."[16] Burr intended to obtain a letter from General James Wilkinson to President Jefferson on October 21, 1806, as well as documents containing instructions to the army and navy "to destroy" the "person and property" of Burr.[17] After argument and several days of debate in court,[18] Marshall firmly rejected the notion that President Jefferson en-

11. *See House Special Comm. Hearings on the Investigation of the United States Steel Corporation*, 62d Cong., 1st Sess. 1369-92 (1911); *Subcomm. of Senate Comm. on Privileges and Elections, Campaign Contributions, Hearings pursuant to S. Res. 79 and S. Res. 386*, 62d Cong., 2d Sess. 177-96; 469-527 (1912).

12. *House Special Committee on the Investigation of the United States Steel Corporation*, 62d Cong., 1st Sess., at 1392.

13. 418 U.S. 683 (1974). *See generally* Freund, *The Supreme Court 1973 Term, Foreward: On Presidential Privilege*, 88 HARV. L. REV. 13 (1974).

14. 25 F. Cas. 30 (No. 14,692) (C.C. Va. 1807). *See generally* T. CARPENTER, THE TRIAL OF COLONEL AARON BURR ON AN INDICTMENT FOR TREASON BEFORE THE CIRCUIT COURT OF THE UNITED STATES, HELD IN RICHMOND, MAY TERM 1807: INCLUDING THE ARGUMENTS AND DECISIONS ON ALL MOTIONS AND TRIAL, AND ON THE MOTIONS FOR AN ATTACHMENT AGAINST GENERAL WILKINSON (1808).

15. United States v. Bu r, 25 F. Cas. 30, 34-35 (No. 14,692) (C.C. Va. 1807). In 1800 Justice Chase had refused to subpoena President Adams in the Cooper libel trial on the grounds that truth of the libel may not be proved by compelling the victim's testimony. Chase denied that Adams was immune from subpoena simply by virtue of his office. *Compare* United States v. Cooper, 25 F. Cas. 631, 632-33 (No. 14,865) (C.C.D. Pa. 1800) *with* T. COOPER, AN ACCOUNT OF THE TRIAL OF THOMAS COOPER, OF NORTHUMBERLAND; ON A CHARGE OF LIBEL AGAINST THE PRESIDENT OF THE UNITED STATES 10 (1800).

16. D. ROBERTSON, REPORT OF THE TRIALS OF COLONEL AARON BURR FOR TREASON AND FOR A MISDEMEANOR 113-14 (1808).

17. *Id.* at 114.

18. After Burr's announcement, Marshall explained, "I am not prepared to give an opinion on this point." *Id.* at 118.

joyed the prerogatives of a monarch, who may be absolutely immune from judicial process or judicially compelled disclosure. The Chief Justice did recognize, however, that a subpoena to the President should not be issued lightly and that the President's official schedule and obligations must be taken into account.[19] The final decision on the validity of any claim of privilege was to be made by the court, not the Executive. If a sitting President can be compelled by subpoena, a former President should be entitled to little protection by virtue of the respect due his former office or the press of his unofficial schedule.

President James Monroe. A virtually unknown case of a judicially upheld subpoena against a President involved President James Monroe. On January 3, 1818, Monroe became the second President of the United States to be served a subpoena while in office.[20] He was summoned as a witness in behalf of the defendant in the court-martial case of Dr. William C. Barton. On two occasions, Dr. Barton had pressed President Monroe for a position at the Philadelphia naval hospital. Barton eventually received this appointment, leading one Dr. Thomas Harris, whom Barton replaced, to bring charges of "intrigue and misconduct" against Barton. Because Barton's meetings with the President were cited as contributing factors in the accusation, a summons was issued to the President. Secretary of State John Quincy Adams, on behalf of President Monroe, solicited Attorney General Wirt's legal opinion on the matter.[21] An unpublished, previously undiscovered, handwritten opinion of the Attorney General concluded that a subpena *ad testificandum*[22] could properly be issued to the President. He advised Monroe:

> A subpoena *ad testificandum* may I think be properly awarded to the President of the U.S. My reasons for this

19. *Id.* at 181-82; *See also* T. ABERNATHY, THE BURR CONSPIRACY 238 (1968); FAULKNER, JOHN MARSHALL AND THE BURR TRIAL, 53 J. AM. HIST. 247, 257 (1966).

20. A copy of the summons to President Monroe is found in Attorney General's Papers: Letters Received from State Department, National Archives Bldg., Record Group 60. *See also* Letter from Richard Bush to the President [Monroe], Nov. 6, 1817, Records of the Office of Judge Advocate General (Navy), National Archives Bldg., Record Group 125 (Records of General Courts Martial and Courts of Inquiry, Microcopy M-272, case 282); P.L. Pleadwell, *William Paul Crillon Barton (1786-1856), Surgeon, United States Navy—A Pioneer in American Naval Medicine*, 46 THE MILITARY SURGEON 260-62 (1920). The Senate Watergate Committee relied upon the Monroe subpoena in its amicus brief in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). The court cited the relevant documents. *Id.* at 710 n.42.

21. I uncovered the Wirt letter with the assistance of Stephen Stathis, an analyst in American History and American National Government with the Library of Congress. After we had unsuccessfully tracked down the opinion letter to a missing microfilm, we finally found the original manuscript by Wirt.

22. A subpoena *ad testificandum* is different from a subpoena *duces tecum*. The latter requires the witness to bring with him documents, papers, or other material that may be in his possession, custody, or control. *Compare* Catty v. Brochelbank, 124 N.J. Law 360, 362-63, 12 A.2d 128, 129 (1940), *with Ex parte* Hart, 240 Ala. 642, 645, 200 So. 783, 785 (1941).

opinion are stated by the Chief Justice of the U.S. in the case of Aaron Burr . . . . But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with . . . .

The return, however, which I would advise is this: if the process has been executed on the President in the usual form, by an officer or an individual, let the person serving it be instructed to make an endorsement like this—"January 1818, executed on the President of the U.S. who stated that his official duties would not admit of his absence from the seat of government, but that he would hold himself ready, at all times, to state, in the form of a deposition, and facts, relevant to the prosecution, which were within his knowledge, and which might be called for by the court or the party." I would farther recommend, *ere abundanti cautela* [with extreme or abundant caution], that this return should be accompanied by a respectful letter from the President to the Judge Advocate, taking the grounds presented by Mr. Jefferson, in the letter to which I have already referred you.—If the process has not been served on the President in the usual form, but sent to him as a letter, I would recommend that he should endorse on it an admission of its service annexing to that admission a similar statement with that which I have before recommended in the case of it having been served; and enclosing the process, thus endorsed in such a letter as I have advised.

It is clearly inferable from the argument of the Chief Justice, that he would require the excuse for non-attendance to be on oath, but I can scarcely think this necessary when the excuse is written on the face of the Constitution and founded on the fact that Mr. Monroe is the President of the U.S. and that Congress is now holding one of its regular sessions, during which his presence is so peculiarly necessary at the seat of government.[25]

Monroe indicated on the back of the summons that because of official duties and his inability to leave "the seat of government" he would hold himself ready to give his testimony in the form of a deposition. Monroe subsequently submitted answers to interrogatories forwarded by the court. This procedure was apparently satisfactory to all parties, though his answers did not arrive until after the court had already dismissed the case.[24]

23. The original handwritten manuscript of the Opinion of Attorney General Wirt, dated January 13, 1818, may be found in the Records of the Judge Advocate General (Navy), Record Group 125, National Archives Building. Wirt's Opinion Letter is important evidence of the law because it was issued in the early days of the Republic. *See* Stuart v. Laird, 5 U.S. (1 Cr.) 299, 308 (1803).

24. The delay in the arrival of the deposition underscores the poor transportation

Presidents John Quincy Adams and John Tyler. Aside from the Jefferson and Monroe episodes, history furnishes several other instances of compelled presidential disclosures. In 1846, Representative Ingersoll accused Daniel Webster of making improper disbursements from a secret service fund while Secretary of State. The charges led to subpoenas against former Presidents John Tyler and John Quincy Adams. The confidential "contingent fund" was to be used by the President for clandestine operations relating to foreign affairs. Disbursements were approved by certificates signed by the President. Ingersoll, who was Chairman of the House Foreign Affairs Committee, wanted the certificates dating from Webster's first term as Secretary of State. Some congressmen thought that the certificates were confidential.[25] On April 20, President Polk sent to the House a list of the amounts in the contingent fund for the relevant time period, which was prior to his term, but he refused to furnish documentation of the uses that had been made of the money. He grounded his refusal on the statute creating the fund, which provided for confidentiality, and on the theory that a sitting President should not publicly reveal confidences of his predecessors.[26]

One week later Congress established two Select Committees to investigate the charges against Webster.[27] Polk's refusal to provide information about his predecessors' actions was quickly mooted. The House, through its investigating committees, subpoenaed the previous Presidents allegedly implicated in the charges of corruption. Both Select Committees questioned former President Tyler, who had been President and keeper of the contingent fund during the period relevant to the Ingersoll accusations.[28] Former President John Quincy Adams filed a deposition with one of the Select Committees and provided information about the uses of the contingent fund during his Presidency.[29] President Polk's Secretary of State, James Buchanan, was also subpoenaed and testified.[30] The House, having conducted the thorough investigation Polk had unsuccessfully sought to prevent, apparently concluded that Webster was innocent of wrongdoing and

of that period. In light of the transportation difficulties, President Monroe's fear of leaving the seat of government for any length of time was well-founded. *Cf. Hantraft's Appeal*, 85 Pa. 433, 449 (1877), in which the governor of Pennsylvania was held immune from grand jury subpoena, in part because the court was reluctant to force him to leave the seat of government. *See generally* Comment, *Executive Privilege at the State Level*, 1975 U. ILL. L.F. 631.

25. CONG. GLOBE, Apr. 9, 1846, at 636-38.

26. *Id.*, Apr. 20, 1846, at 698.

27. *Id.*, Apr. 27, 1846, at 733-35.

28. H.R. REP. No. 684, 29th Cong., 1st Sess. 8-11 (1846); H.R. REP. No. 686, 29th Cong., 1st Sess. 22-25 (1846).

29. H.R. REP. No. 686, 29th Cong., 1st Sess. 22-25 (1846).

30. *Id.* at 4-7. Buchanan's compliance with the Congressional subpoena could hardly have been fatal to his political career; he was later elected President.

that nothing further need be done.[31]

History shows that assuming the role of a witness is not demeaning or unprecedented for a President or former President. This does not mean, however, that a President or former President is at the beck of any person or group that has access to a subpoena. The reaction of former President Truman to a subpoena by the House Un-American Activities Committee illustrates this distinction.

President Harry S. Truman. In July of 1973, when President Nixon refused to appear before the Senate Watergate Committee (a refusal which occurred before he was ever invited to appear), he relied on a letter President Truman had written to the Chairman of the House Committee on Un-American Activities (HUAC) on November 12, 1953. President Nixon wrote Senator Ervin:

> I have concluded that if I were to testify before the Committee irreparable damage would be done to the Constitutional principle of separation of powers. My position in this regard is supported by ample precedents . . . . It is appropriate, however, to refer to one particular occasion on which this issue was raised.
>
> In 1953 a committee of the House of Representatives sought to subpoena former President Truman to inquire about matters of which he had personal knowledge while he had served as President. As you may recall, President Truman declined to comply with the subpoena on the ground that the separation of powers forbade his appearance . . . .[32]

Unfortunately, Mr. Nixon did not elaborate on the circumstances surrounding the subpoena issued to former President Truman. The subpoena was prompted by charges made by Attorney General Herbert Brownell in a speech on November 6, 1953. Brownell charged that at the time Truman's nomination of former Assistant Secretary of the Treasury Harry Dexter White to a post with the International Monetary Fund was confirmed, Truman knew that White was a "Russian spy." Truman denied the charges the same day. On November 10, the Republican majority of HUAC subpoenaed Truman; his former attorney general, then Justice Tom Clark; and his former Secretary of State, James F. Byrnes, then Governor of South Carolina. The next day, President Eisenhower said that he would not have subpoenaed Truman or Justice Clark, and the ranking Democrat on HUAC protested the slur on Truman's patriotism. On November 12, Truman sent the letter relied on by Mr. Nixon, in which Truman refused to comply with the subpoena because of the separation of powers doctrine. On November 16, Truman spoke in his defense on national television and radio, explained White's appointment and resignation,

31. *See* 2 G. TICHNOR, LIFE OF DANIEL WEBSTER 283 (1870).
32. Letter frim Richard Nixon to Senator Sam Ervin, July 6, 1973.

charged that the Eisenhower Administration was embracing McCarthyism, and accused Brownell of lying. HUAC never pressed for Truman's appearance, and neither Governor Byrnes nor Justice Clark ever appeared.[33]

Truman's refusal to testify is troublesome and not entirely defensible. He was apparently not concerned about executive privilege or national security; after all, he spoke about the White appointment and defended himself in a nationwide speech. Because he was willing to give the speech, perhaps he should have testified before the congressional committee. Truman's desire to choose a favorable forum for his defense hardly rises to the level of an evidentiary privilege. This argument, however, overlooks the unique circumstances under which the refusal to testify took place. Although the doctrine of separation of powers would not have suffered if Truman had appeared, he was probably concerned about dignifying not only the charges but also the tribunal, thus aiding McCarthyism by giving added prestige to HUAC. One may agree that normally Presidents and ex-Presidents should err on the side of providing testimony, yet defend Truman's refusal to testify given the special circumstances with which he was presented.

The Truman episode does not mean that Presidents are immune from giving testimony about presidential activities. Blanket immunity should not be inferred from the occasional refusal of Presidents or former Presidents to testify, or from the failure of those seeking the testimony to press the matter to contempt. Rather, the historical examples presented here indicate that such testimony is normally given when two conditions exist. First, the President must have possible knowledge relating to charges of criminal wrongdoing and corruption in the executive branch. Second, these charges must be supported by credible, reasonable evidence. Cases in which the President or former President refuses to comply with a request for information based on unsupported[34] charges of presidential complicity are distinguishable. President Truman's refusal to appear before HUAC in the hysterical atmosphere of 1953, probably falls into this category and may be justified, if at all, on that ground, not on the basis of a broad doctrine of separation of powers.

The historical evidence shows that voluntary or involuntary submission to interrogation by a former President will not offend the

33. On Nov. 11, 1953, Byrnes wired his rejection, stating that he could not "as chief executive of a State admit your right to command a governor to leave his state and remain in Washington until granted leave." Justice Clark, on the 13th, explained his refusal on the ground that the Judiciary was independent of the Legislature. *Congress and the Nation: 1945-1964: A Review of Government and Politics in the Postwar Years*, CONG. QUARTERLY SERV. 715 (1965). *See also* N.Y. Times, Nov. 11, at 1, col. 8; *id.*, Nov. 15 at 1, col. 1; *id.*, Nov. 16, at 1, col. 8; *id.*, Nov. 17, at 1 (1953).
34. For a description of how unsupported the charges were see H. MESSICK, JOHN EDGAR HOOVER 141-42 (1972). In fact White had been cleared in 1948 by a grand jury that indicted scores of people as Communist leaders. *Id.*

separation of powers doctrine nor do lasting damage to the Office of the Presidency—even if the ex-President undergoes vigorous or hostile cross-examination by a government attorney, an attorney of one of his former colleagues in a criminal case, a private lawyer in a civil suit, or a congressman or staff attorney in a congressional hearing. When a President or ex-President had knowledge relating to colorable charges of executive misconduct, he has made his testimony available.

These historical examples do not of themselves establish a President's legal duty to testify; that has not been the purpose of this piece. These examples do show that any legal argument asserting that compelled testimony from a President or former President will cause the downfall of the body politic, is groundless. The weight of history is otherwise, and fully supports Lord Hardwicke's dictum that the public has a right to every man's evidence.[35]

35. *Cf.* C. ANDERSON, OUTSIDER IN THE SENATE 83-84 (1970). Even royalty has been called upon to testify. King Edward VII of England, when he was Prince of Wales, once was summoned and testified in a civil case about the plaintiff's possible cheating at cards. A commoner from the jury was allowed to ask a question. 8 J. WIGMORE, EVIDENCE § 2371, at 749, *quoting* NOTABLE BRITISH TRIAL SERIES, THE BACCARAT CASE 3, 75 (Shore ed. 1932). *See also* R. ABINGER, FORTY YEARS AT THE BAR 84, 85 (1930). The Prime Minister is also liable to subpoena. Rex v. Baines, 1 K.B. 258, 261-62 (1909).

THE RIGHT TO A SPEEDY TRIAL: BARKER v. WINGO IN THE LOWER COURTS

*David Stewart Rudstein**

I. THE RIGHT TO A SPEEDY TRIAL, BARKER, AND THE BALANCING PROCESS

THE SIXTH AMENDMENT to the Constitution provides in part that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."** The history of this guarantee can be traced from the 12th century to Magna Carta, through the common law of England, and into American law.[1] The speedy trial clause was designed to prevent undue pretrial incarceration, minimize anxiety accompanying public accusation, and limit the possibility that long delay will impair the accused's ability to defend himself.[2] The clause is intended to protect not only the accused, but also society. As Mr. Justice Brennan has stated:

> The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case . . . . Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commis-

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** *Since this article was written, Congress passed, and President Ford signed, the Speedy Trial Act, Pub. L. No. 93-619, Jan. 3, 1975. The act sets specific times within which an accused must be brought to trial if the action arises in the federal courts. Of course this does not affect the constitutional issues in any way, but hopefully the problems discussed herein will arise with less frequency, especially as the states begin to follow the lead of the federal government, and of the states cited in note 9 infra.*

1. Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967); United States v. Provoo, 17 F.R.D. 183, 196-97 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955). *See generally* F. HELLER, THE SIXTH AMENDMENT (1951).
2. United States v. Ewell, 383 U.S. 116, 120 (1966).

TELECOPY COVER SHEET

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TO: ERIC JASO

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FROM: RAJEEV DUGGAL

Number of Pages: 8 (including this cover sheet)

Message: I JUST LOCATED THIS ARTICLE THAT YOU HAD MENTIONED IN YOUR FAX. IT SEEMS TO ME TO BE PRETTY COMPREHENSIVE, SUBSTANTIVELY, UP THROUGH NIXON.

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EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH

RAOUL BERGER

Harvard University Press Cambridge, Massachusetts 1974

issue was whether the Supreme Court could require an official to answer, but the doctrine is equally applicable to the case of an investigation by a congressional committee."[136] Even within *judicial* compass, as we have seen, this reads *Marbury* much too broadly. In truth, *Marbury* is utterly irrelevant to *congressional* inquiry. That was a suit by a private individual, and Marshall stated that the "province *of the court* . . . is not to inquire how the executive or executive officers perform duties in which they have a discretion."[137] Precisely that function, however, does lie within the *province of the legislature*, as parliamentary history makes clear, and as Montesquieu and James Wilson perceived. President Washington, it will be recalled, welcomed an investigation of the Secretary of the Treasury, and he turned over all documents in the investigation of General St. Clair. The congressional power to investigate into the executive branch was confirmed by the Supreme Court in *McGrain v. Daugherty*.[138] No comparable judicial power exists, as Marshall justly remarked. The claim that communications and advice to the President by his advisers are shielded from congressional inquiry is without constitutional warrant. Whether Congress should respect such advice as a matter of comity, as it has done from time to time, is something else again.

G. *The Trial of Aaron Burr*

1. *Production of Documents*

Secretary of State Rogers, testifying before a Senate Committee in 1971, alluded to "President Jefferson's refusal to comply with Chief Justice Marshall's subpoena in the trial of Aaron Burr."[139] Apparently this was patterned after Corwin's statement that Jefferson "refus[ed] to respond to Chief Justice Marshall's subpoena in Aaron Burr's Trial for Treason."[140] This is demonstrably wrong.

Preliminarily it needs once more to be emphasized that in any event judicial power over the President is not the measure of con-

136. Corwin, *President* 138.
137. 5 U.S. at 168–170; emphasis added.
138. 273 U.S. 135 (1927).
139. Ervin Hearings 473.
140. Corwin, *President* 139. At another point Corwin alludes to "Jefferson's defiance of the *subpoena duces tecum*, which Chief Justice Marshall issued during the trial of Aaron Burr for treason ordering the President to produce certain documents in court"; ibid. 383. For additional discussion of Burr, see infra, Epilogue at nn. 49–73.

gressional power. The judicial power in question was the general power to compel testimony, and Marshall held that the President was not exempted from that authority.[141] The source of congressional power is the inquisitorial function and the fact that the President was made subject to impeachment. Iredell exulted in the provision that made the President triable.[142] Congress, said Corwin, "has power to investigate his every official act."[143] President Andrew Jackson "cheerfully conceded" the constitutional right of Congress to "inquire or decide upon the conduct of the President."[144] No British minister was exempt from inquiry, and inquiry without a power to compel testimony would be enfeebled.[145]

Notwithstanding that *Burr* is thus irrelevant to congressional investigation, consideration of the case will point up Rogers' inveterate tendency to distort the cases. According to his memorandum, Marshall ruled that the President "was free to keep from view such portions of the letter which the President deemed confidential in the public interest."[146] At the outset it is necessary to separate what Jefferson wrote to his counsel[147] from what he did. In fact Jefferson went a long way toward full compliance.[148]

The argument had revolved almost entirely about a letter to Jefferson from General Wilkinson; and it had been argued for Jefferson that it was

141. See infra, text accompanying nn. 154–156.

142. 4 Elliot 109.

143. Corwin, *President* 365; cf. supra, Ch. 2.

144. Quoted supra, text accompanying n. 112.

145. "Without the power to investigate—including of course the authority to compel testimony . . . Congress could be seriously handicapped in its efforts to exercise its constitutional functions"; Quinn v. United States, 349 U.S. 155, 160–161 (1955).

146. Rogers memo 35.

147. See 9 Jefferson, *Writings* 55–62 n. 1, for his correspondence concerning the subpoena.

148. Jefferson, on June 12, 1807, wrote George Hay, the United States District Attorney, that he had delivered the papers to the Attorney General, and instructed the War and Navy Departments to review their files with a view to compliance. 1 David Robertson, *The Trial of Aaron Burr* 210–211 (Philadelphia, 1808). On June 17, 1807, Jefferson wrote Hay that "the receipt of these papers [by Hay] has, I presume, so far anticipated, and others this day forwarded will have substantially fulfilled the object of a subpoena from the District Court of Richmond"; ibid. 254.

When Jefferson learned that the Attorney General did not have the Wilkinson letter that Burr had subpoenaed, he wrote Hay on June 23, 1807, "No researches shall be spared to recover this letter, & if recovered, it shall immediately be sent on to you"; 9 Jefferson, *Writings* 61. Hay advised the court that "When we receive General Wilkinson's letter, the return will be complete"; 1 Robertson 256. Jefferson also stated that if Burr should "suppose there are any facts within the knowledge of the heads of the departments or of myself . . . we shall be ready to give him the benefit of it, by way of deposition"; 1 Jefferson, *Writings* 57. Notwithstanding Jefferson's attempts to comply with the subpoena, Rogers states that Jefferson "paid no attention to the subpoena"; Rogers memo 35.

improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and contained confidential communications, which the president ought not and could not be compelled to disclose. It might contain *state secrets*, which could not be divulged without endangering national safety.[149]

Mark that this was not so much a claim for "confidentiality" per se as against disclosure of "state secrets" which might endanger the "national safety," a much narrower ground. Jefferson left it to his counsel, George Hay, "to withhold communication of any parts of the letter which are *not directly material* for the purposes of justice."[150] Hay emphasized that he was willing to disclose the entire letter to the court, and to leave it to the court to suppress so much of the letter as was not material to the case.[151] This was reemphasized on his return to the subpoena duces tecum wherein he supplied a copy of the letter

excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defense of the accused, or pertinent to the issue now about to be joined. . . . The accuracy of this opinion I am willing to refer to the judgment of the court, by *submitting the original letter* to its inspection.[152]

149. United States v. Burr, 25 Fed. Cas. 30, 31 (No. 14692d) (C.C. Va. 1807); emphasis added.

150. 1 Robertson, supra, n. 148 at 210; emphasis added.

Because Jefferson had thus devolved on Hay the exercise of "discretion" to withhold nonmaterial parts of the letter, United States v. Burr, 25 Fed. Cas. 55, 65 (No. 14693) (C.C. Va. 1807), Chief Justice Marshall said: "the *president* has assigned no reason whatever for withholding the paper called for. The propriety of withholding must be decided by *himself*, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge. It is their operation on *his* mind, not on the mind of others, which must be respected by the court"; United States v. Burr, 25 Fed. Cas. 187, 192 (No. 14694) (C.C. Va. 1807); emphasis added. In other words, the *initial* judgment of need to withhold must be made by the President, not left to a subordinate.

151. Thus, Hay said: "The application made by the defendant is that testimony which concerns himself should be adduced; that what tends to his own just defense and exculpation may be brought forward. Is it right that he should have more? Is it proper, fair or right that he should have the liberty of going through the whole letter, as well those parts which do not relate to him as those which do, for the purpose of making unfavorable impressions on the public mind . . . making public confidential communications respecting private characters, and thereby producing controversies and violent quarrels? *I wish the court to look at the letter* and see whether it does not contain what ought not to be submitted to public inspection"; 2 Robertson, supra, n. 148 at 509; emphasis added.

152. 25 Fed. Cas. 187, 190 (No. 14694) (C.C. Va. 1807); emphasis added. Marshall said, "I do not think that the accused ought to be prohibited from seeing the letter"; ibid. 192. Rogers himself states that "Judge [sic] Marshall made it clear that if a letter in the possession of the President material to the trial contains matter —'which it would be imprudent to disclose, which it is not the wish of the executive to disclose; such matter, *if it be not immediately* and essentially applicable to the

Far from asserting a claim of absolute privilege, therefore, counsel for Jefferson was perfectly willing to leave it to the court to determine whether portions of the letter were in fact not material. He insisted only that the portions so adjudged should be withheld from the defendant. To this the defendant objected that the court could not judge whether the confidential portions were relevant to the defense until that defense was fully disclosed, and that defendants were not required to make such disclosure until they had put in their case.[153]

It was on this state of facts that Chief Justice Marshall ruled that the president of the United States *may be subpoenaed* and *examined as a witness*, and *required to produce* any paper in his possession, is not controverted . . . The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be such* as to restrain the court from enforcing its production . . . I can readily conceive that the president might receive a letter which would be improper to exhibit in public, because of the manifest inconvenience of its exposure. The occasion for demanding it ought, in such a case, be very strong, and to be fully shown to the court before its production *could be insisted on.*[154]

And, referring to private letters sent to the President respecting matters of public concern, Marshall stated that they "ought not *on light ground* to be forced into public view."

Yet it is a very serious thing, if such letter should contain any information material to the defense, to withhold from the accused the power of making use of it . . . I cannot precisely lay down any general rule for such a case. *Perhaps* the court ought to consider the reasons, which would induce the president to refuse to exhibit such letter as conclusive on it, *unless* such letter could be shown to be *absolutely necessary* in the defense. The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the *court could not refuse* to pay proper attention to the affidavit of the accused. But on objections being made by the president to the pro-

point, will, of course, be suppressed' "; Rogers memo 36; emphasis added. In short, Marshall would exclude only irrelevant or immaterial matter, not the entire letter. Whether the adversary should inspect the entire letter is hereinafter discussed.

153. 2 Robertson, supra, n. 148 at 516. Note also Luther Martin's statement on behalf of Burr that "the *personal* attendance of the president was dispensed with only on the condition that the [Wilkinson] letter should be produced"; ibid. at 514.

154. United States v. Burr, 25 Fed. Cas. 187, 191–192 (No. 14694) (C.C. Va. 1807); emphasis added.

duction of a paper, the court would not proceed further in the case without such an affidavit as would *clearly shew the paper to be essential* to the justice of the case . . . [T]o induce the court to take any definite and decisive step with respect to the prosecution, founded on the *refusal of the president* to exhibit a paper, for reasons stated by himself, the *materiality* of that paper *ought to be shown.*"[155]

Materiality to the defense, in short, would overcome presidential refusal to disclose. And Marshall concluded that "I do not think that the accused ought to be prohibited from seeing the letter."[156]

Plainly this contradicts Rogers' statement that Marshall "ruled that the President was free to keep from view such portions of the letter which the President deemed confidential in the public interest. The President alone was judge of what was confidential."[157] For Marshall asserted judicial power to decide whether a presidential claim of privilege had merit, and that a claim of secrecy in the "public interest" would have to yield to the necessities of the accused. Rogers' statement that "the President may in his own discretion withhold documents from a court"[158] is further discredited by the all but universal rule in private litigation that whether disclosure must be made by the executive branch cannot be left to the caprice of executive officers.[159]

2. *Personal Attendance by the President*

As the Rogers memorandum states, Marshall claimed for the courts "the right to issue a subpoena against the President"; and

155. Ibid. 192; emphasis added.

156. Ibid. Lest it be thought that the rule in civil cases may be narrower, note Marshall's statement that "if this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power which contain evidence pertinent to the issue"; ibid. 191. We need look no further than United States v. Reynolds, 345 U.S. 1, 9–10 (1953), for confirmation that "judicial control over evidence in a case cannot be abdicated to the caprice of executive officers."

157. Rogers memo 35. After Marshall delivered the foregoing opinion, Jefferson sent a copy of the Wilkinson letter, "excepting such parts as he deemed he ought not permit to be made public," United States v. Burr, 25 Fed. Cas. 187, 193 (No. 14694) (C.C. Va. 1807), thereby complying with Marshall's preliminary requirement that the President himself must decide the propriety of withholding. But Burr no longer pressed the matter. Beveridge says, "Perhaps the favorable progress of the case relieved Burr's anxiety. It is possible that the 'truce' [with Marshall] so earnestly desired by Jefferson was arranged." 3 Albert J. Beveridge, *Life of John Marshall* 522 (Boston, 1919). The Marshall opinion, however, stands and speaks for itself; it announced the paramount power of the court to decide the claim of privilege for itself.

158. William P. Rogers, "Constitutional Law: The Papers of the Executive Branch," 44 A.B.A.J. 941, 1012 (1958).

159. See infra, Ch. 7.

the subpoena that issued required the President "to personally attend."[160] Jefferson objected that personal attendance would disrupt performance of his executive functions, for he could be haled to far-off St. Louis, to one court after another.[161] But he offered to testify by deposition, stating that if Burr should "suppose there are any facts within the knowledge of the heads of the departments or of myself . . . we shall be ready to give him the benefit of it, by way of deposition."[162] This was a plea of serious administrative inconvenience, not a claim of absolute immunity from judicial process. No such claim was made by his counsel; to the contrary, as Marshall stated, the "attorney for the United States avowed his opinion that a general subpoena might issue to the president."[163] Not satisfied to rest on concession, Marshall left no doubts on this score: "In the provisions of the constitution, and of the statutes, which give the accused the right to compulsory process of the courts, there is no exception whatever."[164] He rejected the reservation in the law of evidence for the King—which was based on the ground that it was "incompatible with his dignity to appear under the process of the court"—because the "principle of the English constitution that the king can do no wrong" was inapplicable to our government whereunder "the president . . . may be impeached and removed from office." And, Marshall added, "it is not known ever to have been doubted, but that the chief may be served with a subpoena ad testificandum."[165] Fully alive to the

160. Rogers memo 36, 35.

161. United States v. Burr, 25 Fed. Cas. 55, 69 (No. 14693) (C.C. Va. 1807).

162. Ibid.

163. 1 Robertson, supra, n. 148 at 180. Jefferson's counsel, Alexander McRae, conceded that "a subpoena may issue against him [the President] as well as against any other man"; ibid. 181.

164. Ibid. This reflected James Wilson's statement in the Pennsylvania Ratification Convention: "not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment"; 2 Elliot 480. Another Framer, Charles Pinckney, speaking in the Senate on March 5, 1800, of the express congressional privilege from arrest, stated:

> it was never intended to give Congress, or either branch, any but specified, and those very limited, privileges. They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here . . . Let us inquire why the Constitution should have been so attentive to each branch of Congress . . . and have shewn so little to the President . . . in this respect . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature. 3 Farrand 385.

165. United States v. Burr, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C. Va. 1807). The Supreme Court stated in 1972 that in Burr, "Chief Justice Marshall, sitting on Circuit,

gravity of the issue, Marshall was at pains to put beyond doubt that a subpoena could reach the President. His subpoena, far from offending the mores of the time, responded to contemporary egalitarianism and met with approval, even from the Republicans.[166] As the foremost apostle of a democratic society, Jefferson could not very well publicly put the President above the law.

In weighing Marshall's judgment it needs to be kept in mind that he knew the problems of government at first hand: he had been a member of the Virginia Assembly and had taken vigorous part in obtaining ratification of the Constitution in Virginia; he had been a member of Congress, defended the Jay Treaty, been a member of the "XYZ mission to France," and had served as Secretary of State under John Adams.[167] As Charles Beard stated, Marshall "had better opportunities than any student of history or law today to discover the intention of the framers of the federal Constitution."[168] Greater light was not given to a present-day President.

What of the defiance threatened by Jefferson in his letters to the district attorney: the court had no "controul over the executive"; force was given by the Constitution to him, not the courts; the executive had the superior means to "protect itself from enterprises of force" attempted by the other departments. This was part and parcel of his total rejection of *Marbury v. Madison* and the doctrine of judicial review, which he denounced as "not law."[169]

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opined that in proper circumstances a subpoena could be issued to the President"; Branzburg v. Hayes, 408 U.S. 665, 689 n. 26.

Rejection of royal immunity had been underlined in the North Carolina Ratification Convention by James Iredell. 4 Elliot 109, quoted supra, Ch. 2, n. 126.

166. "For the first time, most Republicans approved of the opinion of John Marshall. In the fanatical politics of the time there was enough of honest adherence to the American ideal that all men are equal in the eyes of the law, to justify the calling of a President, even Thomas Jefferson, before a court of justice"; 3 Beveridge, supra, n. 157 at 450.

Writing in 1803, before the Burr trial, St. George Tucker, the prominent Republican editor of Blackstone, and later judge of the Virginia Court of Appeals, stated: "In the trial of Mr. Thomas Cooper [before Justice Chase] . . . for a libel against the President . . . under the sedition law, it is said that Mr. Cooper applied to the court for a subpoena to summon the president as a witness on his behalf, and that the court refused to grant one. Upon what principle the application was refused (notwithstanding this article [for compulsory process]) I have never been able to obtain satisfactory information"; Tucker's Blackstone, supra, n. 12 at App. 358. For Chase's high-handed conduct of such trials, see Berger, *Impeachment* 224–251.

167. 12 *Dictionary of American Biography* 315.

168. Charles Beard, *The Supreme Court and the Constitution* 108 (Englewood Cliffs, N.J., 1962).

169. 9 Jefferson, *Writings* 55–62; 3 Henry S. Randall, *Life of Jefferson* 211–212 (New York, 1858). Randall states that "Jefferson in no way publicly challenged [the court's] authority"; ibid. 218.

But, as with Stalin's cynical query, "How many battalions has the Pope?," the respect due to Marshall's opinion cannot be measured by his lack of battalions to enforce a judicial decree. Command of the armed forces was not given the President in order that he might resist judicial decrees but rather to enforce them. The effect of Marshall's opinion as law is not a whit diminished by Jefferson's private threats of resistance. Jefferson's view was not that of the Founders; history confirms Marshall: the final word as to the "law" was given to the courts, the "ultimate interpreter" of the Constitution.

H. *Executive Shielding of Subordinates*

Not the least of Rogers' misreadings of law and history is his assertion that "heads of departments may not be compelled to attend a trial," and that they "are subject . . . to the direction of the Presidents of the United States. They are not subject to any other directions." Given a subpoena, he maintains, "The President may intervene and direct the Cabinet officer or department not to appear; the person subpoenaed would then advise the court of the President's order and abstain from appearing altogether."[170] As long ago as 1838 *Kendall v. United States* rejected an analogous claim. The Postmaster General, acting on presidential instructions, refused to pay moneys owed by the United States for carriage of mails. Congress then passed a law directing payment, and when this was refused by the Postmaster General, mandamus was brought against him to compel payment. Although the executive power is vested in the President, the Supreme Court declared:

> it by no means follows that every officer in every branch of that department is under the exclusive direction of the President . . . it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution.

The contrary principle, said the Court, would clothe "the President with a power entirely to control the legislation of congress, and paralyze the administration of justice."[171] Whether the rights asserted by a department head are "protected by the Constitution" was not of course left for final decision by the President, but committed to the "ultimate interpreter" of the Constitution, the judiciary.

170. Rogers memo 38, 2.
171. 37 U.S. (12 Pet.) 524, 610, 613 (1838).

NYT 12/5/79

By WARREN WEAVER Jr.
Special to The New York Times

WASHINGTON, Dec. 4 — The legislative logjam holding up President Carter's plan to tax "windfall" oil profits broke today and the Senate promptly began strengthening the measure along lines suggested by the White House.

After a week of stalemate, senators favoring a lower tax on the oil industry gave up their threat of a filibuster in return for assurances that a series of their amendments would receive full consideration on the floor, among them a multibillion-dollar income tax cut, effective in 1981.

To settle Federal complaints of overcharges, the Getty Oil Company agreed to give $25 million to a new fund to help the poor buy heating oil. Page D1.

After 15 minutes of debate, the Senate voted by 58 to 35 to increase the tax on one category of oil by $22.5 billion. The amendment would increase from 60 percent to 75 percent the rate on production from wells discovered from 1973 through 1978, so-called "new oil."

Sponsored by Moynihan

Later the Senate approved by a 68-to-26 vote an amendment sponsored by Senator Daniel Patrick Moynihan, Democrat of New York, that would delay an automatic phase-out of the tax by several years and thus increase total Government revenue.

Senator Moynihan estimated that his amendment would increase total revenue collectible under the Senate bill from $145 billion to $214 billion by postponing the termination of the tax about six years. The $214 billion figure is for the period 1980-90; all other revenue estimates are for 1980-90.

In another energy development, Carter Administration officials are scheduled to make public this week a program to force the states to conserve energy, as well as a proposal for a standby rationing program for gasoline. The plans are expected to revive regional controversies over supply allotments. [Page D5.]

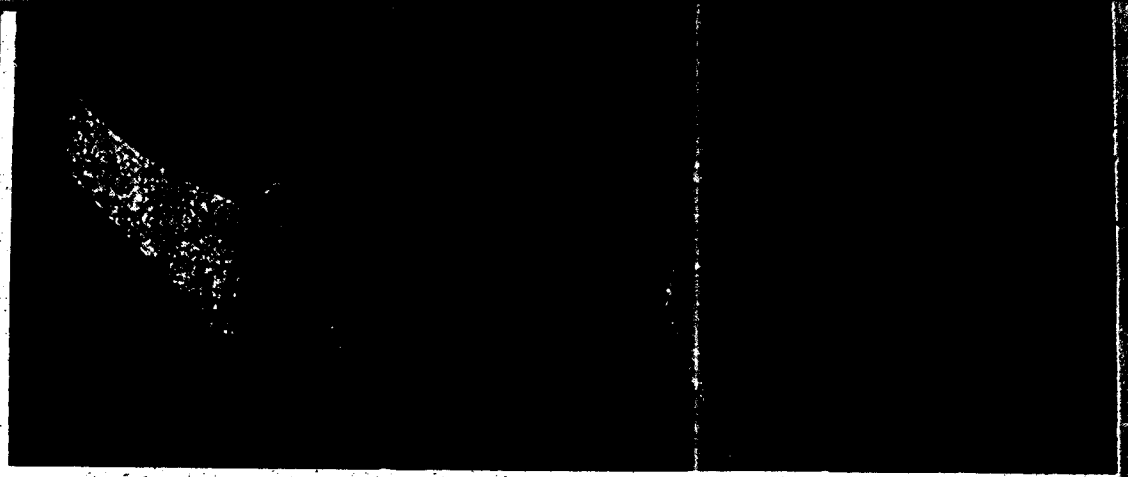
Far Less Than House Version

Advocates of a higher oil tax, mostly but not all Democrats, now anticipate that they can increase the 11-year revenue total for the legislation to about $185 billion, far more than the original Senate version, although far less than the $276 billion in the version the House of Representatives approved last summer.

If this Senate strategy succeeds, and the conference committee reconciling the two bills splits the difference, the final legislation going to President Carter could provide about $230 billion over the 1980-90 period.

If the conference committee adopts the

Continued on Page D5, Column 4



The New York Times/Tyrone Hendrix

President Carter with Vice President Mondale at the White House after announcing candidacy for a second term

GASOLINE USE DROPS SHARPLY IN CITY AREA

Price Rise, Supply Cuts and Public Awareness in 3 States Cited

By PETER KIHSS

Public awareness of the need for conservation, along with high prices and shorter supplies, has resulted in sharp decreases in the use of gasoline in New York, New Jersey and Connecticut, officials of the three states said yesterday.

All warned that gasoline supplies would continue to be tight. According to forecasts, 8 percent less gas will be delivered in New York State this month than in December 1978.

According to the officials, New York motorists used 14.6 percent less gasoline in September — the latest month with available data — than in September of last year. It was the sixth consecutive month of decline, with an overall decrease of 6.1 percent for the year's first nine months.

16.1% Drop in New Jersey

New Jersey data for September, still subject to revision, showed a decline of 16.1 percent in gasoline use from a year ago. The decrease over nine months in the state was 3.9 percent.

Connecticut reported 10.3 percent less gasoline used in September than last year and a 3.6 percent decline for the year.

James L. Larocca, New York Commissioner of Energy, said the state's drop in

Continued on Page D22, Column 1

Carter, Without Fanfare, Declares He Is Candidate for a Second Term

By TERENCE SMITH
Special to The New York Times

WASHINGTON, Dec. 4 — President Carter, still grappling with the Iranian crisis, today officially declared his candidacy for a second term in a subdued, nine-minute ceremony shorn of the usual political fanfare.

Surrounded by his family and with his running mate, Vice President Mondale, at his side, Mr. Carter told an audience of Administration officials and White House staff members gathered in the East Room that he would "continue to talk sense to the American people in the campaign."

"As President and as a candidate, I will continue to ask you to join me in looking squarely at the truth," he said. "Only by facing up to the world as it is can we lift ourselves towards a better future."

Mr. Carter also called for the renomination of Mr. Mondale, whom he referred to as "the most effective Vice President in American history."

Strauss Voices Confidence

After the ceremony, Robert S. Strauss, the President's campaign manager, predicted that Mr. Carter would become the front-runner in the race for the Democratic nomination within 60 to 90 days. He conceded that Senator Edward M. Kennedy was still ahead in the polls but said the Massachusetts Democrat was "declining steadily, while the President is climbing, slowly but steadily."

Mr. Carter canceled a scheduled appearance at a $1,000-per-couple fund-raising party at the Washington Hilton tonight. His press secretary, Jody Powell, said that the President "simply feels his presence there would not be appropriate."

Continued on Page A26, Column 1

President Negotiating To Give Vesco Inquiry Answers by Videotape

By ROBERT PEAR
Special to The New York Times

WASHINGTON, Dec. 4 — President Carter is negotiating an agreement to answer questions by videotape for a Federal grand jury investigating allegations that Robert L. Vesco attempted to have his legal problems "fixed" in the Carter Administration.

Sources familiar with the grand jury inquiry said today that several members of the panel considered the videotape arrangement unsatisfactory because the jurors would not be able to ask the President follow-up questions. However, a majority of the jurors voted to accept the arrangement rather than insist on his personal appearance, the sources said.

No Jurors at Questioning

Under the proposed arrangement, said to have been approved by Chief Judge William B. Bryant of the Federal District Court here, questions would be put to the President by Government lawyers, and no grand jurors would be present. Lawyers for the White House and for the United States Attorney here have been negotiating details of the interview.

If Mr. Carter gives his answers in this manner, it would be the first time that a President answered questions for a grand jury by videotape. No incumbent President has testified in person before a

Continued on Page A17, Column 6

Cincinnati Officials Order Inquiry Into Concert Crush That Killed 11

By REGINALD STUART
Special to The New York Times

CINCINNATI, Dec. 4 — City officials today ordered an investigation into the sequence of events that led to the deaths of 11 youths crushed by other rock fans rushing to get unreserved seats at a concert last night.

This river city was shocked and saddened by the deaths of the young rock fans and the injuries to at least eight others caught in the frenzied stampede to get first-come, first-served general admission seats at the concert by the Who.

The accident at Riverfront Coliseum also raised concern that the conditions that led to the deaths — thousands of excited youths rushing through doors in a race for good seats — existed at hundreds of other concert halls around the nation.

'Hard to Believe'

"It is hard to believe that people would run over other people," said 31-year-old Mayor John Kenneth Blackwell, sworn into office only four days ago.

Mr. Blackwell, who ordered the city's investigation, was among those who decided last night that the concert should proceed despite the incident. The 18,000 fans who watched the performance were unaware of what had happened at the gates of the coliseum, and officials were worried that the abrupt cancellation of the concert would produce an unruly reaction from the young audience.

"My reaction, when I was first advised of the incident, was one of total disbelief," said Mr. Blackwell, pausing in an interview in his office this afternoon to look toward the ceiling, his eyes showing fatigue.

Mr. Blackwell's views were echoed by others, including members of the Who, a British group. An older sister of Jacqueline Eckerle, a 15-year-old girl who was

Continued on Page D21, Column 4

Associated Press

TRIAL SUSPENDED IN KOREA: Kim Jae Kyu, charged in murder of President Park. Court's jurisdiction was challenged. Page A4.

INSIDE

Koch Plans Hospital Shifts

Mayor Koch plans to shift the leadership structure of the Health and Hospitals Corporation in an apparent effort to weaken its president. Page B1.

Few Leads in Navy Ambush

There were few leads in the attack in Puerto Rico in which two sailors died. The ambush renewed turmoil over independence for the island. Page A24.

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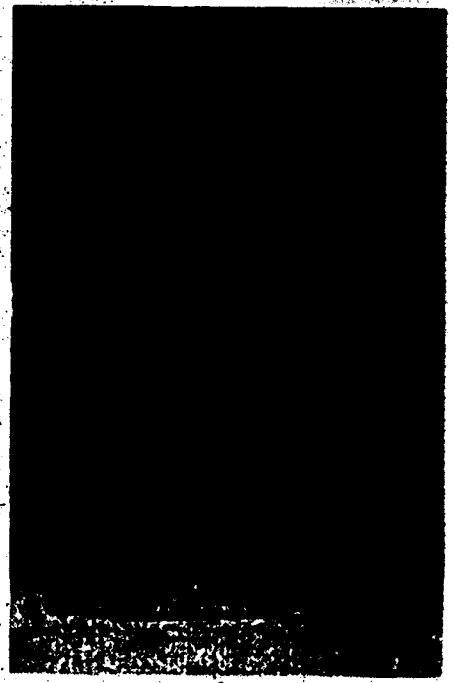


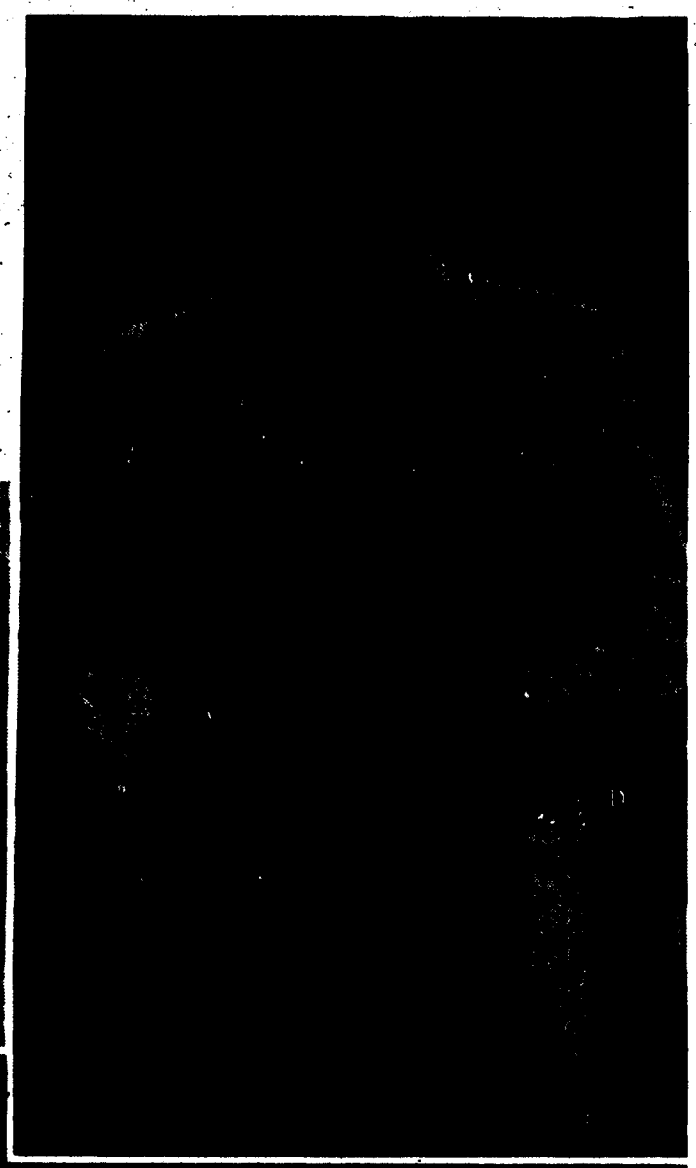
Members of the United Nations Security Co... on resolution yesterday demanding release ... captured during the takeover of the United ...

Iranians Say Record...

By JEFF GERTH
Special to The New York Times

TEHERAN, Iran, Dec. 4 — Iranian officials charge that documents uncovered in an investigation into the finances of the deposed Shah of Iran show that over $1 billion in identifiable funds was diverted or misappropriated by the Shah and his family from Iranian banks and other institutions.

Officials at the central bank here presented documents for examination by The New York Times that they said supported their charges that the Shah had ... used a ... and in ... phon... final ... 'writte... The Ir... had re... trients ... 'make ... The ... throug... In file ... record ... and his ...



CARTER NEGOTIATING IN INQUIRY ON VESCO

Continued From Page A1

grand jury, Justice Department officials said.

It was not known whether a date for the interview with Mr. Carter had been selected.

Lloyd N. Cutler, the White House counsel, declined to comment on the grand jury proceedings. But he did say, "This President will give evidence in an appropriate forum to any proper investigative body."

President Carter has given court testimony at least twice before. Paul J. Curran, the special counsel who investigated the Carter family's peanut business in Georgia, took a four-hour, sworn deposition in the White House on Sept. 5. Mr. Curran concluded his inquiry with the finding that there was "no evidence whatsoever" that money from the business was used in the 1976 Presidential campaign.

In April 1978, a 51-minute videotape of the President's testimony was presented in Federal District Court in Macon, Ga., at the trial of a Georgia State Senator, Culver Kidd, on gambling and conspiracy charges. Mr. Kidd was acquitted.

The grand jury here has for more than a year been investigating allegations that representatives of Mr. Vesco, the financier who is accused of swindling investors, made improper contacts with high-ranking officials of the Carter Administration in 1977 in hopes of halting extradition proceedings against him.

The grand jury foreman, Ralph E. Ulmer, tried to resign last August, charging that the Justice Department had directed a "cover-up" to protect the Administration, but Judge Bryant rejected the resignation.

Philip B. Heymann, Assistant Attorney General in charge of the criminal division of the Justice Department, and Jody Powell, the White House press secretary, have denied Mr. Ulmer's charges, saying there was no political interference with the investigation.

Likely Focus of Questions

The jury's questions for Mr. Carter are likely to focus on a Feb. 15, 1977, meeting at the White House between the President and Richard M. Harden, an aide who had met a week earlier with W. Spencer Lee 4th, a lawyer from Albany, Ga., who was representing Mr. Vesco's interests.

After conferring with Mr. Harden, the President sent a note to Griffin B. Bell, then Attorney General, urging him to see Mr. Lee. Justice Department officials have said that Mr. Bell never received the note and never met with Mr. Lee.

Sources in the department said last summer that Mr. Harden was under investigation for possible perjury in his account to the grand jury of conversations with Mr. Carter and Mr. Lee. Thus, the grand jury might seek Mr. Carter's account of the February 1977 meeting with Mr. Harden in an effort to determine whether the President's account corroborates or contradicts Mr. Harden's testimony.

The grand jury might also ask the President why he sent Mr. Bell a handwritten note saying, "Please see Spencer Lee from Albany when he requests an appointment."

Apparent Efforts by Vesco

Mr. Vesco evidently hoped to use Mr. Lee's contacts at the White House to arrange a settlement of charges pending against him. Mr. Vesco, wanted on felony charges of looting millions of dollars from investors in mutual funds, fled the United States for Costa Rica in the early 1970's. He is believed to be living in the Bahamas.

President Ford was the first incumbent President to submit to interrogation by lawyers concerning a criminal case. A film of his testimony was shown in 1975 at the trial of Lynnette Alice Fromme, who was later convicted of attempting to assassinate Mr. Ford in Sacramento, Calif.

The procedure for taking President Carter's testimony is being negotiated in an exchange of letters between Mr. Cutler and Carl S. Rauh, the United States Attorney for the District of Columbia.

Two well-placed sources said that several of the 23 grand jurors would have preferred for Mr. Carter to deliver his testimony in person. However, Justice Department lawyers said there was no precedent for demanding a personal appearance by Mr. Carter. The grand jury could have attempted to subpoena the President had it thought such action necessary.

Neither Mr. Rauh nor the White House nor Mr. Heymann would confirm or discuss plans for taking the President's testimony.

Baby Found in Manger At a Scene of Nativity

LONGVIEW, Tex., Dec. 4 (AP) — The Rev. Charles Holland walked by

NYT 12/8/79

Calls Himself 'a Possibility'

Mr. Dole, who was President Ford's running mate in 1976, is, he admits, a long shot in the crowded Republican field, but he continues to regard himself as "a possibility" in the year ahead.

"Maybe I'm dreaming," he said in an interview off the Senate floor, "but I can see Connally and Reagan knocking each other off and Bush and Baker doing the same thing, and there I'd be all alone."

The Senator was referring to his chief competitors, Ronald Reagan of California, John B. Connally of Texas, George Bush, and Howard H. Baker Jr. of Tennessee, the Senate minority leader.

Mr. Dole said that his campaign was not in debt, except for a disputed claim of $100,000 by a political consulting concern. His organization has spent virtually all the $800,000 it has raised but expects to receive $400,000 or more in Federal matching funds early next year.

"We're all right financially," the Senator said.

Any Presidential candidate who drops out of the competition before 1980 will not be eligible for the Federal subsidy payments.

Connally Hires New Aide

WASHINGTON, Dec. 7 (AP) — John B. Connally has hired a new senior campaign aide and is making sharp cuts in the size of his staff as part of an effort to inject new life into his drive for the 1980 Republican Presidential nomination.

The new aide is Charles Keating, a former Arizona businessman, who will take over as chief administrative official of the campaign.

A campaign spokesman, Hugh O'Neill, said today that 20 of Mr. Connally's 160 staff members in campaign headquarters had been dropped. He added that there would soon be more dismissals, mainly among middle-level campaign workers.

Meanwhile, he said, the new appointment will give Eddie Mahe, the campaign manager, time to plan political strategy as the primary election season draws near. He said that the change was not a demotion for Mr. Mahe.

Civiletti Says He Is Withdrawing From Role in Vesco Investigation

WASHINGTON, Dec. 7 (AP) — Attorney General Benjamin R. Civiletti said today that he had removed himself from any role in the Government's investigation into allegations of White House influence-buying in behalf of Robert L. Vesco, the fugitive financier.

At the same time, the Attorney General said at an impromptu news conference that he believed it was proper that President Carter be allowed to give videotaped testimony to a grand jury. The President plans to give the testimony to a Federal grand jury that has been investigating the Vesco case for more than a year.

Mr. Civiletti said he was taking no part in the investigation because of his role in the Administration's 1977 decision to abandon efforts to extradite Mr. Vesco in favor of using diplomatic channels to have him deported.

There has been no evidence that the decision was made to benefit Mr. Vesco. Nonetheless, Mr. Civiletti said it would be "inappropriate" for him to take part in the investigation because he was "involved in contemporaneous actions" relating to extradition proceedings against Mr. Vesco.

Living in the Bahamas

Mr. Vesco, who fled the country in 1970, is wanted in the United States on charges of misappropriating $224 million from the Investors Overseas Service, a Swiss-based mutual fund, and with making an illegal $200,000 contribution to President Nixon's re-election campaign. He is now believed living in the Bahamas.

Mr. Civiletti said today that he was not consulted about the plans disclosed this week for the President to testify by videotape rather than in person before the grand jury.

Mr. Carter's videotaped answers in the Vesco case would mark the first time a President has answered grand jury questions in this manner, but Mr. Carter has provided testimony in different forms at least twice before criminal investigations since January 1977, when he became President.

Sources close to the investigation said that some grand jurors had complained that the videotaping procedure would prevent them from asking follow-up questions. Asked if a President should be given special treatment when called to testify, the Attorney General replied: "Certainly. Only in the most compelling circumstances should a President have to provide information directly to a court or investigation."

Georgia Businessman Involved

A District of Columbia grand jury is investigating allegations that, shortly after Mr. Carter took office, an attempt was made to pay off high officials in the Administration to quash extradition proceedings against Mr. Vesco.

R.L. Herring, a Georgia businessman who has been convicted on unrelated fraud and racketeering charges, has said he paid $10,000 to a lawyer, W. Spencer Lee 4th of Albany, Ga., to act in Mr. Vesco's behalf.

Mr. Lee has said he met with Richard M. Harden, a White House aide, in February 1977 and was persuaded by Mr. Harden not to pursue the matter further. Mr. Harden subsequently met with the President, who sent a note to Griffin B. Bell, then Attorney General, that said, "Please see Spencer Lee from Albany when he requests an appointment."

The Justice Department said the note was placed in a file folder for potential job-seekers but that Mr. Lee never appeared for an appointment.

Carter Defeats Kennedy 84 to 14% in Tennessee

NASHVILLE, Dec. 8 (UPI) — President Carter, hailed for his handling of the Iranian crisis, won an overwhelming victory last night in a Presidential straw poll of Tennessee Democrats attending fund-raising dinners in 10 cities.

Mr. Carter, who made an obvious reference to Senator Edward M. Kennedy's criticism of the Shah in a telephone speech to the meetings, rolled up 84.5 percent of the total, or 1,425 votes, to 14.1 percent, or 236 votes, for Mr. Kennedy and 1.4 percent, or 24 votes, for Gov. Edmund G. Brown Jr. of California.

NYT 3/2/80

JURY IN VESCO CASE SEES CARTER ON TAPE

His Testimony to the Panel Is Said to Focus on Alleged Attempt to 'Fix' Legal Problems

By EDWARD POUND
Special to The New York Times

WASHINGTON, March 1 — President Carter spent more than an hour answering questions on videotape last month for a Federal grand jury investigating allegations that Robert L. Vesco, the fugitive financier, attempted to have his legal problems "fixed" in the Carter Administration.

Sources familiar with the interview said that Mr. Carter offered no major new information about the case when he was questioned at the White House by three Federal prosecutors. His videotaped interview was shown to the grand jury on Feb. 21, the sources said.

They declined to comment on Mr. Carter's testimony other than to say that it was not damaging to anyone in his Administration, including an aide who is under investigation for possible perjury. The President, the sources said, often responded by saying that he could not recall matters about which the Government lawyers were inquiring.

Mr. Carter's videotaped answers marked the first time that a President had answered grand jury questions in that manner, though he has provided testimony in different forms at least twice before in criminal investigations.

Carter Aide Is Reticent

Lloyd N. Cutler, the White House counsel, declined to confirm that the President had been questioned. But he said, "The President always cooperates with the proper law enforcement investigation. He has and he will cooperate with this investigation."

Government lawyers who questioned Mr. Carter refused to discuss the session. However, they were known to have focused their questioning on a meeting Mr. Carter held in the White House on Feb. 15, 1977, with Richard M. Harden, a special assistant.

The lawyers wanted the President's account of the meeting to determine whether it corroborated or contradicted Mr. Harden's testimony before the grand jury in December 1978. Sources in the Justice Department said last summer that Mr. Harden was under investigation for possible perjury in his account of his conversation with Mr. Carter and an earlier one with W. Spencer Lee 4th, a lawyer from Albany, Ga., who was representing Mr. Vesco's interests and who is a close friend of Mr. Harden.

Mr. Harden reportedly told the grand jury that he talked Mr. Lee out of continuing to represent Mr. Vesco's interests when they met on Feb. 8, 1977. He was also reported to have testified that he briefed Mr. Carter on the Vesco situation a week later and informed him that Mr. Lee was withdrawing from the deal.

Some Jurors Dissatisfied

Sources close to the grand jury investigation said that jurors submitted some of the questions that were put to the President by Government lawyers. No jurors were present for the interview and, the sources said, several jurors were dissatisfied with the procedure because it prevented them from asking followup questions. They were also reportedly displeased because they believed the President should have testified in person.

Evidence in the case is being presented to the grand jury by the office of the United States Attorney here. Government lawyers have not indicated whether the investigation will continue after the grand jury's 18-month term expires in early April.

At one point, Ralph E. Ulmer, the grand jury's foreman, tried to resign, charging the Justice Department with directing a "cover-up" to protect the Carter Administration. His charges were denied by Mr. Carter's spokesmen and the Justice Department.

John T. Kotelly, deputy chief of the fraud division in the United States Attorney's office, declined to comment on the investigation.

Origin of Inquiry

The investigation began after R. L. Herring, a businessman in Albany, Ga., charged that Mr. Vesco wanted to bribe Carter Administration officials to resolve his legal problems. Mr. Vesco fled the United states nearly a decade ago after he was charged with defrauding stockholders of millions of dollars in an international swindle.

Mr. Herring, who was convicted on unrelated fraud and racketeering charges and is in a Federal prison in Miami, has said that he retained Mr. Lee, the Albany lawyer, to act in Mr. Vesco's behalf.

In a telephone interview yesterday, Mr. Herring said that he was scheduled to take a polygraph (lie detector) test on March 6 and that he planned to release the test results to the press.

Goldwater Tells G.O.P.

WSJ 10/17/79

Independent Prosecutor Clears Carters In Peanut Warehouse Loan Investigation

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON—An independent prosecutor's investigation into the finances of the Carter family peanut warehouse cleared President Carter and his brother, Billy, of any criminal wrongdoing.

Paul Curran, special counsel appointed in March to investigate loan transactions between the warehouse and a Georgia bank headed by Bert Lance, former federal Budget Director, yesterday closed out his inquiry with reports to Congress and the Attorney General.

Mr. Curran told reporters his six-month investigation hadn't turned up any evidence President Carter "committed any crimes." He added that "based on all the evidence and the applicable law," he wouldn't seek any indictments in the case.

No Room for Doubt

The investigation was triggered, in part, by speculative press reports suggesting the warehouse loans had been diverted to the Carter presidential campaign during 1976. Mr. Curran said his "audits and examinations of the books and records" don't leave any "room for doubt" this allegation was false.

"Every nickel and every peanut have been traced into and out of the warehouse," and there wasn't any unlawful diversion of funds "in either direction," Mr. Curran said.

Jody Powell, presidential press secretary, said Mr. Curran's findings ended a "witch hunt" in which investigators "didn't find any witches." The White House later issued a more formal statement expressing pleasure at Mr. Curran's decision.

The President, asked about the report at a Democratic Party reception in Harvey, Ill., said, "I'm glad they have completed their investigation and turned their attention to crime control." Later, at the White House, he added, "The truth finally came out."

Carter Made Deposition

President Carter testified under oath to Mr. Curran in a four-hour deposition taken at the White House early last month. Mr. Curran said yesterday he thought this was the first time a sitting U.S. President had been examined under oath in a criminal investigation. He added that President Carter had "cooperated totally."

Billy Carter, the President's brother and manager of the warehouse until mid-1977, said in a telephone interview yesterday the Curran investigation had been "a complete waste of the taxpayers' money." He blamed the long inquiry on "idiot reporters" and the fact that "Jimmy is President."

Despite Mr. Curran's finding that indictments shouldn't be sought, his 179-page public report outlines some irregularities in the loan relationship between the Carter warehouse and the National Bank of Georgia. The bank, which Mr. Lance headed at the time of the loans, lent the warehouse nearly $10 million from 1975 through 1977.

Loan Violated Collateral Terms

In one instance, a 1975 loan to finance inventories of peanuts was "out of bond," or in violation of the collateral provisions of the loan agreement, "almost from its inception to its termination on Aug. 31, 1976," Mr. Curran found. He said that during the spring of 1976, when the warehouse owed the bank more than $1 million, there weren't any bonded peanuts in the warehouse to meet the loan's collateral terms.

Mr. Curran also found that because of repeated overdrafts in the warehouse account, the National Bank of Georgia simply held checks from Billy Carter until there were sufficient funds in the account.

The toughest task Mr. Curran faced was deciding whether that loose bookkeeping constituted technical violations of federal banking laws that warranted indictment of Billy Carter, and perhaps others.

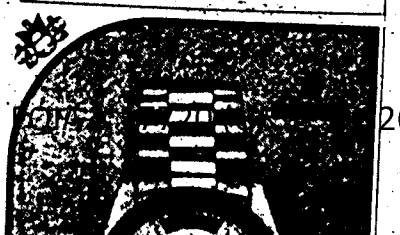
Mr. Curran decided any technical violations that might exist didn't amount to willful criminal acts. He did so after analyzing numerous bank-law cases that raise similar issues. But this detailed analysis of the evidence, and its relation to past cases, was made only in Mr. Curran's 239-page report to the Attorney General and wasn't made available to Congress or reporters.

Mr. Curran's report draws a devastating picture of Billy Carter as a manager. The report describes the warehouse books as "disorganized" and notes that by August 1977 the warehouse was in such "financial difficulty" its current liabilities exceeded its current assets by about $400,000.

To bail out his foundering family business, President Carter provided the warehouse, through his trustee, Charles Kirbo, $440,000 during 1977 and 1978, Mr. Curran found. To finance these loans to the warehouse, Carter Farms Inc., a business owned entirely by President Carter and his children, borrowed $480,000 from Trust Co. Bank in Atlanta. The balance of these loans was $275,000 as of July 1978, Mr. Curran notes.

The Carter warehouse may also owe the government some income tax. Mr. Curran's audit discovered what he said were "a number of errors related to the recording of sales and purchases" that "may have material income-tax consequences."

For example, $260,000 of peanuts bought in 1975 weren't recorded until 1976. Mr. Curran said such errors affect the net profit reported by the warehouse for 1975 through 1977. The special counsel added that these audit findings will be reported to the Internal Revenue Service.



NYT 10/17/79

Times

LATE CITY EDITION

Weather: Cloudy with showers today, tonight. Variably cloudy tomorrow. Temperature range: today 51-65; yesterday 47-66. Details on page D22.

17, 1979 — 30 cents beyond 50-mile zone from New York City. Higher in air delivery cities. — 25 CENTS

BELS SAY NG TALKS RKED OUT

S. and Others Seized From w Regime

RDERS

rk Times

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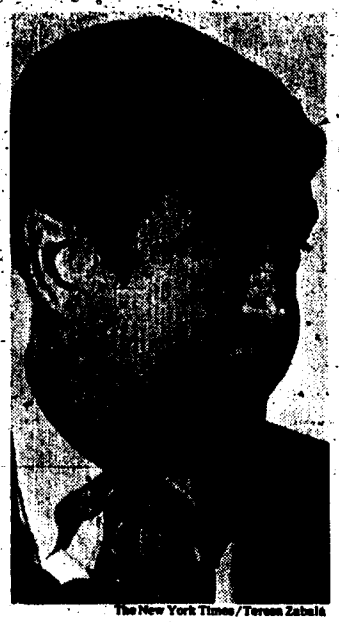

The New York Times/Teresa Zabala

Paul J. Curran at news conference

CARTER'S BUSINESS CLEARED IN INQUIRY ON CAMPAIGN FUNDS

INDICTMENTS ARE RULED OUT

Investigator Finds No Evidence of Diversion of Warehouse Profit to '76 Presidential Race

By EDWARD T. POUND
Special to The New York Times

WASHINGTON, Oct. 16 — Paul J. Curran, a special Federal investigator, said today that an exhaustive inquiry into loans to President Carter's family peanut business by the National Bank of Georgia had turned up "no evidence whatsoever" that proceeds had been diverted to Mr. Carter's 1976 Presidential campaign.

Mr. Curran, who spent nearly seven months investigating $9.8 million in loans to Carter's Warehouse, the President's family business in Plains, Ga., said: "Our audits and examinations of the books and records leave no room for doubt on this score. Every nickel and every peanut have been tracked into and out of the warehouse, and no funds were unlawfully diverted."

"There is no evidence to establish that President Jimmy Carter committed any crimes," Mr. Curran said. "Further, my overall conclusion . . . is that based on all the evidence and the applicable law, no indictment can or should be brought against anyone. None will be filed."

Excerpts from statement, page A21.

Insufficient Loan Collateral

But Mr. Curran's report said the investigation found that the Carter warehouse loans had insufficient collateral for long periods in 1975 and 1976; that the warehouse had major overdrafts of its bank account in late 1975 and that the bank often held checks because the account had insufficient funds.

Mr. Curran said that there had been some "record-keeping violations by a fairly low-level bank person." He did not identify the bank employee but said that the employee had been granted immunity to testify before the grand jury and would not have been prosecuted in any event "on the facts in this case."

Mr. Curran, a Republican who is a New York lawyer, was appointed as the Justice Department's special counsel in the warehouse inquiry on March 20 by Griffin B. Bell, then the Attorney General. He was given Watergate-style prosecution powers, meaning that he had the authority to seek indictments without clearance from anyone in the Justice Department.

Loan Diversion Alleged

He was appointed after repeated allegations had been made that proceeds from the National Bank of Georgia loans to the Carter business may have been diverted to Mr. Carter's Presidential campaign.

In 1975 and 1976, when Mr. Carter ran for the Presidency and when the bulk of the National Bank of Georgia loans were made, the warehouse business was managed by his brother, Billy Carter. The National Bank of Georgia, which is based in Atlanta, was controlled by Bert Lance, a close friend of the President.

Mr. Lance, who was Mr. Carter's first director of the Office of Management and

Continued on Page A20, Column 1

Sindona Enters A Hospital Here With a Wound

By JOSEPH B. TREASTER

Michele Sindona, the Italian financier who disappeared two and a half months ago while awaiting trial on fraud charges in connection with the collapse of the Franklin National Bank, was admitted to Doctors Hospital yesterday with a possible bullet wound in the leg, Federal authorities said.

The United States Attorney's office said that Mr. Sindona had been immediately arrested, but the Federal Bureau of Investigation and the financier's lawyers said that Federal marshals were on hand only for his protection.

Mr. Sindona's family said in a statement that the 59-year-old businessman had been released by his kidnappers. However, the F.B.I. said it had no information on that point.

Since late on the evening of Aug. 2 when Mr. Sindona was reportedly last seen walking alone on Fifth Avenue near his apartment at the Pierre Hotel, law-enforcement officials had been divided on whether the millionaire had been kidnapped or had fled to avoid the upcoming trial.

In late September, Mr. Sindona's law-

Continued on Page B3, Column 1

adoran Junta Promises s and a General Amnesty

By ALAN RIDING
Special to The New York Times

ct. 16 — El Salva- junta today an- economic and so- easing this coun- isis.

ho led yesterday's t Carlos Humberto ly fled the country, iselves to calling a reasonable peri- political prisoners ity, and to respect-

violence that has r the last two years at least six persons ween soldiers and Mejicanos district also moved against had occupied three h was burned down

further leftist un- declared a state of constitutional guar- d imposed a 10 P.M. l meetings of more re prohibited.

ing a "wait-and-see" attitude toward the new junta, which is expected to be expanded to include three civilians and today began describing itself as the "revolutionary Government." Antonio Morales Erlich, leader of the Christian Democratic Party, noted that the junta was echoing the sentiments of most Salvadorans but stressed that "it is absolutely necessary to implement the promise as soon as possible."

The new rulers received cautious sup-

Continued on Page A10, Column 3

OCT 17 1979

Carter Business Cleared in Inquiry on Bank Loans and Campaign Funds

Continued From Page A1

Budget, resigned in September 1977 after a Senate inquiry into his banking practices. He was indicted last May 22 on criminal counts of illegal banking manipulations and conspiracy matters unrelated to the Carter warehouse inquiry.

Mr. Curran declined today to say whether he had questioned Mr. Lance, but he emphasized, "We found no violations of law committed by President Jimmy Carter, by Billy Carter, by Mr. Lance."

Mr. Curran, perhaps reflecting a prosecutor's caution, said in response to a question: "I'm not exonerating anyone. Our investigation covered all the transactions involving Carter's Warehouse and the National Bank of Georgia . . . and my statement stands that there is no evidence to warrant the bringing of criminal charges against anyone."

President Carter, who was in the Chicago area today holding a "town meeting," was clearly pleased by Mr. Curran's findings. He told reporters, "I'm glad they have completed their investigation and turned their attention to crime control." He said he knew "all the time" that he had not engaged in wrongdoing.

Billy Carter's lawyer, Pierre Howard of Decatur, Ga., said today, "This is the result we have anticipated from the beginning. We're glad that it's over."

Mr. Curran completed his assignment today by delivering a 239-page report to Benjamin R. Civiletti, who succeeded Mr. Bell as Attorney General. Mr. Curran also delivered an abridged report to Congress and provided copies of that document to reporters during a late morning news conference at the Justice Department. He said that his report to Congress was "incomplete" because he was prohibited by law from releasing testimony given before a Federal grand jury in Atlanta.

Mr. Curran emphasized today at his news conference that his investigation had been "thorough." He said that he and his team of lawyers and accountants, with assistance from the Federal Bureau of Investigation, had reviewed more than 80,000 documents and interviewed numerous witnesses, among them President Carter.

He said that he had taken Mr. Carter's deposition during a four-hour meeting at the White House on Sept. 5. He said the deposition had been submitted to the grand jury and that the President, in response to a subpoena last May, had "promised all documents sought and more. He has cooperated totally in this investigation," Mr. Curran said.

Errors in the Records

The White House said late this afternoon that Mr. Carter's deposition would not be made public because the President had been advised by his lawyers that "it would be inappropriate in this case" to release the document.

Mr. Curran said that he and his investigators had found numerous errors in the warehouse records relating to the sales and purchases of peanuts; failure by the National Bank of Georgia to obtain, at all times, sufficient collateral, and numerous overdrafts on a warehouse checking account by Billy Carter.

Mr. Curran said he also conducted "a limited examination" of the records of Gerald Rafshoon Advertising Inc. to determine whether the Atlanta-based agency had obtained money from any outside sources that enabled it to extend credit to Mr. Carter's primary campaign. The agency was owned at the time by Gerald Rafshoon, who is Mr. Carter's media adviser, but it was sold this year.

Mr. Curran said that his inquiry showed that the Rafshoon agency had had no access to unexplained cash while handling Mr. Carter's primary campaign and that the agency had at no point spent more than it had received from Mr. Carter's campaign committee.

Mr. Curran said that he and his staff had audited all peanut sales and purchases by the warehouse and had turned up "a number of errors related to the recording of sales and purchases" from 1975 through 1977. He said the errors his staff had discovered had had "a material impact on each year's reported net profits, although in the aggregate, the three-year 1975-1977 profits and losses remain unchanged."

He said, however, that the errors related to net income and loss for each year and "they may have material income tax consequences" for the partners — the President, Billy Carter and Lillian Carter, their mother.

The bank loans examined by Mr. Curran were made from 1975 through 1977. They were made in the following categories: $1,101,813 to purchase a peanut sheller and construct a new warehouse for peanut storage and $8,775,181 in two commodity loans.

Mr. Curran said he believed that none of the proceeds of those loans had been diverted to the Presidential campaign. "We traced every advance and every repayment into and out of the warehouse accounts and found them all properly accounted for," he said.

There is no evidence that Billy Carter ever pledged the same collateral more than once or that there was a major delay in payments between March and May 1976.

History of Loans Traced

In a summary statement released with the report he gave to reporters, Mr. Curran traced the history of the loans. The commodity loans were to be secured by peanuts at the warehouse, Mr. Curran explained, and at one point — from March 23 through May 13, 1976 — there was "no security" on the initial commodity loan. At the time, the warehouse owed the National Bank of Georgia $1,150,000 on the loan, Mr. Curran said.

Moreover, Mr. Curran said, "The repayment checks issued by the warehouse to N.B.G. to accompany the warehouse releases were not processed by N.B.G., except for the first five checks totaling $250,000 written in October 1975. Every other repayment check issued with releases during the life of the loan was held by the bank and not processed. Instead, the bank adopted the procedure of reducing the loan by debit memos debiting the warehouse account as monies were deposited in the account by the warehouse. The checks were not processed by N.B.G. due to insufficient funds in the warehouse account." The releases referred to were the collateral — peanuts.

Mr. Curran said that overdrafts "appeared very frequently in the warehouse account in 1975," reaching a peak of $369,415 in October. But they were eliminated in large part after that time, Mr. Curran said, when the bank adopted the procedure of not processing the loan repayment checks.

The first commodity loan, he said, was to be repaid on Aug. 31, 1976. However, the balance of $520,936 was not repaid; rather, he said, it was "rolled over" into the 1976 commodity loan, meaning that the warehouse commenced its 1976 peanut buying season with a heavy debt on its hands.

Mr. Curran said that his inquiry showed that some repayment checks from the warehouse continued to be held by the bank during the life of the second commodity loan. This was a result, he said, of "insufficient funds" and the fact that the checks were processed when the warehouse account had sufficient funds to cover them.

By Aug. 31, 1977, the warehouse was still in financial difficulty and was unable to pay its current debts. Consequently, Mr. Carter said, Carter Farms, a corporation in which President Carter has a 91 per cent interest, and Mr. Carter personally lent $440,000 to the warehouse to "bail out" the business.

Associated Press

A forklift operator storing bags of peanuts at Carter Warehouse in Plains, Ga.

Brown Off for Talks in Seoul

WASHINGTON, Oct. 16 (Reuters) — Defense Secretary Harold Brown left today for consultations on security in South Korea and Japan. He will attend the annual military meetings of the United States and South Korea in Seoul tomorrow through Friday. He then goes to Japan where he will confer with military officials and visit Japanese air and ground military installations before returning home next Monday.

TELECOPY COVER SHEET

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Date: 6/28/95

TO: ERIK JASO

Company Name:

Fax Number: 501-221-8707 Telephone Number:

FROM: RAJEEV DUGGAL

Number of Pages: 2 (including this cover sheet)

Message: HERE IS THE ARTICLE FROM THE POST FYI.

Vesco Jury Agrees to Take Taped Testimony From Carter

Associated Press

A federal grand jury investigating a case of alleged White House influence-buying involving fugitive financier Robert L. Vesco has agreed to accept videotape testimony from President Carter, government sources said yesterday.

The sources, who asked not to be identified, said several members of the grand jury objected to the proposed arrangement for questioning Carter on the grounds that they would be unable to submit follow-up questions to the president.

The minority of the grand jurors contended that the president should not be afforded special treatment and that if security was a problem special precautions could be taken, the sources said.

The grand jury is investigating allegations that there was an attempt shortly after Carter took office in January 1977 to quash extradition proceedings against Vesco, who fled the country after his indictment on stock fraud charges. He is believed to be living in the Bahamas.

Under the arrangement for questioning Carter, the president would be interviewed by government lawyers without grand jurors present, sources said. They said negotiations between the White House and the U.S. attorney's office are incomplete and that no date has been set for the videotape interview.

The questions for the president are likely to center on a Feb. 15, 1977, meeting between Carter and an aide, Richard M. Harden.

F. Spencer Lee IV, a Georgia lawyer who allegedly acted as an intermediary in Vesco's behalf, met with Harden in February 1977.

Lee and Harden have said that Harden talked the lawyer out of pursuing the matter.

Activities Today in Senate, House

House

Meets at 10 a.m.

Committees:

Agriculture—10:30 a.m. Open. Cont. mark-up Forestry Loan Act, Food Stamp Act amends. 1301 Longworth House Office Bldg.

Armed Services—10 a.m. Open. Res. & Develop. Subcomte. on reprogramming requests. 2212 Rayburn House Office Bldg.

District of Columbia—9:30 a.m. Open. Pending business, H-128 Capitol.

Education & Labor—9:30 a.m. Open. Elem., secondary & Voc. Edu. Subcomte. Oversight hrngs. on innovative school lunch programs. 2175 RHOB.

Education & Labor—10 a.m. Open. Labor-Manage. Relations Subcomte. Oversight hrngs. on pressure in today's workplace. 2261 RHOB.

Education & Labor — 9:30 a.m. Open. Labor Standards Subcmte. Oversight hrngs. on Longshoremen's & Harbor Workers' Comp. Act. 2257 RHOB.

Interior & Insular Affairs—9:45 a.m. Open. Mines & Mining Subcomte. Mark-up geothermal legis. 310 Cannon House Office Bldg.

Interior & Insular Affairs—9:45 a.m. Open. Public Lands Subcomte. Cont. on pending wilderness legis. 1324 LHOB.

Interstate & Foreign Commerce—10 a.m. Open. Cont. mark-up Natl. Energy Conserv. Initiatives Act, 2123 RHOB.

Judiciary—9:30 a.m. Open. Civil & Constit. Rights Subcomte. Cont. hrngs. on FBI charter. 2226 RHOB.

Judiciary—2 p.m. Open. Criminal Justice Subcomte. Cont. mark-up Criminal Code revision. B-352 RHOB.

Merchant Marine & Fisheries—9:30 a.m. Open. Maritime Edu. & Training Subcomte. On Maritime Edu. & Training Act. 1334 LHOB.

Merchant Marine & Fisheries—9:30 a.m. Open. Coast Guard & Navigation Subcomte. Hrng. on compensation for losses resulting from Mexican oil spill. 1302 RHOB.

Public Works & Transportation—10 a.m. Open. Aviation Subcomte. Hrng. on air traffic control system. 2167 RHOB.

Ways & Means—10 a.m. Open Trade Subcomte. Mark-up oil import legis. 1100 LHOB.

Select Comte. on Committees—9:30 a.m. Open. Cont. hrngs. on energy jurisdiction. 2337 RHOB.

Senate

Meets at 9:30 a.m.

Committees:

Appropriations Subcomte on the District of Columbia—8 a.m. Open. Hearing on D.C. 1979 summer youth program. 1114 Dirksen Office Bldg.

Banking, Housing and Urban Affairs—11 a.m. Open. Hearing on procedures for allocation of mass transportation funds. Followed by hearing on nomination of Theodore Lutz to be administrator of the Urban Mass Transportation Admin. 5302 DOB.

Commerce, Science and Transportation—9:30 a.m. Open. Business meeting. 235 Russell Office Bldg.

Energy and Natural Resources—10 a.m. Open. Business meeting to consider nuclear waste policy and other pending calendar business. 3110 DOB.

Finance—10 a.m. Open. Business meeting to consider U.S. trade status with People's Republic of China; nom. of Michael Smith to be dep. special rep for trade negotiations, and other pending business. 2221 DOB.

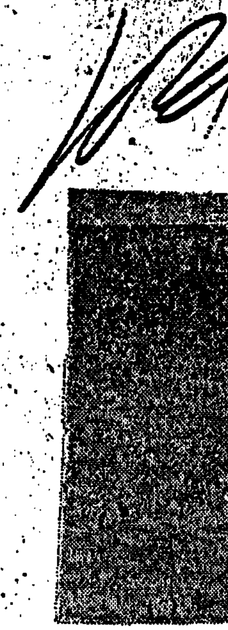
Foreign Relations—10 a.m. Open. Hearing on Special Central American and Caribbean Security Assistance Act, 1979. 4221 DOB.

Foreign Relations—2 p.m. Closed. Subcomte on Near Eastern & South Asian Affairs to hold hearing on current situation in Yemen including military buildup. S-116 Capitol.

Governmental Affairs Subcomte—9 a.m. Open. Energy, Non-proliferation and Federal ...

President's Appointments

The president's appointment's today:



404(b) & 608(b)
Research
ERIC JASO
ATTORNEY WORK PRODUCT

404(b) Research
608(b)

Memorandum **Office of the Independent Counsel**

To : S. M. Colloton Date 7/12/95

From : E. H. Jaso

Subject: U.S. v. Tucker: Required Disclosure under Rule 404(b)

A 1991 amendment to Fed. Rule Crim. P. 404(b) requires that:

> "upon request by the accused, the prosecution . . . shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any [Rule 404(b)] evidence it intends to introduce at trial."

The Committee Note explains that both the request and the response should properly be submitted "in a reasonable and timely fashion." The Rule requires "no specific form of notice"; the Note reports that the Committee "considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument." The Government must "apprise the defense of the general nature of the evidence"; the requirement does not "supercede [sic] other rules of admissibility or disclosure, such as the Jencks Act, nor require the prosecution to disclose the names and addresses of witnesses." The Rule does not include any specific sanction for failure to provide the required notice. See also 22 Wright & Miller, Federal Practice & Procedure sec. 5249 (Rule 404) (1994 Supp.).

Required Specificity of Government Response[1]

Most courts to address the subject have not read Rule 404(b) to require pretrial disclosure of specific facts regarding 404(b) evidence to be introduced at trial, following the Committee Note's admonition that "no specific form of notice" is required. For example, in United States v. Kern, 12 F.3d 122, 124 (8th Cir. 1993), a bank robbery case, the court held that the Government had provided sufficient notice of its intention to introduce evidence of a subsequent robbery allegedly carried out by defendants by informing the defense at a pretrial hearing that it "might use some evidence from some local robberies" and by later (one week prior to trial) providing the defense with copies of the state authorities' reports of the robberies, once they were obtained.

Along the same lines, the Eighth Circuit affirmed another bank robbery/firearms conviction, holding that two days advance notice of 404(b) evidence of illegal drug use by defendant was permissible where the Government did not obtain the evidence until a Friday five days before the trial and disclosed

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[1] Courts have held that the defense request for disclosure under 404(b) must be timely and reasonably specific, preferably mentioning the provision itself. See, e.g., United States v. Tuesta-Toro, 29 F.3d 771, 774-75 (1st Cir. 1994) ("at a minimum the defense must present a timely request sufficiently clear and particular, in an objective sense, to fairly alert the prosecution that the defense is invoking its specific right to pretrial notification [under 404(b)]"). The defense has met that requirement here. One court has noted that the Rule requires defendant merely to make a request of the Government; a motion before the court is unnecessary. United States v. Goldberg, 855 F. Supp. 725, 731 (M.D. Pa. 1994).

it to the defense on the following Monday. United States v. Sutton, 41 F.3d 1257, 1258-59 (8th Cir. 1994) cert. denied, 115 S. Ct. 1712 (1995). The court noted that the Government had previously turned over a witness statement implicating the defendant in an illegal drug buy on the day of the robbery, so that in any event the defense had notice that the Government might raise the issue of defendant's illegal drug use at trial. Id.[2]

In a case decided shortly after the notice amendment became effective, a Federal judge in Illinois rejected as overbroad a defense motion for disclosure under 404(b) nearly identical to the ones made by Tucker and Marks. United States v. Sims, 808 F. Supp. 607, 610 (N.D. Ill. 1992). Defendants sought production of "the dates, times, places and persons involved in the specific crimes or acts; the statements of each participant; the documents which contain such evidence; and a statement of issues to which the government believes such evidence may be relevant." Id. at 611. Noting that the Committee specifically considered and rejected a requirement that the pretrial notice "satisfy the particularity requirements normally required of language used in a charging document," the court held that neither the Rule nor the accompanying Committee Note entitles the defense to such specific pretrial discovery. Id. The notice

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[2] The court went on to hold that the evidence of defendant's drug use, which was offered as evidence of motive for the robbery, was inadmissible as unduly prejudicial, but the court ultimately held the error harmless. 41 F.3d at 1259-60.

requirement, the court observed, is intended to prevent surprise; it "is not a tool for open ended discovery." Id. at 610. Accord United States v. Damico, 1995 WL 221883 (N.D. Ill. April 10, 1995); United States v. Agunloye, 1995 WL 340760 (N.D. Ill. June 1, 1995); United States v. Jackson, 850 F. Supp. 1481, 1493 (D. Kan. 1994); United States v. Washington, 819 F. Supp. 358, 367-68 (D. Vt. 1993) (rejecting similar requests); see also United States v. Williams, 792 F. Supp. 1120, 1134 (S.D. Ind. 1992) ("the purpose of the . . . notice provision, to prevent surprise during trial, does not support providing a defendant with the materials which the Government possesses and plans to offer at trial"), followed in United States v. Richardson, 837 F. Supp. 570, 575-76 (S.D.N.Y. 1993) (notice of "general nature" of 404(b) evidence is "all that is required" by the Rule and is "sufficient to allow the defendant to adequately prepare for trial").

However, at least two circuits' decisions (and those of several district courts) suggest that the notice required under 404(b) must contain more than a general description of the extrinsic conduct to be introduced at trial. Citing the need for the trial court eventually to make a determination as to the admissibility for 404(b) evidence, these courts have seemingly imported into 404(b)'s pretrial notice requirement a requirement that the Government provide the defense and/or the trial court with certain details regarding the evidence, as well as a specific articulation of the purpose for which the 404(b) evidence is to be used at trial. The Sixth Circuit, surveying

several other courts' treatment of 404(b), held that "the government's notice must characterize the prior conduct to a degree that fairly apprises the defendant of its general nature." However, the court also declared that the notice "must be sufficiently clear so as 'to permit pretrial resolution of the issue of its admissibility.'" United States v. Barnes, 49 F.3d 1144, 1148-49 (6th Cir. 1995).[3] A case from the Tenth Circuit may also be read to require the Government's 404(b) notice to describe precisely each piece of evidence and "articulate with precision [its] evidentiary purpose." See United States v. Birch, 39 F.3d 1089, 1093 (10th Cir. 1994).[4]

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[3] Barnes also declares that a request for disclosure under 404(b) triggers a continuing duty on the part of the Government to disclose newly revealed evidence. 49 F.3d at 1148. But see United States v. Tuesta-Toro, 29 F.3d 771, 775 n.1 (1st Cir. 1994) (rule as read suggests that Government need only give notice of 404(b) evidence it intends to use as of the time the defendant's request is made).

[4] Birch, at least, may be distinguishable. The appellant there did not raise the specific issue of insufficient notice, but challenged generally the admissibility of the 404(b) evidence introduced at trial; the court found that the prerequisite articulation of evidentiary purpose was absent both from the Government's submitted pretrial notice and from the record of the Government's submission of the evidence at trial. See id. However, United States v. Kendall, 766 F.2d 1426, 1436 (10th Cir. 1985) cert. denied, 474 U.S. 1081 (1986), cited by the Birch court, held that such articulation was required at the time the evidence is offered for admission, to aid the trial court in making its determination and to make a record in case of appeal. Id. at 1436-37. Kendall obviously was decided well before 404(b) was amended to include a notice requirement; further, as several courts have noted (see infra), the purposes of the notice requirement differ greatly from those underlying the provisions of Rule 404 governing admissibility at trial. Thus, the most that Birch bears on the proper content of the Government's pretrial notice is that if the notice includes a precise articulation of the intended purposes of the 404(b) evidence to be used, the Government need not make another such articulation

The Committee Note to the 1991 Amendment does state that one of the Amendment's purposes was to "promote early resolution on the issue of admissibility." However, the Note plainly distinguishes between the requisite pretrial notice, of which "no specific form . . . is required" and the ultimate issue of admissibility, which is typically determined at trial; the Note specifically anticipates pretrial in limine rulings on the admissibility of 404(b) evidence, for which the court may require the Government "to disclose to [the court] the specifics of such evidence which the court must consider in determining admissibility." The court in United States v. Melendez, 1992 WL 96327 (S.D.N.Y. Apr. 24, 1992) recognized this distinction, noting that while the Rule requires only disclosure of the "general nature" of 404(b) evidence, "the Advisory Committee does not appear to contemplate that [the] notice need include 'the specifics of such evidence which the court must consider in determining admissibility,' since it refers to such specifics as something the Court may require to be disclosed in ruling in limine, a step to follow upon the notice." Id. at *1. The court nonetheless held that proper notice did require the government to identify "each crime, wrong or act by its specific nature" including dates, places, and type of wrong committed. Id. See also, e.g., United States v. Johnson, 1994 WL 805243 *5 (W.D.N.Y. Aug. 9, 1994) (requiring pretrial disclosure by Government "in sufficient detail to permit defense counsel to prepare and file

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prior to submitting the evidence for admission at trial.

appropriate motions in limine on the issue of admissibility"); United States v. Altimari, 1994 WL 116086 *8 (S.D.N.Y. Mar. 25, 1994) (ordering Government to give notice "in writing and in an understandable manner, of the specific prior act evidence it intends to offer"); but see Damico, 1995 WL 221883 *4 (rejecting defense request for specific disclosure of 404(b) evidence as overbroad, but citing the Committee Note in observing that "[t]his court may require the government to disclose to it [in camera] the specifics of such evidentiary detail which the court must consider in determining admissibility"); see also United States v. Williams, 1993 WL 270504 (D. Kan. June 16, 1993) (finding sufficient Government's pretrial notice containing "descriptions of the general nature" of 404(b) evidence to be introduced at trial, but ordering Government to disclose to defense, at least one day prior to introducing evidence at trial, specific evidence, including identification of the purpose for which evidence will be offered).

The court in United States v. Long, 814 F. Supp. 72 (D. Kan. 1993) held insufficient as notice a letter sent by the U.S. Attorney to defense stating that 404(b) evidence would be introduced, and noting that a particular witness would testify "consistent with his prior statement," which statement the Government had already produced to the defense. Id. at 73. The court denied the defense motion to prohibit introduction of the evidence, and instead ordered the Government to amend its notice to "describe the nature of the defendant's prior conduct the

government intends to introduce" via the witness's testimony. Id. at 74. Defendant's request did not seek "unduly detailed information . . . [r]ather, the defendant simply seeks notice of the general nature of such evidence to permit pretrial resolution of the issue of its admissibility." Id. The court apparently did not believe that the admissibility determination would require detailed information, although it did suggest that the Government include in its amended notice "the specific purpose, among those listed in [Rule 404(b)], for which the evidence is intended to be introduced at trial." Id. The court cited with approval Van Pelt, 1992 WL 371640 (D. Kan. Dec. 1, 1992), where the court held that the prosecution's notice providing "fairly detailed descriptions" of the 404(b) evidence was sufficient; nonetheless the court also quoted the Committee Note's admonition that the Rule did not intend to impose "the particularity requirements [of] a charging document" upon 404(b) pretrial notice. 814 F. Supp. at 74.

The Second Circuit has affirmed the intention expressed in the Committee Note to the 1991 Amendment that the Rule does not require the Government to disclose "either directly or indirectly" the identity of witnesses in advance of trial. United States v. Matthews, 20 F.3d 538, 551 (2d Cir. 1994). In Matthews, appellant objected that he had not received notice that the Government intended to introduce extrinsic evidence of his having attacked a woman with an icepick. The court held that where the testimony constituting 404(b) evidence itself would

reveal the identity of the witness (in this case, defendant had apparently ever attacked only one person with an icepick), the evidence itself need not be disclosed, either generally or specifically. Id.

The Eleventh Circuit has crafted a three-element test, analogizing the 404(b) notice requirement to other, more specific discovery notice requirements (e.g., Rules 609(b), 803(24), 805(b)(5)), to determine whether notice was sufficient in retrospect in a particular circumstance. United States v. Perez-Tosta, 36 F.3d 1552, 1560-63 (11th Cir. 1994). Pretrial notice under 404(b) is reasonable depending on:

> (1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;
> (2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and
> (3) How significant the evidence is to the prosecution's case.

Id. at 1562. Citing the Committee Note to the 1991 Amendment, the court observed that the determination must be made case-by-case, and that the decision with regard to admissibility of 404(b) evidence remains within the discretion of the trial court and is reviewed accordingly on appeal. Id. at 1561.

Additional Factors

Prior crimes and bad acts which are directly relevant to the criminal acts charged need not be disclosed. "Where the evidence of an act and the evidence of a crime charged are

inextricably intertwined, the act is not extrinsic and Rule 404(b) is not implicated." United States v. DeLuna, 763 F.2d 897, 913 (8th Cir.), cert. denied, 474 U.S. 980 (1985), quoted in United States v. Severe, 29 F.3d 444, 447 (8th Cir. 1994) (in context of admissibility challenge based on lack of notice under 1991 amendment to Rule 404(b)) cert. denied, 115 S. Ct. 763 (1995). Accord United States v. Oakie, 12 F.3d 1436, 1441-42 (8th Cir. 1993) reh'g en banc denied, Jan. 28, 1994.

Where the Government intends to use extrinsic 404(b) evidence solely for the purpose of impeaching the defendant when he testifies as provided under Rule 608(b), notice of such intended use need not be given. United States v. Tomblin, 46 F.3d 1369, 1388 n.51 (5th Cir. 1995). But see United States v. Matthews, 20 F.3d 538, 551 (2d Cir. 1994) (the notice provision "applies whether the government wishes to use the other-act evidence in its direct case, on rebuttal, or as impeachment") (citing Fed. R. Evid. 404(b) Advisory Committee Note); accord United States v. Jackson, 850 F. Supp. 1481, 1494 (D. Kan. 1994).

Where the defense is already aware of the Government's possession of and intention to introduce 404(b) evidence at trial, the Government's failure to provide formal notice in response to a motion for disclosure is of no moment, and will not affect the evidence's admissibility. See United States v. Adediran, 26 F.3d 61, 64 (8th Cir. 1994).

Timing of Government Response

The length of time in advance of trial required for adequate notice generally depends on circumstances, and is within the court's discretion to determine. For example, in United States v. Kern, 12 F.3d 122, 124 (8th Cir. 1993), the magistrate judge had ordered the Government to make its 404(b) disclosures at least two weeks prior to the trial. Where the Government had informed the defense orally at a pretrial conference of its intention to use 404(b) evidence pertaining to the later commission by defendant of a similar crime as the one charged, the appeals court held that the Government had provided sufficient notice by later (one week prior to trial) providing the defense with specific reports of such crimes once they were obtained from state authorities.

In United States v. Sutton, 41 F.3d 1257, 1258-59 (8th Cir. 1994) cert. denied, 115 S. Ct. 1712 (1995), the court held that two days advance notice that the Government intended to introduce evidence of illegal drug use by defendant was permissible where the Government did not obtain the evidence until a Friday five days before the trial and disclosed it to the defense on the following Monday, despite the trial court's order that the Government was required to give notice of all such evidence at least four days before trial.

In United States v. Williams, 1993 WL 270504 (D. Kan. June 16, 1993), the court ordered the Government to disclose to

the defense, at least one day prior to introducing 404(b) evidence at trial, specific details regarding such evidence, including identifying the purpose for which evidence would be offered.

Other examples of advance notice deemed "reasonable" are United States v. Johnson, 1994 WL 805243 *5 (W.D.N.Y. Aug. 9, 1994) (thirty days before trial, or prior to a scheduled pretrial conference); United States v. Messino, 855 F. Supp. 955, 965 (N.D. Ill. 1994) (thirty days prior to trial); United States v. Altimari, 1994 WL 116086 (S.D.N.Y. Mar. 25, 1994) (fifteen days before trial); United States v. Richardson, 837 F. Supp. 570, 576 (S.D.N.Y. 1993) (ten days prior to trial); United States v. Evangelista, 813 F. Supp. 294, 302 (D.N.J. 1993) (ten business days prior to trial "because alleged incidents occurred more than five years ago [and thus] defendants' preparation to respond to [the evidence] may require more effort than if the incidents had occurred more recently"); United States v. Williams, 792 F. Supp. 1120, 1133-34 (S.D. Ind. 1992) (ten days prior to trial); United States v. Green, 144 F.R.D. 631, 645 (W.D.N.Y. 1992) (thirty days prior to jury selection due to "the complexity and volume of the evidence") and United States v. Melendez, 1992 WL 96327 *1 (S.D.N.Y. Apr. 24, 1992) (fourteen days prior to trial).

At least one court has considered, and rejected, a defendant's argument that Rule 404(b) requires that the court set a pretrial deadline by which the Government must either disclose all "bad acts" evidence it intends to introduce, or be precluded

from further such disclosure and/or introduction. United States v. Van Pelt, 1992 WL 371640 *14 (D. Kan. Dec. 1, 1992).

22 Wright & Miller, Federal Practice and Procedure Rule 404
(TREATISE MAIN VOLUME)
(Publication page references are not available for this document.)

Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
Kenneth W. Graham, Jr.

Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

TEXT OF RULE 404 (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609. (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Advisory Committee's Note

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof. Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof. In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick ss 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers

22 Wright & Miller, Federal Practice and Procedure Rule 404
(TREATISE SUPPLEMENT)
(Publication page references are not available for this document.)

Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
Kenneth W. Graham, Jr.

1994 Supplement

Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

TEXT OF RULE 404

1991 Amendments

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Committee Note to 1991 Amendments

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2d 670 (5th Cir.1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution. The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions). The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla.Stat.Ann. s 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex.R.Evid. 404(b) (no time limit). Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla.Stat.Ann. s 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. s 3500, et seq. nor require the prosecution to disclose the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16. The amendment requires the prosecution to

provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Although the amendment does not address specifically the issue of sanctions for failure to provide notice, the Court in its discretion may enter appropriate orders. The amendment is not intended to redefine what evidence would otherwise be admissible under Rule 404(b). Nor is it intended to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, ___ U.S. ___, 108 S.Ct. 1496 (1988).

1987 Amendments

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

* * * * * (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Committee Note to 1987 Amendments

The amendments are technical. No substantive change is intended. [FNa] [FNa]But see s 5231.1, this supplement.

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Federal Practice and Procedure
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1994 Supplement

Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

s 5249. OTHER CRIMES, WRONGS, OR ACTS--PROCEDURE

The same double standard that seems to mar the substantive application of Rule **404(b),** [FN2.1] now appears to be creeping into the procedure for implementing the Rule. [FN2.2]

In 1991 the Supreme Court adopted a notice provision for Rule **404(b).** [FN9.1] Under the amended Rule, the prosecution must give notice if the defense requests such notice. However, the rule provides no sanction for failure to give notice, the notice must only be of the "general nature" of the evidence, and can be delayed until the time of trial if the court finds "good cause" for such delay. This was apparently as much notice as the Justice Department was willing to tolerate; it remains to be seen if it will be of much use to criminal defendants.

One recent case suggests that the trial judge has no duty to engage in the balancing of probative worth and prejudice if the defendant does not request this. [FN19.1] If this means that the defendant must object and request balancing if the objection is overruled, it is clearly wrong. Both the Advisory Committee's Note and the better-reasoned cases make it clear that the balancing process is an essential part of the decision to admit other crimes evidence, and an objection suffices to trigger the duty to balance. [FN19.2]

One court has applied the Luce doctrine to other crimes evidence, holding that if the trial court rules on a motion in limine that evidence of other crimes will be admissible if the defense counsel makes a particular form of argument, the issue is not preserved for appeal unless counsel makes the argument and the other crimes evidence is admitted against the defendant. [FN20.1]

Even in the absence of an objection, admission of evidence of other crimes may be reviewable on appeal as plain error. [FN22.1]

In Huddleston v. United States [FN25.1] the Supreme Court rejected the argument made in the main volume and most of the caselaw on the proof of preliminary facts in the use of other crimes evidence. In an opinion by the Chief Justice, a unanimous Court held that proof of the preliminary facts was governed by Rule 104(b), rather than Rule 104(a). [FN25.2] Huddleston involved the use of other sales of stolen property to prove that the defendant knew that the goods he was charged with selling were stolen property. [FN25.3] The preliminary fact to be proved was whether the defendant had known the property involved in the uncharged crimes had been stolen and the Court held that the trial court need find only that a reasonable jury could find the preliminary fact by a preponderance of the evidence. [FN25.4] As with other questions of conditional relevance, the Court held that the other crimes evidence could be admitted subject to later proof of the preliminary fact. [FN25.5] In making its determination, the opinion suggests that the trial judge can consider not only the evidence with respect to the uncharged crime, but also with respect to the charged crime; that is, in determining whether the defendant was

guilty of the uncharged crime, the court can take into account evidence that suggests that he was guilty of the charged crime. [FN25.6] Although the opinion does not mention this, the trial court must instruct the jury to disregard the uncharged crime if they do not find the preliminary fact to have been proved by a preponderance of the evidence. [FN25.7]

Admissibility of evidence under Rule **404(b)** is not required to be resolved at a pretrial hearing to avoid prejudicing trier of fact in a court trial. [FN28.1]

It is important for the court to distinguish between evidence of other acts offered under Rule **404(b)** and those offered under Rule 608(b) because the requirements for admissibility are substantially different under each rule. [FN29.1]

In other cases the issues may be clear from the arguments of counsel or the tenor of cross-examination of prosecution witnesses. [FN38.1]

One court has held that before the defendant can be asked about any other crimes, the prosecutor must show a good faith basis for the questions. [FN46.1]

All of the prior federal caselaw on the standard for proof of other crimes has been swept away by a Supreme Court decision that such evidence is admissible merely on a showing that a reasonable jury could find the defendant committed the prior crime by a preponderance of the evidence. [FN47.1] It remains to be seen whether or not the state courts will take the same view.

In 1991 the Supreme Court adopted a notice provision for Rule **404(b).** [FN9.1] Under the amended Rule, the prosecution must give notice if the defense requests such notice. However, the rule provides no sanction for failure to give notice, the notice must only be of the "general nature" of the evidence, and can be delayed until the time of trial if the court finds "good cause" for such delay. This was apparently as much notice as the Justice Department was willing to tolerate; it remains to be seen if if will be of much use to criminal defendants.

The Louisiana Evidence Code specifically provides that the enactment of Rule **404(b)** and 104(a) does not alter the pre-existing caselaw that requires other crimes to be proved by clear and convincing evidence, but allows the courts to change these rules. [FN57.1]

The Fifth Circuit Court of Appeals, sitting en banc, has said that Rule **404(b)** does not incorporate the pre-existing caselaw governing the use of evidence of other crimes. [FN61.1] The court adopts a two-step analysis suggested by a student writer. [FN61.2] To be admissible under this scheme, evidence of other crimes must do no more than satisfy the minimal standard of relevance in Rule 401; [FN61.3] then the judge must apply the balancing test of Rule 403. [FN61.4] Although the court seems to read back some of the pre-existing caselaw into the trial judge's balancing under Rule 403, [FN61.5] the thrust of the opinion is that hereafter trial courts should admit evidence of other crimes more freely than has been done in the past. [FN61.6]

The court flatly rejects the notice that prior crimes must be proved by "clear and convincing evidence," holding that the proper standard is to be found in Rule 104(b). [FN61.7] The court does not specify what "preliminary fact" it thinks is involved in the proof of other crimes. [FN61.8] Moreover, the implicit ruling that the admissibility of character evidence is a question for the jury rather than the trial judge seems highly questionable. [FN61.9] It will be interesting to see if the court will apply Rule 104(b) to the determination of the admissibility of evidence under Rules 406-411 as well.

In Oklahoma, it has been suggested that where the prosecution uses proof of crime as other crimes evidence, it cannot thereafter be the basis of another prosecution against the defendant. [FN80.1] This would certainly tend to discourage the strategy of holding back stronger cases until they have been used as other crimes evidence in prosecutions where the evidence against the defendant is weaker.

Some courts have begun to emphasize the importance of the trial judge making an adequate record of his decision, including the purpose for which the evidence was admitted and the reasons therefor. [FN92.1]

A ruling that evidence of extrinsic offenses is inadmissible must be honored by the proponent; a deliberate attempt to prove the other crime by circumstantial evidence is egregious misconduct and grounds for a mistrial or a reversal on appeal. [FN96.1]

Perhaps for these reasons, the trial judge is under no duty to give a cautionary instruction sua sponte; it must be requested by counsel. [FN2.1]

Another procedural device used in the control of evidence of other crimes is the mistrial. [FN8.1]

There are a number of recent opinions that do offer guidance to trial judges in distinguishing the legitimate uses of this form of proof from the ersatz justifications sometimes offered by counsel. [FN11.1]

FN2.1 Double standard See s 5248, note 31, this supplement.

FN2.2 Creeping into See, e.g., U.S. v. Acosta-Cazares, C.A.6th, 1989, 878 F.2d 945, 949-950, certiorari denied 110 S.Ct. 255, 493 U.S. 899, 107 L.Ed.2d 204 (prosecutor's lying about intent to use other crimes evidence excused on grounds of ignorance; defense denied review of 403 balancing because counsel did not utter magic words in colloquy on admissibility at trial despite pretrial objections to use).

FN9.1 Rule **404(b)** notice The text of the amended rule and the Advisory Committee's Note thereto appear in this supplement immediately before the supplementary materials for s 5231.

FN19.1 No duty without request State v. Gollon, App.1983, 340 N.W.2d 912, 918, 115 Wis.2d 592.

FN19.2 Balancing essential See, for example, the two-step process for admission prescribed in the leading case of U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898 (described in s 5249 of this supplement). The correct view is also explained in the able dissenting opinion of Abrahamson, J., in State v. Rutchik, Sup.Ct., 1984, 341 N.W.2d 639, 650 n. 1, 116 Wis.2d 61.

FN20.1 Luce doctrine U.S. v. Ortiz, C.A.2d, 1988, 857 F.2d 900, 906. For a nice contrast to the Luce doctrine, see U.S. v. Sullivan, C.A.7th, 1990, 911 F.2d 2, 8 (defendant's failure to object to co-defendant's introduction of evidence of bribe by X allows government, which also did not object, to introduce evidence that X said that defendant had accepted a similar bribe--evidence totally irrelevant to rebut evidence admitted without objection). Motion in limine was not sufficient to preserve error in admission of other crimes evidence where the trial judge declined to rule until evidence was offered at trial and no objection was made at that time. Doty v. Sewall, C.A.1st, 1990, 908 F.2d 1053, 1056.

FN22.1 Plain error Improper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself. U.S. v. Parker, C.A.10th, 1979, 604 F.2d 1327, 1329.

FN25.1 Huddleston decision 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. For a good illustration of synergistic effect of reducing the standard of proof of other crimes, see U.S. v. Rodriguez, C.A.6th, 1989, 882 F.2d 1059, 1064 (evidence of another drug transaction by a person who visited defendant at about the same time admissible to show that defendant was in possession of drugs for sale). Testimony of police officer that defendant had sold him cocaine on prior occasion was admissible under Rule **404(b)** without any other evidence that substance was in fact cocaine. U.S. v. Gibbs, C.A.D.C.1990, 904 F.2d 52, 56.

FN25.2 Governed by 104(b) 108 S.Ct. at 1500-1501, 485 U.S. at 687-688.

FN25.3 Knew stolen 108 S.Ct. at 1498, 485 U.S. at ___ . Although the court does not discuss this, the relevance of the evidence was based on the "doctrine of chances"; that is, how likely is it that a person could sell so much stolen property without learning that it was not of legitimate origin?

FN25.4 Could find preponderance 108 S.Ct. at 1501, 485 U.S. at 689. Huddleston holds that trial court need not make any preliminary finding that the prosecution has proved another crime by even a preponderance of the evidence before submitting the evidence to a jury. U.S. v. Manso-Portes, C.A.7th, 1989, 867 F.2d 422, 425.

FN25.5 Later determination 108 S.Ct. at 1501 n. 7, 485 U.S. at 690. Since the Court cites this Treatise and points out that Rules do not alter the trial judge's discretion with respect to the order of proof, it seems safe to assume that the Court would accept the caveat in vol. 21, pp. 271 about prior determination of the preliminary fact where the proffered evidence is highly prejudicial.

FN25.6 Guilt of charged crime This is defensible in Huddleston where the relevance of the evidence of both the charged and uncharged crimes rests on the "doctrine of chances", see note 25.3 above, because the use of the evidence does not require any inference as to character or resort to circular reasoning. The Court's suggestion, however, could be read as an invitation to find that since there is evidence that the defendant was guilty of the charged crime, this can be used to support an inference that he was also guilty of the uncharged crime so that crime can be used to prove he was guilty of the charged crime, thus adding up two cases of proof by preponderance to one case of proof beyond a reasonable doubt. This seems to violate the policy of Rule **404(b)**, particularly where the inference from the proof of the charged crime to the uncharged crime is that the defendant has a criminal character and must, therefore, have committed the uncharged crime. Consider, for example, the common case where the defendant is charged with a sex crime as to which the jury could find guilt by a preponderance but not beyond a reasonable doubt and the prosecution wants the victim to testify the defendant did the same thing on five other occasions where there is no other proof of guilt on those occasions. It does not seem logical to say that the addition of these other uncorroborated accusations adds anything to the prosecution's case, but if the corroboration as to the charged crime allows the jury to infer that the defendant is a sex maniac who must be guilty of the others as well, the jury is likely to do just that.

FN25.7 Must instruct See vol. 21, pp. 271-272. Since most of the current instructions on the use of other crimes evidence are so poor, one shudders to think what such instructions will look like.

FN28.1 Court trial State v. Sirek, Minn.App.1985, 374 N.W.2d 481, 484.

FN29.1 Distinguish Rule 608(b) State v. Morgan, 1986, 340 S.E.2d 84, 91, 315 N.C. 626 (suggesting that because this is not easy to determine, that trial court indicate on the record the purpose for which the evidence is being admitted).

FN38.1 Arguments or cross-examination Mere reliance on mistaken identity defense did not remove issues of knowledge and intent from drug case where this was not clear when evidence was offered, defendant made no clear offer to stipulate, and argued "mere presence" in car where drugs were found was not sufficient to convict. U.S. v. Ferrer-Cruz, C.A.1st, 1990, 899 F.2d 135, 139. Trial court properly ruled that if defense counsel planned to argue that amount of heroin was as consistent with personal use as with intent to distribute that this would put intent in issue and open the door to use of other crimes to prove intent. U.S. v. Ortiz, C.A.2d, 1988, 857 F.2d 900, 904. Cross-examination of prosecution witness that suggested defendant had no knowledge of charged conspiracy opened door to proof of other bad acts on this issue. U.S. v. Walker, C.A.5th, 1983, 710 F.2d 1062, 1067. Evidence of other crimes offered to prove his opportunity to commit crime was admissible even though he did not "dispute" the issue in the ordinary sense of the term where defense theory of the case brought the issue into prominence as a practical matter. U.S. v. DeJohn, C.A.7th, 1981, 638 F.2d 1048, 1052 n. 4. In prosecution for misapplying tribal funds, cross-examination by defense counsel of witnesses concerning possible authorization of defendant's conduct placed in issue the defendant's wilfulness and it was therefor proper to permit use of other crimes on the issue of intent. U.S. v. Foote, C.A.8th, 1980, 635 F.2d 671, 673. Where defense counsel emphasized in his opening statement that knowledge that property was stolen was an essential element of the government's prima facie case, the issue was in dispute and could be proved by prior crimes. U.S. v. Berkwitt, C.A.7th, 1980, 619 F.2d 649, 655. When the

prosecution offers evidence of other crimes on an issue, counsel must express a decision not to dispute the issue with sufficient clarity to justify the judge in excluding any evidence or jury argument that raises that issue and in charging the jury that they need not find that element of the crime because it is not disputed; this can be done by a formal stipulation, but a stipulation is not necessary to remove the issue. U.S. v. Figueroa, C.A.2d 1980, 618 F.2d 934, 942. Defendant raised issue of entrapment by motion for directed verdict thus making admissible evidence of prior crime to rebut. Jackson v. State, 1984, 677 S.W.2d 866, 869, 12 Ark.App. 378. Where at the time evidence of other crimes was offered on the issue of intent, defendant had not conceded intent, did not state that identity was the only issue, and did not offer to stipulate to intent, prosecution was properly allowed to introduce evidence. People v. Johnson, 1981, 176 Cal.Rptr. 390, 123 Cal.App.3d 106. If the defense attempts to show that the complaining witness is mistaken in her identification of the defendant, identity is in issue and state may then introduce evidence of other crimes on this issue. State v. Harris, App.1985, 365 N.W.2d 922, 926, 123 Wis.2d 231.

FN46.1 Show good faith State v. Flannigan, 1985, 338 S.E.2d 109, 110, 78 N.C.App. 629 (holding confused hearsay statement of abused child was not sufficient). One wonders if the court has not, perhaps, creatively confused Rule **404(b)** with Rule 405(a). See s 5268, p. 622 in the main volume.

FN47.1 Merely preponderance Huddleson v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. Evidence of prior entrapment by DEA agents offered to support defense of entrapment failed to meet the Huddleston standard for admission because no reasonable jury could conclude prior incident was entrapment. U.S. v. Rodriguez, C.A.11th, 1990, 917 F.2d 1286, 1290, vacated in part on another point, on rehearing 1991, 935 F.2d 194. Under Huddleston, evidence of prior injuries to child was admissible in murder case without any proof that defendant caused these injuries beyond what could be inferred by his access to child at time of injury. U.S. v. Boise, C.A.9th, 1990, 916 F.2d 497, 501. After Huddleston, evidence of other crimes comes in even though the sole witness to them was an admitted liar whose uncorroborated testimony was given to avoid prosecution for his own crimes. U.S. v. Newton, C.A.8th, 1990, 912 F.2d 212, 213. Evidence that identifying marks had been obliterated from historical documents that defendant had offered for sale and from others found in his possession was sufficient to support conclusion that defendant had obliterated them. U.S. v. Mount, C.A.1st, 1990, 896 F.2d 612, 622. Huddleston standard for admission of other crimes was not met where defendant denied any knowledge of act, there was no evidence he was knowledgeable about prostitution ring, and he had been told he was not a target of grand jury investigation of ring. U.S. v. DeGerratto, C.A.7th, 1989, 876 F.2d 576, 585. Huddleston sweeps away all prior procedures for admissibility of other crimes and substitutes a "four-step framework" that requires a proper purpose, relevance thereto, balancing under Rule 403, and a limiting instruction under Rule 105. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1374. An early call for Supreme Court clarification of the issue appeared in A.B.A. Section of Litigation, Emerging Problems Under The Federal Rules of Evidence, Joseph ed. 1983, p. 66 (seeming to lean toward the view adopted in Huddleston).

FN57.1 Louisiana La.Evid.Code Art. 1103: "Article **404(B)** and 104(A) neither codifies nor affects the law of other crimes evidence, as set forth in State v. Prieur, 277 So.2d 126 (La.1973), State v. Davis, and State v. Moore and their progeny, as regards the notice requirement and the clear and convincing evidence standard in regard to other crimes evidence. Those cases are law and apply to Article **404(B)** and 104(A), unless modified by subsequent state jurisprudential development."

FN61.1 Does not incorporate U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898. For a clear statement of the "demanding standards" applied prior to Beechum, see U.S. v. Herzberg, C.A.5th, 1977, 558 F.2d 1219, 1224. Requirement of clear and convincing evidence does not apply to evidence that bullet proof vest was found in same search that turned up charged drugs. U.S. v. McDowell, C.A.D.C., 1985, 762 F.2d 1072, 1075 n. 3. Court would follow Fifth Circuit in holding that Rule **404(b)** repealed requirement that other crimes be proved by "clear and convincing" evidence. U.S. v. Martin, C.A.4th, 1985, 773 F.2d 579, 582. Court rejects Beechum holding because it believes that requirement of clear and convincing evidence of other crimes serves a legitimate function. U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222. Evidence of other crime did not meet the Beechum standards where witness could not identify the defendant as the perpetrator. U.S. v. Vitrano, C.A.11th, 1984, 746 F.2d 766, 770. Under Beechum, it is enough that the jury could reasonably find the other crimes took place. U.S. v. Walker, C.A.5th, 1983, 710 F.2d 1062, 1066. Testimony of eye-witness to prior crime was sufficient to satisfy Beechum standard for admission of such evidence. U.S. v. Mortazavi, C.A.5th, 1983, 702 F.2d 526. Eleventh Circuit follows decision in Beechum in

determining the propriety of admission of evidence of other crimes. U.S. v. Mitchell, C.A.11th, 1982, 666 F.2d 1385, 1389. Rule **404(b)** requires a two-step analysis for admissibility of other crimes evidence: (1) it must be relevant to an issue other than the defendant's character; (2) probative value must not be outweighed by the countervailing factors in Rule 403. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 501. Prior procedural restrictions on the use of other crimes evidence are still of assistance in interpreting Rule **404(b)** but it would be contrary to the intended operation of the rule to use them as a rigid checklist in every case. U.S. v. Czarnecki, C.A.6th, 1977, 552 F.2d 698, 702. Proof of prior crime must only be sufficient to convince jury of probability of defendant's action. People v. Alexander, 1985, 370 N.W.2d 8, 10, 142 Mich.App. 231. Beechum is discussed with apparent approval in Survey, Federal Rules of Evidence, 1979, 11 Texas Tech.L.Rev. 485, 486-489. Beechum is found wanting by the author of Comment, The Jurisprudence of Similar Acts Evidence in the Eighth Circuit, 1980, 48 U.M.K.C.L.Rev. 342, 431. The Beechum holding is applauded in Note, Extrinsic Evidence at Trial under Federal Rule of Evidence **404(b)--The** Need for a Uniform Standard, 1979, 25 Wayne L.Rev. 1343.

But see Procedural requirement for use of other crimes evidence that were recognized prior to the adoption of the Evidence Rules remain valid now. U.S. v. Two Eagle, C.A.8th, 1980, 633 F.2d 93, 96 n. 5. The Eighth Circuit has held that the pre-existing requirements for proof of other crimes, including that the evidence be relevant to a disputed issue and that the evidence be clear and convincing, are still valid after the effective date of the Evidence Rules. U.S. v. Robbins, C.A.8th, 1979, 613 F.2d 688, 693. The Eighth Circuit has held that the requirements for the admissibility of other crimes evidence set forth in U.S. v. Clemons, C.A.8th, 1974, 503 F.2d 486, are unchanged by the enactment of Rule **404(b)** but that the balancing test of Rule 403 supplants the one laid down in that opinion. U.S. v. Frederickson, C.A.8th, 1979, 601 F.2d 1358, 1365 n. 9.

FN61.2 Two-step analysis Id. at 911. The student work is Note, Rule **404(b)** Other Crimes Evidence: The Need for a Two-Step Analysis, 1976, 71 Nw.U.L.Rev. 636.

FN61.3 Minimal standard Id. at 913. The way in which the court applies the standard to the facts of the instant case is instructive. The defendant was charged with having possessed a silver dollar that he knew had been stolen from the mail. The defendant denied that he wrongfully possessed the coin, claiming that he had found it loose in the mail and intended to turn it over to his supervisor. To prove intent, the government was permitted to introduce evidence that at the time of his arrest he was in possession of two unsigned credit cards issued to other persons which had been mailed to two addresses on routes that the defendant had serviced on some occasions in his capacity as a substitute letter carrier. The cards had been mailed some ten months prior to the date of the defendant's arrest. During his interrogation by postal inspectors the defendant refused to explain his possession of the credit cards. The majority opinion finds the credit card evidence relevant to prove intent, stating that "If [the defendant] wrongfully possessed these cards, the plausibility of his story about the crime is appreciably diminished." Id. at 907. But the balance of the court's opinion overlooks the "if" in the statement. Two pages later the court refers to the defendant's possession of the coin and two credit cards "none of which belonged to him." Id. at 9091. But the government did not prove this; all the evidence showed was that the cards carried the names of other persons and had been mailed to them. Yet the court suggests that the defendant had "possessed the cards for some time, perhaps ten months, prior to his arrest." Ibid. But so far as the evidence shows, the defendant might have picked up the cards on the street the day before. The court solves this gap in the government's case by shifting to the defendant the burden of proof on the other crime. "The obvious question is why would [defendant] give up the silver dollar if he kept the credit cards? In this case, the government was entitled to an answer." Ibid. With all due respect, the government is entitled to no such thing. The burden is on the government to prove the defendant guilty beyond a reasonable doubt of the crime with which he is charged. It is totally alien to the spirit of the Fifth Amendment to suggest that the defendant can be found to have a criminal intent because he has failed to prove himself innocent of another crime imputed to him by innuendo but never proved by the government. Later the opinion explains the relevance of the credit card evidence to the issue of intent: "The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely he had lawful intent in the present offense." Id. at 911. But by this time most readers will have forgotten that the government never proved that the defendant had "unlawful intent in the extrinsic offense," unless the refusal of the defendant to answer questions concerning the credit cards on Fifth Amendment grounds is to be taken as proof that his possession of them was wrongful.

FN61.4 Balancing test Id. at 916-918.

FN61.5 Read back in E.g., the requirement that the issue on which the evidence is offered be in dispute. Id. at 914 n. 19, 916. Beechum holding is not inconsistent with rule that defendant's plea of not guilty in conspiracy case puts intent in issue unless defendant stipulates that if he did the charged acts, he had the requisite intent. U.S. v. Kopituk, C.A.11th, 1982, 690 F.2d 1289, 1335. Factors to be considered under the second prong of Beechum include the strength of government's case on issue the other crime is offered to prove, similarity and temporal relationship between charged and uncharged crime, and whether it appeared at outset that defendant was contesting the issue to be proved by the other crime. U.S. v. Mitchell, C.A.11th, 1982, 666 F.2d 1385, 1390.

FN61.6 Admit more freely The court argues that this was the intent of the Congressional amendment of Rule **404(b),** discussed in the main volume at pp. 331-333. See id. at 910 n. 13.

FN61.7 Found in 104(b) Id. at 913. Since the opinion cites this Treatise for the requisite standard of proof, it seems justifiable to point out that the court overlooks our argument that Rule 104(b) does not apply to the determination of the admissibility of evidence under Rule **404(b).** See vol. 21, s 5053, pp. 256-257. The same point is made in the main volume at pp. 534-535, but this volume may not have been available when the opinion was prepared. Proof of prior act need be only sufficient to support a finding that it occurred even where issue is whether or not act was done with particular intent. U.S. v. Moree, C.A.5th, 1990, 897 F.2d 1329, 1335. Defendant's own admissions would justify jury finding that he committed extrinsic offenses and thus satisfy this branch of Beechum. U.S. v. Edwards, C.A.11th, 1983, 696 F.2d 1277, 1280. Uncontroverted testimony of single witness was sufficient to meet Beechum standard for proof of uncharged crime. U.S. v. Terebecki, C.A.11th, 1982, 692 F.2d 1345, 1349. Prior conviction is sufficient proof of other crime to satisfy Beechum standard. U.S. v. Lippner, C.A.11th, 1982, 676 F.2d 456, 461. Evidence of other crime is only admissible if the jury could reasonably find that the defendant actually committed it; defendant's admission of crime satisfies this test. U.S. v. Tunsil, C.A.11th, 1982, 672 F.2d 879, 881. As a predicate to the admission of evidence of another crime, the prosecution must prove that the defendant committed it, but whether or not the preliminary fact has been adequately proved is to be determined by the jury under Rule 104(b). U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 502. It was error to admit evidence of other crime where the prosecution had failed to prove the defendant had committed the crime by evidence from which a reasonable jury could find this preliminary fact. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 504. In civil action on insurance policy, evidence of alleged prior acts of arson by insured must be proved by proof sufficient to permit a reasonable jury to find the insured participated; evidence was inadmissible where there was no showing the insured had anything to do with prior fires. Garcia v. Aetna Casualty and Surety Co., C.A.5th, 1981, 657 F.2d 652, 655.

FN61.8 What "preliminary fact" Normally the writers distinguish between the "proffered evidence" and the "preliminary fact" that must be proved to make it admissible. It would seem that in a Rule **404(b)** issue, the "proffered evidence" is that the defendant has committed some extrinsic offense and that the only question involved is one of law; i.e., does the proffered evidence meet the requirements of the rule? Apparently the majority in Beechum is distinguishing between the other offense and proof that the defendant committed it, the latter being the "preliminary fact" to be proved by the lesser standard of Rule 104(b) so that the former is admissible. But this is nonsense. The government is not trying to prove that another crime was committed by some unidentified person and offering defendant's guilt only to make that evidence admissible. It wants to prove that the defendant committed the other crime and would be thrown into a fit of consternation if the defendant were to offer to stipulate to the admissibility of the proof that someone had committed the offense in order to prevent the prosecution from proving the "preliminary fact." Moreover, this notion that the issue of the defendant's guilt of the extrinsic offense is a preliminary fact is fraught with mischief. Does the court intend that the evidence of the other crime must first be heard out of the presence of the jury and that the defendant is free to mount an attack on his guilt of the other offense without being subject to cross-examination on the instant offense--the reverse of its holding in Beechum?

FN61.9 Questionable Is the defendant entitled to have the jury instructed that if it finds that he did not commit the other offense it must ignore the evidence? And if the jury is to determine his guilt, must they not also be instructed about the elements of the other offense when it is not the same as the charged offense?

FN80.1 Cannot be prosecuted Mayan v. State, Okla.Crim.1985, 696 P.2d 1044, 1045 (dictum).

FN92.1 Record important While the trial court made no on-the-record findings of Rule 403 balancing, this does not matter where the admissibility of the evidence was discussed at length, the judge relied on a case that mentioned Rule 403, and even if the judge had done the balancing the evidence would have been admitted. U.S. v. Santagata, C.A.1st, 1991, 924 F.2d 391, 394. Requirement that 403 balancing must be "on the record" does not require any explanation by trial judge of how the balance was struck; all it means is that the appellate court must be able to deduce from the record that the trial judge actually considered Rule 403. U.S. v. Ono, C.A.9th, 1990, 918 F.2d 1462, 1465 (deducing trial court must have considered the Rule from the fact that defense invoked it). For the results of allowing trial courts to get away with sloppy procedures that do not document grounds for admissibility, see U.S. v. Doran, C.A.10th, 1989, 882 F.2d 1511, 1524 (court forced to allow trial court to get away with a laundry list limiting instruction previously condemned on ground that defendant, who was never told why evidence was admitted, failed to object to the instruction). While judge should state his reasons for admitting evidence under Rule **404(b),** this is not necessary where reasons are obvious. U.S. v. Nolan, C.A.7th, 1990, 910 F.2d 1553, 1561. Court's failure to specify grounds for admissibility at time of admission was cured by the giving of a smorgasbord instruction on the proper use of the evidence. U.S. v. Binkley, C.A.7th, 1990, 903 F.2d 1130, 1136. It was not reversible error for trial court to fail to articulate grounds for admission of other crimes where prosecutors made some noises about why they were offering the evidence. U.S. v. Porter, C.A.10th, 1989, 881 F.2d 878, 885. It was error for court to admit evidence of other crimes without any identification or analysis of the purpose for which it was thought admissible. U.S. v. DeGeratto, C.A.7th, 1989, 876 F.2d 576, 585. Huddleston does not displace the requirement that the prosecution and the trial judge articulate precisely the basis on which other crimes are to be admitted. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1375 n. 7 (but holding failure to do was harmless where purpose was apparent from the record). Before admitting evidence of other crime, court must specify the purpose for which it is being admitted; it is not enough to recite the language of Rule **404(b).** U.S. v. Orr, C.A.10th, 1988, 864 F.2d 1505, 1510 (but holding error harmless). Reversal was not required when trial court failed to state reasons for admission of other crimes evidence where no objection on grounds of relevance was made and no request for on-the-record findings was made. U.S. v. Prati, C.A.5th, 1988, 861 F.2d 82, 86. Trial court criticized for holding a five-page hearing on admission of highly prejudicial other crimes evidence, then reciting that it was admissible for all the purposes in Rule **404(b).** U.S. v. Fortenberry, C.A.5th, 1988, 860 F.2d 628, 634. Without a complete analysis on the record, an appellate court cannot determine whether a trial court's exercise of discretion was based upon careful and thoughtful consideration of the issue. State v. Smith, 1986, 725 P.2d 951, 953, 106 Wash.2d 772. A judge who records his reasons for admitting other crimes evidence is less likely to err because the process of weighing the evidence and stating specific reasons insures a thoughtful decision. State v. Jackson, 1984, 689 P.2d 76, 79, 102 Wn.2d 689.

FN96.1 Ruled inadmissible Where the trial court ruled that evidence of an allegedly forged commitment letter used by the defendant in an unrelated transaction was not admissible, it was an abuse of discretion not to grant a mistrial or new trial when the government attempted to get the forged letter introduced in evidence and to cross-examine the defendant about it. U.S. v. Westbo, C.A.10th, 1978, 576 F.2d 285.

FN2.1 Must be requested Where evidence of other crimes was admitted with a promise that the jury would be instructed on the proper use of the evidence, failure to give such an instruction was reversible error. U.S. v. Yopp, C.A.6th, 1978, 577 F.2d 362, 366.

FN8.1 Mistrial Defendant cannot complain on appeal that mistrial should have been granted when witness referred to defendant's escape from custody where the reference was in response to a question by defense counsel. U.S. v. Allen, C.A.11th, 1985, 772 F.2d 1555. Compare the Oklahoma doctrine of "evidentiary harpoons", described below. In prosecution for peonage, mistrial was not required at testimony that bones of migrant workers had been found in streams in the area of defendant's private Gulag. U.S. v. Warren, C.A.11th, 1985, 772 F.2d 827, 838. Mistrial was not required when prosecutor violated prophylactic motion in limine by eliciting evidence of other crimes without giving the court and opposing counsel an opportunity to consider its admissibility. U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1437. Mistrial was not required where prosecutor elicited proof of prior crime in violation of pretrial ruling where judge promptly struck the testimony and ordered jury to disregard it. U.S. v. Krevsky, C.A.8th, 1984, 741 F.2d 1090, 1093. Mistrial was not required to cure prosecution witness' reference to fact that defendant had

served time in a South American jail where the court promptly (i.e., the next morning) admonished the jury to disregard the evidence. U.S. v. Steele, C.A.6th, 1984, 727 F.2d 580, 587. In prosecution of prisoners for possession of homemade knives, mistrial was not required by mention that weapons were used as part of an escape attempt. U.S. v. Dennis, C.A.7th, 1984, 737 F.2d 617, 619. Trial court did not err in denying a mistrial when witness made reference to the fact that defendant had just been released from prison three months before the crime where a curative instruction was given and the evidence against the defendant was strong. U.S. v. Morrow, C.A.4th, 1984, 731 F.2d 233, 235 n. 4. Striking of evidence that co-defendant had served time and clear and positive instruction to jury to disregard it cures error and obviates need for mistrial. U.S. v. Steele, C.A.6th, 1984, 727 F.2d 580, 588. In prosecution for importation of tons of marijuana, evidence that a vial of cocaine was found in cargo plane was not so prejudicial as to require mistrial. U.S. v. Snowden, C.A.11th, 1984, 735 F.2d 1310, 1314. Where there was no evidence that government had elicited reference to defendant's alleged Mafia connections in bad faith, single reference that was immediately stricken did not require a mistrial. U.S. v. Reed, C.A.8th, 1984, 724 F.2d 677, 679. Prompt cautionary instruction was sufficient to cure error in mention of prior crime so that reversal was not required. U.S. v. Jordan, C.A.7th, 1983, 722 F.2d 353, 357. Prompt instruction to disregard was sufficient to cure error in mention of criminal record of RICO defendant where reference was ambiguous, did not mention a crime or defendant's last name, and took only moments in a 24 day trial. U.S. v. Kimble, C.A.5th, 1983, 719 F.2d 1253, 1257. Mistrial was not required at introduction of evidence that drug dealer said "we are not used to flashing it in public" where no objection was made at time and implication of prior dealings was slight. U.S. v. McCown, C.A.9th, 1983, 711 F.2d 1441, 1453. Mistrial was required where government elicited evidence that defendant charged with robbery had previously been incarcerated in state penitentiary. U.S. v. Sostarich, C.A.8th, 1982, 684 F.2d 606, 608. Instruction to disregard statement of witness that defendant was a hippy who took drugs was adequate remedy. U.S. v. Mangiameli, C.A.10th, 1982, 668 F.2d 1172, 1176. Trial court did not err in murder prosecution in failing to strike testimony of government witness that defendant had once pulled a gun on him where government was not responsible for testimony. U.S. v. Skinner, C.A.9th, 1982, 667 F.2d 1306, 1310. Mistrial was not required by reference to handing down of superseding indictment where jury could not possibly have thought this referred to another crime. U.S. v. Jackson, C.A.3d, 1981, 649 F.2d 967, 977. It was error not to grant a mistrial in a personal injury case after the plaintiff played a tape for the jury that contained references to the defendant's indictment for sexual offenses against young girls, his fugitive status, and alleged responsibility for murder of young girl. White v. Cohen, C.A.9th, 1981, 635 F.2d 761. Mistrial was not required in trial for firearms violations after the court granted motion to dismiss charge of obstruction of justice based on defendant's murder of girl friend's cat in reprisal for her (the friend, not the cat) finking on him. U.S. v. Bagley, C.A.9th, 1981, 641 F.2d 1235, 1240. Judge's decision that evidence of other crime was to be excluded under Rule 403 did not require that a mistrial be declared when the jury heard the evidence. U.S. v. Escalante, C.A.9th, 1980, 637 F.2d 1197, 1204. Where experienced government agent gave a nonresponsive answer revealing that defendant had been incarcerated for armed robbery, the resulting mistrial was not deliberately provoked by the prosecution so as to prevent retrial of defendant. U.S. v. Green, C.A.4th, 1980, 636 F.2d 925. Where evidence of loansharking and fixing horse races was irrelevant for any purpose but came in after questions designed to elicit other information, these unsolicited references were not so inflammatory that they could not be cured by instructions given by trial judge. U.S. v. Provenzano, C.A.3d, 1980, 620 F.2d 985, 994. It was not error to grant a mistrial when F.B.I. agent, in reading from defendant's confession, interpolated the fact that the defendant's education had been completed under the auspices of the Texas Department of Corrections. U.S. v. Doby, C.A.8th, 1979, 598 F.2d 1137, 1141. In determining whether a curative instruction was sufficient to cure error in admission of evidence of uncharged crime, court must weigh the forcefulness of the instruction and the conviction with which it was given against the degree of prejudice of the evidence. U.S. v. Johnson, C.A.9th, 1980, 618 F.2d 60, 62. It was not error to deny mistrial where judge promptly sustained objection to question insinuating that defendant was involved in another crime and instructed jury to disregard remark. U.S. v. Pappas, C.A.1st, 1979, 611 F.2d 399, 406. Where evidence of defendant's participation in uncharged crime was elicited by a co-defendant, it was not error to refuse to declare a mistrial where trial court gave a prompt and thorough admonition to the jury. U.S. v. Johnson, C.A.4th, 1979, 610 F.2d 194, 197. Sustaining of objection and instructing the jury to disregard statement about other crimes was sufficient to protect defendant and it was not error to deny motion for mistrial. U.S. v. John Bernard Industries, Inc., C.A.8th, 1979, 589 F.2d 1353, 1359.

State cases Mistrial was not required when sister of rape victim testified that victim was concerned about getting defendant in trouble because his sister was her friend and she knew defendant had been involved in prior offenses. Hines v. State, Alaska 1985, 703 P.2d 1175, 1178. General rule that evidence of serious unrelated bad acts not

otherwise admissible merits a mistrial does not apply to an unelaborated statement that defendant had previous involvement in criminal justice system. State v. Grijalva, App.1983, 667 P.2d 1336, 137 Ariz. 10. Mistrial was not required when witness unexpectedly explained recollection of particular day by mentioning defendant's arrest for another crime on that day. State v. Adamson, Sup.Ct., 1983, 665 P.2d 972, 136 Ariz. 250. Mistrial was not required when, upon being asked what sort of people were depicted in the photo spread from which he had selected the defendant's picture, the witness answered "criminals"; if defense felt prejudiced, it should have objected, moved to strike, and asked for an instruction to the jury. People v. Abbott, Colo.1984, 690 P.2d 1263, 1269. Trial court was not required to grant a mistrial when prosecutorial questions on cross-examination suggested vaguely that defendant had committed other wrongs. State v. Stellwagen, 1983, 659 P.2d 167, 232 Kan. 744. Mistrial was not required when prosecution elicited evidence of prior instance of similar conduct from pederasty victim. State v. Nichols, Me.1985, 495 A.2d 328. In rape prosecution based on uncorroborated testimony of victim which had been impeached by testimony of others that she had admitted it was false, mistrial was required where the prosecutor did not caution his witnesses not to mention charges involving another daughter and such evidence came before the jury. State v. Goodrich, Me.1981, 432 A.2d 413, 417. Mistrial was not required because of inadvertent reference during cross-examination of defendant's brother to defendant's time in prison. People v. McKeever, 1983, 332 N.W.2d 596, 123 Mich.App. 533. In view of the other sordid evidence in the record, mistrial was not required when a police witness let slip the fact that the defendant had told someone he did not want them "narking" on him because of his dope dealing. State v. Blanchard, Minn.1982, 315 N.W.2d 427, 432. Mistrial was not required when rape victim "blurted out" statement that defendant had smoked a marijuana cigarette during the crime. State v. Liddell, 1984, 685 P.2d 918, 925, 211 Mont. 180. While prosecution failure to admonish its witnesses not to mention defendant's parole status in violation of court order was inexcusable, two passing references to parole did not warrant the granting of a mistrial. State v. Gray, 1983, 673 P.2d 1262, 1266, 207 Mont. 261. Where it was clear from other evidence that the defendant had been the object of a manhunt and had been jailed, inadvertent reference to the crime that he was wanted for did not require a mistrial. State v. Gilbert, Sup.Ct., 1982, 657 P.2d 1165, 1167, 99 N.M. 316. Trial judge did not err in refusing to declare a mistrial when witness mentioned fact that the defendant had been in prison with him where this was not deliberately elicited by the prosecutor and the defense declined to have the court give an admonition that would have dissipated much of the prejudice. State v. Vialpando, C.A., 1979, 599 P.2d 1086, 1093, 93 N.M. 289. No mistrial was required where trial judge concluded that reference to another murder for which defendant was under investigation was an innocent response to a direct question by defense counsel. Wilkie v. State, 1982, 644 P.2d 508, 98 Nev. 192. In prosecution of college official for embezzlement, mistrial was not required where trial court promptly admonished jury to ignore reference in testimony to another scam involving defendant. Allison v. State, Okl.Crim.1983, 675 P.2d 142, 150. Mistrial was not required in homicide trial where witness inadvertently made reference to prior rape committed by defendant. King v. State, Okl.Crim.1983, 667 P.2d 474, 477. Mistrial not required even where prosecutor deliberately brings up subsequent crime in violation of court order made on motion in limine. State v. Beel, 1982, 648 P.2d 443, 32 Wash.App. 437.

FN11.1 Offer guidance For an example of such an opinion, see U.S. v. Emery, C.A.5th, 1982, 682 F.2d 493. For an example of a thoughtful opinion, see U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102. In murder prosecution in which there was a serious question as to whether the death of the wife was an accident or a homicide, it was an abuse of discretion to admit evidence that two weeks before her death, husband dragged wife into yard and sprayed her with a garden hose during a marital dispute. People v. Deeney, 1983, 193 Cal.Rptr. 608, 145 Cal.App.3d 647. For an opinion that is a model, despite the fact that it drew a dissent, see People v. Goree, 1984, 349 N.W.2d 220, 228, 132 Mich.App. 693. For one of the best opinions in recent years, see People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. For a careful sketch of the procedural requirements to admissibility under Wash.R.Ev. **404(b),** see State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358. For a well-done state court opinion, see State v. Pharr, 1983, 340 N.W.2d 498, 115 Wis.2d 334.

Supplement to Notes in Main Volume

FN2. Procedure important Seventh Circuit employs a four part test: (1) relevant to an issue other than propensity; (2) similarity and temporal recency; (3) evidence sufficient to support a finding act was done; and (4) probative value not outweighed by prejudice. U.S. v. Penson, C.A.7th, 1990, 896 F.2d 1087, 1091. Admission of prior crimes requires

trial court to find that it is offered for a purpose that does not require an inference to character, that probative value outweighs 403 factors, and the giving of a limiting instruction. U.S. v. Colon, C.A.2d, 1989, 880 F.2d 650, 656. See Slough, Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited, 1978, 26 U.Kan.L.Rev. 161, 164-166. One opinion claims that the Tenth Circuit has imposed at least ten procedural controls on the admission of other crimes evidence, but rejoices that Huddleston has put the court back on the right path. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1373. Admission of other crimes requires a two-step process; court must find evidence relevant to issue without resort to inference of propensity to prove conduct, then perform balancing under Rule 403. U.S. v. DiGeronimo, C.A.2d, 1979, 598 F.2d 746, 753. Before proof of other crime can be admitted under Rule **404(b),** there must be clear and convincing evidence of defendant's commission of it, it must not be too remote in time from the charged crime, it must be similar to charged offense, and it must be offered to prove a material element of charged offense. U.S. v. Bailleaux, C.A.9th, 1982, 685 F.2d 1105, 1110. To be admissible, evidence of bad act must be relevant to material issue, similar in kind and reasonably close to charged crime, must be clear and convincing, and probative worth must not be outweighed by prejudice. U.S. v. Marshall, C.A.8th, 1982, 683 F.2d 1212, 1215. In Ninth Circuit, other crimes evidence must meet three part test of admissibility; prior act must be similar and close enough in time to be relevant, evidence of prior act must be clear and convincing, and probative worth must outweigh potential prejudice. U.S. v. Hooten, C.A.9th, 1981, 662 F.2d 628, 635. Standards for admission of other crimes evidence in Eighth Circuit are quite familiar: (1) a material issue to which evidence is relevant must be raised; (2) proffered evidence is relevant; (3) evidence must be clear and convincing; (4) other crime must be similar in kind and reasonably close in time to the charged offense; (5) evidence must not be excludible under Rule 403. U.S. v. Burchinal, C.A.8th, 1981, 657 F.2d 985, 993. Evidence that defendant went behind desk at YMCA to obtain checks he later cashed with forged endorsements were identical to acts offered to show opportunity and were close in time, testimony of two eyewitnesses was clear and convincing evidence of other acts, and evidence was so highly probative that it outweighed prejudice to defendant. U.S. v. DeJohn, C.A.7th, 1981, 638 F.2d 1048, 1052 n. 4. Before evidence of other crimes can be admitted under Rule **404(b)** four prerequisites must be met: (1) a material issue has been raised; (2) the evidence must be relevant to that issue; (3) the evidence must be clear and convincing; and (4) the other crime must be similar in kind and reasonably close in time to the charge at trial. U.S. v. Farber, C.A.8th, 1980, 630 F.2d 569. The Clemons-Conley standards were reiterated in U.S. v. Young, C.A.8th, 1980, 618 F.2d 1281, 1289. For a masterful treatment of the procedural issues, see U.S. v. Figueroa, C.A.2d 1980, 618 F.2d 934 (per Newman, J.). Under Rule **404(b),** evidence of other wrongdoing is admissible only if the trial court finds that (1) a material issue is raised on a subject for which such evidence is admissible; (2) the proffered evidence is relevant to that issue; (3) the wrongdoing is similar in kind and reasonably close in time to the offense charged; (4) the evidence is clear and convincing; and (5) the probative value of the evidence outweighs its prejudicial possibilities. U.S. v. Drury, C.A.8th, 1978, 582 F.2d 1181, 1184. The Drury requirements were reiterated in U.S. v. Vik, C.A.8th, 1981, 655 F.2d 878, 881. It has been held that the prerequisites to admission are less stringent when the evidence offered consists of other acts of the defendant rather than other crimes. U.S. v. Greenfield, C.A.5th, 1977, 554 F.2d 179, 185. Evidence of other crimes is admissible only if the issue is disputed, the crime is relevant to that issue, the evidence of the crime is clear and convincing, and probative worth outweighs probable prejudicial impact. U.S. v. McMillian, C.A.8th, 1976, 535 F.2d 1035, 1038. Before evidence of other crimes can be admitted it must be shown that (1) an issue on which the evidence can be received has been raised, (2) that the evidence is relevant to that issue, (3) that the evidence is clear and convincing, (4) and that the probative worth outweighs its prejudicial effect. U.S. v. Conley, C.A.8th, 1975, 523 F.2d 650, 653-654. Colorado courts require the prosecutor to advise the court of the purpose for which evidence of other crimes is offered and the court to then and at the conclusion of the trial to instruct the jury as to the proper use of the evidence using neutral terms such as "other acts" instead of such loaded phrases as "similar crimes." Callis v. People, Colo.1984, 692 P.2d 1045, 1051. For evidence of other crimes to be admissible, there must be a valid purpose for which it is offered, it must be relevant to a material issue, and probative value must outweigh prejudice to defendant. People v. Casper, Colo.1982, 641 P.2d 274. Before evidence of other crimes is admissible, it must be offered for a valid purpose, be relevant to a material issue in the case, and probative worth must not be outweighed by prejudice. People v. Ray, Colo.1981, 626 P.2d 167. An interesting set of procedural restrictions, though limited to sex cases, appears in Colo.Rev.Stats. s 16-10-301(2)-(4): "(2) If the prosecution intends to introduce evidence of similar acts or transactions as provided in subsection (1) of this section, the prosecutor shall advise the trial court of the purpose for which evidence of similar acts or transactions is offered. The burden shall be on the prosecution to show the relevancy of evidence if objection to introduction of said evidence has been made. The trial court shall determine whether or not the evidence offered is relevant and, if relevant, whether or not the prejudice which would result to the

defendant by the introduction of the evidence outweighs the evidentiary value of the evidence. "(3) The trial court shall, at the time of the reception into evidence of similar acts or transactions and again in the general charge to the jury, direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it. The court in instructing the jury, and the parties when making statements in the presence of the jury, shall use the words 'similar act or transaction' and shall at no time refer to 'similar offenses'. 'Similar crimes', or other terms which have the same connotations. "(4) Before admitting evidence of similar acts or transactions, the court must find that the people have introduced sufficient evidence against the defendant to constitute a prima facie case, warranting submission of the case to the jury on the evidence presented other than that of similar acts or transactions." In admitting evidence of other crimes under Kans.Stat.Anns. s 60-445 the court, out of the presence of the jury, must determine that it is relevant to prove one of facts listed in the statute, that the fact is disputed, and that prejudice does not outweigh probative worth. State v. Breazeale, 1986, 714 P.2d 1356, 1360, 238 Kan. 714. In ruling on admissibility of evidence under K.S.A. s 60-455, court must determine if evidence is relevant to prove one of facts specified in the statute, that the fact is a disputed material fact, and balance probative value against prejudice. State v. Gowler, 1982, 644 P.2d 473, 7 Kan.App.2d 485. Before evidence of other crimes may be admitted, there must be substantial evidence that the defendant perpetrated it, there must be some special circumstance tending to show guilt of charged crime, it must be offered on material issue, and probative worth must not be outweighed by prejudice. People v. Betancourt, 1982, 327 N.W.2d 390, 120 Mich.App. 58. Under the Michigan similar acts statute, three things must be shown for admissibility; there must be substantial evidence that the defendant perpetrated the bad act, the act must be probative of motive, etc., in connection with the charged offense, and motive, etc., must be material to determination of guilt of charged offense. People v. Worden, 1979, 284 N.W.2d 159, 91 Mich.App. 666. Evidence of other crimes is admissible if the proof of defendant's participation is clear and convincing, the evidence is relevant and material, and probative worth outweighs prejudice. Ture v. State, Minn.1984, 353 N.W.2d 518, 521. In applying Minn.R.Ev. 404(a), court should first determine relevance and materiality, then see if proof of other crime is clear and convincing, and finally balance prejudice and probative worth. State v. Filippi, Minn.1983, 335 N.W.2d 739, 743. Key tests in determining admissibility of other crimes proof is whether there is clear and convincing proof of defendant's participation, the relevance and materiality of the evidence, and whether prejudice substantially outweighs probative worth. State v. Woelm, Minn.1982, 317 N.W.2d 717. Requirements for admission of other crimes are (1) similarity to charged crime, (2) nearness in time to charged crime, (3) tendency to show a common plan, scheme, or system, and (4) a determination that probative worth outweighs prejudice. State v. Stroud, 1984, 683 P.2d 459, 465, 210 Mont. 58. The procedures to be followed in Montana are spelled out in State v. Just, 1979, 602 P.2d 957, 184 Mont. 262. Before evidence of other crimes can be admitted to prove a requisite mental state, there must be proof beyond a reasonable doubt that the defendant committed the act charged. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 837. Trial court did not follow correct procedure in failing to specify purpose for which other crimes evidence was being admitted and not providing a reasoned explanation of why probative worth outweighed prejudice. State v. Shillcutt, App.1983, 341 N.W.2d 716, 719, 116 Wis.2d 227. To be admissible, proof of other crimes must be plain, clear and convincing, the crimes must not be too remote and offered for purpose sanctioned by Rule **404(b),** the issue to be proved must be a material one in the case, and there must be a substantial need for the evidence. Bishop v. State, Wyo.1984, 687 P.2d 242, 246. For a discussion of recent Seventh Circuit decisions on these procedural issues, see Crowley, Modernizing and Liberalizing the Law of Evidence, 1981, 57 Chi.-Kent L.Rev. 191, 192-194. For description of a four-step procedure for determining admissibility that seems better than the two-step process embraced by some federal courts, see Roth, Understanding Admissibility of Prior Bad Acts. A Diagrammatic Approach, 1982, 9 Pepp.L.Rev. 297, 312. For a thoughtful set of suggested procedures, see Comment, Other Crimes Evidence: Relevance Reexamined, 1983, 16 J.Marsh.L.Rev. 371, 390.

FN3. Minnesota decisions Evidence of other crime was improperly admitted where state did not give notice of intent to use such evidence. State v. Doughman, Minn.1986, 384 N.W.2d 450, 455. Notice of intent to use other crimes evidence was not required where defense counsel was aware of other crimes through discovery and should have known the evidence would be offered to put the charged crimes in context. State v. Cermak, Minn.1985, 365 N.W.2d 238. Where defendant was properly charged with multiple offenses occurring over a period of time, she was not entitled to notice of these as "other crimes" since they were part of the episode for which she was being tried so that pleadings and discovery provided adequate notice. State v. Becker, Minn.1984, 351 N.W.2d 923, 927. Where the defendant had actual notice that the prosecution intended to offer proof of a prior robbery, failure to give formal notice in advance was not prejudicial even if error. State v. Johnson, Minn.1982, 322 N.W.2d 220. Montana requirement of notice and

dual set of cautionary instructions were crafted from similar procedural requirements in Minnesota. State v. Stroud, Mont.1984, 683 P.2d 459, 465.

FN5. Louisiana followed See also, La.Code Cr.Proc. Art. 720: "Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the state's intent to offer evidence of the commission of any other crime admissible under the authority of Louisiana Code of Evidence Article 404. Provided however, that such order shall not require the district attorney to inform the defendant of the state's intent to offer evidence of offenses which relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding or other crimes for which the accused was previously convicted."

FN7. Other states Written notice to defense counsel of names of four rebuttal witnesses and that testimony they would give would include defendant's willingness to engage in other crimes was adequate to comply with Ariz.R.Cr.P. 15.1(f). State v. Linden, App.1983, 664 P.2d 673, 136 Ariz. 129. Claim that absence of notice of intent to use evidence of another crime was a denial of due process could not be maintained where record showed that counsel was aware of intent to offer evidence the day before and there was no request for a continuance to prepare to meet the evidence. People v. Ott, 1978, 148 Cal.Rptr. 479, 84 Cal.App.3d 118. Trial court did not err in refusing to instruct jury that it could not use other crimes evidence to show defendant's propensity to commit crimes. State v. Sanford, 1985, 699 P.2d 506, 509, 237 Kan. 312 (holding pattern jury instruction on proper use suffices; debatable ruling). It was reversible error to admit evidence of a prior sexual assault where prosecution had failed to give notice of intent to use the evidence. State v. Berg, 1985, 697 P.2d 1365, 1367, 215 Mont. 431. It was a denial of due process for trial court to reverse ruling excluding evidence of prior crimes after defendant had relied on ruling in planning and presentation of case by, for example, to conducting voir dire on this issue. State v. Doll, 1985, 692 P.2d 473, 476, 214 Mont. 390. It was error to admit evidence of other crimes where defendant did not get ten-day notice ordered by court on motion in limine. State v. Brown, 1984, 680 P.2d 582, 209 Mont. 502. It was not error to admit evidence of other crime where required notice was only delivered on the morning of trial where the defense was granted a two day continuance to investigate and had indicated it needed no more time. State v. Azure, 1984, 676 P.2d 785, 208 Mont. 233. State must provide defendant with written notice of intent to use evidence of other crimes before case is called to trial; notice must include a statement of purpose for which evidence will be offered. State v. Gray, 1982, 643 P.2d 233, 197 Mont. 348. Montana now requires that the prosecutor give the defendant notice of intent to use evidence of other crimes that must include specification of the purpose for which the evidence will be used. State v. Just, 1979, 602 P.2d 957, 184 Mont. 262. Evidence of offenses that are part of the entire transaction of the offense charged need not be noticed to the defense. Melvin v. State, Okla.Crim.1985, 706 P.2d 163, 164. Notice of intent to use other crimes evidence that was given five weeks before trial was timely and adequate. Mayhan v. State, Okla.Crim.1985, 696 P.2d 1044, 1045. State cannot be required to give notice of intent to use evidence of other crimes in rebuttal because it cannot be known in advance of trial what evidence will be relevant to rebuttal. Freeman v. State, Okl.Crim.1984, 681 P.2d 84. Where the prosecution did not learn of testimony concerning other crimes until the day before it was presented and promptly notified the defense, notice requirement was not violated. Seegars v. State, Okl.Crim.1982, 655 P.2d 563. Normally the state has a duty to give notice of intent to prove other crimes but this does not apply to testimony that when defendant was arrested a few moments after attempted burglary he was carrying a concealed weapon. Scott v. State, Okl.Crim.1983, 663 P.2d 17, 19. State complied with requirement for use of evidence of other crimes when it gave the defendant ten days notice of intent to use evidence, the court found evidence probative, and proof was clear and convincing. Odum v. State, Okl.Crim.1982, 651 P.2d 703. Notice to the defendant on the morning of trial of intent to use evidence of other crime was a breach of state's statutory duty to make a prompt **disclosure** of such material. State v. Harshman, 1983, 658 P.2d 1173, 61 Or.App. 711. The Comment to Del.R.Ev. 404 urges an amendment of the Superior Court Criminal Rules to require the prosecution to give notice of intent to offer other crimes evidence. Tex.R.Cr.Ev. **404(b)** requires notice upon request by the defendant. See s 5231 n. 39. The Vermont drafters amended that state's rules of criminal procedure to require notice of intent to use evidence of other crimes. Reporter's Notes, Vt.R.Ev. 404.

FN9. Declined to add The New York Law Revision Commission refused to add a provision requiring the prosecution to give notice of intent to use other crimes evidence, suggesting that Rule 403 might be used to exclude the evidence when lack of notice resulted in unfairness to the defendant. Comment, Prop.N.Y.Evid.Code s **404(b).**

FN10. Notice not required Prosecution was not required to give notice of intent to use evidence of other crimes. U.S. v. Fitterer, C.A.8th, 1983, 710 F.2d 1328, 1332. Where after government notice of intent to use evidence of other crimes, defense motion in limine to exclude evidence during government's case-in-chief was granted, it was not error to rule that evidence might be admissible on cross-examination of defendant. U.S. v. Kovic, C.A.7th, 1982, 684 F.2d 512, 515. It is apparently the practice of some prosecutors to give notice of intent to use other crimes evidence, even though this is not required. See, e.g., U.S. v. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 378; U.S. v. Capo, C.A.5th, 1979, 595 F.2d 1086, 1094 n. 8; U.S. v. Powell, C.A.9th, 1978, 587 F.2d 443, 447. Notice is constitutionally required to forewarn a defendant of acts for which he may ultimately be convicted and sentenced; evidence of proof of an extraneous crime was no more required to be described in the indictment than any other piece of relevant, inculpatory evidence. U.S. v. Barrett, C.A.1st, 1976, 539 F.2d 244, 249. In U.S. v. Solomon, D.C.Ga., 1980, 490 F.Supp. 373, the prosecution gave notice of intent to use other crimes evidence under Criminal Rule 12(d)(1).

But see Court suggests that in future cases the prosecution should exercise the discretion given it by Criminal Rule 12(d)(1) and notify the defense before trial of its intention to introduce any evidence of prior bad acts. U.S. v. Foskey, C.A., 1980, 636 F.2d 517, 526 n. 8, 204 U.S.App.D.C. 245. Notice would be required under Report of the Eastern District of New York Criminal Procedure Committee on Case Management and A Uniform Pretrial Order, 1986, 111 F.R.D. 311, 315.

FN12. Denial of discovery It was not a denial of due process not to order the prosecution to reveal its other crimes evidence to the defendant in advance of trial. U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1440. Prosecution had no duty to reveal evidence of other crimes to defense and trial court did not err in not granting defendant a continuance so he could prepare to meet the evidence. U.S. v. Carr, C.A.8th, 1985, 764 F.2d 496, 499. In loansharking prosecution, trial court did not abuse discretion in admitting evidence that two defendants had engaged in drug deals with a third defendant. U.S. v. DiPasquale, C.A.3d, 1984, 740 F.2d 1282, 1295. Evidence of other crimes offered to rebut an entrapment defense did not fall within discovery order directed at evidence to be offered under Rule **404(b)** and failure of government to **disclose** did not preclude admission of evidence. U.S. v. Sonntag, C.A.11th, 1982, 684 F.2d 781, 787. Trial court did not abuse discretion in allowing prosecution to use evidence of other crime despite failure to make pretrial **disclosure** of intent to do so as required by pretrial order. U.S. v. Roe, C.A.11th, 1982, 670 F.2d 956, 965. No unfair surprise resulted when the government informed defense counsel of intent to call witness to testify concerning other crimes as soon as it became aware that the witness could testify. U.S. v. Wixom, C.A.8th, 1976, 529 F.2d 217, 220. Failure to comply with discovery rule was not prejudicial to defendant and prior crimes were properly admitted. U.S. v. Kimbrough, C.A.7th, 1976, 528 F.2d 1242, 1249. One trial judge, after denying the defendant's motion to discover evidence of other crimes so that he could make a motion in limine, then begged the prosecution to turn the evidence over to the defendant as a favor to the judge so as to expedite the trial. U.S. v. Kilroy, D.C.Wis.1981, 523 F.Supp. 206, 216.

FN13. Without good reason Denial of discovery of other crime which prevented defendant from adequately preparing his defense may deny the defendant a fundamentally fair trial and be grounds for federal habeas corpus relief. Williams v. Owens, C.A.7th, 1983, 731 F.2d 391.

FN14. Notice of change Federal court was not required to follow state rulings on admissibility of evidence of other alleged arson in a diversity action on a fire insurance policy. Warner v. Transamerica Ins. Co., C.A.8th, 1984, 739 F.2d 1347, 1351. Where the prosecution agreed in Omnibus hearing that it would not offer evidence of other crimes "unless subsequent developments **disclosed**", it was error for the trial court to admit substantial evidence of other crimes in the middle of the trial without inquiring as to whether the defendant had reasonable notice of intent to use such proof and without balancing the probative worth of evidence against prejudice to defendant. U.S. v. Jackson, C.A.5th, 1980, 621 F.2d 216. Defendant could not claim surprise in testimony concerning uncharged crime where the prosecution informed the defense of intent to use the evidence as soon as it learned of the evidence. U.S. v. Murray, C.A.2d, 1980, 618 F.2d 892, 901. Fact that introduction of evidence of other crimes was a violation of prosecution's pretrial agreement not to use such evidence would not be considered by the appellate court where this was not called to the attention of the trial judge. U.S. v. Witt, C.A.5th, 1980, 618 F.2d 283, 286. It was an abuse of discretion and reversible error for trial judge to reverse his ruling excluding evidence of other crimes three days into the trial. State v.

Doll, 1985, 692 P.2d 473, 476, 214 Mont. 390.

FN17. Prejudice to defendant In considering prejudice to defendant from use of other crimes, court notes that prosecutor gave defense advance notice of intent to use evidence and did not make careless references to it in opening statements. U.S. v. Lavelle, C.A.D.C.1985, 751 F.2d 1266, 1278.

FN18. Discretion to admit Court did not consider this possibility in case where defendant requested a continuance to meet pharmacist's "sudden recall" that defendant had used two other forged prescriptions. State v. Barringer, 1982, 650 P.2d 1129, 32 Wash.App. 882.

FN19. Motion in limine Rule **404(b)** does not require an advance hearing into evidence of other crimes that might have prevented the testimony about prejudicial detail of crime. U.S. v. Mickens, C.A.2d, 1991, 926 F.2d 1323, 1329. One court has ruled that when the prosecution makes a motion in limine to have other crimes evidence admitted and the motion is granted, the defendant cannot raise the propriety of the ruling on appeal if he has subsequently abandoned the issue on which the evidence was to have been admitted. U.S. v. Johnson, C.A.8th, 1985, 767 F.2d 1259, 1270. Where trial court never ruled on motion in limine to exclude prior crimes and defendant did not renew the motion at trial, no issue was preserved for appellate review. U.S. v. Wagoner, C.A.8th, 1983, 713 F.2d 1371, 1374. One advantage of the pretrial motion is that exclusion of the evidence may be the subject of an interlocutory appeal by the government. U.S. v. Margiotta, C.A.2d, 1981, 662 F.2d 131, 141. Where government gave notice of intent to use evidence of other crime well before trial and a hearing was had on motion in which trial court ruled evidence admissible, trial court's ruling should be given great deference. U.S. v. Longoria, C.A.9th, 1980, 624 F.2d 66, 68. For an illustration of the problems that can arise when the issue is postponed, see Grimaldi v. U.S., C.A.1st, 1979, 606 F.2d 332, 339 (after overruling objections to reference to evidence of other crimes in opening statement, court found the evidence inadmissible). If the motion in limine only suppresses certain evidence of the prior crime, an objection may still be necessary at trial if the prosecution attempts to get evidence in by some other means. State v. Patton, 1979, 600 P.2d 194, 183 Mont. 417. Slough, Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited, 1978, 26 U.Kan.L.Rev. 161, 166. One danger in the use of the motion by the defendant is that if it is denied and the objection is not renewed when the evidence is offered at trial, the appellate court will only consider the evidence available to the trial judge at the time of the motion in reviewing the ruling. U.S. v. Cobb, C.A.8th, 1978, 588 F.2d 607, 610-611. It was not error for the court to refuse to rule on the admissibility of evidence of other crimes prior to the trial where the court did give the defense an opportunity to object and have the question of admissibility determined out of the presence of the jury at trial. U.S. v. Moore, C.A.9th, 1978, 580 F.2d 360, 363. One of the hazards of such preliminary rulings is that the defendant may claim prejudice when his own conduct requires an alteration of the ruling. See People v. Vidaurri, 1980, 163 Cal.Rptr. 57, 103 Cal.App.3d 450. Defendant was not prejudiced by timing of court's pretrial ruling concerning admissibility of other crimes evidence since this made it possible to make an informed decision as to whether or not to testify. State v. Brant, Minn.1984, 345 N.W.2d 248. On writ of prohibition following denial of motion in limine to exclude evidence of other crimes, court would not pass on merits of ruling but only on whether there was an abuse of discretion. State v. Hagen, Minn.App.1984, 342 N.W.2d 160. Where on motion in limine court ordered that defendant be given ten days notice of intent to use evidence of other crimes, error was adequately preserved for appeal even though no objection was made when evidence was introduced at trial. State v. Brown, 1984, 680 P.2d 582, 209 Mont. 502. An unsuccessful motion in limine does not suffice to preserve the issue of admissibility of other crimes evidence for appeal; defendant must object again when the evidence is offered at trial. State v. Harper, 1983, 340 N.W.2d 391, 215 Neb. 686. Ruling on motion in limine is not binding on trial court; in order to preserve objection it must be raised again during trial. Odum v. State, Okl.Crim.1982, 651 P.2d 703, 706. Trial judge could not rule on admissibility of other crimes evidence as rebuttal in response to a motion in limine because it had no way of knowing whether there would be anything to rebut; hence, it was not error to refuse to rule on the motion. Simpson v. State, Okl.Crim.1982, 642 P.2d 272. In most cases, only proffered evidence of other crimes that is unusually prejudicial should be ruled on before trial. State v. Browder, 1984, 687 P.2d 168, 170, 69 Or.App. 564. Where the trial court has granted a motion in limine admitting evidence to impeach experts, defendant did not have to call experts and have them impeached at trial in order to preserve issue for appeal. State v. Cochrun, S.D.1983, 328 N.W.2d 271 (holding unclear). Where motion in limine did not specify the particular evidence complained of on appeal, objection at trial is required to preserve issue. State v. Shaffer, Utah 1986, 725 P.2d 1301, 1308. When prosecution disclaimed any intent to use evidence of bad acts, trial court was

justified in declining to rule on motion in limine and waiting till issue arose at trial. State v. Bissonette, 1985, 488 A.2d 1231, 1237, 145 Vt. 381. Pretrial order precluding state from using other crimes evidence is appealable as of right as an order suppressing evidence. State v. Harris, App.1985, 365 N.W.2d 922, 924, 123 Wis.2d 231. Where defendant pleads guilty following a decision on a motion in limine that admits evidence of other crimes, he waives his right to appeal the ruling. State v. Nelson, 1982, 324 N.W.2d 292, 108 Wis.2d 698.

FN20. Objection Where tape had been furnished to defendant months in advance of trial, timely objection to other crimes should have been made before the tape was played. U.S. v. Castiello, C.A.1st, 1990, 915 F.2d 1, 4 n. 4. In absence of objection, it was not plain error to admit evidence of prior robberies to prove defendant committed charged robbery for thrills, not because insane. U.S. v. Medved, C.A.6th, 1990, 905 F.2d 935, 939. Where judge refused to rule on motion in limine, objection at time of trial was required to preserve issue of admissibility of other crimes evidence. U.S. v. Westbrook, C.A.8th, 1990, 896 F.2d 330, 334. Court would not consider error in use of the plaintiff's prior drug use in civil case where there was no objection or request for limiting instruction. Pinkham v. Maine Central R. Co., C.A.1st, 1989, 874 F.2d 875, 880. If no objection was made to other crimes evidence in trial court, defendant must show plain error on appeal; that is, that but for the admission of the evidence he would have been acquitted. U.S. v. Snyder, C.A.7th, 1989, 872 F.2d 1351, 1357. Objection on lack of proper foundation and lack of specificity was not sufficient to raise the propriety of the admission of other crimes under Rule **404(b).** U.S. v. Mascio, C.A.7th, 1985, 774 F.2d 219, 223. Of course, the fact that the defendant does not cite Rule **404(b)** and did not object on that ground below does not bar the appellate court from applying that Rule to his argument in order to shoot it down. U.S. v. Wolfe, C.A.11th, 1985, 766 F.2d 1525, 1528. Defendant's failure to object at trial to evidence of other crime operates as a waiver of that objection unless admission constituted plain error. U.S. v. Gironda, C.A.7th, 1985, 758 F.2d 1201, 1219. Where defendant did not object to evidence of his threats to kill under Rule **404(b),** he waived the issue on appeal. U.S. v. Medina, C.A.7th, 1985, 755 F.2d 1269, 1277. Where defendant made no objection to other crimes evidence at trial, review was by plain error standard. U.S. v. Darby, C.A.11th, 1984, 744 F.2d 1508, 1523. In prosecution for income tax evasion, objections to testimony that defendant was a pimp who lived off the income of hookers were too general to preserve issue. Clinkscale v. U.S., C.A.8th, 1984, 729 F.2d 940. Failure to object at trial waived contention in loansharking prosecution that evidence of other crimes should not have been admitted. U.S. v. Gigante, C.A.2d, 1984, 729 F.2d 78, 84. Where no objection was made to the admission of other crimes evidence at trial, issue was not preserved for appeal. U.S. v. Vitale, C.A.8th, 1984, 728 F.2d 1090, 1092. It was not plain error in prosecution for fraud to introduce evidence of sale of truck by the defendant to show his use of a front man to hide his interest in certain transactions. U.S. v. Murphy, C.A.5th, 1983, 703 F.2d 1335. Objection that evidence was inadmissible proof of other crimes was waived when it was not raised at trial. U.S. v. Carson, C.A.2d, 1983, 702 F.2d 351, 369. It was not plain error to admit evidence of other incidents of check forging before the period charged in the indictment; in the absence of objection issue was not reviewable. U.S. v. Simmons, C.A.3d, 1982, 679 F.2d 1042, 1050. Where no objection was made at trial to the introduction of evidence that an associate of the conspirators was murdered on eve of his appearance, review was limited to whether this was plain error. U.S. v. Howton, C.A.5th, 1982, 688 F.2d 272, 278. Where defense counsel objected on hearsay grounds to use of client's prior record and there was no showing that he intended to sandbag the prosecution, evidence of other crimes admitted without justification and without limiting instruction was plain error. U.S. v. Escobar, C.A.5th, 1982, 674 F.2d 469, 475. If defense counsel believes ruling admitting evidence of other crimes was error, he should have objected or moved to strike; failure to do so is a waiver of the objection. U.S. v. Allain, C.A.7th, 1982, 671 F.2d 248, 252. Given the complexity of a decision to admit or exclude evidence under Rule **404(b),** neither court nor counsel should rely upon a continuing objection as a method of dealing with issue. U.S. v. Mangiameli, C.A.10th, 1982, 668 F.2d 1172, 1177. Where defendant did not object to use of other crimes evidence at trial, standard of review was that of plain error. U.S. v. Gonzalez, C.A.5th, 1981, 661 F.2d 488, 493. Where the defendant did not object to hints he was keeping company with loose women on grounds it was character evidence, appellate court did not need to consider admissibility under Rule **404(b).** U.S. v. Bruner, C.A.1981, 657 F.2d 1278, 1292, 212 U.S.App.D.C. 36. One court has based the obligation to object on Criminal Rule 51 rather than Evidence Rule 103. U.S. v. Foote, C.A.8th, 1980, 635 F.2d 671, 672. Where both defendant and his counsel said they had no objection to exhibit offered to show that defendant was in custody of Attorney General at time of charged escape, it was not error to admit it with statement that the defendant had been convicted of first degree murder underlined in red ink. U.S. v. Caldwell, C.A.7th, 1980, 625 F.2d 144, 148. In absence of objection at trial, receipt of evidence of other crimes could only be reviewed on appeal under plain error standard. U.S. v. Licavoli, C.A.9th, 1979, 604 F.2d 613, 623. Where objection that evidence was

proof of "other crimes" was not raised below, this ground was not available on appeal. U.S. v. Viserto, C.A.2d, 1979, 596 F.2d 531, 537. Defendant must object to the sufficiency of the government's foundation for admissibility in order to raise the issue on appeal. U.S. v. Cobb, C.A.8th, 1978, 588 F.2d 607, 611. Where the defendant charged with firearms offenses did not object at trial to evidence that he had been dealing in drugs, reversal was not required where admission did not amount to plain error. U.S. v. Garrett, C.A.5th, 1978, 583 F.2d 1381, 1386. Where defense counsel made no objection to the admission into evidence of mug shots, even though specifically asked by the trial judge if he had any objections, review on appeal was limited by the plain error rule. U.S. v. Bohr, C.A.8th, 1978, 581 F.2d 1294, 1299. Defendant waived objection to admission of evidence of prior crimes when he failed to make a timely objection on this specific ground in the trial court. U.S. v. Cepeda Penes, C.A.1st, 1978, 577 F.2d 754, 760. Objections to evidence of other crimes as being overly prejudicial, irrelevant, and lacking sufficient probative worth was enough to preserve for appeal the question of admissibility under Rule **404(b).** U.S. v. Gubelman, C.A.2d, 1978, 571 F.2d 1252, 1256 n. 13. If the evidence comes in as part of a non-responsive answer, the trial court may grant a motion to strike rather than declare a mistrial. U.S. v. Aaron, C.A.8th, 1977, 553 F.2d 43, 45. Where the trial court referred to the proffered evidence as "evidence of prior bad acts," the objection was "apparent from the context" within the meaning of Rule 103(a)(1) and the defendant's failure to make a specific objection did not bar appellate review. U.S. v. Barrett, C.A.1st, 1976, 539 F.2d 244, 247 n. 5. Objection to evidence that defendants in a prostitution case offered a Lincoln Continental to a witness as a bribe could not be raised on appeal where no objection was made below. Garibay v. State, Alaska App.1983, 658 P.2d 1350, 1357. Where no objection was made to evidence of other crimes and defense counsel even consented to its admission, there was no error in admission of evidence. State v. Jahns, App.1982, 653 P.2d 19, 133 Ariz. 562. It was enough that defendant objected first time other crime was mentioned; he did not need to object to every subsequent mention of incident to save point for appeal. State v. Featherman, C.A.1982, 651 P.2d 868, 133 Ariz. 340. Claim that trial should have excluded details of other crimes could not be asserted on appeal where no objection on this ground was made at trial. People v. Allen, 1986, 232 Cal.Rptr. 849, 869, 42 Cal.3d 1222, 729 P.2d 115. Where objection to other crimes was generic, appellate court would not consider whether narrower objection to specific parts of the testimony might have been sound. People v. Barney, 1983, 192 Cal.Rptr. 172, 143 Cal.App.3d 490. Failure to object to evidence of other crime waived any error in admitting evidence. Nelson v. Gaunt, 1981, 178 Cal.Rptr. 167, 125 Cal.App.3d 623. In prosecution of pickets for making false report to police officer, failure to object to evidence that pickets struck a delivery truck with their signs was a waiver of the objection. People v. Lawson, 1979, 161 Cal.Rptr. 7, 100 Cal.App.3d 60. Defendant waived objection to use of other crimes evidence by failure to object when it was offered. People v. Jackson, 1978, 151 Cal.Rptr. 688, 88 Cal.App.3d 490. Generally Admissibility of evidence of other crimes will not be reviewed on appeal without a timely objection at trial urging the grounds to be used on appeal. People v. Crume, 1976, 132 Cal.Rptr. 577, 61 Cal.App.3d 803. In absence of a timely objection under Kan.Stats.Ann. s 60-404, defendant could not raise admissibility of evidence of other crimes on appeal. State v. Whitehead, 1979, 602 P.2d 1263, 226 Kan. 719. Where defendant made a motion in limine to exclude evidence of other crimes that was overruled, objection made in chambers after evidence was admitted was sufficient to preserve issue; it was not necessary to object in presence of jury and thus emphasize the evidence. People v. Hernandez, 1985, 377 N.W.2d 729 n. 1, 736 n. 3, 423 Mich. 340. Appellate review of admission of other crimes evidence was precluded where the defendant failed to object. People v. Duenaz, 1986, 384 N.W.2d 79, 82, 148 Mich.App. 60. Where defendant did not move to strike testimony that defendant and companion were passing bad checks, issue of propriety of this evidence was not preserved for appeal. People v. Chappelle, 1982, 319 N.W.2d 584, 114 Mich.App. 364. Where defendant did not object to evidence of other crimes in trial court, he forfeited his right to have issue considered on appeal. State v. Stutelberg, Minn.1983, 328 N.W.2d 735. Where there was no objection and no plain error, defendant was not entitled to raise claim of error in admission of other crimes evidence on appeal. State v. Brown, Minn.1984, 348 N.W.2d 743, 746. Failure to object to prosecutor's questions about defendant's prior possession of gun similar to that used to commit charged robbery precluded raising this issue on appeal. State v. Marquetti, Minn.1982, 322 N.W.2d 316. Where defendant failed to object to other crimes evidence at trial, he could not do so on appeal. State v. Weinberger, 1983, 204 Mont. 278, 665 P.2d 202, 210. Review on appeal was foreclosed where there was no evidence of crime admitted, no objection was made, and insinuation of crime in question was not plain error. State v. Warnick, Mont.1982, 656 P.2d 190. Objection under N.M.R.Ev. **404(b)** could not be entertained on appeal where it was not raised below; objection under Rule 609 was not sufficient. State v. Doe, App.1981, 639 P.2d 72, 97 N.M. 263. Where no objection was made at trial, motion in limine did suffice to preserve objection to evidence of other insurance claims filed by the plaintiff. Caserta v. Allstate Insurance Co., 1983, 470 N.E.2d 430, 436, 14 Ohio App.3d 167. Even if testimony that defendant was

"pilfering more or less" was an accusation of another crime, defendant failed to object and thus cannot complain. Peters v. State, Okla.Crim., 1986, 727 P.2d 1386. Where trial judge sustained objection to questions about other crimes, issue was not preserved for appeal where no request that jury be admonished was made. Ross v. State, Okla.Crim.1986, 717 P.2d 117, 121. Error in admission of other crimes was not preserved for appeal where no objection was made at trial. Thompson v. State, Okla.Crim.1985, 705 P.2d 188, 191. Objection to evidence of possession of stolen gun under Rule **404(b)** was waived where no objection on this ground was made at trial. Jones v. State, Okla.Crim.1985, 695 P.2d 13, 15. Defendant waived any error in the admission of other crimes evidence when he failed to object to its admission at trial. Huddleston v. State, Okla.Crim.1985, 695 P.2d 8, 10. Issue of introduction of other crimes evidence was not properly before the appellate court for review where no objection was made below. Pegg v. State, Okl.Crim.1983, 659 P.2d 370, 373. Since no proper objection was made at trial, issue of admissibility of other crimes was not preserved for review. Hack v. State, Okl.Crim.1982, 654 P.2d 629. In absence of objection, admission of evidence of other crimes could not be raised as error on appeal. Miller v. State, Okl.Crim.1982, 642 P.2d 276. Claimed error in admission of other crimes was waived when defendant failed to object below. King v. State, Okl.Cr.1982, 640 P.2d 983. Where objection to other crime was not made till conference in chambers after it was admitted, objection would not preserve error. State v. Dirk, S.D.1985, 364 N.W.2d 117, 123. Where defense failed to object to proof of other crime, reversal was possible only if admission was plain error. State v. Sonnenberg, 1984, 344 N.W.2d 95, 103, 117 Wis.2d 159. Failure to interpose a timely objection to evidence of other crimes constitutes a waiver unless evidence is so flagrant as to be plain error. Hopkinson v. State, Wyo.1981, 632 P.2d 79, 124.

But see Improper admission of evidence of a prior crime constitutes plain error impinging upon the fundamental fairness of the trial itself. U.S. v. Biswell, C.A.10th, 1983, 700 F.2d 1310, 1319.

FN21. Irrelevant Objection that evidence was "completely inadmissible" did not suffice to raise issue of Rule **404(b).** U.S. v. Penson, C.A.7th, 1990, 896 F.2d 1087, 1092. Objection that evidence of other crime was "not relevant" and "highly prejudicial" was sufficient where judge treated it as an objection under Rule **404(b).** U.S. v. Nolan, C.A.7th, 1990, 910 F.2d 1553, 1559. Objection that evidence was irrelevant was sufficient to preserve objection to admission of other crimes evidence. U.S. v. Afjehei, C.A.2d, 1989, 869 F.2d 670, 673. "I object" is not sufficient to raise objection under Rule **404(b)** but appellate court would assume that the ground of objection was apparent from the context. U.S. v. Gilmore, C.A.8th, 1984, 730 F.2d 550, 554 n. 1. Where defendant made no objection to proof of other crime on grounds of hearsay or opinion, these objections could only be reviewed for plain error. U.S. v. Wormick, C.A.7th, 1983, 709 F.2d 454, 460. Objection that evidence was "an effort to prove that defendants did something by showing that they did the same alleged activities to someone else" was sufficient to raise objection under Rule **404(b).** Jay Edwards, Inc. v. New England Toyota Distributor, C.A.1st, 1983, 708 F.2d 814, 824 n. 7. Hearsay objection to statement concerning other crime of defendant was not sufficient to preserve issue of admissibility under Rule 404. U.S. v. Montemayor, C.A.5th, 1982, 684 F.2d 1118, 1121. Where counsel's objection to admissibility of other crimes was limited to Rule 403, the objection did not adequately raise issue of compliance with Rule **404(b)** and issue could only be raised if it was plain error. U.S. v. Kloock, C.A.5th, 1981, 652 F.2d 492, 494. The Evidence Rules require that an objection to evidence of other crimes be specific; this requirement was not satisfied by the statement: "This is objected to. That is not a proper place in this trial." U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 765. Objection that evidence was "collateral" did not suffice to preserve claim that its admission violated Rule **404(b).** State v. Bissonette, 1985, 488 A.2d 1231, 1237, 145 Vt. 381. Objection to other crimes evidence under Wis.Stats.Ann. s 904.04(2) was sufficient despite fact it did not cite the section where defense counsel argued to trial judge that if the evidence that circumstantially showed drunk driving were admissible, so would a conviction for that offense. State v. Draize, 1979, 276 N.W.2d 784, 88 Wis.2d 445.

But see Courts hold that relevance objection does not suffice to preserve Rule **404(b)** objection, either alone or in conjunction with assertion of Rule 403. U.S. v. Chaidez, C.A.7th, 1990, 919 F.2d 1193, 1202-1203; U.S. v. Harris, C.A.10th, 1990, 903 F.2d 770, 776-777; U.S. v. Diaz, C.A.2d, 1989, 878 F.2d 608, 616; U.S. v. Carroll, C.A.7th, 1989, 871 F.2d 689, 691; U.S. v. Laughlin, C.A.7th, 1985, 772 F.2d 1382, 1391; Bryant v. Consolidated Rail Corp., C.A.1st, 1982, 672 F.2d 217, 220; U.S. v. Singh, C.A.2d, 1980, 628 F.2d 758, 762; State v. Casteneda, App.1982, 642 P.2d 1129, 1133, 97 N.M. 670; State v. Fredrick, 1986, 729 P.2d 56, 60 n. 3, 45 Wn.App. 916; State v. Platz, 1982, 655 P.2d 710, 33 Wn.App. 345.

FN22. Invoking discretion An objection on grounds of relevance is sufficient to also raise claim that evidence should have been excluded under Rule 403, given the close relationship between the two rules. U.S. v. Afjehei, C.A.2d, 1989, 869 F.2d 670, 673. Court rejects argument that because the balancing test of Rule 403 is virtually subsumed in Rule **404(b)** via the Advisory Committee's Note, an objection under Rule **404(b)** is sufficient to trigger duty to balance under Rule 403. U.S. v. Manso-Portes, C.A.7th, 1989, 867 F.2d 422, 426. This is especially important in the Third Circuit where one decision can be read as requiring the objector to add an invocation of Rule 403 to his objection if he intends to attack the court's exercise of discretion on appeal. U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 766. However, in that case the defendant failed to make an adequate objection and it is possible that the court's holding is limited to that situation. Defendant could not raise error in admission of evidence of other crimes where he neither objected under Cal.Evid.Code s 1101 nor invoked the court's discretion to exclude under Cal.Evid.Code s 352 and there was nothing in the record to suggest that judge understood that objection was being made on these grounds. People v. Salinas, 1982, 182 Cal.Rptr. 683, 131 Cal.App.3d 925. Objection that evidence of gang membership was so prejudicial as to outweigh any probative value was sufficient to invoke the discretion of the trial court under Cal.Evid.Code s 352. People v. Perez, 1981, 170 Cal.Rptr. 619, 114 Cal.App.3d 470. Objection of lack of foundation was not adequate to raise objections as to prejudicial effect of mug shots. State v. McCardell, Utah, 1982, 652 P.2d 942. Defendant cannot complain of trial judge's failure to balance prejudice against probative worth where he did not object or move to strike the evidence of a prior brawl. State v. Stawicki, 1979, 286 N.W.2d 612, 93 Wis.2d 63.

FN23. Must show relevance Trial court's failure to follow "rigorous criteria for admitting evidence of other crimes" by not showing an evidentiary hypothesis to justify admissibility is harmless error if the appellate court can construct one on its own. U.S. v. Doran, C.A.10th, 1989, 882 F.2d 1511, 1523-1524. "In the Rule **404(b)** context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Huddleston v. U.S., 1988, 108 S.Ct. 1496, 1501, 485 U.S. 681, 99 L.Ed.2d 771. In drug prosecution, evidence of murder of pilot to whom money was owed for past smuggling and who was withholding the use of plane needed for future smuggling was relevant to prove intent to continue the conspiracy. U.S. v. Meester C.A.11th, 1985, 762 F.2d 867, 874. Evidence of other crimes must meet the standard of relevancy set forth in Rule 401; this is a function of the similarity between the charged and uncharged crimes. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 502. Caution and judgment are called for in receiving evidence of other crimes; trial judge should require the prosecution to explain why the evidence is relevant and necessary. U.S. v. Reed, C.A.6th, 1981, 647 F.2d 678, 687. Unless the relevance of proof of prior crime to some issue in criminal trial can be shown, it must be excluded. U.S. v. Foskey, C.A., 1980, 636 F.2d 517, 523, 204 U.S.App.D.C. 245. As a predicate to the determination that the extrinsic offense is relevant, the prosecution must offer proof demonstrating that the defendant committed the offense. U.S. v. Brown, C.A.5th, 1979, 608 F.2d 551, 555. There is no presumption that other crimes evidence is relevant. U.S. v. Mohel, C.A.2d, 1979, 604 F.2d 748, 751. There is no presumption that other crimes evidence is relevant. U.S. v. Manafzadeh, C.A.2d, 1979, 592 F.2d 81, 86. Government has the burden of showing that evidence offered under Rule **404(b)** is relevant to prove one of the excepted facts and that it is more probative than prejudicial to the defendant. U.S. v. Hernandez-Miranda, C.A.9th, 1979, 601 F.2d 1104, 1108. A trial judge faced with an other-crimes evidence problem should require the government to explain why such evidence is relevant and necessary. U.S. v. DeVaughn, C.A.2d, 1979, 601 F.2d 42, 45. Evidence that defendant was in company of a man who was arrested in airport with cocaine in his suitcase was not relevant to show that he hired woman to travel with him with cocaine in her girdle. U.S. v. Mann, C.A.1st, 1978, 590 F.2d 361, 370. Evidence of subsequent rape was not relevant to prove charged rape. U.S. v. Aims Back, C.A.9th, 1979, 588 F.2d 1283, 1286. Relevancy of evidence of other crimes must be examined with care and if connection with the crime charged is not clearly perceived, doubts should be resolved in favor of the accused. People v. Guerrero, 1976, 129 Cal.Rptr. 166, 16 Cal.3d 719, 548 P.2d 366. Evidence of co-defendant's prior trademark infringements had no relevance against defendant in prosecution for passing fraudulent traveler's checks. People v. Jones, 1983, 336 N.W.2d 889, 126 Mich.App. 191. Evidence that four days before handgun robbery of a drug store the defendant pulled a knife on a clerk who tried to apprehend him for stealing a bottle of perfume was relevant to show defendant was in area at the time of the charged crime, that he had a mustache, and was willing to use weapon. State v. Kumpula, Minn.1984, 355 N.W.2d 697, 703. The first two facts could have been proved without showing the crime; the last looks like an inference as to character. For a case in which the court does not state the grounds for supposing the evidence to be relevant and relevance is not obvious, see State v. Thomas, Minn.App.1985, 360 N.W.2d 458 (in rape-burglary where defendant had first attempted to seduce victim by claiming to be football star, evidence of similar seduction attempt was admissible). In prosecution for arson, evidence that the

defendant had taken money from purse of victim a year earlier was irrelevant. Dorsey v. State, 1980, 620 P.2d 1261, 96 Nev. 951. In order to gain admission of evidence of other crime, counsel must identify the consequential fact and articulate precisely the evidential hypothesis by which it may be inferred from the commission of the other crime. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 838. Court should not jump into listed categories, but should begin by considering the basic relevancy of other crimes evidence. State v. Johns, 1986, 725 P.2d 312, 320, 301 Or. 535. Evidence offered under Rule **404(b)** must also satisfy Rule 401 and be relevant to prove some controverted fact other than propensity to commit crime. State v. Morgan, 1986, 340 S.E.2d 84, 91, 315 N.C. 626. The admissibility of evidence of other crimes under Utah R.Ev. 55 turns on whether it is relevant to prove some material fact. State v. Forsyth, Utah 1982, 641 P.2d 1172, 1175. In deciding whether or not to admit evidence of other crimes, trial judge must first decide if it is relevant to issue on which it is offered, then balance probative worth against prejudice. State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358. Krivosha, Langsworth & Pirsch, Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs or Bad Acts to Convict, 1981, 60 Neb.L.Rev. 657.

But see It is defendant's burden to show that other crimes evidence was irrelevant. U.S. v. Culver, C.A.8th, 1991, 929 F.2d 389, 391 (but possible to read this as meaning this is a burden on appeal when evidence has been admitted at trial).

FN24. Burden of proof Evidence that defendant had once flown a plane to Colombia was not admissible to prove his intent in possessing cocaine where there was not a shred of evidence of his intent in making the Colombia flight. U.S. v. Chilcote, C.A.11th, 1984, 724 F.2d 1498, 1503. Rule **404(b)** does not require proof that defendant was aware of acts offered to show his motivation as jury could reject his contrary testimony and infer knowledge from acts proved. Bohannon v. Pegelow, C.A.7th, 1981, 652 F.2d 729, 733. It is the government's burden to show that other crimes evidence is relevant and that is more probative than prejudicial. U.S. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 379.

FN25. Jury determines The Supreme Court so held in Huddleston v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771, discussed at footnote 25.1 in this supplement. Evidence that defendant made large investments in real estate was relevant to prove narcotics transactions under Rule **404(b)** because jury could infer that defendant was laundering proceeds of crime. U.S. v. Towers, C.A.7th, 1985, 775 F.2d 184, 187. While Fifth and Eleventh Circuits believe that preliminary facts in proof of other crimes is for the jury, Seventh Circuit believes this is a function of the judge under Rule 104(b). U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222 n. 4.

FN27. Determined by judge This view was emphatically rejected by the Supreme Court in Huddleston v. U.S., 1988, 108 S.Ct. 1496, 1500, 485 U.S. 681, 99 L.Ed.2d 771. Policy of Rule **404(b)** would not be served by giving the jury the function of determining the preliminary facts in the admission of the evidence of other crimes. U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222 n.4. It was not necessary for judge to charge jury that it must find that other crimes were committed by "clear and convincing evidence"; preliminary fact could be decided against proponent under Rule 104(b) by judge only if jury could not reasonably find defendant committed crime. U.S. v. Pepe, C.A.11th, 1984, 747 F.2d 632, 670 n. 74. Determination of preliminary facts which are needed to make other crimes evidence admissible is to be made by the trial judge. U.S. v. Day, C.A.1979, 591 F.2d 861, 878, 192 U.S.App.D.C. 252. The contrary view is taken in U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 913. In determining whether prior crime has been proved by clear and convincing evidence, court can consider evidence of yet another uncharged crime that was not admitted in evidence. State v. Luna, Minn.1982, 320 N.W.2d 87. The question of whether the proof of a prior crime meets the "clear and convincing" standard is for the trial judge under Minn.R.Ev. 104(a), not the jury under Rule 104(b). State v. Matteson, Minn.1979, 287 N.W.2d 408. The Comment to Prop.N.Y.Evid.Code s **404(b)** says that preliminary facts regarding the admission of other crimes evidence are to be determined by the judge under the New York equivalent of F.R.Ev. 104(a). Evidence of other crimes was properly admitted after extensive pretrial hearing in which nine witnesses testified and trial judge made findings of fact and conclusions of law. State v. Wedemann, S.D.1983, 339 N.W.2d 112, 115. For a contrary opinion, see Kuhns, The Propensity to Misunderstand The Character of Specific Acts Evidence, 1981, 66 Iowa L.Rev. 777, 800.

FN28. Offer of proof Trial court is not required to hold hearing on admissibility of other crimes evidence; all that is required is that the judge be satisfied that there is enough evidence so that a jury could decide that defendant committed

the act. U.S. v. Carter, C.A.11th, 1985, 760 F.2d 1568, 1579. Rule 103 bars appellate reversal for exclusion of evidence of other crimes offered to support coercion defense where no adequate offer of proof was made in trial court. U.S. v. Morlan, C.A.9th, 1985, 756 F.2d 1442, 1447. Court was not required to hold hearing outside presence of jury on admissibility of other crimes evidence where adequate offer of proof was made, evidence was fully explained in the prosecutor's brief, and explained again at a bench conference at trial. U.S. v. Lavelle, C.A.D.C.1985, 751 F.2d 1266, 1279 n. 17. For a case enforcing a severe requirement for offers of proof by defendant seeking to prove other crimes of government witness, see U.S. v. Cutler, C.A.9th, 1982, 676 F.2d 1245, 1250. Where evidence of other crimes is offered, Rule 104(c) and prior decisions require that the trial judge hold a hearing out of the presence of the jury concerning its admissibility. U.S. v. Benton, C.A.5th, 1981, 637 F.2d 1052, 1055. The trial court was commended for hearing evidence of prior bad acts in camera before permitting them to be introduced into evidence before the jury in U.S. v. McPartlin, C.A.7th, 1979, 595 F.2d 1321, 1345. The failure of the trial court to conduct a preliminary hearing into the admissibility of other crimes evidence is not reversible error. U.S. v. Black, C.A.5th, 1979, 595 F.2d 1116, 1117. For a case in which the prosecutor made an offer of proof to avoid jeopardizing his case if the court thought the evidence inadmissible, a sort of "reverse motion in limine," see U.S. v. McFadyen-Snider, C.A.6th, 1977, 552 F.2d 1178, 1181. This procedure was employed in U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 358. Questions as to the admissibility of other crimes evidence must be determined out of the presence or hearing of the jury. People v. Campbell, 1976, 133 Cal.Rptr. 815, 63 Cal.App.3d 599. Witnesses need not testify at hearing on the admissibility of other crimes evidence; it is enough that prosecutor state the substance of the expected evidence. State v. Breazeale, 1986, 714 P.2d 1356, 1360, 238 Kan. 714. Trial court properly determined admissibility of other crimes evidence out of the presence of the jury. State v. Shepherd, 1983, 657 P.2d 1112, 232 Kan. 614. While it would be preferable for the prosecutor to make an offer of proof showing details of other offense, this was not required where the defense did not insist on one and evidence was never offered because defense to which it was relevant was not made. People v. Johnson, 1983, 333 N.W.2d 585, 124 Mich.App. 80. In ruling on admissibility of evidence of other crimes, trial court can rely on avowal of prosecutor as offer of proof without requiring a question-and-answer offer from witness. State v. McAdoo, Minn.1983, 330 N.W.2d 104. Trial judge followed correct procedure in requiring state to make case for admission of evidence of prior crime in a hearing outside presence of jury in which judge was apprised of quantum and quality of proof that defendant had committed the crime and then balanced probative value and prejudice. Petrocelli v. State, Nev.1985, 692 P.2d 503, 507. Better practice is for proponent of evidence of other crimes to obtain a ruling on the admissibility of the evidence out of the presence of the jury before offering it in evidence. State v. Morgan, 1986, 340 S.E.2d 84, 92, 315 N.C. 626. When other crimes evidence is tendered, it is desirable for the court to require a proffer out of the presence of the jury and make a record of its finding under Rule 403. Elliot v. State, Wyo.1979, 600 P.2d 1044, 1049 n. 1.

FN29. Must specify issue Prosecution must show why other crimes evidence is relevant and necessary to prove a specific element of the charged crime. U.S. v. Yeagin, C.A.5th, 1991, 927 F.2d 798, 803; U.S. v. Porter, C.A.10th, 1989, 881 F.2d 878, 884; U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1436; U.S. v. Shackleford, C.A.7th, 1984, 738 F.2d 776, 780; U.S. v. Biswell, C.A.10th, 1983, 700 F.2d 1310, 1317; U.S. v. Figueroa, C.A.2d, 1980, 618 F.2d 934, 939 n. 2. Judge who admits evidence of other crimes must specify under which provision of Rule **404(b)** it is being admitted. U.S. v. Westbrook, C.A.8th, 1990, 896 F.2d 330, 334. Failure of prosecution to specify the purpose of introduction of other crimes evidence and attempt to justify this on all the grounds listed in **404(b)** warrants inference that purpose was simply to prejudice defendant rather than prove some specific element of the charged crime. U.S. v. Fortenberry, C.A.5th, 1988, 860 F.2d 628, 633. Where instructions limited use of other crimes evidence to one purpose, court could not justify its admissibility on some other ground. U.S. v. Rappaport, Ct.Mil.App.1986, 22 M.J. 445, 447. Testimony of other crimes should not have been admitted where offeror stated baldly that the purpose was to show penchant for violence. Lataille v. Ponte, C.A.1st, 1985, 754 F.2d 33, 36. One court, while criticizing prosecution for refusal to do this either at trial or on appeal, went on to justify admissibility on concededly weak grounds. U.S. v. Mehrmanesh, C.A.9th, 1982, 689 F.2d 822, 831. Evidence of other crimes was not admissible when the prosecution stated that the purpose of the evidence was to show the defendant's propensity to lie and thus show guilt of the charge of making false statement to enlistment officer. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 504. On appeal, decision admitting evidence of other crimes will be upheld if it is admissible on any ground; it is not necessary that the ground relied upon have been specified in the trial court. U.S. v. Green, C.A.9th, 1981, 648 F.2d 587, 592. Although preferred procedure would have been for defendant to invoke Rule **404(b)** instead of Rule 609(a), he is not barred from asserting error in excluding evidence of violent acts of victim to show his fear in

support of claim of self-defense where his theory of admissibility was clearly outlined to the trial court. Government of Virgin Islands v. Carino, C.A.3d, 1980, 631 F.2d 226, 230. Although the prosecution did not attempt to justify introduction of evidence of other crimes under Rule **404(b)** and the trial court did not give any reasons for admitting the evidence, no such specification is necessary as long as the evidence was in fact admissible under the rule. U.S. v. Provenzano, C.A.3d, 1980, 620 F.2d 985, 993. Although evidence of other crimes might have been relevant to prove state of mind of defendants, appellate court could not use that theory to salvage case where evidence was admitted on an erroneous theory and under erroneous instructions; potential unfairness of permitting the assertion of new theory on appeal is substantial. U.S. v. Pantone, C.A.3d, 1979, 609 F.2d 675, 681. One appellate court has thought it proper to justify the admission of the evidence on other grounds despite the fact that the trial judge admitted it on the issue of "intent", because the instruction given at the end of the trial listed all of the other grounds in Rule 104(b). U.S. v. Albert, C.A.5th, 1979, 595 F.2d 283, 288 n. 11. When evidence of other crimes is offered, the prosecutor's first duty is to identify with specificity the purpose for which the evidence is admissible; this duty is not satisfied by reciting litany of all the purposes listed in Rule 404. People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. In determining relevance of evidence of other crimes, trial court must first identify the purpose for which the evidence is offered. State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358.

FN30. Point to element Defendant's plea of not guilty puts in issue every element of crime charged. U.S. v. Mothershed, C.A.8th, 1988, 859 F.2d 585, 589. The Ninth Circuit has accused other circuits of accepting the view that a plea of not guilty puts in issue all of the elements of the offense and justifies use of other crimes without any inquiry into what issues were actively contested at trial. U.S. v. McKoy, C.A.9th, 1985, 771 F.2d 1207, 1214 n. 4. By pleading not guilty, the defendant puts in issue all elements of the charged crime; the prosecution is not required to wait until the defense puts in evidence asserting a lack of one of the elements but may prove other crimes in anticipation of defense. U.S. v. Gilmore, C.A.8th, 1984, 730 F.2d 550, 554. Since plea of not guilty placed in issue the defendant's membership in charged conspiracy, it was not necessary for prosecution to wait for defense case before introducing other crimes on this issue. U.S. v. Wagoner, C.A.8th 1983, 713 F.2d 1371, 1375. In conspiracy case in 11th Circuit, the mere entry of plea of not guilty puts issue of intent in issue even though defendant denies commission of acts. U.S. v. Kopituk, C.A.11th, 1982, 690 F.2d 1289, 1334.

FN31. "Fancy defenses" The Thompson argument was adopted by the court in State v. Harris, App.1985, 365 N.W.2d 922, 926, 123 Wis.2d 231. For an example of an appellate court engaged in just this sort of game, see U.S. v. Lewis, C.A.1983, 701 F.2d 972, 226 U.S.App.D.C. 236 (after prosecution elicited on cross-examination that car in which he was riding had a valid sticker, it was proper to permit prosecution to prove that defendant had been arrested on outstanding assault warrant to rebut possible inference that arrest which turned up blackjack defendant was charged with possessing was illegal and high-handed even though defense counsel indicated he had no intent to raise any such claim; no attempt to explore possible alternatives to the introduction of evidence suggesting that defendant was of assaultive character and thus likely to use blackjack for violent purposes).

FN33. Read into codes Where co-defendants did not dispute that they were together at time of charged crime and the only issue was which was the triggerman, there was no disputed issue to which evidence that they had committed five prior robberies together was relevant. People v. Holt, 1984, 208 Cal.Rptr. 547, 555, 37 Cal.3d 436, 690 P.2d 1207. Evidence of other crimes must be relevant to an ultimate fact actually in dispute. People v. Dellinger, 1984, 209 Cal.Rptr. 503, 511, 163 Cal.App.3d 284. Evidence of other crimes must be offered upon an issue which will ultimately prove to be material to the prosecution's case. People v. Gerrero, 1976, 129 Cal.Rptr. 166, 16 Cal.3d 719, 548 P.2d 366. Before receiving evidence of other crimes, the court should require a showing of materiality and necessity. People v. Eastmon, 1976, 132 Cal.Rptr. 510, 61 Cal.App.3d 646. Under Wis.Stats.Ann. s 904.01, evidence is not relevant unless it proves a material fact; it was therefore error to admit evidence of a prior rape where the defense in charged rape was consent because such evidence is not relevant to the issue of consent. State v. Alsteen, 1982, 324 N.W.2d 426, 108 Wis.2d 723.

FN34. "Nearly every court" Defendant placed identity in issue by denying any participation in charged robbery. U.S. v. Connelly, C.A.7th, 1989, 874 F.2d 412, 418. It was error to admit other crime to prove motive and opportunity where defense conceded both of these. U.S. v. Fortenberry, C.A.5th, 1988, 860 F.2d 628, 634. Before evidence of other crimes is admissible, the trial court must find that it is relevant to some material issue. U.S. v. McKoy, C.A.9th,

1985, 771 F.2d 1207, 1214. Evidence of other crimes may not be admitted unless relevant to an actual issue in the case. U.S. v. Hodges, C.A.9th, 1985, 770 F.2d 1475, 1479. Where trial court instructed jury that identity was "the most important issue in the case", it is obvious that identity is in issue. U.S. v. DiGeronimo, C.A.2d, 1979, 598 F.2d 746, 753. Evidence of other crime was not admissible to show identity where defendant was admittedly the person present in auto in which drugs were found and the disputed issue was his possession of drugs; prior crimes evidence may not be introduced on issues that are not contested. U.S. v. Foskey, C.A., 1980, 636 F.2d 517, 524, 204 U.S.App.D.C. 245. Other crimes evidence is never admissible unless it is necessary to prove a material fact such as those listed in Rule **404(b).** U.S. v. Shelton, C.A.1980, 628 F.2d 54, 56, 202 U.S.App.D.C. 54. To be admissible under F.R.Ev. **404(b),** evidence of other crimes must be relevant to some disputed issue in the trial and its probative value must not be substantially outweighed by the rise of unfair prejudice. U.S. v. Figueroa, C.A.2d, 1980, 618 F.2d 934, 939. The Seventh Circuit appears to be retreating from Frierson though without overruling it. In U.S. v. Miroff, C.A.7th, 1979, 606 F.2d 777, 780, the court said that the government could introduce evidence of other crimes to show the defendant's knowledge that certain property was stolen even without any contention by the defense that such knowledge was lacking inasmuch as knowledge was an element of the crime. Evidence of other crimes must be relevant to an actual issue in the case in order to be admissible under Rule **404(b).** U.S. v. Mohel, C.A.2d, 1979, 604 F.2d 748, 751. If defendant concedes the issue to which other crimes evidence is relevant, the evidence may be inadmissible not only under Rule 403 but also Rule **404(b).** U.S. v. Danzey, C.A.2d, 1979, 594 F.2d 905, 914 n. 9. Under Rule **404(b),** an issue on which the other crimes evidence is admissible must be raised at trial before the evidence can be introduced. U.S. v. Peltier, C.A.8th, 1978, 585 F.2d 314, 321. In prosecution for distribution of heroin, the government is required to prove that the distribution was intentional; defendant's general denial of acts did not remove issue of intent from the case and the government was entitled to anticipate defense of lack of intent. U.S. v. Jardan, C.A.8th, 1977, 552 F.2d 216, 219. Evidence of prior extortionate transactions was admissible to prove intent where intent was in issue in the trial. U.S. v. Largent, C.A.6th, 1976, 545 F.2d 1039, 1043. Where the government concedes that no mental element was in issue, evidence of other crimes is not admissible to show motive, intent, or the like. U.S. v. Park, C.A.5th, 1976, 525 F.2d 1279, 1284 n. 6. Evidence of other crimes is inadmissible if the issue to which it is relevant is not expressly in dispute. People v. Alcala, 1984, 205 Cal.Rptr. 775, 790, 36 Cal.3d 604, 685 P.2d 1126. Where neither identity or intent was in issue, evidence was inadmissible because all other crimes could prove was the defendant's disposition to act in the way he was accused of acting. People v. Gordon, 1985, 212 Cal.Rptr. 174, 189, 165 Cal.App.3d 839. Where defense was that charged rape of daughter did not take place, there was no issue of intent or identity on which evidence of rape of other daughter would be admissible. State v. Goodrich, Me.1981, 432 A.2d 413, 417. Materiality requires that there must be a genuine controversy about the fact that other crimes evidence is offered to prove; where the defendant denied delivering anything to informant, there was no issue concerning her knowledge of the nature of cocaine. People v. Rosen, 1984, 358 N.W.2d 584, 136 Mich.App. 745. Where defense was that acts were never committed, intent was not in issue and it was error to admit evidence of other crimes to prove it. People v. Key, 1982, 328 N.W.2d 609, 121 Mich.App. 168. Evidence of other crimes under Mich.R.Ev. **404(b)** must be offered on a factor that is material to the determination of defendant's guilt of charged offense. People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. Before evidence can be admitted under Mich.R.Ev. **404(b)** it must be offered for some "material" purpose; issue is material when defendant disputes it in opening argument, by cross-examination of prosecution witnesses, or presenting affirmative evidence. People v. Hawley, 1982, 317 N.W.2d 564, 112 Mich.App. 784, judgment reversed on other grounds 332 N.W.2d 398, 417 Mich. 975. In order to be admissible under Mich.R.Ev. **404(b),** evidence must not only be directed at one of the specified purposes but that purpose must be one that is "in issue" in the case. People v. Major, 1979, 285 N.W.2d 660, 407 Mich. 394. Since motive for soliciting act of prosecution is obvious, it was not a material issue in case and prior acts of prostitution were not admissible to prove motive. State v. Matthews, 1984, 471 N.E.2d 849, 14 Ohio App.3d 440. If the fact for which evidence of other crimes is offered is of no consequence to the outcome of the action, the evidence should be excluded. State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358. Evidence is not admissible under Rule **404(b)** even if it fits within an exception thereto if the point it is offered to prove is not at issue. State v. Harris, App.1985, 365 N.W.2d 922, 925, 123 Wis.2d 231. Where the defendant denied that he had touched the child, his intent to molest was not an issue in the case. State v. Sonnenberg, 1984, 344 N.W.2d 95, 101, 117 Wis.2d 159.

FN35. Contrary opinions Seventh Circuit does not permit defendant to remove issue of specific intent from case by relying on some defense that does not contest the issue of intent. U.S. v. Chaimson, C.A.7th, 1985, 760 F.2d 798,

808. In every conspiracy case, a not guilty plea renders the defendant's intent a material issue and other crimes evidence is admissible unless the defendant affirmatively takes the issue of intent out of the case. U.S. v. Roberts, C.A.5th, 1980, 619 F.2d 379, 383. Whether a mere plea of not guilty justifies the prosecution in introducing extrinsic evidence in its case in chief is an open question in this circuit. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 915. For the sorry state of the precedents in California, see the scholarly opinion of Kaus, J., for the court in People v. Tassell, 1984, 201 Cal.Rptr. 567, 36 Cal.3d 77, 679 P.2d 1. Conlon & O'Connor, Evidence: Recent Developments in the Seventh Circuit, 1982, 58 Chi.-Kent L.Rev. 417, 428.

FN36. Deleted provision Because Rule 401 makes evidence relevant even when offered on an uncontested issue, evidence of other crimes is admissible to prove intent even when the issue of intent is not contested. U.S. v. Roberts, C.A.5th, 1980, 619 F.2d 379, 382 n. 1. The Fifth Circuit has read this deletion as having repealed the requirement that the issue be in dispute except in cases in which intent is not an element of the crime. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 914 n. 19. However, the court reads the requirement back into the balancing test. See s 5250 n. 29.

FN37. Consider under Rule 403 Where the defendant does not contest intent, evidence of other crimes offered on that issue is inadmissible because the incremental probative value of the evidence is inconsequential when compared to its prejudice. U.S. v. Roberts, C.A.5th, 1980, 619 F.2d 379, 382. Comment, Federal Rules of Evidence--Rule **404(b)** Limits The Admission Of Other Crimes Evidence, Under An Inclusionary Approach, To Cases Where It Is Relevant To An Issue In Dispute, 1980, 55 Notre Dame L. 574, 586-587.

FN38. Stipulation If the defense had conceded intent, court would have been obliged to remove issue from case and foreclose the use of other crimes evidence to prove it. U.S. v. Ortiz, C.A.2d, 1988, 857 F.2d 900, 905. The court ducked the issue in U.S. v. Dynalectric Co., C.A.11th, 1988, 859 F.2d 1559, 1581 n. 31. But other courts have accepted the controlling effect of an offer to stipulate: U.S. v. Yeagin, C.A.5th, 1991, 927 F.2d 798, 801 (offer to stipulate to intent to distribute drugs and to prior felony on weapons count); Wierstak v. Heffernan, C.A.1st, 1986, 789 F.2d 968, 972 (stipulation to probable cause bars evidence of crime plaintiff was accused of committing); U.S. v. McDowell, C.A.D.C., 1985, 762 F.2d 1072, 1076 n. 4 (offer to stipulate to intent will exclude other acts under Rule 403); U.S. v. Franklin, C.A.10th, 1983, 704 F.2d 1183 (refusal to stipulate to racial intent justifies admission of other racial crimes); U.S. v. Reed, C.A.2d, 1981, 639 F.2d 896, 906 (refusal to stipulate to knowledge and intent justifies use of other crimes to prove); U.S. v. DeJohn, C.A.7th, 1981, 638 F.2d 1048, 1053 (prosecution refusal to stipulate to be taken into account in Rule 403 balancing); U.S. v. Mohel, C.A.2d, 1979, 604 F.2d 748, 753 (unequivocal offer to stipulate removes issues in drug prosecution); U.S. v. DeVaughn, C.A.2d, 1979, 601 F.2d 42, 46 (evidence of identity inadmissible where prosecution refused to accept stipulation of identity). The principle seems to be accepted by cases that find the stipulation inadequate to justify exclusion: U.S. v. Davis, C.A.5th, 1986, 792 F.2d 1299, 1305 (stipulation to fact A does not exclude when relevant to fact B); U.S. v. Martin, C.A.4th, 1985, 773 F.2d 579, 583 (stipulation of amount of unreported income did not bar evidence of crimes to show source); U.S. v. Sliker, C.A.2d, 1984, 751 F.2d 477, 487 (offer to stipulate lacked sufficient clarity to remove issue); U.S. v. Pedroza, C.A.2d, 1984, 750 F.2d 187, 201 (offer to stipulate drugs were ransom demand did not suffice to show motive for kidnapping this particular victim and thus intent); U.S. v. Rubio, C.A.9th, 1983, 727 F.2d 786, 797 (stipulation of conviction did not bar proof of details thereof); U.S. v. Wilkes, C.A.5th, 1982, 685 F.2d 135, 137 (stipulation of intent that denied intent did not bar proof of intent); U.S. v. Provenzano, C.A.3d, 1980, 620 F.2d 985, 1004 (offer to stipulate to mediate fact that imprisonment was relevant to prove did not bar evidence where it left ultimate fact in dispute). District court properly refused to accept defense stipulation of intent that was inconsistent with proffered defense but it erred in not doing so after defense altered theory to make it consistent with stipulation. U.S. v. Colon, C.A.2d, 1989, 880 F.2d 650, 658-659.

State cases The better course would be to require acceptance of defense stipulation that would have avoided any necessity to show that defendant was a suspect in another case in order to authenticate a mug shot. Braaten v. State, Alaska App.1985, 705 P.2d 1311, 1317. If a defendant offers to admit the existence of an element of the crime, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element. People v. Hall, 1980, 167 Cal.Rptr. 844, 28 Cal.3d 143, 616 P.2d 826. Although knowledge of nature of narcotic is an essential element of crime of selling drugs, this element may be established by stipulation to avoid prejudice to accused by use of prior conviction to prove knowledge; where it is possible to meet issue by

stipulation, it is error to refuse to do so. People v. Washington, 1979, 157 Cal.Rptr. 58, 95 Cal.App.3d 488. Where the defense offered to stipulate to elements of charged crime and this would not unjustly impair the prosecution's case, it was error to permit the prosecution to prove prejudicial details of other crime. People v. Perry, 1985, 212 Cal.Rptr. 793, 798, 166 Cal.App.3d 924. In prosecution for being a felon in possession of weapon, defendant should be permitted to stipulate to felon status in cases where prior conviction is not relevant to other issues in the case. State v. Davidson, Minn.1984, 351 N.W.2d 8, 11. So long as defendant does not stipulate to identity, it is an issue that can be proved by other crimes. State v. Shaffer, Utah 1986, 725 P.2d 1301, 1308.

But see Prosecution need not accept defense stipulation but can insist on proving fact by other crimes evidence despite offer to stipulate. U.S. v. Zalman, C.A.6th, 1989, 870 F.2d 1047, 1056; U.S. v. Booker, C.A.8th, 1983, 706 F.2d 860, 862; U.S. v. Campbell, C.A.9th, 1985, 774 F.2d 354, 356.

FN39. Control order of proof A similar view is taken in A.B.A. Section of Litigation, Emerging Problems Under The Federal Rules of Evidence, 1983, pp. 66-67. If the court does not do this, it may have to give the jury a futile instruction to the jury to disregard the evidence when it later turns out the evidence should be excluded. See, e.g., U.S. v. Curcio, C.A.2d, 1985, 759 F.2d 237, 240. The safer course in offering similar act evidence is for the prosecution to rest, reserving out of the presence of the jury the right to reopen to present such evidence in the event the defendant rests without introducing evidence. U.S. v. Figueroa, C.A.2d, 1980, 618 F.2d 934, 939 n. 1. While the cases suggest that it is wise for the government to wait to see how the case develops before offering other crimes evidence so that it can show need, at least where prejudice is substantial and probative worth slight, there is no rule prohibiting the use of such evidence during the prosecution's case-in-chief. U.S. v. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 379 n. 1. Where the defendant relied on defense of duress and other crime was relevant to that defense, it was proper to permit the prosecution to prove the other crime during its case-in-chief. U.S. v. Hearst, C.A.9th, 1978, 573 F.2d 579. Trial judge properly deferred ruling on admission of evidence that defendant possessed a gun similar to one used in bank robbery until all of the other proof had been introduced so that he better weigh probative worth against prejudice. U.S. v. Robinson, C.A.2d, 1977, 560 F.2d 507, 515.

FN40. Other evidence first While it is usually better for judge to wait to admit other crimes evidence until rebuttal, when it was clear that the defendant would rely on intent as defense, it was proper to admit the evidence during the prosecution's case-in-chief. U.S. v. Lavelle, C.A.D.C.1985, 751 F.2d 1266, 1278 n. 16. Where defendant never did affirmatively take his intent out of the case, it was not error to permit the prosecution to prove other crimes as part of its case-in-chief. U.S. v. Mergist, C.A.5th, 1984, 738 F.2d 645, 650. It was eminently reasonable for trial judge to exclude evidence of other crimes until the close of the prosecution's case. U.S. v. Hadaway, C.A.4th, 1982, 681 F.2d 214, 217. Where it was abundantly obvious before case began that identity of robbers would be the only major issue, it was proper to permit proof of 15 other robberies during the prosecution's case since otherwise there might be no evidence on crucial issue. U.S. v. Danzey, C.A.2d, 1979, 594 F.2d 905, 912. Trial court properly exercised his discretion by waiting until the close of the government's case to permit the introduction of evidence of a prior conviction on the issue of intent. U.S. v. Williams, C.A.2d, 1978, 577 F.2d 188, 193. Ordinarily it is preferable to wait until the end of the defense case to decide upon the admissibility of other crimes evidence because at that time the court is in a better position to see what are the issues in the case and the need for the evidence; but where government could reasonably anticipate defense as a result of confession of defendant, it was not error to admit evidence during case-in-chief. U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 361 n. 20. Where intent had been in dispute in prior trial, prosecution was justified in introducing evidence of prior crimes on that issue as part of its case-in-chief. U.S. v. Adderly, C.A.5th, 1976, 529 F.2d 1178, 1182. Before evidence of other crimes can be admitted, there must be proof of the commission of the charged crime. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 837.

FN41. Rebuttal Trial court should have excluded evidence of other crimes until after the defense case to see if intent would be an admission; if the defense puts on no defense, the prosecution should then be allowed to reopen to introduce the evidence if it is then admissible. U.S. v. Colon, C.A.2d, 1989, 880 F.2d 650, 660 n. 2. One court, for reasons that are obscure, thought it was better for the government to offer the evidence during its case in chief rather than on rebuttal. U.S. v. Smith Grading and Paving, Inc., C.A.4th, 1985, 760 F.2d 527, 531. Though it is preferable to delay the admission of **404(b)** evidence until after the defense rests so the court can see what issues are in dispute,

where defense is made clear at outset of trial and defense did not object to timing, it was not error to admit evidence earlier. U.S. v. Estabrook, C.A.8th, 1985, 774 F.2d 284, 289. Judge did not err in not deferring ruling on the admissibility of evidence of other crimes until after defense case where no request for this was made and key government witness was an accomplice with a blemished record. U.S. v. Wagoner, C.A.8th, 1983, 713 F.2d 1371, 1376. Trial court has discretion to admit evidence of other crimes that would have been admissible in case-in-chief during prosecution's rebuttal. U.S. v. Bulman, C.A.11th, 1982, 667 F.2d 1374, 1382 n. 12. Although normally the government may not introduce evidence of defendant's propensity to engage in crime as part of its case-in-chief, it may do so once a defendant submits some evidence which raises the possibility that he was induced to commit the crime. U.S. v. Salisbury, C.A.5th, 1981, 662 F.2d 738, 740. Where it was obvious from defendant's refusal to accept a stipulation that intent was going to be disputed, policy reasons for postponing admissibility of other crimes evidence until after the defense has presented its case did not apply and it was proper to permit the government to put in the evidence during its case in chief. U.S. v. Reed, C.A.2d, 1981, 639 F.2d 896, 907. Normally evidence of prior crime offered to show knowledge or intent of defendant should not be admitted until the conclusion of the defendant's case since the judge is in a better position to engage in required balancing under Rule 403 at that time; however, it was not reversible error to admit it at the conclusion of the government case when no objection to time of admission was made. U.S. v. Alessi, C.A.2d, 1980, 638 F.2d 466, 477. Where evidence of another crime is offered to show that defendant did the act charged, it is admissible as part of the prosecution's case-in-chief, but when offered to show knowledge or intent it should not be admitted until the conclusion of the defendant's case; this enables the trial judge to determine if intent is really disputed. U.S. v. Figueroa, C.A.2d 1980, 618 F.2d 934, 939. The admission of other crimes evidence should normally await the conclusion of the defendant's case; the court will then be in the best position to balance the probative worth of, and the government's need for, such evidence against the prejudice to the defendant. U.S. v. Benedetto, C.A.2d, 1978, 571 F.2d 1246, 1249. Government should wait until issue is sharpened by defense evidence before introducing evidence of other crimes on rebuttal. U.S. v. Feinberg, C.A.7th, 1976, 535 F.2d 1004, 1010. It would have been wiser for the trial judge to have excluded evidence of other crime until the conclusion of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it. U.S. v. Leonard, C.A.2d, 1975, 524 F.2d 1076, 1092. To avoid bringing in other crimes evidence to prove an issue that will not be disputed, the trial judge should instruct the prosecutor not to refer to such evidence until judge rules it admissible in rebuttal. People v. Perkins, 1984, 205 Cal.Rptr. 625, 628-629, 159 Cal.App.3d 646. Trial court did not err in not ruling on defense motion to exclude evidence of prior conviction for child abuse until after defense testimony; until that time, the judge had no assurance that the defense would not raise accident or some other issue to which the evidence could be relevant on rebuttal. State v. Chapman, Me.1985, 496 A.2d 297, 303. Prosecutor can prove evidence of other crimes in rebuttal because he cannot use the evidence until the matter it tends to disprove, repel, or contradict is in issue. People v. Johnson, 1983, 333 N.W.2d 585, 124 Mich.App. 80. Court cites with approval the view of some courts that admission of other crimes evidence should be restricted to rebuttal where the availability of other proof and the disputed issues are clearer. State v. Harris, App.1985, 365 N.W.2d 922, 926, 123 Wis.2d 231. It was error to admit other crimes evidence to rebut testimony of the defendant during the prosecution's case-in-chief when defendant had not yet testified and, had evidence not been introduced, might well have chosen not to give testimony supposed to be rebutted by the evidence. State v. Holder, Utah 1984, 694 P.2d 583, 584.

FN43. Must satisfy other rules Without any explanation, the Fifth Circuit has held that the best evidence rule is inapplicable to the proof of other crimes. U.S. v. Byers, CA.5th, 1979, 600 F.2d 1130, 1132. Adoption of the inclusionary form of the rule does not mean that the government can use any means it chooses to prove the other crime. U.S. v. Lyles, C.A.2d, 1979, 593 F.2d 182, 195. Rule **404(b)** does not make evidence of other crimes admissible when the evidence is barred by the hearsay rule. People v. Raffaelli, Colo.App.1985, 701 P.2d 881, 885. Witness to other crime must have personal knowledge of that crime and cannot relay hearsay accounts of modus operandi. State v. Jones, Utah 1982, 656 P.2d 1012.

FN44. Proof by conviction Fact that prior conviction was on a plea of nolo contendere does not affect its admissibility as proof of prior crimes. U.S. v. Frederickson, C.A.8th, 1979, 601 F.2d 1358, 1365 n. 10. U.S. v. Sigal, C.A.9th, 1978, 572 F.2d 1320, 1323. Proof of other crime need not be a constitutionally valid criminal conviction; hence, proof of a conviction in a foreign court is admissible for this purpose. U.S. v. Nolan, C.A.10th, 1977, 551 F.2d 266, 270. Conviction of defendant who testifies as a witness may be used both for impeachment and as substantive evidence if requirements of Rule **404(b)** are met. U.S. v. Wilkerson, C.A., 1976, 548 F.2d 970, 179 U.S.App.D.C. 15. There

may, however, be hearsay problems if the other crime is one not punishable by death or more than a year in prison. See Rule 803(22).

FN47. "Beyond reasonable doubt" In a case in which an uncharged bribe was used to show motive for accumulation of slush fund, court seems to think that fact that bribe was paid from slush fund must be proved beyond a reasonable doubt. U.S. v. Siegel, C.A.2d, 1983, 717 F.2d 9, 17. The lower standard of proof has been advanced as a justification for admission of evidence of other acts which have been the subject of a previous acquittal. U.S. v. Etley, C.A.5th, 1978, 574 F.2d 850, 853. Cf. Smith v. Wainwright, C.A.5th, 1978, 568 F.2d 362, 364 (holding that subsequent acquittal of other crime does not invalidate conviction based upon it on grounds that this would be tantamount to requiring that proof of other crime be beyond a reasonable doubt). Testimony in record sufficed to provide clear evidence of defendant's participation in prior murder offered to show cover-up motive for the charged crime. State v. Williams, Iowa 1985, 360 N.W.2d 782, 786. Proof of prior crimes need not be beyond a reasonable doubt but must convince the jury of the probability that defendant did the act; the testimony of three witnesses was sufficient for this purpose. People v. Worden, 1979, 284 N.W.2d 159, 91 Mich.App. 666.

FN48. Admissibility generally For a case which conveniently overlooks this, see U.S. v. Murphy, C.A.7th, 1985, 768 F.2d 1518, 1535 (invoking Rule **404(b)** in bribery case to permit testimony by witness that he had paid numerous bribes to judge over a five year period but could not remember names or details of cases). Undisputed testimony of witnesses was sufficient to permit jury to conclude that corporation had committed prior crime. U.S. v. Bi-Co Pavers, Inc., C.A.5th, 1984, 741 F.2d 730, 737. One court has found a hearsay statement to be sufficient proof of another crime offered to show knowledge of illicit drugs. U.S. v. Pirolli, C.A.11th, 1982, 673 F.2d 1200, 1203. Evidence of other crimes, wrongs, or acts that is vague and speculative is not admissible under Rule **404(b).** U.S. v. Peltier, C.A.8th, 1978, 585 F.2d 314, 321. Evidence of bad act requires showing of sufficient indicia of reliability; it was sufficient that hearsay accusations of murder victim were corroborated by physical evidence of assaults committed on her. State v. Jeffers, Sup.Ct.1983, 661 P.2d 1105, 135 Ariz. 404. In child abuse prosecution, evidence that victim had suffered a spiral fracture of leg two weeks earlier was improperly admitted where there was no evidence that defendant was responsible for the injury. People v. Dellinger, 1984, 209 Cal.Rptr. 503, 512, 163 Cal.App.3d 284. It is not enough to prove commission of other crimes by plain, clear, and convincing evidence if there is not at least a prima facie case that the defendant was the perpetrator. Bishop v. State, Wyo.1984, 687 P.2d 242, 246. Boyce, Evidence of Other Crimes or Wrongdoing, 1977, 5 Utah B.J. 31, 60 (reporting little consideration of issues in Utah cases). One writer has proposed a variable standard. See Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 1984, 59 Notre Dame L.Rev. 556.

But see The Second Circuit has, however, rejected this view as based on a "misconception," holding that the prosecution need prove the other crime only by a preponderance of the evidence so long as the entire record supports finding of guilt of charged crime beyond a reasonable doubt. U.S. v. Leonard, C.A.2d, 1975, 524 F.2d 1076, 1090-1091. Evidence of other crimes need only be proved by a preponderance of the evidence. U.S. v. Kahan, C.A.2d, 1978, 572 F.2d 923, 932. Prima facie proof of an uncharged offense is all that is required. People v. DeRango, 1981, 171 Cal.Rptr. 429, 115 Cal.App.3d 583. For California cases holding that the prior crime need only be proved by a preponderance of the evidence, see Roth, Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach, 1982, 9 Pepp.L.Rev. 297, 310 n. 48.

FN49. "Substantial evidence" Defendant's confession of crime was substantial evidence sufficient to justify its use as other crime evidence. People v. Doyle, 1983, 342 N.W.2d 560, 563, 129 Mich.App. 145. Before evidence of bad acts can be admitted, there must substantial evidence that the defendant actually committed the acts. People v. Jones, 1983, 336 N.W.2d 889, 126 Mich.App. 191. Before evidence of other crime can be admitted under Mich.R.Ev. **404(b),** there must be substantial evidence that defendant was the perpetrator of the crime. People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. Fact the defendant's palmprint was found at site of burglary was sufficient proof of his participation to permit it to be used to identify him as perpetrator of charged burglary. Pedford v. State, Tex.App.1986, 720 S.W.2d 267, 268.

FN51. "Satisfactory proof" Fact that witness could not recall details of the defendant's boasts about his pedophile conquests did not violate rule requiring "clear proof" of other crimes. State v. Spargo, Iowa 1985, 364 N.W.2d 203,

209.

FN52. "Clear and convincing" Evidence of other crime is admissible only if there is clear and convincing evidence that the defendant committed the other crime. State v. Doughman, Minn.1986, 384 N.W.2d 450, 454. Evidence of other crimes satisfied requirement that defendant's commission of those crimes be proved by clear and convincing evidence. State v. Halverson, Minn.App.1986, 381 N.W.2d 40, 43. Circumstantial evidence of bid-rigging satisfied requirement of proof that was clear and convincing. State v. Rupp, Minn.App.1986, 393 N.W.2d 496, 499. A consent decree signed by defendant is clear and convincing evidence that he committed the violations alleged. State v. Stagg, Minn.1984, 342 N.W.2d 124, 127. Fact that witness was not able to make a positive identification of defendant as perpetrator of other crime and charges based thereon had been dismissed by the state did not mean that the evidence could not meet the clear and convincing standard. State v. McAdoo, Minn.1983, 330 N.W.2d 104. Testimony of accomplice and victim of robbery who had identified defendant from a photo display was clear and convincing evidence of other crime. State v. Johnson, Minn.1982, 322 N.W.2d 220. Positive nature of victim's testimony satisfied the clear and convincing evidence test; fact that other crime is against the same victim as the charged crime does not make it inadmissible. State v. Luna, Minn.1982, 320 N.W.2d 87, 89. In prosecution for complicity in murder of witness against the defendant's paramour, evidence that she had attempted to bail out a person who was involved in another attempt by the paramour to murder a witness should have been excluded under Minn.R.Ev. **404(b)** as it did not show her participation prior crime by clear and convincing evidence. State v. Link, Minn.1979, 289 N.W.2d 102.

FN54. "Plain, clear, and conclusive" Before state can introduce evidence of a prior act, it must be shown by plain, clear and convincing evidence that the defendant committed it. Petrocelli v. State, Nev.1985, 692 P.2d 503, 508. Fact that proof of crime was plain, clear and convincing did not make it admissible where the crime was offered to show identity and there was not a prima facie case that defendant was the perpetrator. Bishop v. State, Wyo.1984, 687 P.2d 242, 246.

FN55. Continue to apply The Supreme Court has rendered obsolete all the federal caselaw previously appearing in this and adjacent footnotes by holding that Rule 104(b) applies and only requires proof by a mere preponderance. Huddleston v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. In discarding these obsolete precedents, we have preserved those that either show the prior federal common law or those that hold that the higher standard was satisfied. The latter remain useful since evidence that satisfies the higher standard should suffice as proof by a preponderance. Where evidence of offer to fix traffic ticket was recorded on tape, it was clear and convincing evidence of the crime. U.S. v. Tuchow, C.A.7th, 1985, 768 F.2d 855, 863. Testimony concerning hearsay statement of defendant admitting it is clear and convincing evidence of other crime. U.S. v. Nabors, C.A.8th, 1985, 761 F.2d 465, 471. Where defendant's admission concerning bribes had been admitted, it was reasonable and clear and convincing evidence that what was in envelope delivered for defendant was bribe money. U.S. v. Chaimson, C.A.7th, 1985, 760 F.2d 798, 807. In civil action, prior crime need not be proved by clear and convincing evidence. Bowden v. McKenna, C.A.1st, 1979, 600 F.2d 282, 284. Where defendant was demoted for filing false report after a police investigation of the charge was clear and convincing evidence of the crime. U.S. v. Wormick, C.A.7th, 1983, 709 F.2d 454. The Reporter for the Advisory Committee has criticized this practice as contrary to the intent of the rule and as defeating the desired uniformity in application of the rules. Cleary, Preliminary Notes on Reading the Rules of Evidence, 1978, 57 Neb.L.Rev. 908, 917. Testimony of two witnesses to defendant's admissions of other crime that were corroborated by other evidence satisfied the clear and convincing evidence standard. U.S. v. Engleman, C.A.8th, 1981, 648 F.2d 473, 479. Pre-existing requirements for the use of other crimes have survived the adoption of the Evidence Rules even though not expressly incorporated into Rule **404(b).** U.S. v. Bowman, C.A.8th, 1979, 602 F.2d 160, 163 n. 3 (collecting similar holdings). Defendant's own admission on prior crime was proof on sufficient clarity and certainty to permit the use of the evidence under Rule **404(b).** U.S. v. Cobb, C.A.8th, 1978, 588 F.2d 607, 611. In Arizona it is not necessary to prove other crime beyond reasonable doubt, but evidence of guilt must be sufficient to take it to jury; i.e., there must be evidence substantial enough to warrant a conviction. State v. LaGrand, App.1983, 674 P.2d 338, 138 Ariz. 275. Evidence of other crimes could meet clear and convincing standard despite fact that the identifications of defendant were somewhat uncertain and one was initially in error. State v. Coleman, Minn.1985, 373 N.W.2d 777, 781. Defendant's own admission is clear and convincing evidence of prior act. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 837. Note, Proof of Prior Act Evidence, 1980, 49 U.Cinci.L.Rev. 613.

FN57. South Dakota Other crimes evidence must be clear and convincing. State v. Micko, N.D.1986, 393 N.W.2d 741.

FN58. Repeals restrictions Standard of proof of preliminary fact that the defendant committed uncharged crime is relatively low; court can find against the prosecutor only where the jury could not reasonably find the preliminary fact to exist. U.S. v. Guerrero, C.A.5th, 1981, 650 F.2d 728, 734. Standard of proof for admissibility of other crimes evidence permits exclusion only where the jury could not reasonably find that the defendant committed other crime. U.S. v. Guerrero, C.A.5th, 1981, 650 F.2d 728, 734. Under Rule **404(b),** prior crimes need not be proved by evidence that is clear and convincing or beyond a reasonable doubt so long as probative worth outweighs prejudice. U.S. v. Ricardo, C.A.5th, 1980, 619 F.2d 1124, 1131. Under Rule **404(b),** the government need only produce proof that the defendant committed the extrinsic offense sufficient to withstand a directed verdict on that offense. U.S. v. Jimenez, C.A.5th, 1980, 613 F.2d 1373, 1376. This possibility was again adverted to in U.S. v. Aaron, C.A.8th, 1977, 553 F.2d 43, 46. Iwinkelried, The Need to Amend Federal Rule of Evidence **404(b):** The Threat to the Future of the Federal Rules of Evidence, 1985, 30 Vill.L.Rev. 1465 (urging amendment to restore the old rules).

FN59. Force into Rule 403 Introduction of vague innuendo concerning the criminal defendant was prejudicial because it could not be met by specific denial but would require defendant to put on evidence of a general good character. U.S. v. Biswell, C.A.10th, 1983, 700 F.2d 1310, 1318. If other act is of doubtful similarity to event in issue and there is substantial doubt as to whether the defendant was the perpetrator, probative value will necessarily be diminished in application of Rule 403 balancing. Smith v. State Farm Fire and Casualty Co., C.A.5th, 1980, 633 F.2d 401, 403. The requirement that other crimes evidence must be clear and convincing is not an independent rule but a principle crystallized from repeated applications of the doctrine in Rule 403 that probative worth must outweigh prejudice. U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102, 107.

FN61. Prior standards intact Admission of defendant contained in reports of government agent are clear and convincing evidence of prior violations. U.S. v. Marshall, C.A.8th, 1982, 683 F.2d 1212, 1215. Under Rule **404(b),** evidence of a prior crime is admissible to prove intent if it is similar and close enough in time to be relevant, it is proved by clear and convincing evidence, and the trial court determines that probative worth outweighs prejudice. U.S. v. Ford, C.A.9th, 1980, 632 F.2d 1354, 1375. The requirement that other crimes must be proved by "clear and convincing" evidence continues to apply under Rule **404(b).** U.S. v. Frederickson, C.A.8th, 1979, 601 F.2d 1358, 1365. The position of the panel dissenter was adopted by the majority of the Fifth Circuit in an en banc rehearing. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 913.

FN62. Who applies In U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102, 107, without indicating that this was required, noted that the trial judge first found that proof of other crimes was clear and convincing and then instructed the jury that they could not use the evidence unless they also found the evidence to be clear and convincing. The reasoning in Wingate v. Wainwright was approved by the Second Circuit in holding that where the defendant had previously been acquitted on a charge of possession of cocaine, evidence of that possession could not be used to convict the defendant of conspiracy to distribute cocaine. U.S. v. Mespoulede, C.A.2d, 1979, 597 F.2d 329. The issue appears to have been left to the jury in State v. Hudson, Minn.1979, 281 N.W.2d 870.

FN63. Preliminary question In a dictum, it is seemingly suggested that the existence of a plan is a preliminary fact with respect to evidence of other crime that is to be determined by the jury, not the judge. State v. Hoffman, 1982, 316 N.W.2d 143, 106 Wis.2d 185.

FN64. Jury determines Before admitting evidence of other crime, judge must be satisfied that reasonable jury could find defendant committed it; evidence that defendant had same name as person convicted of prior crime and had told undercover agent he was on probation at time of offense sufficed for this. U.S. v. Hernandez, C.A.11th, 1990, 896 F.2d 513, 521. It has now been decided that the jury is to determine the preliminary facts by a preponderance of the evidence. Huddleston v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. Whether defendant committed other crime is a jury question unless the judge is convinced that no reasonable jury could so find. U.S. v. Wyatt, C.A.11th, 1985, 762 F.2d 908, 910. For a case which seems to assume that a preliminary fact necessary to the relevance of proof of an uncharged bribe is to be decided by the jury, see U.S. v. Siegel, C.A.2d, 1983, 717 F.2d 9,

17. Whether or not the defendant committed an uncharged crime offered under Rule **404(b)** is a 104(b) preliminary fact and can be decided against the prosecution only if a jury could not reasonably find that the defendant committed the uncharged crime. U.S. v. Mitchell, C.A.11th, 1982, 666 F.2d 1385, 1389. For a decision apparently approving the submission of this issue to the jury, see U.S. v. Testa, C.A.9th, 1977, 548 F.2d 847, 851 n. 1. Evidence of other crime need not be beyond a reasonable doubt; it is sufficient if it convinces the trier of fact of the probability of defendant's actions. People v. Sorscher, 1986, 391 N.W.2d 365, 371, 151 Mich.App. 122.

FN65. Cases and commentators The Supreme Court has rejected the views of these cases and commentators. See Huddleston v. U.S., 1988, 108 S.Ct. 1496, 1500, 485 U.S. 681, 687, 99 L.Ed.2d 771. Clear and convincing evidence standard for proof of prior crimes is to be applied by the judge under Rule 104(a), not by the jury. U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222. One writer endorses the view that determination of the relevance of other crimes evidence is a question for the jury under Rule 104(b), a view he erroneously attributes to this Treatise as well. Sharpe, Two-Step Balancing and The Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 1984, 59 Notre Dame L.Rev. 556, 568.

FN67. How much Where other crimes are offered to show intent, it is enough if the government proves that the intent was similar in both crimes. U.S. v. Oshatz, C.A.2d, 1990, 912 F.2d 534, 541. In Hobbs Act prosecution, cross-examination concerning acts of violence directed at others who had used competitors gambling machines was admissible without any evidence that defendants were responsible for those acts. U.S. v. Curcio, C.A.2d 1985, 759 F.2d 237, 241. For a case in which the court seems to have inferred that the defendant committed the uncharged crime from proof that he committed the charged crime, see U.S. v. Harris, C.A.10th, 1981, 661 F.2d 138, 142. One court, perhaps inadvertently, seems to have applied the "clear and convincing" standard to proof of the charged crime rather than crime offered under Rule **404(b).** U.S. v. Two Eagle, C.A.8th, 1980, 633 F.2d 93, 96. See U.S. v. Jones, C.A.8th, 1978, 570 F.2d 765, 768 (apparently holding that in prosecution for dispensing drugs without a legitimate medical purpose, proof that other similar prescriptions were also without legitimate purpose must be clear and convincing). Where evidence of defendant's presence at two other raids on PCP laboratories was offered to show her knowledge of nature of operation at charged lab, it was not necessary that the evidence of the uncharged crimes be sufficient to show her guilty of some crime. People v. Goodall, 1982, 182 Cal.Rptr. 243, 131 Cal.App.3d 129.

FN68. "Physical elements" The panel decision in Beechum was reversed by an en banc decision. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 910.

FN72. Effect of acquittal For a case which raises but does not seem to answer the intriguing question of whether in a multiple offense trial, the judge can acquit the defendant of some crimes but use the evidence of those crimes as evidence of guilt on remaining counts, see U.S. v. Green, C.A.7th, 1984, 735 F.2d 1018, 1027. Double jeopardy does not invalidate a state conviction based in part upon evidence of another crime when the defendant is subsequently acquitted of the other crime. Smith v. Wainwright, C.A.5th, 1978, 568 F.2d 362. Boyce, Evidence of Other Crimes or Wrongdoing, 1977, 5 Utah B.J. 31, 59. One student argues that an acquittal, at least where it appears to be based on failure of proof, ought to bar use of proof of the crime but not necessarily some part of the crime that was not the basis of the acquittal. Comment, Other Crimes: Relevance Reexamined, 1983, 16 J.Marsh.L.Rev. 371, 386. Note, Evidentiary Use of Prior Acquitted Crimes: The "Relative Burdens of Proof" Rationale, 1986, 64 Wash.U.L.Q. 189. Note, Collateral Estoppel Effect of Prior Acquittals, 1980, 46 Brook.L.Rev. 781. Note, Admissibility of Evidence of Other Crimes--Emphasis on Use In Prosecution of Sex Crimes--For Which Defendant Had Been Acquitted under Similar Crimes Rules, at Subsequent Trial, 1980, 7 North Ky.L.Rev. 133. Annot., Admissibility of Evidence As To Other Offense As Affected By Defendant's Acquittal of That Offense, 1983, 25 A.L.R.4th 934.

FN73. Contrary authority Evidence of other offense for which defendant was subsequently acquitted would be admissible in trial for another offense that was held prior to the acquittal. U.S. v. Wyatt, C.A.11th, 1985, 762 F.2d 908, 911 (dictum). It is a violation of collateral estoppel aspect of double jeopardy for a state to use evidence of a crime of which defendant has been acquitted as evidence of other crimes in a later prosecution. Albert v. Montgomery, C.A.11th, 1984, 732 F.2d 865, 869 (collecting other similar decisions). Case would be remanded to give defendants an opportunity to show that in using acts of which they had previously been acquitted under Rule **404(b),** government was attempting to relitigate an issue that should be barred by collateral estoppel. U.S. v. Johnson, C.A.6th, 1983, 697

F.2d 735, 741. It was not error to admit evidence of prior crime in trial that preceded defendant's acquittal of that crime. State v. Johnson, Minn.1982, 322 N.W.2d 220, 222 n. 1. It was reversible error to permit prosecution to introduce evidence of other charges of which defendant had been acquitted. State v. Reich, 1984, 676 P.2d 363, 66 Or.App. 862. Under no circumstances is evidence of a crime other than that for which the defendant is on trial admissible when the defendant has been acquitted of that other offense. State v. Wakefield, Minn.1979, 278 N.W.2d 307. The Florida Supreme Court has adopted the Wingate doctrine, excluding evidence of prior crimes that result in acquittals, as the law in that state. State v. Perkins, Fla.1977, 349 So.2d 161, noted, 1978, 9 Cum.L.Rev. 299. Note, Criminal Law--Excluding Evidence of Prior Crimes When Trial Resulted in Acquittal, 1980, 6 Wm.Mitch.L.Rev. 455, 456, n. 12.

FN74. Double jeopardy Collateral estoppel prevents use of crimes of which defendant has previously been acquitted as other crimes evidence. U.S. v. Day, C.A.1979, 591 F.2d 861, 869, 192 U.S.App.D.C. 252. Where defendant raised claim of entrapment by a government agent, evidence of other sales to the same agent could not be used to show his predisposition where he had been acquitted of those sales on grounds of entrapment as such use is barred by the doctrine of collateral estoppel. U.S. v. Keller, C.A.3d, 1980, 624 F.2d 1154, 1157. For a collection of conflicting federal cases, see U.S. v. Keller, C.A.3d, 1980, 624 F.2d 1154, 1157 n. 3. State was not collaterally estopped from using prior assault because case had been dismissed with prejudice. People v. Hampton, Colo.App.1986, 728 P.2d 345, 349. Better reasoned cases are those that hold that doctrine of collateral estoppel prevents the prosecution from using as other crimes evidence acts of which the defendant has been found to be not guilty. People v. Arrington, Colo.App.1983, 682 P.2d 490, 492 (adopting this rule). Comment, Extension of Collateral Estoppel To Evidence From Prior Acquitted Crime, 1984, 35 Mercer L.Rev. 1419. Note, The Double Jeopardy Clause As a Bar to Reintroducing Evidence, 1980, 89 Yale L.J. 962. Note, Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which Defendant Has Been Acquitted, 1974, 2 Fla.St.U.L.Rev. 511.

FN75. State courts Evidence of other crimes is admissible despite the fact that defendant has previously been acquitted of the charges. People v. Coy, 1981, 173 Cal.Rptr. 889, 119 Cal.App.3d 254 (collecting other California cases). For a collection of cases pro and con, see People v. Arrington, Colo.App.1983, 682 P.2d 490, 491. Note, Criminal Law--Excluding Evidence of Prior Crimes When Trial Resulted in Acquittal, 1980, 6 Wm.Mitch.L.Rev. 455, 456.

FN76. Federal cases U.S. v. DeVincent, C.A.1st, 1980, 632 F.2d 147; Crooker v. U.S., C.A.1st, 1980, 620 F.2d 313; Pacelli v. U.S., C.A.2d, 1978, 588 F.2d 360, 367 (dictum); King v. Brewer, C.A.8th, 1978, 577 F.2d 435, 441; U.S. v. Riley, C.A.8th 1982, 684 F.2d 542, 546; U.S. v. Moore, C.A.9th, 1975, 522 F.2d 1068, 1078-1079; U.S. v. Gutierrez, C.A.10th, 1982, 696 F.2d 753, 755 n. 2; U.S. v. Van Cleave, C.A.10th, 1979, 599 F.2d 954, 957; U.S. v. Hicks, Ct.Mil.App.1987, 24 M.J. 3, 7-9. Evidence of prior offense of which plaintiff was acquitted was admissible in civil rights action to show her bias against defendant who had been involved in prior prosecution. Pittsley v. Warish, C.A.1st, 1991, 927 F.2d 3, 9. Since jurors could have concluded that the defendant was innocent of prior rape charges because women consented, collateral estoppel did not bar proof of those rapes to prove issues other than consent in present rape trial. Oliphant v. Koehler, C.A.6th, 1979, 594 F.2d 547, 555. The fact that a co-conspirator has been found not guilty of attempting to pass a counterfeit bill does not make that act inadmissible as an overt act of the charged conspiracy; even if the evidence was of a "prior crime" the determination of innocence would be irrelevant. U.S. v. Etley, C.A.5th, 1978, 574 F.2d 850, 853.

FN77. Dismissal After judge has dismissed counts of an indictment the prosecution can use evidence of crimes in those counts under Rule **404(b).** U.S. v. Billups, C.A.4th, 1982, 692 F.2d 320, 328. One court has gone so far as to hold that the use of other crimes is not barred when a prosecution for those crimes was dismissed because delays in bringing defendant to trial had prejudiced her ability to defend against the charges. U.S. v. Birney, C.A.2d, 1982, 686 F.2d 102, 106. But see, U.S. v. Taglione, C.A.5th, 1977, 546 F.2d 194, 199 (improper to admit evidence of prior charges of theft that were subsequently dismissed as this requires the jury to try the defendant for two crimes, for one of which he was never indicted). It was reversible error to admit proof of crime when charges had been dismissed and so proof had little probative value and much prejudice. Evans v. State, 1985, 697 S.W.2d 879, 882, 287 Ark. 136. Other crime may be proved despite fact that same evidence was held insufficient to hold the defendant to answer for the crime; court may have dismissed the action for failure to show some element of the offense that was not needed to make offense relevant to prove charged crime. People v. James, 1976, 132 Cal.Rptr. 888, 62 Cal.App.3d 399. Fact that

charges had been dismissed in Wisconsin did not bar use of crime as evidence of charged crime in Minnesota. State v. Lande, Minn.1984, 350 N.W.2d 355, 358.

FN79. Discretionary exclusion In a case rife with prosecutorial misconduct, court did not abuse discretion in excluding evidence of prior crimes that had been subject of mistrial and acquittal. U.S. v. Martinez, C.A.10th, 1984, 744 F.2d 76.

FN80. Prove acquittal Where prosecution was permitted to produce proof of prior sex crime in rape prosecution, it was error to reject defense evidence that the defendant had been acquitted of that charge in a prior trial. State v. Evans, 1982, 323 N.W.2d 106, 212 Neb. 476.

FN81. Not applicable Rule 410 does not bar use of other crime to which defendant pleaded nolo contendere as proof of charged crime if otherwise admissible under Rule **404(b).** U.S. v. Wyatt, C.A.11th, 1985, 762 F.2d 908, 911. In suit for misappropriation of trade secrets, evidence of events or transactions barred by the statute of limitations are admissible to show nature of transactions in issue. Whittaker Corp. v. Execuair Corp., C.A.9th, 1984, 736 F.2d 1341, 1347. In prosecution for failure to file income tax returns, evidence of failure to file in seven earlier years was admissible to prove intent even though prosecution for those years was barred by the statute of limitations. U.S. v. Ming, C.A.7th, 1972, 466 F.2d 1000, 1008-1009. Fourth Amendment exclusionary rule does not apply when illegally seized marijuana is used under Rule **404(b)** as an uncharged crime to prove knowledge. U.S. v. Lopez-Martinez, C.A.9th, 1984, 725 F.2d 471, 476. Acts and transactions barred by the statute of limitations are admissible under Rule **404(b)** to prove preparation and plan. U.S. v. DeFiore, C.A.2d, 1983, 720 F.2d 757, 764. In prosecution for political bribes and kickbacks, court properly admitted evidence of acts beyond the statute of limitations as proof of plan under Rule **404(b).** U.S. v. Primrose, C.A.10th, 1983, 718 F.2d 1484, 1487 n. 2. In conspiracy case, evidence of acts beyond the statute of limitations is admissible to establish a continuing course of conduct or to cast light on the character of an existing conspiracy. Reid Bros. Logging Co. v. Ketchikan Pulp Co., C.A.9th, 1983, 699 F.2d 1292, 1305. Statute of limitations does not apply to the use of other crimes evidence. U.S. v. Means, C.A.5th, 1983, 695 F.2d 811, 816. Fact that incidents took place prior to the limitations period does not bar their use to show intent. U.S. v. Scott, C.A.8th, 1981, 668 F.2d 384, 387. Statute of limitations did not bar use of evidence of prior instances of police abuse in a civil rights action. Commonwealth of Pennsylvania v. Porter, C.A.3d, 1981, 659 F.2d 306, 320. One court has hinted that the rule excluding evidence procured by an illegal search does not apply when the evidence is offered to prove an uncharged crime under Rule **404(b).** U.S. v. Batts, C.A.9th, 1978, 573 F.2d 599, 602 n. 7. Where indictment charged a continuous conspiracy to accept bribes, it was proper to permit the government to prove bribes that were beyond the statute of limitations to show the nature and continuity of the conspiracy. U.S. v. Seuss, C.A.1st, 1973, 474 F.2d 385, 391. Fact that prosecution of prior crimes was barred by statute of limitations did not make evidence inadmissible. People v. Creighton, 1976, 129 Cal.Rptr. 249, 57 Cal.App.3d 314. Requirement that testimony of accomplice must be corroborated did not apply to proof of other crimes. State v. Sanford, 1985, 699 P.2d 506, 509, 237 Kan. 312. In libel action, evidence of defamatory statements made beyond the statute of limitations was properly admitted on the issue of punitive damages. Advanced Training Systems v. Caswell Equipment Co., Minn.1984, 352 N.W.2d 1, 10. Proof of other crime was not barred by the fact that conviction had been expunged following a successful completion of probation. Driskell v. State, Okl.Crim.1983, 659 P.2d 343, 349.

But see A few courts have assumed that illegally seized evidence cannot be used as other crimes evidence. U.S. v. Hill, C.A.7th, 1990, 898 F.2d 72, 74; U.S. v. Espinoza, C.A.9th, 1978, 578 F.2d 224, 228.

FN88. Labeling In admitting evidence of other crimes, the trial court must specifically identify the purpose for which it is to be used; it is enough to make a broad statement invoking or restating Rule **404(b).** U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1436.

FN89. Appellate opinions

But see The Fifth Circuit has attempted to lay down a per se rule governing application of Rule 403 when the government offers evidence of the good faith of officers accused of entrapping the defendant. U.S. v. Webster, C.A.5th, 1981, 649 F.2d 346, 351. For examples of federal courts looking to the precedents rather than analysis

of the present case in determining admissibility of other crimes, see U.S. v. Rubio-Estrada, C.A.1st, 1988, 857 F.2d 845, 848; Warner v. Transamerica Ins. Co., C.A.8th, 1984, 739 F.2d 1347, 1351; U.S. v. Miller, C.A.7th, 1978, 573 F.2d 388, 393. See also, U.S. v. Webster, C.A.5th, 1981, 649 F.2d 346, 351 (attempting to create a per se rule to be followed in other cases). Some states have made the same error. See, e.g., State v. Nelson, Minn.1982, 326 N.W.2d 917; State v. Keithley, 1984, 358 N.W.2d 761, 218 Neb. 707 (court so preoccupied with precedent it fails to note fact evidence was offered to prove was not in issue); State v. Thomas, S.D.1986, 381 N.W.2d 232, 236 (relying on cases from states that had not yet adopted Rule **404(b));** State v. LeFever, 1984, 690 P.2d 574, 577, 102 Wn.2d 77; State v. Rutchik, 1984, 341 N.W.2d 639, 643, 116 Wis.2d 61; Sanville v. State, Wyo.1979, 593 P.2d 1340, 1345.

FN90. Discretion to admit Court rejects claim that Rule **404(b)** requires judge to balance prejudice against probative worth as asserted in the Advisory Committee's Note and holds that there is no duty to consider Rule 403 unless this has been explicitly requested. U.S. v. Manso-Portes, C.A.7th, 1989, 867 F.2d 422, 427. For an illustration of a less than optimum expression of this balancing, see U.S. v. Long, C.A.9th, 1983, 706 F.2d 1044, 1052 n. 5. Where it is clear from the record that the trial court performed the necessary balancing of probative worth and prejudice, failure to use "magic words" in reaching decision is not reversible error. U.S. v. Evans, C.A.8th, 1983, 697 F.2d 240, 249. One court has said that "the practice of entering a finding as to this balance should definitely be encouraged"; but the failure to do so is not a ground for reversal. U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102, 106. Admissibility of evidence of other crimes is a two-step process; first, relevance must be determined under Rule **404(b)** and, second, the court must apply the balancing test in Rule 403. U.S. v. Williams, C.A.5th, 1979, 596 F.2d 44, 50. Even though the trial judge did not explicitly state that probative worth outweighed prejudice of evidence of other crimes, appellate court would infer that he performed the required balancing from his awareness of the rule and the arguments made to him. U.S. v. Sangrey, C.A.9th, 1978, 586 F.2d 1312, 1315. Task of determining admissibility of other crimes evidence does not end with determination that requirements of Rule **404(b)** are met; court must apply the balancing test in Rule 403 as well. U.S. v. Bohr, C.A.8th, 1978, 581 F.2d 1294, 1298. Under Rule **404(b),** the trial judge must first find that evidence of other crimes is relevant to some issue at trial other than to show that the defendant is a bad man; he must then determine that the probative worth and need for the evidence is not substantially outweighed by prejudice to the defendant. U.S. v. Williams, C.A.2d, 1978, 577 F.2d 188, 191. An opinion in the Third Circuit takes the wholly erroneous view that unless Rule 403 is invoked with sufficient specificity to satisfy Rule 103, the trial judge is not required to balance the probative worth of the evidence against its prejudicial qualities. U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 766. This is directly contrary to the last two sentences of the Advisory Committee's Note and to the overwhelming weight of authority. It is possible that the language of the opinion was meant only to apply to the case before the courts; i.e., a case in which no adequate objection was made under Rule **404(b).** The inclusionary approach to other crimes evidence does not mean that other crimes evidence is automatically admissible; the judge must first determine that the evidence is relevant for some purpose other than proof of disposition, then weigh the probative value of the evidence against its harmful consequences. U.S. v. Benedetto, C.A.2d, 1978, 571 F.2d 1246, 1248. Judge is not required to rule on prejudice of other crimes if no objection is made on the basis of Rule 403. State v. Cannon, 1985, 713 P.2d 273, 277, 148 Ariz. 72. Where record did not **disclose** that trial judge had engaged in the required balancing and that such balancing would have excluded evidence of prior crime as too prejudicial, appellate court would reverse. People v. De La Cruz, 1983, 192 Cal.Rptr. 701, 144 Cal.App.3d 497. It is not enough that evidence of other crimes satisfy the statutory requirements for admission; trial court must balance probative worth against prejudice and may admit only if the former predominates. People v. Worden, 1979, 284 N.W.2d 159, 91 Mich.App. 666. It was error, though harmless, for court to admit evidence of other crime without balancing probative worth and prejudice on the record. State v. Monk, 1985, 711 P.2d 365, 367, 42 Wash.App. 320.

FN93. Limit use In U.S. v. King, C.A.4th, 1985, 768 F.2d 586, the trial judge barred reference to the other crime in the opening statements, excluded evidence of the details of the criminal conduct, and gave clear instructions on the use to which the evidence could be put. Note, Evidence--A Limit to Limiting Instructions Concerning Other Crimes Evidence in Joint Trials--Multiple Juries as a Viable Alternative, 1981, 47 Brook.L.Rev. 1021.

FN94. Only relevant details Minute details of criminal investigation of murder defendant's drug dealing, including the name of the drug-sniffing dog used to apprehend him, were irrelevant but also not prejudicial. U.S. v. Chaverra-Cardona, C.A.7th, 1989, 879 F.2d 1551, 1554. Admitting evidence that defendant dealt in stolen chickens to prove

that defendant had unreported income did not prejudice where the trial court excluded any evidence that the chickens had been stolen. U.S. v. Martin, C.A.4th, 1985, 773 F.2d 579, 583. For an example of a case in which a state trial court admitted gory details of an assault on a robbery victim that had not the slightest relevance to proof of the issue on which the evidence was supposedly offered, see Porter v. Estelle, C.A.5th, 1983, 709 F.2d 944, 954-955. This was overlooked by court that held that evidence that defendant had boasted to prostitutes about his fraud was admissible to show knowledge of fraudulent scheme; obviously one could prove the boasts without any need to prove the occupation of the recipients. U.S. v. Mangiameli, C.A.10th, 1982, 668 F.2d 1172, 1177. Trial court properly limited evidence that defendant failed to return to halfway house after robbery to details relevant to show flight; there was no evidence that the house was a place only inhabited by persons with criminal records. U.S. v. Sims, C.A.9th, 1980, 617 F.2d 1371, 1378. In commending the trial court for the way in which proof of a prior crime was handled, the appellate court noted that the prosecution was cautioned not to go into details of prior crime not necessary for the purpose for which the evidence was admitted and this admonition was honored. U.S. v. Carleo, C.A.8th, 1978, 576 F.2d 846, 850. Prejudice arising from the use of letters from the defendant's homosexual lover to show motive for murder was reduced when the letters were not introduced into evidence, the jury was only told how the letters had been signed, and the letters were not used by the jury in deliberations. U.S. v. Free, C.A.5th, 1978, 574 F.2d 1221, 1223. For an egregious violation of this principle, see Carter v. U.S., C.A.8th, 1977, 549 F.2d 77 (prosecution of a convicted felon for possession of firearm; witness who saw the defendant drop the gun over a fence in the course of a chase permitted to testify that the chase began when defendant attempted to use a forged drug prescription). In prosecution for murder, evidence of a subsequent kidnapping was properly admitted to show relationship between defendant and kidnap victim so as to make meaningful certain admissions made to victim where court carefully limited the proof of the kidnapping to those details that were essential for this purpose. U.S. v. Kaiser, C.A.5th, 1977, 545 F.2d 467, 475-476. Where evidence of prior robbery was offered to impeach defendant's statement that he had not seen accomplice for years, trial court did not err in not restricting witness to testimony that she had seen the two together since the fact that this observation was made in course of being robbed was relevant to accuracy of identification of parties. People v. Benson, 1982, 180 Cal.Rptr. 921, 130 Cal.App.3d 1000. Where evidence that defendant was being held for prior crime would suffice to show motive for murder of witness, it was flagrant departure from order in limine for prosecution to attempt to prove guilt of prior crime. State v. Williams, Iowa 1985, 360 N.W.2d 782, 786. Evidence that the defendant had swapped a battery for the weapon used in a robbery would be relevant, but evidence that he had stolen the battery was not. State v. Boyd, Me.1979, 401 A.2d 157. It was not an abuse of discretion for court to exclude papers showing defendant was guilty of AWOL from collection of papers offered to prove defendant was living in home in which stolen property was found. State v. Zgodava, Minn.App.1986, 384 N.W.2d 522, 524. Trial judge properly excluded details of prior burglary, such as fact that one of the victims was sexually fondled. State v. Kennedy, Minn.App.1985, 363 N.W.2d 863, 866. In prosecution for arson and theft, it was not error to show that prior theft was committed shortly before someone burned down building as prosecution was entitled to prove all the facts surrounding prior crime even though it might lead jury to infer that defendant set other fire. State v. Richardson, Minn.App.1985, 363 N.W.2d 793, 797. Trial court did not err in excluding details of murder committed by prosecution witness. State v. Phelps, Minn.1982, 328 N.W.2d 136, 139. It was error, but harmless on the facts of the case, to permit witnesses to relate details of other crimes that were not relevant to the purpose for which the evidence was supposedly introduced. State v. Forsyth, Utah 1982, 641 P.2d 1172, 1177.

FN95. Impermissible argument For an illustration of a prosecutor getting evidence admitted on a non-character theory, then using it as a basis for character arguments to the jury, see U.S. v. Rodriguez-Cardona, C.A.1st, 1991, 924 F.2d 1148, 1153. Error in admission of other crimes evidence was not harmless where it was compounded by the prosecutor's improper argument that the defendant committed the crime because he was a thrill-killer. U.S. v. Brown, C.A.9th, 1989, 880 F.2d 1012, 1016. Where evidence is admitted under Rule **404(b)** on a non-character theory, trial court should not have permitted prosecutor to argue that it showed defendant's bad character. U.S. v. Fakhoury, C.A.7th, 1987, 819 F.2d 1415, 1423. It was error to admit evidence of other crimes where prosecution's use of evidence in closing argument shows that it was intended to prove the defendant's bad character to prove that he acted in conformity with that character; this is forbidden by Rule 405(b). U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 505. A careful reading of the entire text of the prosecutor's argument shows that it was designed to use other crimes evidence to provide a motive for the charged crime and not for the purpose of establishing that the defendants were "bad men" with a propensity to engage in crime. U.S. v. Greene, C.A.5th, 1978, 578 F.2d 648, 653. Error in admitting evidence of other crime was compounded by failure to give a limiting instruction and by the prosecutor's

argument which invited the jury to use evidence for impermissible purposes. People v. St. Andrew, 1980, 161 Cal.Rptr. 634, 101 Cal.App.3d 450. This was overlooked by court that approved the argument that repeatedly referred to the defendant as a "rapist" or "experienced rapist" or (sarcastically) "a reformed rapist" on the ground that argument was based on evidence showing that defendant had committed three prior rapes. State v. Hanks, 1985, 694 P.2d 407, 414, 236 Kan. 524. It was not improper for prosecutor to argue that evidence of other crime showed that the defendant was "accustomed to dealing in stolen property." State v. Richardson, Minn.App.1985, 363 N.W.2d 793, 797 Where evidence of other crimes was offered on issue of intent, it was error to permit the prosecutor to argue that it showed the defendant's depravity. Templin v. State, Tex.Crim.App.1986, 711 S.W.2d 30, 34.

FN96. Suggest other uses Appellate court frowns on prosecutor who got evidence of prior gun offense admitted on theory that it showed defendant was aware that it was unlawful to carry concealed weapon, then argues to jury that prior offense involved an attempted bank robbery. U.S. v. Gomez, C.A.11th, 1991, 927 F.2d 1530, 1534 n. 4. Reversal was compelled where evidence of other crimes tended to suggest that defendants should be convicted because they were bad men and prosecutor enhanced this effect by closing argument that defendants were dangerous, ruthless people who should not be left loose on the streets. U.S. v. Weir, C.A.8th, 1978, 575 F.2d 668, 671.

FN97. Principal device One court has erroneously supposed that the giving of a limiting instruction cures any error in the admission of other crimes evidence. U.S. v. Sanders, C.A.10th, 1991, 928 F.2d 940, 942. Since the defendant is entitled to a limiting instruction when the evidence is properly admitted, it cannot cure the improper admission of evidence. Failure to give a limiting instruction compounded error in admitting evidence of defendant's drug use that was irrelevant to prove intent. U.S. v. Monzon, C.A.7th, 1989, 869 F.2d 338, 344. Court's refusal to instruct on proper use of evidence of other crimes was harmless error. U.S. v. Davis, C.A.5th, 1986, 792 F.2d 1299, 1306. Failure of judge to give limiting instruction is a relevant factor in deciding if error in admitting evidence of other crimes was harmless. U.S. v. Green, C.A.9th, 1981, 648 F.2d 587, 593. A judge should carefully give instructions limiting use of extrinsic offense evidence wherever there is a possibility of prejudice, U.S. v. Jimenez, C.A.5th, 1980, 613 F.2d 1373, 1377. Where evidence of prior criminal conduct is admitted for a limited purpose, it must be accompanied by a limiting instruction if the defendant so requests. U.S. v. Washington, C.A.2d, 1979, 592 F.2d 680, 681. It has been suggested by way of dictum that erroneous admission of other crimes evidence can be cured by a limiting instruction. U.S. v. Evans, C.A.5th, 1978, 572 F.2d 455, 484. This seems to confuse an admonition to disregard inadmissible evidence with a limiting instruction. If the evidence is inadmissible for a limited purpose, the fact that a proper limiting instruction was given would seem to be irrelevant. Failure to give a requested limiting instruction concerning the use of evidence of other crimes admitted for impeachment purposes was reversible error. U.S. v. Whiteus, C.A.6th, 1978, 570 F.2d 616, 617. Defendant is not entitled to limiting instruction on use of other crimes evidence when both crimes are joined in single trial. People v. Thornton, 1979, 152 Cal.Rptr. 77, 88 Ca App.3d 795. Erroneous admission of other crimes evidence is not harmless because it would have been properly admitted for some other purpose that was not the subject of a jury instruction. State v. Perrigo, 1985, 708 P.2d 987, 989, 10 Kan.App.2d 651. Jury should be instructed that it must find that defendant committed charged crime before it can make use of evidence of other crimes. State v. Micko, N.D.1986, 393 N.W.2d 741 (holding unclear). Defendant could not complain of instruction on use of other crimes evidence where his objection at trial did not specify defect in the one proposed and no alternative instruction was tendered. State v. Reutter, So.Dak. 1985, 374 N.W.2d 617, 625. It was error, but not reversible error, for the trial judge to fail to give requested instruction on use of other crimes evidence at the time the evidence was admitted. State v. Smith, Utah 1985, 700 P.2d 1106, 1110.

FN98. Skeptical For a limiting instruction that may demonstrate why there is skepticism about their effectiveness, see People v. Carter, 1982, 330 N.W.2d 314, 334, 415 Mich. 558.

FN99. Prefer not to emphasize For a case that apparently holds that it is proper to give a cautionary instruction even over the objection of the defendant if there is such evidence in the record, see U.S. v. Mora, C.A.10th, 1985, 768 F.2d 1197. Counsel was not ineffective for failing to object to two bits of other crimes evidence where the objection might have highlighted the evidence and caused more harm than letting it quietly slip by. U.S. v. Brown, C.A.7th, 1984, 739 F.2d 1136, 1146. In assessing prejudice in admission of other crimes evidence, court would take into account prejudice that could have been eliminated by a limiting instruction where the judge did not give one only because defense counsel exercised their right to block it. U.S. v. Moore, C.A.1984, 732 F.2d 983, 990, 235

U.S.App.D.C. 381. Trial judge was not required to give a limiting instruction sua sponte where the prosecution conceded that it would be proper but defense counsel chose to stand or fall on issue of admissibility; though limiting instruction is desirable, the court is not required to override the wishes of defense counsel. U.S. v. Price, C.A.7th, 1980, 617 F.2d 455, 460. Where there was no request for a limiting instruction and the chief effect of an instruction would be to highlight evidence of other crimes, it was not plain error to fail to give an instruction. U.S. v. Childs, C.A.1979, 598 F.2d 169, 176, 194 U.S.App.D.C. 250. Counsel may refrain from requesting a limiting instruction on other crimes in order not to emphasize potentially damaging evidence or for other strategic reasons; trial court need not second guess this decision and instruct sua sponte. U.S. v. Barnes, C.A.5th, 1978, 586 F.2d 1052, 1059. Defendant's refusal of proffered limiting instruction forecloses raising on appeal the issue of whether admission without such instructions was error under Rule **404(b).** U.S. v. Levy, C.A.2d, 1978, 578 F.2d 896, 900. It was not error for trial judge to fail to give a limiting instruction on use of other crimes evidence where defense counsel had withdrawn a proposed instruction on the subject. State v. Reed, 1979, 604 P.2d 1330, 25 Wash.App. 46. Where defense counsel did not want an instruction because it might highlight the prior act, the trial judge was under no duty to give a limiting instruction without a request. Goodman v. State, Wyo.1979, 601 P.2d 178, 184.

FN2. No duty It was error to admit other crimes evidence against F.B.I. agent without an instruction that limited it to its proper purpose. U.S. v. Miller, C.A.9th, 1989, 874 F.2d 1255, 1270 (no mention of whether such instruction was requested). Huddleston does not require the trial judge to give a limiting instruction in the absence of a request by counsel. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1376. It is well-settled that where no limiting instruction on use of other crimes is requested, the failure to give one sua sponte is not reversible error. U.S. v. Multi-Management, Inc., C.A.9th, 1984, 743 F.2d 1359, 1364. Under Rule 105, burden of requesting a limiting instruction on use of other crimes evidence is on the defendant; without such a request, he cannot complain on appeal that no such instruction was given. U.S. v. Gilmore, C.A.8th, 1984, 730 F.2d 550, 555. It was not plain error for judge to fail to give a limiting instruction on the use of other crimes evidence where there was no request for such instruction. U.S. v. Vincent, C.A.6th, 1982, 681 F.2d 462, 465. Trial court is not under duty to give a limiting instruction sua sponte at time evidence of other crimes is admitted where the evidence has no potential for substantially prejudicing defendant. U.S. v. Lewis, C.A.1982, 693 F.2d 189, 196-197, 224 U.S.App.D.C. 74. Where evidence of character was admissible and not unfairly prejudicial, the trial court was not obliged to give a limiting instruction sua sponte. U.S. v. Murzyn, C.A.7th, 1980, 631 F.2d 525, 531. If the defendant does not request a limiting instruction on the use of evidence of other crimes, it is not reversible error to fail to give one. U.S. v. Potter, C.A.9th, 1979, 616 F.2d 384, 389. Where the only issue in the case actually in dispute was the defendant's intent, it was not plain error to fail to give an instruction limiting other crimes evidence to the issue of intent since there was not other issue on which the jury could have used the evidence. U.S. v. Childs, C.A.1979, 598 F.2d 169, 175, 194 U.S.App.D.C. 250. It is not plain error for the trial court to fail to give an instruction sua sponte limiting the use of evidence of other crimes. U.S. v. Barnes, C.A.5th, 1978, 586 F.2d 1052, 1058. Ordinarily defense counsel must request a limiting instruction on the use of other crimes evidence; if he does not, the error can be considered on appeal only if it is plain error. U.S. v. Bridwell, C.A.10th, 1978, 583 F.2d 1135, 1140. Although it would have been better practice for the trial judge to sua sponte give a cautionary instruction limiting the use of other crimes evidence, it was not plain error for him to fail to do so on facts of instant case, though it might be in a case where conduct is more egregious and its relevance is less. U.S. v. Cooper, C.A.6th, 1978, 577 F.2d 1079, 1087-1089. Though it would have been preferable to give an instruction which carefully limited the jury's use of evidence of other crimes, failure to give such instruction sua sponte was not an abuse of discretion where counsel did not request such an instruction. U.S. v. Walls, C.A.9th, 1978, 577 F.2d 690, 697. The giving of a limiting instruction is simply one factor in determining whether there has been an abuse of discretion in admitting evidence of other crimes. U.S. v. Brown, C.A.9th, 1977, 562 F.2d 1144, 1148. Where after the court charged the jury, the defendant did not object to the omission of the single limiting objection which he requested, nor ask for any others, he waived any objection he might have had to the failure of the trial judge to give a limiting instruction on the use of other crimes evidence. U.S. v. Barrett, C.A.1st, 1976, 539 F.2d 244, 249. Where defense counsel objected to introduction of other crimes evidence but did not request a limiting instruction, failure to give an instruction could not be considered on appeal unless it was plain error. U.S. v. Semak, C.A.6th, 1976, 536 F.2d 1142, 1145. Failure to give limiting instruction in absence of request could meet requirements for plain error. U.S. v. Cox, C.A.5th, 1976, 536 F.2d 65, 69 n. 9. In the absence of a specific defense request, no limiting instruction is required here other crimes evidence is relevant to an issue in the case. U.S. v. Conley, C.A.8th, 1975, 523 F.2d 650, 654 n. 6. It has been argued that adoption of Rule 105 has repealed prior caselaw requiring a sua

sponte instruction. Green, The Military Rules of Evidence and The Military Judge, May 1980, Army Lawyer 47. Although judge has no duty to give an instruction on use of other crimes sua sponte, if he does give one it should correctly state the precise issues to which the evidence is relevant. People v. Key, 1984, 203 Cal.Rptr. 144, 153 Cal.App.3d 888. Where past offenses were not a dominate part of the evidence and were not highly prejudicial court had no duty to give sua sponte limiting instruction. People v. Tucciarone, 1982, 187 Cal.Rptr. 159, 137 Cal.App.3d 701. Trial court was under no obligation to sua sponte modify instructions on use of other crimes to include charge that jury must find other crimes by a preponderance of the evidence. People v. Goodall, 1982, 182 Cal.Rptr. 243, 131 Cal.App.3d 129. Although there may be exceptional cases in which evidence of other crimes is so dominant a part of the case against the accused that a sua sponte limiting instruction is required, the usual rule is that the trial judge has no duty to give such an instruction without a request. People v. Collie, 1981, 177 Cal.Rptr. 458, 30 Cal.3d 43, 634 P.2d 534. In the absence of a request, a court is not required to give a limiting instruction on the use of evidence of other crimes. People v. Marshall, 1981, 175 Cal.Rptr. 497, 121 Cal.App.3d 627. Trial court has no duty to instruct sua sponte on proper use of other crimes evidence. People v. Morrisson, 1979, 155 Cal.Rptr. 152, 92 Cal.App.3d 787. It is better practice, though not plain error, for the trial court to sua sponte give a limiting instruction on the use of other crimes evidence. People v. White, Colo.App.1984, 680 P.2d 1318, 1321. Failure to request a limiting instruction on use of other crimes evidence precludes raising failure to give instruction as error on appeal. People v. Freeman, 1985, 385 N.W.2d 617, 619, 149 Mich.App. 119. Trial judge was not required sua sponte to give a limiting instruction on the use of other crimes evidence. People v. Armentero, 1986, 384 N.W.2d 98, 105, 148 Mich.App. 120. Trial court has no duty to give sua sponte instruction on use of other crimes evidence. People v. Morris, 1984, 362 N.W.2d 830, 833, 139 Mich.App. 550. Trial judge has no duty to give a limiting instruction sua sponte when evidence of other crimes is admitted. People v. Flynn, 1979, 287 N.W.2d 329, 93 Mich.App. 713. Failure to request instruction on use of other crimes forfeits right to raise issue on appeal. State v. Starnes, Minn.App.1986, 396 N.W.2d 676, 681. Defendant waived objection to failure to give a limiting instruction on the use of other crimes evidence when he failed to object to instructions given. Thompson v. State, Okla.Crim.1985, 705 P.2d 188, 191. Statements of defendant to arresting officers that he had grown instant marijuana himself in his bedroom and that he could direct officers to a place where they could purchase an additional 15 pounds were such subtle references to other crimes that there was no duty to give a limiting instruction sua sponte. Cole v. State, Okl.Crim.1982, 645 P.2d 1025, 1027. The state need not request a limiting instruction when it introduces evidence of other crimes; it is up to the defendant to request the instruction. State v. Amundson, 1975, 230 N.W.2d 775, 69 Wis.2d 554. It was not error to fail to give a limiting instruction on use of other crimes evidence where no such instruction was requested. Evans v. State, Wyo.1982, 655 P.2d 1214.

But see Where evidence of other crimes is admitted for a limited purpose under Kan.Stats. Ann. s 60-455, the trial judge must give a limiting instruction even though there was no request for the instruction and no objection to the admission of the evidence. State v. Whitehead, 1979, 602 P.2d 1263, 226 Kan. 719.

FN3. Give twice Double shot of instructions approved as proof that issue was handled "with consummate care." U.S. v. Hadfield, C.A.1st, 1990, 918 F.2d 987, 995. It was not error to refuse to give limiting instruction at time that other crimes evidence was admitted where proper instruction was given as part of final instructions. U.S. v. Evans, C.A.4th, 1990, 917 F.2d 800, 809. Prejudice from evidence of other crimes is lessened when judge gives limiting instruction both at the time the evidence is introduced and at the close of the trial. U.S. v. Hernandez, C.A.11th, 1990, 896 F.2d 513, 523. Such a double warning was applauded in U.S. v. Harrod, C.A.7th, 1988, 856 F.2d 996, 998. One reason it is wise to give the instruction at the time the evidence is introduced is that the court may forget to give the instruction at the conclusion of the case. See, e.g., U.S. v. Yopp, C.A.6th, 1978, 577 F.2d 362, 366. See U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 359 n. 15 (apparently endorsing practice). In one case the jury was given three instructions on the limited purpose for which other crimes evidence was admitted. Carter v. U.S., C.A.8th, 1977, 549 F.2d 77, 78. Trial court properly gave limiting instruction both before admitting evidence of other crimes and at the close of the trial. U.S. v. Davis, C.A.5th, 1977, 546 F.2d 617, 619. Trial judge properly gave limiting instruction prior to introduction of other crimes evidence. State v. Breazeale, 1986, 714 P.2d 1356, 1360, 238 Kan. 714. Where trial judge gave admonition before first witness testified to other crime and when case was submitted to jury, it was not error not to give cautionary instructions at each intervening introduction of other crimes. State v. Tecca, 1986, 714 P.2d 136, 140, 220 Mont. 168. While court upon admitting evidence of other crimes should give an immediate cautionary instruction, failure to give one is not reversible error in the absence of request for one. State v. Stroud,

1984, 683 P.2d 459, 465, 210 Mont. 58. At the time evidence of other crimes is admitted, trial judge must explain to the jury the purpose of the evidence and admonish the jury to use it only for those purposes and give another limiting instruction at the time of its final charge. State v. Gray, 1982, 643 P.2d 233, 197 Mont. 348. When evidence of other crimes is admitted under Mont.R.Ev. **404(b)**, it is the duty of the trial judge to give an instruction at the time the evidence is admitted and again in the final charge admonishing the jury of the limited purposes for which the evidence may be used. State v. Just, 1979, 602 P.2d 957, 184 Mont. 262.

But see A number of courts have held that a single instruction is all that is required: U.S. v. Longbehn, C.A.8th, 1990, 898 F.2d 635, 639; U.S. v. Sliker, C.A.2d, 1984, 751 F.2d 477, 487; U.S. v. Soulard, C.A.9th, 1984, 730 F.2d 1292, 1303; Murray v. Superintendent, C.A.6th, 1981, 651 F.2d 451, 454; People v. Hawley, 1982, 317 N.W.2d 564, 112 Mich.App. 784, reversed on other grounds, 1983, 332 N.W.2d 398, 417 Mich. 975.

FN4. Criticisms For some evidence that bad instructions are the product of sloppy thinking about the admissibility of the evidence, see U.S. v. Rodriguez-Cardona, C.A.1st, 1991, 924 F.2d 1148, 1151. Instruction that was simply a laundry list of permitted uses under Rule **404(b)** was insufficient to limit evidence to proper uses. U.S. v. Cortijo-Diaz, C.A.1st, 1989, 875 F.2d 13, 15. Although instruction given by judge sua sponte on the use of evidence of defendant's sexual relations with his patients might have been more carefully drawn to indicate exactly how the evidence might be used by the jury, it was not so defective as to be plain error. U.S. v. Potter, C.A.9th, 1979, 616 F.2d 384, 390. Trial judge did not err in refusing to give a requested instruction on the use of other crimes evidence because it was internally inconsistent and misleading. U.S. v. Albert, C.A.5th, 1979, 595 F.2d 283, 289.

FN5. Little advice For a folksy, midtrial instruction judged good enough, see U.S. v. Cordell, C.A.5th, 1990, 912 F.2d 769, 775. Court seemingly approves smorgasbord instruction that simply paraphrases language of Rule **404(b)** without indicating why evidence might be relevant in instant case. U.S. v. Watford, C.A.4th, 1990, 894 F.2d 665, 671. For a limiting instruction that the appellate court seems to think is just fine, though it must have been incomprehensible to the jurors, see U.S. v. Serian, C.A.8th, 1990, 895 F.2d 432, 434 n. 2. Use of smorgasbord instruction on use of other crimes was not a denial of due process. Hopkinson v. Shillinger, C.A.10th, 1989, 866 F.2d 1185, 1199 n. 8. One court has approved an instruction in a multi-defendant conspiracy case despite the fact that it fails to state for what purposes the evidence may be used or which of the defendants it can be used against. U.S. v. Astling, C.A.11th, 1984, 733 F.2d 1446, 1457. For a fairly typical example of judicial handwringing over this issue, see U.S. v. Bradshaw, C.A.9th, 1982, 690 F.2d 704, 710 (court would have preferred a more carefully drafted instruction but apparently has no idea of how this might be done). Prejudice to defendant was reduced when trial court, sua sponte, eliminated the word "crime" from a jury instruction on the use of other crimes, wrongs, or acts. U.S. v. Mucci, C.A.10th, 1980, 630 F.2d 737, 743. Some appellate courts have endorsed instructions that seem woefully inadequate by any standard. See, e.g., U.S. v. Knowles, C.A.10th, 1979, 572 F.2d 267, 270. The trial judge should limit the use of other crimes evidence by specifying in his instructions just which issues the evidence has been admitted to prove. Slough, Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited, 1978, 26 U.Kan.L.Rev. 161, 166. For a set of limiting instruction on the use of evidence of other crimes on the issue of intent judged to be adequate by the appellate court, see U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 917 n. 23. Judge properly instructed the jury that they could not consider a prior conviction offered on the issue of intent until they first found beyond a reasonable doubt that the defendant had actually done the acts charged in the indictment. U.S. v. Williams, C.A.2d, 1978, 577 F.2d, 188, 193. In U.S. v. Carleo, C.A.8th, 1978, 576 F.2d 846, 849, the jury was instructed at the time the evidence was admitted that: "Testimony is being received for the very limited purpose of shedding what light it may, if any, on the motive and intent of the defendant in your consideration of the charges made against him in this case." This seems somewhat less than adequate. One court, criticizing the instruction given by the trial judge as well as a pattern jury instruction, has suggested that it would be better to instruct the jury in the language of Rule **404(b)**. U.S. v. Miller, C.A.7th, 1978, 573 F.2d 388, 393-394. It is unlikely that such an instruction, while perhaps more accurate than those given, would be very helpful to the jurors. It was proper to instruct the jury that evidence of other crimes could not be used to prove the commission of the act charged in the indictment, but that if the jury found beyond a reasonable doubt that the charged act was committed it could, but was not required to, consider the other crimes as evidence of intent or state of mind. U.S. v. Evans, C.A.5th, 1978, 572 F.2d 455, 485. For a pattern jury instruction on the use of other crimes to show common scheme that is employed in the District of Columbia, see U.S. v. Wilkerson, C.A., 548 F.2d 970, 179 U.S.App.D.C. 15. In U.S. v. Testa, C.A.9th, 1977, 548 F.2d 847, 851 n. 1, the court approved instructions

in which the jury was told that they could not use evidence of other crime unless they were first satisfied beyond a reasonable doubt that the defendant did the act charged and only if the other crime were proved by clear and convincing evidence. For a good instruction requiring jury to first determine whether or not the defendant did the acts charged in the indictment before considering other crimes evidence offered to prove intent, see U.S. v. Davis, C.A.5th, 1977, 546 F.2d 617, 619. For an especially curt limiting instruction, see U.S. v. McMillian, C.A.8th, 1976, 535 F.2d 1035, 1038-1039. Where evidence of other crimes were offered on the issue of intent, trial court properly charged the jury that could consider the evidence only after they found that the defendant did the act charged in the indictment. U.S. v. Snow, C.A.9th, 1976, 529 F.2d 224, 225. For a vague and abstract limiting instruction given at the time of the admission of evidence, see U.S. v. Alejandro, C.A.5th, 1976, 527 F.2d 423, 429. Where evidence of other crimes is admitted, the court should give a limiting instruction, informing the jury of the narrow purpose for which it has been admitted. U.S. v. Calvert, C.A.8th, 1975, 523 F.2d 895, 907. Where evidence of other crimes was only relevant for a narrowly limited purpose, court should not have given the jury a boiler-plate instruction that listed all of the possible reasons why evidence might be admissible under statute. People v. Deeney, 1983, 193 Cal.Rptr. 608, 145 Cal.App.3d 647. Instructions on use of other crimes should refer to them as "transactions" or "acts", rather than "offenses." People v. Mason, Colo.1982, 643 P.2d 745. It is improper to give an instruction on other crimes evidence that simply includes all of the permissible reasons in Rule **404(b);** instruction should state the specific reasons for which the evidence has been admitted. State v. Fitzgerald, 1985, 694 P.2d 1117, 1124, 39 Wn.App. 652. Court approves instruction on use of other crimes evidence that is lucid but somewhat terse in State v. Brittain, 1984, 689 P.2d 1095, 1099 n. 4, 38 Wn.App. 740. For an elaborate instruction on the use of other crimes evidence which succeeds only in missing the point, see Federal Judicial Center Committee to Study Criminal Jury Instructions, Pattern Criminal Jury Instructions, 1982, p. 60. CALJIC 2.50 has at least been amended so as to discourage the smorgasbord form that simply invites the jury to pick whatever purpose they like for the evidence. L.A.Super.Ct., California Jury Instructions--Criminal, CALJIC 2.50 (1984 Revision). For a perfect example of an instruction so abstract as to be useless, see L.A.Super.Ct., California Jury Instructions--Criminal, 1977, CALJIC 2.27.

FN6. State proper purpose For a good instruction where evidence was admitted on issue of intent, see U.S. v. Scott, C.A.9th, 1985, 767 F.2d 1308, 1310. For a collection of mid-trial admonitions on the use of other crimes evidence that are of higher than average quality, see U.S. v. Bloom, C.A.5th, 1976, 538 F.2d 704, 705-707. For an instruction that is one of the better ones, see State v. Johns, 1986, 725 P.2d 312, 326, 301 Or. 535. It was error for court to give instruction that implied jury could use evidence of other crimes for improper purposes. People v. Key, 1984, 203 Cal.Rptr. 144, 153 Cal.App.3d 888. It was error to instruct jury that evidence of other crimes could be used to show common plan or scheme where the evidence was not admissible for that purpose, though it was admissible to show intent. People v. Garcia, 1981, 171 Cal.Rptr. 169, 115 Cal.App.3d 85. For a particularly slovenly set of instructions, see People v. Girtman, Colo.App.1984, 695 P.2d 759, 760 (court concerned because transcript suggests judge told jury that evidence could be used to prove guilt; more serious problem is that instruction did not tell jury what the evidence was offered to prove but only listed all the permissible elements in Rule **404(b)).** Limiting instruction which permitted evidence to be used for purposes for which it was irrelevant could not cure error in admitting proof of other crime. State v. Matthews, 1984, 471 N.E.2d 849, 14 Ohio App.3d 440. Where trial court properly admits evidence for several purposes, failure to instruct jury on use for one of those purposes does not preclude reliance on that purpose to uphold decision on appeal. State v. Johnson, S.D.1982, 316 N.W.2d 652.

FN7. Invite forbidden inference It was error, but harmless, to instruct the jury that they could use evidence of other crimes to infer the defendant's predisposition to commit crimes since this is the very inference that Rule **404(b)** prohibits. U.S. v. Nolan, C.A.7th, 1990, 910 F.2d 1553, 1562. For an instruction somewhat better than the usual, see State v. Tecca, 1986, 714 P.2d 136, 139-140, 220 Mont. 168. It was harmless error to instruct jurors that other crimes evidence could be used to prove the defendant's predisposition. U.S. v. Zapata, C.A.7th, 1989, 871 F.2d 616, 621. One court has seemingly approved a limiting instruction that simply listed all of the permissible grounds of admissibility in Rule **404(b).** U.S. v. Federbush, C.A.9th, 1980, 625 F.2d 246, 249, 254. Instruction that jury could use evidence of other crime for what it was worth was not adequate because it permitted the jury to infer that if defendant committed uncharged rape he must have committed the rape charged. U.S. v. Aims Back, C.A.9th 1979, 588 F.2d 1283, 1286. Instruction that act of defendant in using false name in filing lost baggage report was "circumstantial evidence of guilt" was erroneous because it misstates the relevance of an act whose ambiguity was for the jury to resolve. U.S. v. Morales, C.A.2d, 1978, 577 F.2d 769, 773. The court's description of the instruction

given in U.S. v. Jacobson, C.A.10th, 1978, 578 F.2d 863, 866, does not inspire confidence that it conveyed any understanding of the rule to the jury. For an example of an instruction that makes it plain what is forbidden, see Government of Virgin Islands v. Felix, C.A.3d, 1978, 569 F.2d 1274, 1281 n. 18. Court gave jury instruction that evidence of other crimes could be used only for all of the purposes listed in Rule **404(b).** U.S. v. Nolan, C.A.10th 1977, 551 F.2d 266, 271. Although statements in instructions concerning effect of evidence of other crimes in causing the jury to believe that the defendant was "inclined to deal in heroin" and his "willingness to deal in drugs generally" may have suggested inference to propensity, instructions as a whole made clear the proper uses to which the evidence could be put. U.S. v. Bloom, C.A.5th, 1976, 538 F.2d 704, 710. It was reversible error to give instructions on the use of other crimes evidence that failed to specify the proper purposes for which the evidence had been admitted and did not forbid the jury to infer that because the defendant had a propensity to commit such crimes, he must have committed this one. People v. Holder, Colo.App.1984, 687 P.2d 462, 463. For a case in which the court gave an instruction that simply rattled off all of the permissible uses listed in Rule **404(b)** but omitted the one for which the evidence had been supposedly admitted, see State v. Fitzgerald, 1985, 694 P.2d 1117, 1124, 39 Wn.App. 652.

FN8. Too refined One court seems to have approved an instruction to the jury that allowed evidence to be used on an entirely different theory from that which the appellate court used to justify its admission. U.S. v. Penson, C.A.7th, 1990, 896 F.2d 1087, 1093.

FN9. Role of discretion A trial court's ruling on the admissibility of evidence of other crimes, following a conscientious assessment of the Rule 403 factors, will not be overturned on appeal absent a clear showing of abuse of discretion. U.S. v. Martino, C.A.2d, 1985, 759 F.2d 998, 1005. Caselaw overwhelmingly affords the trial judge a broad discretion in the admission of evidence of other crimes. U.S. v. Vincent, C.A.6th, 1982, 681 F.2d 462, 465. In reviewing discretionary decision to admit evidence of other crimes under Rule 403, great deference is due the trial judge who saw and heard the evidence. U.S. v. Brown, C.A.8th, 1979, 605 F.2d 389, 394. Balancing of probative worth of other crimes evidence against its possible prejudice is generally a matter of discretion for the trial court and reversal is not required where that discretion is not abused. U.S. v. Young, C.A.9th, 1978, 573 F.2d 1137, 1140. Question of whether other crimes were sufficiently similar to constitute a plan was within the discretion of the trial court. Fazio v. Brotman, Iowa App.1985, 371 N.W.2d 842, 846. What the court really did in this case was to approve a sloppy definition of the word "plan" under the guise of honoring a discretion concerning facts. While generally a decision to admit evidence of other crimes is within discretion of trial court, trial court had no discretion to decide that the evidence was inadmissible as needless and prejudicial on a pre-trial motion. State v. Browder, 1984, 687 P.2d 168, 170, 69 Or.App. 564.

FN10. Only abuse of discretion The abuse of discretion standard has been endorsed by most federal courts. Second Circuit: U.S. v. Rucker, C.A.2d, 1978, 586 F.2d 899, 903 (reversal only if trial judge is "arbitrary or irrational"): U.S. v. Leonard, C.A.2d, 1975, 524 F.2d 1076, 1092 (explains rationale). Third Circuit: U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 767 (thoughtful but somewhat extravagant description of trial court discretion). Fifth Circuit: U.S. v. Robinson, C.A.5th, 1983, 713 F.2d 110. Sixth Circuit: U.S. v. Acosta-Cazeres, C.A.6th, 1989, 878 F.2d 945, 948; U.S. v. Hamilton, C.A.6th, 1982, 684 F.2d 380, 384. Seventh Circuit: U.S. v. Baskes, C.A.7th, 1980, 649 F.2d 471, 481. Eighth Circuit: U.S. v. Bohr, C.A.8th, 1978, 581 F.2d 1294, 1299; U.S. v. Conley, C.A.8th, 1975, 523 F.2d 650, 654. Ninth Circuit: Coursen v. A.H. Robins Co., Inc., C.A.9th, 1985, 764 F.2d 1329, 1335; U.S. v. Martin, C.A.9th, 1979, 599 F.2d 880, 889; U.S. v. Herrell, C.A.9th, 1978, 588 F.2d 711, 714; U.S. v. Sangrey, C.A.9th, 1978, 586 F.2d 1312, 1314; U.S. v. Espinoza, C.A.9th, 1978, 578 F.2d 224, 228. Tenth Circuit: U.S. v. Jacobson, C.A.10th, 1978, 578 F.2d 863, 867. Eleventh Circuit: U.S. v. Reed, C.A.11th, 1983, 700 F.2d 638, 646.

But see Courts, however, have found it easy to ignore the supposed rule in some cases: U.S. v. Green, C.A.9th, 1981, 648 F.2d 587, 593 (where no evidence trial judge performed Rule 403 balancing); U.S. v. Bejar-Matrecios, C.A.9th, 1980, 618 F.2d 81, 84; U.S. v. Bettencourt, C.A.9th, 1980, 614 F.2d 214, 218 (trial judge reversed for having "incorrectly struck [the] balance" under Rule 403).

State cases It was an abuse of discretion to admit all of the evidence of other crimes tendered by the prosecution without balancing probative worth and prejudice. People v. Carner, 1982, 324 N.W.2d 78, 117 Mich.App. 560. In murder prosecution, evidence of other murder supposedly committed by defendant was so prejudicial that its

admission denied the defendant a fair trial. People v. Golochowicz, 1982, 319 N.W.2d 518, 527, 413 Mich. 298. Admission of prior acts will be overturned as an abuse of discretion only when it is overtly inflammatory in comparison to alternative modes of proof. State v. Bouchard, 1982, 639 P.2d 761, 31 Wash.App. 381. Review of trial court's ruling admitting other crimes evidence is limited to whether the court exercised its discretion in accordance with the law and on the facts of record. State v. Harris, App.1985, 365 N.W.2d 922, 925, 123 Wis.2d 231.

FN11. Determining relevance For a case in which the court affirms convictions despite egregious prosecutorial abuse, but fires a warning shot across the bow, see U.S. v. Rodriguez-Cardona, C.A.1st, 1991, 924 F.2d 1148, 1153. One court seems to have resurrected the doctrine of "precedential relevance," see s 5162, stating that in light of prior decisions it could not hold that the trial court had abused its discretion in the instant case. U.S. v. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 380. The court in U.S. v. Wilson, C.A.5th, 1978, 578 F.2d 67, 71-72, chastises the prosecutor for introducing in evidence unnecessary evidence of other crimes. Unfortunately the balance of the opinion appears to put the prosecutor in a "can't lose" situation; if the evidence was unnecessary, the prosecution's case was so strong that the error was harmless. And presumably, if the error was harmful, the evidence was not unnecessary. The court's rhetoric seems misdirected. Whatever the ethical obligations of the prosecutor, Rule **404(b)** puts the duty of determining the admissibility of evidence of other crimes evidence on the trial judge. No amount of exhortation of the prosecutor can do much to assist the trial judge in exercising his authority. Evidence of prior narcotics transaction that was close in time and similar in kind to those charged in the indictment was relevant to prove intent. U.S. v. Jardan, C.A.8th, 1977, 552 F.2d 216, 219. Where trial court's decision to admit evidence of prior acts of sex offender was based on a single ground, appellate court would limit its review to propriety of use of evidence for that purpose. People v. Thompson, 1979, 159 Cal.Rptr. 615, 98 Cal.App.3d 467. Where 1962 murder conviction was erroneously admitted at trial for purposes of impeachment, it could not be argued on appeal that the conviction was admissible as other crimes evidence under N.M.R.Ev. **404(b)**. Casaus v. State, 1980, 607 P.2d 596, 94 N.M. 58.

FN12. Not appropriate Without the slightest effort to engage in the balancing required by Rule 403, court holds that massive evidence of prior sexual abuse of students was admissible to prove intent despite fact that intent was obvious and defendant offered to stipulate that if he did the act he had the requisite intent. U.S. v. Hadley, C.A.9th, 1990, 918 F.2d 848, 852. Prejudice that arose from evidence that defendant was a cocaine user with lots of money was not unfair because it proved that he was a participant in the charged conspiracy to distribute drugs. U.S. v. Hargrove, C.A.7th, 1991, 929 F.2d 316, 320. For an incomprehensible opinion, see U.S. v. Auerbach, C.A.8th, 1982, 682 F.2d 735, 738. Evidence that black defendant was having relations with two white women was properly admitted to show that one of the women so trusted him that she could be used as part of charged insurance fraud, despite fact that this woman had testified in court that she trusted defendant. U.S. v. Boykin, C.A.8th, 1982, 679 F.2d 1240, 1244. For an almost incomprehensible opinion explaining why it was not error in prosecution for sale and transportation of stolen antique silver tea service to admit evidence that defendants were also ready to sell 500 pounds of marijuana, see U.S. v. Tisdale, C.A.10th, 1981, 647 F.2d 91. Does this mean "Tea for Two" will now be banned from airwaves as a surreptitious drug song? "District court did not abuse its discretion in concluding that the probative value, on the issue of appellant's knowledge and intent, of evidence that appellant had committed two similar robberies within a month prior to the offense charged outweighed any improper prejudicial effect of this evidence." U.S. v. Casanova, C.A.9th, 1981, 642 F.2d 300, 301. In U.S. v. Williams, C.A.5th, 1979, 596 F.2d 44, 51, the court warned prosecutors that they might jeopardize convictions by putting in evidence of other crimes "when the question of admissibility, as here, is a close one." However, the court neglects to explain why the issue was "a close one." For a diabolical application of the Catch 22 principle, see U.S. v. Underwood, C.A.5th, 1979, 588 F.2d 1073, 1076 (defendant's argument that the prosecution had so much other evidence that it had no need to use evidence of other crimes used to support a conclusion by the appellate court that the error was harmless). For a case in which the appellate court approves the admission of evidence of other crimes without describing the evidence or the purpose for which it was thought admissible, see U.S. v. Griffin, C.A.8th, 1978, 579 F.2d 1104, 1109. For a case which seems to treat the admissibility of evidence of other crimes to be a matter of comparing precedents, see U.S. v. Espinoza, C.A.9th, 1978, 578 F.2d 224, 227-228. For a particularly egregious example of appellate cynicism, see U.S. v. Weidman, C.A.7th, 1978, 572 F.2d 1199, 1201-1203 (court approves admission of other crimes to prove intent and plan, though the latter ground was never raised in the trial court and the jury was explicitly instructed that the evidence could not be used to prove intent). One does not know what to say about an opinion that admits evidence that defendant had raped one

woman with a butcher knife to identify him as the person who murdered another woman with a similar knife, then approves action of trial court in admitting conviction alone without any of the details supposed to make it relevant. State v. Churchill, 1982, 646 P.2d 1049, 231 Kan. 408. For a case in which the court gives no reasons at all for conclusion that trial court properly admitted evidence of prior instance of "contempt of cop" in prosecution for shooting in a nightclub brawl involving civilians, see State v. Taylor, Minn.App.1985, 369 N.W.2d 30, 31. In prosecution for terroristic threats against a Cuban immigrant, trial court did not abuse discretion in admitting evidence of gesture in court where defendant drew index finger across throat or similar gesture two years earlier made with knife; court offers no explanation of relevance of the evidence. State v. Lavastida, Minn.App.1985, 366 N.W.2d 677, 679. For an opinion so written as to make it all but impossible to know what the court has decided, see State v. Coles, Minn.1983, 328 N.W.2d 157 (statement of facts so skimpy that it is impossible to say what evidence was).

FN14. Erie doctrine In diversity action, Federal Rules of Evidence govern the admissibility of evidence of other crimes. Garcia v. Aetna Casualty & Surety Co., C.A.5th, 1981, 657 F.2d 652, 654. In suit for common law fraud in tampering with odometers on automobiles, evidence of prior odometer rollbacks was admissible under Oklahoma law to show intent. Edgar v. Fred Jones Lincoln-Mercury, C.A.10th, 1975, 524 F.2d 162, 167. Court assumes without discussion that admissibility of other acts in a libel case is governed by state law. Sharon v. Time, Inc., D.C.N.Y.1984, 103 F.R.D. 86, 91.

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Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
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Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

s 5249. ---- PROCEDURE

Rule **404(b)** recognizes the legitimate probative worth that evidence of other crimes, wrongs, or acts may have when offered to prove some fact other than the propensity of the accused to engage in criminal conduct. But the popularity of this form of proof with prosecutors is probably due as much to the tactical advantages it affords as to its probative worth. [FN1] Given its capacity for prejudice and abuse, the defense ought to have a reasonable opportunity to limit such proof to its legitimate probative impact. This means that the procedure for adjudicating admissibility is as important as the rules of admission and exclusion. [FN2] However, Rule **404(b)** makes no attempt to spell out such procedures. It is therefore the duty of the trial judge, with such aid as may be gleaned from appellate opinions, to devise appropriate techniques to prevent abuse.

The major tactical advantage accruing to the prosecution is surprise since there is no requirement that the other crime be alleged in the pleadings and often the existence of such evidence cannot be determined through the limited discovery available in criminal cases. The Minnesota Supreme Court, in an important pair of decisions, has required the prosecutor to give advance notice of intent to use other crimes evidence, [FN3] a procedure now covered by court rule in that state. [FN4] Louisiana followed suit shortly thereafter. [FN5] The Louisiana procedure has now been incorporated in the Florida Evidence Code, [FN6] but few other states have seen fit to adopt similar reforms. [FN7]

Although urged to do so, [FN8] Congress declined to add a notice requirement to Rule **404(b).** [FN9] Federal courts have held that notice of intent to use evidence of other crimes is not required, [FN10] explicitly refusing to adopt the Minnesota procedure. [FN11] Worse yet, some opinions seem to approve the denial of discovery designed to elicit evidence of other crimes. [FN12] However, some recent decisions may indicate a contrary trend. It has been held error to refuse discovery of other crimes evidence without good reason. [FN13] Another opinion suggests that notice is required where the prosecutor changes his mind after stating at an omnibus hearing that evidence of other crimes will not be offered. [FN14] Finally, a notice requirement has been imposed in cases in which the prosecutor intends to call the defendant's probation officer as a witness. [FN15]

Of course, even the precedents declining to require notice do not suggest that it is beyond the power of the trial judge to require **disclosure** of the intent to use evidence of other crimes at a pretrial conference, [FN16] or otherwise. Moreover, the absence of notice can be taken into account when the trial judge is determining prejudice to the defendant [FN17] as part of the exercise of his discretion to admit or exclude such evidence. [FN18]

If counsel knows or suspects that evidence of other crimes, wrongs, or acts may be offered against his client, the issue may be raised prior to a trial by a motion in limine. [FN19] Otherwise the issue is properly raised by a timely objection when the evidence is sought to be introduced. [FN20] Although the proper objection is that the evidence is irrelevant, [FN21] it is probably wise for counsel to add that even if the evidence is relevant he wishes to invoke the trial judge's discretion to exclude it nonetheless under Rule 403. [FN22]

Once the issue of admissibility has been properly raised it is up to the offeror to show that the evidence of other crimes is relevant. [FN23] He has the burden of proof with respect to any preliminary questions of fact. [FN24] Although relevance is generally a preliminary fact to be determined by the jury under Rule 104(b), [FN25] the importance of the trial judge's discretion [FN26] in the decision to admit or exclude under Rule **404(b)** suggests that preliminary questions concerning the admissibility of other crimes evidence should be determined by the trial judge under Rule 104(a). [FN27] It has been argued that the best procedure is to require the prosecution to make an offer of proof out of the presence of the jury. [FN28]

The offeror must specify the issue proposed to be proved by the evidence of other crimes. [FN29] Some federal courts have taken the position that since the plea of not guilty puts in issue every element of the offense, it is enough that the prosecution be able to point to some element of the crime as to which the evidence is relevant. [FN30] The contrary opinion was well put in the House of Lords over fifty years ago: Before an issue can be said to be raised, which would permit the introduction of evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words * * *. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice. [FN31] This position has been applauded by most of the writers [FN32] and it has been read into some of the state codes. [FN33]

Although the requirement that other crimes evidence be offered on an issue that is actually in dispute has been said to have been "espoused by nearly every court of appeals," [FN34] there are enough contrary opinions to put the issue in doubt. [FN35] The Advisory Committee added to the confusion when it deleted a provision from prior codifications that would have made evidence irrelevant unless directed at a disputed issue. [FN36] Despite these contrary indications, it would seem that the trial court must consider whether the issue is actually disputed in exercising its discretion under Rule 403; [FN37] if the defendant does not contest the point, there is little need for the proof and its probative worth is therefore outweighed by the countervailing factors.

Since the pleadings in a criminal case are not designed to frame issues, it is not always easy to see what issues are disputed. Clearly if the defense is willing to enter into an adequate stipulation as to the fact or issue, there is nothing in dispute. [FN38] In other cases the issues may be clear from the arguments of counsel or the tenor of cross-examination of prosecution witnesses. One way for the trial court to get a clearer picture is through an exercise of its power to control the order of proof. [FN39] It has been suggested that the prosecution be required to put on all of its other evidence first [FN40] so that the court can accurately measure the need for other crimes evidence. Another method is to postpone the admissibility of such evidence until rebuttal [FN41] or the conclusion of the case. [FN42]

After the offeror designates the disputed issue it is designed to prove, he must then reveal the evidence of other crimes, wrongs, or acts he wishes to introduce. Such evidence must, of course, satisfy other rules of evidence; e.g., the hearsay rule. [FN43] A prior conviction [FN44] is obviously the most efficient method of proof since presumably under general principles of collateral estoppel the defendant would be precluded from disputing the ultimate facts necessary to the conviction. [FN45] Sometimes, however, the conviction will not reveal the facts concerning the prior crime that are relevant in the instant case; e.g., modus operandi when needed to identify the defendant. In such cases, and in cases in which the prior crime has not been the subject of prosecution, it may be proved by witnesses and other fact and the defendant is free to disprove it if she can. [FN46]

If the government undertakes to prove the other crime, wrong, or act by the introduction of evidence, an important question is the standard by which the sufficiency of that proof is to be measured. It is generally agreed that the other crime need not be proved "beyond a reasonable doubt." [FN47] But most courts have attempted to impose a somewhat higher standard than that imposed for the admissibility of evidence generally. [FN48] It has been said that there must be "substantial evidence," [FN49] "substantial proof" [FN50] or "satisfactory proof." [FN51] Some courts require that the evidence be "clear and convincing;" [FN52] this is the standard that appears to have been applied by most federal courts prior to the adoption of Rule **404(b)**, [FN53] though the Fifth Circuit favored a requirement that the evidence be "plain, clear, and conclusive." [FN54]

Rule **404(b)** does not explicitly deal with this issue. As a result, many courts have continued to apply pre-existing standards for the sufficiency of proof of other crimes. [FN55] The Florida [FN56] and South Dakota [FN57] codifiers have read Rule **404(b)** as incorporating, or at least not inconsistent with, a higher standard for proof of other crimes. However, at least one court has speculated that Rule **404(b)** may have been intended to repeal procedural restrictions on the use of other crimes evidence developed by the prior case law, including the requirement that other crimes be proved by a higher standard than that provided in Rule 104(b). [FN58] That court seems to argue that exclusion is justified only if the proof of the other crime is so uncertain that probative worth is outweighed by one or more of the countervailing factors in Rule 403. While it is possible to incorporate all of the pre-existing procedural safeguards into the formula of Rule 403, [FN59] one can also argue that Rule 403 is designed to deal with the strength of the inference from the other crime to the ultimate issue it is offered to prove, and thus assumes that the other crime has been proved; hence, the sufficiency of the proof of the other crime is an entirely different question. [FN60] The first opinion to deal explicitly with this issue holds, albeit over a strong dissent, that Rule **404(b)** leaves intact the prior standard for proof of other crimes. [FN61]

Whatever the standard of proof, there is also the question of who is to apply it. [FN62] If proof of the other crime were to be regarded as a preliminary fact involving relevance, [FN63] Rule 104(b) would suggest that the judge should admit the proof on a mere showing of sufficiency to support a finding of the commission of the other crime and instruct the jury that they cannot use it as evidence unless they find that it was proved by "clear and convincing evidence," or whatever the standard is to be. [FN64] But the cases and commentators [FN65] all appear to assume that the higher standard of proof is to be applied by the judge in determining the admissibility of the evidence. Given the important role assigned the trial judge in the Advisory Committee's Note, [FN66] it seems very doubtful that they intended the admissibility of other crimes evidence to be determined by the jury under Rule 104(b).

A related question is how much of the prior offense must be proved by the more exacting standard. [FN67] One case suggests that only "the congruent physical elements of the prior offense" need be shown. [FN68] However, that was a case in which the evidence was offered to prove intent on a theory of probability. [FN69] Under that theory there is, of course, no requirement that mental element of the prior offense be proved at all, much less by the higher standard. It would seem that the question in each case must turn on the underlying theory of relevance; for example, a prior arrest for possession of marijuana can prove the defendant's subsequent knowledge of the nature of the substance even if it is assumed the prior possession was innocent. Hence, the prosecution need not prove all of the elements of the prior crime by "clear and convincing proof" but only those elements that are essential under its theory of relevance.

The reasonable doubt standard is not the only rule of sufficiency that is inapplicable when a prior crime is being used for evidentiary purposes. It has been held that the two-witness rule does not apply to proof of an act of perjury not charged in the indictment. [FN70] By analogy, it would seem that other rules dealing with the sufficiency of evidence, such as those requiring corroboration of certain kinds of testimony, should be held to apply only when the defendant is charged with the crime and not when the crime is being used as evidence under Rule **404(b).** [FN71]

Is the use of a prior crime as evidence barred when the defendant has previously been prosecuted for that crime and acquitted? [FN72] Although there is contrary authority [FN73] and some commentators have argued that such use violates the doctrine of collateral estoppel and the prohibition against double jeopardy, [FN74] most state [FN75] and federal courts [FN76] have rejected these claims and held the evidence admissible. A fortiori, dismissal of the charges prior to trial is no bar. [FN77] Similar results have been reached under Rule **404(b).** [FN78] Some cases have suggested that the trial judge may take the fact of acquittal into account in balancing probative worth and prejudice for purposes of discretionary exclusion. [FN79] It can also be argued that an acquittal conclusively establishes that the higher standard for proof of other crimes has not been met. If the evidence is admitted, the defendant should be allowed to prove the acquittal as going to the weight of the evidence. [FN80]

It seems to be generally assumed that most of the rules that govern the prosecution of a crime are not applicable

when it is used under Rule **404(b);** [FN81] i.e., statutes of limitation, grand jury indictment, etc. For example, in a recent case it was held that an agreement not to prosecute an extradited person for certain crimes did not preclude the introduction of evidence of those crimes in a trial of different charges. [FN82] But in some cases the evidentiary use of the prior crime seems unfair; e.g., proving a crime where charges based on that crime were dismissed because government delay made it impossible to obtain defense evidence. [FN83] One court has held that evidence of another crime obtained under a grant of immunity to the defendant cannot be used against him. [FN84] It would seem appropriate for a court to consider these matters in assessing the prejudice to the defendant in the use of the other crime. [FN85]

Once the material issue has been identified and the other crimes evidence has been presented out of the presence of the jury, [FN86] the trial judge is in a position to rule on its admissibility. As will be explained in the next section, [FN87] this decision is not to be made simply by labeling the evidence [FN88] or by comparing it with evidence held properly admitted in appellate opinions; [FN89] rather the trial judge must consider both the probative worth of the evidence and its prejudice to the defendant in exercising a discretion to admit or exclude. [FN90] If there is no jury, the standard for admission is said to be less stringent, [FN91] partially because the judge will have necessarily heard the evidence in making his ruling and partially because the judge is assumed to be capable of ignoring the prejudicial aspects and giving the evidence no more than its proper probative value. [FN92]

If the court's decision is to admit the evidence, steps must be taken to insure that the evidence is only used for the purpose or purposes for which it was admitted. [FN93] One such step is to admit only those details of the prior crime that are relevant to legitimate use of the evidence. [FN94] For example, if the other crime is to be offered to show defendant's knowledge of karate techniques in order to identify him as the attacker of the present victim, there is no need to show the injuries to the victim of the prior crime. In addition, the court must prohibit counsel from arguing impermissible inferences from the evidence [FN95] and must not suggest to the jury that the evidence can be used for purposes beyond those for which it was admitted. [FN96]

The principal device for controlling the use of other crimes, wrongs, or acts is the limiting instruction. [FN97] Critics have been skeptical regarding the utility of instructions [FN98] and attorneys often prefer not to have the evidence emphasized by such futile exhortations. [FN99] Perhaps for these reasons, [FN1] the trial judge is under no duty to give a cautionary instruction sua sponte; [FN2] it must be requested by counsel. If instructions are to be given, it would be wise to give them twice; [FN3] once when the evidence is about to be heard and again when the case is submitted to the jury. As to the form of the instructions, trial judges will find criticisms of those usually given, [FN4] but little advice on how to improve them from either the writers or the appellate courts. [FN5] A good instruction should explain to the jury the proper use of the evidence [FN6] in terms that are not so vague as to invite the forbidden inference to propensity [FN7] and not so refined that they cannot be applied. [FN8]

Appellate review of decisions admitting evidence of other crimes, wrongs, or acts is an important, but sometimes misunderstood, part of the procedure for administering Rule **404(b).** A few opinions seem to suggest that because of the role of discretion in the trial court, [FN9] appellate review is confined to cases involving abuses of discretion. [FN10] But the trial judge's discretion does not arise unless the evidence is relevant for some purpose other than to prove the defendant's propensity to commit crimes. The appellate court has an important role to play in developing standards for the relevance of other crimes evidence that go beyond the collection of labels in Rule **404(b).** [FN11] There are a number of recent opinions that do offer guidance to trial judges in distinguishing the legitimate uses of this form of proof from the ersatz justifications sometimes offered by counsel. But some appellate opinions do not provide an appropriate model for trial judges to follow in the conscientious application of the rule. [FN12]

Federal courts are not required to follow state rulings on the use of other crimes evidence in criminal cases. [FN13] Since other crimes evidence has seldom been offered in civil cases, the application of the Erie doctrine when such evidence is offered in diversity cases is not clear. [FN14] It can be argued that a state rule admitting or excluding such evidence is so intertwined with the state substantive law that a federal court would be bound to

follow it. [FN15] Now that Rule **404(b)** expands the rule to include other acts and wrongs [FN16] the possibility for conflict with state law is increased and some more definitive rulings may soon appear. Of course, rulings construing state versions of Rule **404(b)** can be quite helpful in applying the rule even though not binding precedents.

FN1. Tactical advantages As noted below, the principal advantage is that of surprise. The defendant may be unprepared to meet evidence offered during the case-in-chief or may be dramatically destroyed by evidence of other crimes offered in rebuttal of a defense that might not have been made had the existence of the evidence been known. Even with notice, the defense may lack the resources to defend against several crimes. Moreover, the defense may be placed in the dilemma of choosing between fighting the other crimes evidence, and thus enhancing its importance in the eyes of the jury, or disparaging its probative worth, thus seeming to concede the truth of the charges.

FN2. Procedure important Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 284; Note, Developments in Evidence of Other Crimes, 1974, 7 U.Mich.J.L.Ref. 535, 546.

FN3. Minnesota decisions State v. Billstrom, 1967, 149 N.W.2d 281, 276 Minn. 174; State v. Spreigl, 1965, 139 N.W.2d 167, 272 Minn. 488.

FN4. Court rule See Minn.R.Crim.P. 7.02.

FN5. Louisiana followed State v. Prieur, La.1973, 277 So.2d 126. See generally, Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 628.

FN6. Florida incorporation See Fla.Evid.Code s 90.404(2)(b), quoted in s 5231 n. 39. See also, Ehrhardt, Florida Evidence, 1977, s 404.12.

FN7. Other states Note, Development in Evidence of Other Crimes, 1974, 7 U.Mich.J.L.Ref. 535, 550.

FN8. Urged to do so 2 House Hearings, p. 203.

FN9. Declined to add It may be that Congress thought such a procedural regulation was out of place in the Evidence Rules. But cf. F.R.Ev. 803(24), 804(5) imposing a requirement of notice of intent to use wildcard exceptions to hearsay rule.

FN10. Notice not required U.S. v. Miller, C.A.9th, 1975, 520 F.2d 1208, 1211. The Government is under no obligation to tell defendant's attorney that it plans to introduce evidence of prior crime that took place 16 years ago. U.S. v. Corey, C.A.2d, 1977, 566 F.2d 429, 431 n. 5.

FN11. Refuse to adopt McConkey v. U.S., C.A.8th, 1971, 444 F.2d 788 (stating such rule should be imposed only as part of rulemaking process).

FN12. Denial of discovery U.S. v. Nakaladski, C.A.5th, 1973, 481 F.2d 289, 297 n. 5. It is not clear whether uncharged prior crimes are discoverable as part of the defendant's "prior criminal record" under Criminal Rule 16(a)(1)(B), added in 1975. See vol. 1, s 253.

FN13. Without good reason It was reversible error for prosecution to refuse to **disclose** the identity of a witness to prior crimes so as to enable the defense to prepare to meet his testimony where the witness was in custody and was hoping to receive sentence considerations for his testimony; advance **disclosure** presented no danger to witness and there were no valid considerations to justify concealment. U.S. v. Baum, C.A.2d, 1973, 482 F.2d 1325, 1331-1332.

FN14. Notice of change U.S. v. Scanland, C.A.5th, 1974, 495 F.2d 1104.

FN15. Probation officer notice U.S. v. Pavon, C.A.9th, 1977, 561 F.2d 799, 802.

FN16. Pretrial conference See vol. 1, s 292.

FN17. Prejudice to defendant Cf. U.S. v. Scanland, C.A.5th, 1974, 495 F.2d 1104, 1106.

FN18. Discretion to admit See s 5250.

FN19. Motion in limine The desirability of an advance ruling has been recognized by some commentators. See 2 Weinstein & Berger, Weinstein's Evidence, 1975, p. 404-29; Ehrhardt, Florida Evidence, 1977, p. 78. For cases in which the procedure has been invoked, see U.S. v. Wiggins, C.A.1975, 509 F.2d 454, 166 U.S.App.D.C. 121; U.S. v. Leon, C.A.5th, 1975, 441 F.2d 175, 178 (advance ruling at behest of prosecutor). For general discussion of the motion in limine, see vol. 21, s 5037. For example of use of motion in limine to suppress other crimes evidence, see U.S. v. Stover, C.A.8th, 1977, 565 F.2d 1010.

FN20. Objection The requirements for making an objection are set out in Rule 103. See generally vol. 21, ss 5036-5038. Defendant must object in trial court to use of other crimes evidence; the issue cannot be raised for the first time on appeal and admission of tape recording in which defendant made reference to a prior prosecution for similar offense was not plain error. U.S. v. Rowe, C.A.10th, 1977, 565 F.2d 635. It was not error for the trial judge to admit evidence of other acts where the objection made to such evidence was too vague to permit an informed decision to be made on the legal issue involved. U.S. v. Greenfield, C.A.5th, 1977, 554 F.2d 179, 186. Objection that evidence "serves no purpose whatsoever in this case" and "is not admissible as original evidence" is too loosely formulated and imprecise to preserve for appeal improper admission of other crimes evidence. U.S. v. Arteaga-Limones, C.A.5th, 1976, 529 F.2d 1183, 1190. General objection was insufficient to preserve for appeal failure of trial court to exclude inflammatory details not necessary for purpose for which other crime was admitted. Holmes v. State, 1977, 251 N.W.2d 56, 76 Wis.2d 259.

FN21. Irrelevant Ehrhardt, Florida Evidence, 1977, p. 72.

FN22. Invoking discretion See s 5224.

FN23. Must show relevance Ehrhardt, Florida Evidence, 1977, p. 72; Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 284; Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 628. It was not reversible error in bank robbery prosecution to admit evidence that defendant and accomplice robbed another business during the prior week using the same gun as in the charged robbery since appellate court could not say that the evidence has no bearing on the issues. U.S. v. McMillian, C.A.8th, 1976, 535 F.2d 1035, 1038-39.

FN24. Burden of proof Ehrhardt, Florida Evidence, 1977, p. 72. In prosecution of a tax preparer for counselling filing of false returns, testimony that an audit of 160 returns prepared by the defendant showed that 90-95% contained overstated deductions should not have been admitted without evidence showing why deductions were thought to be overstated; such evidence insinuated other crimes by the defendant without any proof of them. U.S. v. Brown, C.A.5th, 1977, 548 F.2d 1194, 1206.

FN25. Jury determines See vol. 21, s 5054.

FN26. Judge's discretion See s 5250.

FN27. Determined by judge In addition, the standard for proof of other crimes, discussed below at notes 47-54, is inconsistent with the standard for proof of preliminary facts established in Rule 104(b) for jury determined facts. It was not error for the trial court to refuse to hold a preliminary inquiry into the admissibility of other crimes evidence, though it would have been wise to have done so since such a hearing would have revealed that the evidence was redundant and remote. U.S. v. DeVincent, C.A.1st, 1976, 546 F.2d 452, 457.

FN28. Offer of proof Comment, A Proposed Analytical Method for the Determination of the Admissibility of Evidence

of Other Offenses in California, 1960, 7 U.C.L.A.L.Rev. 463, 483.

FN29. Must specify issue Comment, A Proposed Analytical Method for the Determination of the Admissibility of Other Offenses in California, 1960, 7 U.C.L.A.L.Rev. 463, 483.

FN30. Point to element U.S. v. DiZenzo, C.A.4th, 1974, 500 F.2d 263, 265. But see discussion in s 5242 at notes 20-25.

FN31. "Fancy defenses" Thompson v. The King, H.L., [1918] A.C. 221, 232 (Lord Sumner).

FN32. Writers Herbert & Mount, Ohio's "Similar Acts Statute": Its Uses and Abuses, 1975, 9 Akron L.Rev. 301, 307, 308, 326; Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 1972, 20 U.Kans.L.Rev. 411, 430; Comment, The Admissibility of Other Crimes in Texas, 1972, 50 Texas L.Rev. 1409, 1411-1412; Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 1961, 70 Yale L.J. 763, 770; Note, Admissibility in Criminal Prosecutions of Proof of Other Offenses As Substantive Evidence, 1950, 3 Vand.L.Rev. 779, 783.

FN33. Read into codes N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 103; People v. Swearington, 1977, 140 Cal.Rptr. 5, 71 Cal.App.3d 935; People v. Reyes, 1976, 132 Cal.Rptr. 848, 62 Cal.App.3d 53. See also, Judicial Council Committee's Note, Wisc.R.Ev. 904.04: "Evidence of other crimes, wrongs or acts which tend to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, is not automatically admissible. It should be excluded if motive, opportunity, intent, etc. is not substantially disputed. * * *"

FN34. "Nearly every court" U.S. v. James, C.A.1977, 555 F.2d 992, 1000 n. 46, 181 U.S.App.D.C. 55 (citing many cases). In order for evidence of other crimes to be admissible on the issue of intent, it is essential that intent be more than a formal issue as a result of defendant's plea of not guilty; where the defendant denied having done the act but made no contention that it was not done with the requisite intent, it was reversible error to permit the government to introduce evidence that the defendant engaged in a similar act on a prior occasion. U.S. v. Frierson, C.A.7th, 1969, 419 F.2d 1020. See also, U.S. v. Myers, C.A.5th, 1977, 550 F.2d 1036, 1044 (element sought to be proved must be "a material issue in the case"); U.S. v. McCord, C.A.7th, 1975, 509 F.2d 891, 895 (other crimes evidence should not be admitted on entrapment theory until defense "demonstrates clearly that the entrapment defense will ultimately be raised"); U.S. v. Miller, C.A.7th, 1974, 508 F.2d 444, 450 (evidence of other crimes not admissible on issue of intent until defendant "affirmatively contested" intent); U.S. v. Goodwin, C.A.5th, 1974, 492 F.2d 1141, 1152 (error to admit evidence on issue of intent where "that issue was never seriously disputed at trial").

FN35. Contrary opinions U.S. v. Adcock, C.A.8th, 1977, 558 F.2d 397, 402; U.S. v. Brettholz, C.A.2d, 1973, 485 F.2d 483, 487; U.S. v. Castro, C.A.9th, 1973, 476 F.2d 750, 753 (explicitly rejecting Frierson, note 34 above.)

FN36. Deleted provision See s 5164.

FN37. Consider under Rule 403 See ss 5214, 5220, 5222.

FN38. Stipulation Where the defendant was willing to stipulate to substance of probation officer's testimony, it was error to permit the officer to testify as a witness. U.S. v. Pavon, C.A.9th, 1977, 561 F.2d 799. "Furthermore, it stands to reason that the other torts or crimes evidence must be offered as bearing on a fact that is actually in issue * * *. If the defendant concedes a fact, or an issue to which it relates, the prosecutor should not be permitted to prove the fact by the use of 'other crimes' evidence." N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 103. See also, Lacy, Admissibility of Evidence of Other Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 275-277 (arguing that there would be greater use of stipulations in criminal cases if courts would bar other crimes evidence on stipulated facts). On the effect of stipulations generally, see s 5194 and 9 Wigmore, 3d ed. 1940, s 2591.

FN39. Control order of proof See Rule 611(a). Where other crimes evidence is offered on the issue of identity, it is proper to admit evidence during Government's case-in-chief because identity is unquestionably in issue unless the defendant admits to commission of the act but denies the requisite intent. U.S. v. Baldarrama, C.A.5th, 1978, 566 F.2d

560, 568 n. 9. In first degree murder prosecution it was error for prosecutor to state in his opening statement that when the defendant was arrested three days after the crime he was driving a stolen car. Theriault v. State, 1976, 547 P.2d 668, ___ Nev. ___ .

FN40. Other evidence first Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 1961, 70 Yale L.J. 763, 773. But see, U.S. v. Austin, C.A.10th, 1972, 462 F.2d 724, 734-735 (trial court could permit prosecution to prove uncharged offenses before evidence of charged crime was introduced). Before evidence of prior crimes can be used, there must be proof of the commission of the charged crime. State v. Stevens, N.D.1975, 238 N.W.2d 251.

FN41. Rebuttal E.g., U.S. v. Chrzanowski, C.A.3d, 1974, 502 F.2d 573, 576. Although the better practice would be to wait to admit evidence of other crimes offered to show intent until the end of the defense case, it was not plain error to admit the evidence during the government's case-in-chief when the issue of intent was foreshadowed by the defendant's confession. U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 361 n. 20.

FN42. Conclusion E.g., U.S. v. Dossey, C.A.8th, 1977, 558 F.2d 1336, 1338.

FN43. Must satisfy other rules See s 5192; Herbert & Mount, Ohio's "Similar Acts Statute": Its Uses and Abuses, 1975, 9 Akron L.Rev. 301, 320.

FN44. Proof by conviction E.g., U.S. v. Payne, C.A.9th, 1973, 474 F.2d 603; U.S. v. Clayton, C.A.10th, 459 F.2d 572.

FN45. Most efficient The defendant could, of course, attack the validity of the conviction on grounds normally available on collateral attack, but otherwise it is presumed valid. U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 498.

FN46. Proof by other means See vol. 2, s 410, p. 133.

FN47. "Beyond reasonable doubt" U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 498; Cunha v. Brewer, C.A.8th, 1975, 511 F.2d 894, 901. See also, McCormick, Evidence, Cleary ed. 1972, s 190, p. 451; Herbert & Mount, Ohio's "Similar Acts Statute": Its Uses and Abuses, 1975, 9 Akron L.Rev. 301, 327; Payne, The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases, 1968, 3 U.Rich.L.Rev. 62, 78; Note, Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence, 1950, 3 Vand.L.Rev. 779, 788.

FN48. Admissibility generally If other crimes evidence is treated as an aspect of relevance, the standard would be that it was "sufficient to support a finding" that the crime was committed by the defendant. See Rule 104(b). Trial court properly admitted evidence of defendant's escape from nearby prison to prove motive for theft of car where evidence of escape was clear and convincing, testimony was limited to bare fact of incarceration, and no details of prior conviction or escape were put before the jury; probative value substantially outweighed danger of unfair prejudice. U.S. v. Stover, C.A.8th, 1977, 565 F.2d 1010.

FN49. "Substantial evidence" Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 620 (collecting cases).

FN50. "Substantial proof" Note, Evidence of Criminal History in Ohio Criminal Prosecutions, 1964, 15 West.Res.L.Rev. 772, 778.

FN51. "Satisfactory proof" Cunha v. Brewer, C.A.8th, 1975, 511 F.2d 894, 901 (applying Iowa law).

FN52. "Clear and convincing" McCormick, Evidence, Cleary ed. 1972, s 190 p. 452; Comment, Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions, 1969, 36 Tenn.L.Rev. 515, 516. Uncorroborated testimony of accomplice was sufficient to constitute "clear and convincing" evidence of other crime. U.S. v. Trevino, C.A.5th, 1978, 565 F.2d 1317, 1319. The defendant's own confession of a prior crime is clear and convincing evidence of the crime. U.S. v. Davis, C.A.8th, 1977, 551 F.2d 233. There must be substantial evidence of

prior acts, what some courts call "clear and convincing evidence." State v. Stevens, N.D.1975, 238 N.W.2d 251.

FN53. Federal courts E.g., U.S. v. Cummings, C.A.8th, 1974, 507 F.2d 324, 331; U.S. v. Clemons, C.A.8th, 1974, 503 F.2d 486, 489; U.S. v. Ostrowsky, C.A.7th, 1974, 501 F.2d 318, 321.

FN54. "Plain, clear, and conclusive" E.g., U.S. v. Pollard, C.A.5th, 1975, 509 F.2d 601, 604; U.S. v. Shadletsky, C.A.5th, 1974, 491 F.2d 677, 678; U.S. v. Broadway, C.A.5th, 1973, 477 F.2d 991, 995.

FN55. Continue to apply E.g., U.S. v. Scholle, C.A.8th, 1977, 553 F.2d 1109, 1121 ("clear and convincing" standard); U.S. v. Cyphers, C.A.7th, 1977, 553 F.2d 1064, 1070 (same); U.S. v. Myers, C.A.5th, 1977, 550 F.2d 1036, 1044 ("plain, clear, and convincing" proof required).

FN56. Florida Ehrhardt, Florida Evidence, 1977, p. 72.

FN57. South Dakota The Commentary to No.Dak.R.Ev. **404(b)** says that the opinion of the North Dakota Supreme Court in State v. Stevens, N.D.1975, 238 N.W.2d 251, 257, set forth "criteria that should be considered whenever section (b) of this rule is invoked" noting that that opinion requires "clear and convincing" evidence of the other crime.

FN58. Repeals restrictions U.S. v. Maestas, C.A.8th, 1977, 554 F.2d 834, 836 n. 2, 837-838.

FN59. Force into Rule 403 See, e.g., U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 507-508.

FN60. Different question Courts in setting out the procedural prerequisites to the use of other crimes evidence have generally treated the balancing required by Rule 403 as separate from the issue of the sufficiency of the proof of the other crime. See, e.g., U.S. v. Ostrowsky, C.A.7th, 1974, 501 F.2d 318, 321. McCormick also treats the two as distinct questions. McCormick, Evidence, Cleary ed., 1972, s 190, pp. 451-453.

FN61. Prior standards intact U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 504-507.

FN62. Who applies It is, of course, possible that both the judge and the jury are to apply the higher standard of proof. Nothing in the caselaw suggests this, but some pattern jury instructions suggest that trial courts may be handling the issue this way. See 1 Devitt & Blackmar, Federal Jury Practice and Instructions, 3d ed. 1977, s 14.15.

FN63. Preliminary question See vol. 21, s 5052.

FN64. Jury determines See vol. 21 s 5054.

FN65. Cases and commentators "Before evidence of a prior offense is given to the jury, the trial judge should conduct an independent examination of the proffered evidence to determine whether it satisfies this standard." U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 497. See also, U.S. v. Scholle, C.A.8th, 1977, 553 F.2d 1109, 1121 (trial judge "will base his decision" to admit or exclude evidence of other crimes on, inter alia, clear and convincing proof that the acts were committed). McCormick, Evidence, Cleary ed. 1972, s 190, p. 452 ("before the evidence is admitted * * * the substantial or unconvincing quality of the proof should be weighed. * * *"); Ehrhardt, Florida Evidence, 1977, s 404.5, p. 72 ("the court must consider whether there is clear and convincing proof").

FN66. Trial judge role Advisory Committee's Note, F.R.Ev. **404(b).**

FN67. How much Another question that does not appear to have been considered extensively in the literature is whether the higher standard applies to prior wrongs or acts that do not amount to a crime. The answer to this question would seem to turn on the policy basis for the higher standard of proof; but that policy is seldom enunciated. Since the higher standard is often spoken of as a substitute for proof "beyond a reasonable doubt," one might infer that the purpose is to insure that if the defendant is to be convicted of a crime not charged in the indictment, at least the jury should be held to something higher than the civil standard. On this theory, the higher standard should not be applied to

other acts not amounting to a crime. Strict requirements for proof of other crimes do not apply to proof of other acts not amounting to a crime. U.S. v. Greenfield, C.A.5th, 1977, 554 F.2d 179, 185. Strict standards of proof of other crimes are applicable to the government; they do not apply when the defendant offers evidence of other wrongs of government agent. U.S. v. McClure, C.A.5th, 1977, 546 F.2d 670, 676.

FN68. "Physical elements" U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 497.

FN69. Probability theory See s 5242.

FN70. Two-witness rule U.S. v. Freedman, C.A.2d, 1971, 445 F.2d 1220, 1224.

FN71. Corroboration, sufficiency See 7 Wigmore, Evidence, 3d ed. 1940, ss 2032-2075.

FN72. Effect of acquittal 2 Wigmore, Evidence, 3d ed. 1940, s 317; Note, Evidence of Defendant's Other Crimes: Admissibility in Minnesota, 1953, 37 Minn.L.Rev. 608, 613.

FN73. Contrary authority It is a violation of defendant's right to be free from double jeopardy for a state to use evidence of prior crimes for which defendant has been previously acquitted in a subsequent trial for a similar offense; the doctrine of collateral estoppel prevents the state from relitigating an issue that has once been determined adversely to the state. Wingate v. Wainwright, C.A.5th, 1972, 464 F.2d 209. Where the defendant has been previously tried and acquitted of a crime, the subsequent evidentiary use of that crime is an abuse of discretion because the fact of acquittal diminishes the probative worth of the evidence and increases the prejudice to the defendant to such a degree that it is inadmissible as a matter of law. State v. Little, 1960, 350 P.2d 756, 87 Ariz. 295.

FN74. Double jeopardy Bray, Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions, 1974, 28 U.Miami L.Rev. 489, 506; Comment, Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight", 1974, 21 U.C.L.A.L.Rev. 892, 914, 921 n. 148. In the early case of U.S. v. Randenbush, 1834, 8 Pet. (33 U.S.) 288, 8 L.Ed. 948, the Court held it was not a violation of the prohibition against double jeopardy to admit evidence of another crime for which defendant had never been prosecuted but which had been used as evidence in a prior prosecution in which defendant had been acquitted. The nature of the double jeopardy argument under the Court's recent cases is illustrated by the dissent in U.S. v. Castro-Castro, C.A.9th, 1972, 464 F.2d 336, note 76 below. However, in that case it can be argued that the evidentiary use of the prior incident is perfectly consistent with the jury's finding of innocence in the prior case; i.e., that even an innocent defendant should have been suspicious when placed in the role of a dupe the second time and that even if defendant did not realize that he was transporting contraband the first time, the prior trial makes it unlikely that he could have been ignorant of what was happening in the second incident.

FN75. State courts E.g., People v. Griffin, 1967, 426 P.2d 507, 66 Cal.2d 459, 58 Cal.Rptr. 107 (collecting cases); State v. Darling, 1966, 419 P.2d 836, 197 Kan. 471 (under provisions of K.S.A. 60-455).

FN76. Federal courts The fact that the defendant was previously acquitted of charge of illegal importation of marijuana on testimony that he was unaware that contraband was concealed in vehicles does not make evidence of that incident inadmissible in subsequent prosecution for same offense in which the marijuana was also concealed in vehicle and defendant disclaimed knowledge of its presence. U.S. v. Castro-Castro, C.A.9th, 1972, 464 F.2d 336. Evidence of prior crime of which defendant was acquitted in state court was admissible in federal prosecution since the federal government was not a party or a privy to the state action and collateral estoppel is therefore not applicable. U.S. v. Smith, C.A.4th, 1971, 446 F.2d 200. The fact that in trial for prior crime a verdict was directed in favor of the defendant does not bar the use of evidence of that crime in a subsequent trial for another offense. Holt v. U.S., C.A.10th, 1968, 404 F.2d 914, 920. Doctrine of res judicata does not make inadmissible evidence of a prior offense of which defendant has been acquitted and which is offered to prove knowledge that heroin was concealed in his vehicle where general verdict makes it impossible to determine basis of decision in prior case. Hernandez v. U.S., C.A.9th, 1966, 370 F.2d 171. Prior acquittal does not bar evidentiary use of other crime. Himmelfarb v. U.S., C.A.9th, 1945, 175 F.2d 924, 941.

FN77. Dismissal Evidence of another narcotics transaction is admissible despite the fact that charges based on that transaction had been dismissed because the unjustified delay and neglect of the government had prejudiced the defendant's ability to defend himself. U.S. v. Jones, C.A.1973, 476 F.2d 533, 155 U.S.App.D.C. 88.

FN78. Similar results U.S. v. Juarez, C.A.7th, 1977, 561 F.2d 65 (dismissal); U.S. v. Rocha, C.A.9th, 1977, 553 F.2d 614 (acquittal). The Florida codifiers seem to suggest that their version of Rule **404(b)** leaves the question open. Sponsors' Note, Fla.Evid.Code s 90.404.

FN79. Discretionary exclusion U.S. v. Smith, C.A.4th, 1971, 446 F.2d 200, 204. See generally, Comment, Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight", 1974, 21 U.C.L.A.L.Rev. 892, 903-905.

FN80. Prove acquittal People v. Griffin, 1967, 426 P.2d 507, 66 Cal.2d 459, 58 Cal.Rptr. 107.

FN81. Not applicable In many cases these other restrictions are, by their own terms, applicable only to prosecution for the crime. Often, however, it is difficult to see why the underlying policy is not equally applicable to the evidentiary use of the crime.

FN82. Extradition restriction U.S. v. Flores, C.A.2d, 1976, 538 F.2d 939.

FN83. Unfair U.S. v. Jones, C.A.1973, 476 F.2d 533, 155 U.S.App.D.C. 88.

FN84. Immunity U.S. v. Hockenberry, C.A.3d, 1973, 474 F.2d 247.

FN85. Prejudice See s 5250.

FN86. Out of presence U.S. v. Bailey, C.A.1974, 505 F.2d 417, 420, 164 U.S.App.D.C. 310; U.S. v. Demetre, C.A.8th, 1972, 464 F.2d 1105, 1108.

FN87. Explained See s 5250.

FN88. Labeling "But the mere labeling of such evidence does not automatically bring admission." Committee Commentary, No.Dak.R.Ev. **404(b).**

FN89. Appellate opinions Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 1972, 20 U.Kan.L.Rev. 411, 417; Stone, The Rule of Exclusion of Similar Fact Evidence: America, 1938, 51 Harv.L.Rev. 988, 1020.

FN90. Discretion to admit McCormick, Evidence, Cleary ed., 1972, s 190, p. 453.

FN91. Less stringent U.S. v. McCarthy, C.A.6th, 1972, 470 F.2d 222, 224; U.S. v. Turner C.A.4th, 1971, 441 F.2d 1161.

FN92. Capable of ignoring Havelock v. U.S., C.A.10th, 1970, 427 F.2d 987, 991.

FN93. Limit use See vol. 21, s 5067.

FN94. Only relevant details U.S. v. Ostrowsky, C.A.7th, 1974, 501 F.2d 318, 323 (abuse of discretion to admit gory details of murder in auto theft case); U.S. v. Ferrone, C.A.3d, 1971, 438 F.2d 381, 386 (need not show details of defendant's gambling operations to prove that agents he interfered with were engaged in official duties while searching defendant's home). Prejudice from proof of prior crime was reduced when trial judge excluded details of prior crime. U.S. v. Dansker, C.A.3d, 1976, 537 F.2d 40, 58. In prosecution for receiving stolen property, evidence of possession of other stolen property was admissible but trial court should have excluded evidence that property was taken in burglary. State v. Spraggin, 1976, 239 N.W.2d 297, 71 Wis.2d 604.

FN95. Impermissible argument E.g., Bellows v. Dainack, C.A.2d, 1977, 555 F.2d 1105, 1107.

FN96. Suggest other uses U.S. v. Araujo, C.A.2d, 1976, 539 F.2d 287, 290.

FN97. Principal device One writer has suggested that use of the judge's power to comment on the evidence could be a more effective method of explaining the proper use of other crimes. Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 285. Instruction that evidence of other crime could be considered to show that defendant was inclined to deal in heroin violated Rule **404(b).** U.S. v. Bloom, C.A.5th, 1976, 538 F.2d 704. Error in admission of other crimes evidence was not cured by an instruction to jury to disregard it. U.S. v. Wiley, C.A.6th, 1976, 534 F.2d 659.

FN98. Skeptical E.g., Note, Rule **404(b)** Other Crimes Evidence: The Need for a Two-Step Analysis, 1977, 71 Nw.U.L.Rev. 635, 643; Comment, Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight", 1974, 21 U.C.L.A.L.Rev. 892, 907-909.

FN99. Prefer not to emphasize See, e.g., U.S. v. Hayes, C.A.2d, 1977, 553 F.2d 824, 829; U.S. v. Tramaglino, C.A.2d, 1952, 197 F.2d 928, 932.

FN1. Reasons U.S. v. Bobbitt, C.A.1971, 450 F.2d 685, 689, 146 U.S.App.D.C. 224, 228.

FN2. No duty U.S. v. Davis, C.A.8th, 1977, 557 F.2d 1239, 1247; U.S. v. Drebin, C.A.9th, 1977, 557 F.2d 1316, 1325; U.S. v. Blount, C.A.6th, 1973, 479 F.2d 650, 651; U.S. v. Van Poyck, C.A.5th, 1972, 464 F.2d 575. See also, Note, Evidence of Criminal History in Ohio Criminal Prosecutions, 1964, 15 West.Res.L.Rev. 772, 779.

FN3. Give twice This is required, on request, by Fla.Evid.Code s 90.404(2)(b)(2), quoted above, s 5231 n. 39. See also, Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 628. For a sample cautionary instruction given at the time of introduction of other crimes evidence, see U.S. v. Weaver, C.A.8th, 1977, 565 F.2d 129, 134.

FN4. Criticisms Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 1972, 20 U.Kan.L.Rev. 411, 428.

FN5. Little advice The pattern jury instructions offer few guides. See 1 Devitt & Blackmar, Federal Jury Practice and Instructions, 3d ed. 1977, ss 14.14, 14.15. For samples of instructions given, see U.S. v. Hayes, C.A.2d, 1977, 553 F.2d 824, 829 n. 11; U.S. v. Hampton, C.A.10th, 1972, 452 F.2d 29, 30.

FN6. State proper purpose U.S. v. Ridley, C.A.6th, 1975, 519 F.2d 791, 793. Appellate court could affirm the admission of evidence of other crimes to prove identity even though the trial court did not instruct the jury that it could be used for this purpose. U.S. v. Baldarrama, C.A.5th, 1978, 566 F.2d 560, 567.

FN7. Invite forbidden inference People v. Hunt, 1977, 72 Cal.App.3d 190, 139 Cal.Rptr. 675.

FN8. Too refined U.S. v. Bobbitt, C.A.1971, 450 F.2d 685, 690, 146 U.S.App.D.C. 224.

FN9. Role of discretion See s 5250.

FN10. Only abuse of discretion In prosecution for falsely stating that he had never been convicted of a felony in order to purchase a firearm where the defense was that the defendant did not understand the question, it was an abuse of discretion to permit the government to introduce into evidence the defendant's rap sheet that showed two felony convictions, numerous arrests, and items of unfavorable personal history. U.S. v. Bledsoe, C.A.8th, 1976, 531 F.2d 888, 891.

FN11. Determining relevance See s 5166.

FN12. Not appropriate Though many could be cited, two recent cases are at hand to illustrate the point. In U.S. v. Tibbets, C.A.4th, 1977, 565 F.2d 867 the per curiam opinion says the evidence of a prior bomb threat was admissible in a prosecution for a subsequent threat. Since the defendant was observed in the act of making the charged threat, which was monitored by the phone company, there does not seem to be any question of identification and the court does not mention any issue of intent as to which the evidence would be relevant. It simply says that under Rule **404(b)** evidence is admissible for other purposes, without specifying what those purposes might be. The trial court apparently admitted the evidence to show how the defendant came to be under surveillance when he made the charged threat but the relevance of that is difficult to discern. In U.S. v. Herbst, C.A.10th, 1977, 565 F.2d 638, 641, the defendant raised a number of arguments against the admissibility of other crimes evidence. The opinion disposes of these by simply listing all of the potential grounds for admissibility, then stating that admissibility was "consistent with our prior opinions."

FN13. Criminal cases U.S. v. Hines, C.A.3d, 1972, 470 F.2d 225, 227-228.

FN14. Erie doctrine See s 5201.

FN15. Intertwined Wellborn, The Federal Rules of Evidence and the Application of State Law in Federal Courts, 1977, 55 Texas L.Rev. 371, 410-411.

FN16. Expands See s 5239.

FPP s 5249 (R 404)

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(Cite as: 20 F.3d 538)

UNITED STATES of America, Appellee,
v.
Michael Lee MATTHEWS and Robert G. Prater, Defendants-Appellants.
Nos. 509, 228, Dockets 93-1158, 93-1172.
United States Court of Appeals,
Second Circuit.
Argued Dec. 1, 1993.
Decided March 30, 1994.

Defendants were convicted in the United States District Court for the Northern District of New York, Howard G. Munson, J., of bank robbery and conspiracy to commit bank robbery, and they appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) first defendant's rights under confrontation clause were not violated by admission of second defendant's out-of-court inculpatory statement; (2) in-court identifications of first defendant did not violate due process; (3) evidence was sufficient to support second defendant's conviction; (4) prosecution had obligation to disclose letter written by second defendant, but late disclosure was not so prejudicial as to require reversal; (5) evidence that second defendant tried to stab girlfriend was admissible, and did not violate notice requirement for other-crimes evidence;

that he would have nothing to do with her because she wouldn't give up her prostitution. You asked her that. She wouldn't give up her drug habit; you asked her that. She wouldn't give up her alcoholism; you asked her that, and because she didn't treat her children in the manner in which your client thought they ought to be treated.

(Tr. 746-47.)

On redirect examination, the government asked Dunbar what had happened on Christmas ***551** Day to cause her to call the police. Over the objection of Prater's attorney stating, "we are getting into things that may be characterized as 404(B) material," Dunbar was allowed to testify that during the Christmas Day argument, Prater had threatened Dunbar and the father of her children with an ice pick. Prater contends that this testimony was inadmissible under Fed.R.Evid. 404(b) because it was introduced in order to show Prater's propensity for violence and because Prater was not given advance notice that the government would introduce such testimony. We disagree.

Rule 404(b) of the Federal Rules of Evidence provides as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the

accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Notwithstanding the language of the provision for notice, which applies whether the government wishes to use the other-act evidence in its direct case, on rebuttal, or as impeachment, see Fed.R.Evid. 404(b) Advisory Committee Note, the notice requirement was "not intend[ed to] ... require the prosecution to disclose directly or indirectly the names and addresses of its witnesses," id. We are unpersuaded that either the substantive reach or the notice provision of the Rule was violated.

First, it does not appear that the ice-pick testimony was offered or admitted to show that Prater committed any other act "in conformity [ ]with" this threat of violence. Given the "rather strenuous[ ]" attack on Dunbar's character during Prater's cross-examination, which sought to show that Dunbar had created a fiction in a fit of jealous anger, the government sought to provide a more objective reason for Dunbar's decision to pass on to the police Prater's statement that he had committed bank robbery. Plainly Rule 404(b) permitted the use of testimony that Prater attempted to stab Dunbar and the father of her children to show Dunbar's motive for turning Prater in to the police.

[28] We note that it would have been appropriate for the trial court to give the jury a cautionary instruction that the ice-pick evidence was admitted only for this limited purpose. However, given the degree to which Prater's cross-examination of Dunbar had attacked her motives, we think it highly improbable that the jury would have used the evidence for any other purpose. In any event, Prater did not request such an instruction and cannot now complain that none was delivered.

[29] Second, we are unpersuaded that the Rule required the government to give notice in advance of trial that Dunbar would testify about the ice-pick attack. Dunbar was designated as a confidential informant and the court denied Prater's pretrial motion for disclosure of her identity. Since the notice provision of Rule 404(b) was not intended to require the government to disclose the identity of its witnesses, either directly or indirectly, and it is difficult to believe that even general notice of an ice-pick attack would not have indicated that the informant was Dunbar, we conclude that the government did not violate the notice requirement by not notifying Prater that it might use evidence that he had attacked someone with an ice pick.

4. The Prosecutor's Summation

[30] Prater also contends that comments by the AUSA during summation denied him a fair trial. He focuses principally on the following reference to a polygraph test:

UNITED STATES of America, Appellee,
v.
Abdul-Rahma ADEDIRAN, also known as Adediran Babatumte, also known as Francis Machante, also known as David K. Bolade, Appellant.

No. 93-3821.

United States Court of Appeals, Eighth Circuit.

Submitted April 12, 1994.

Decided June 8, 1994.

Defendant was convicted in the United States District Court for the Eastern District of Missouri, George F. Gunn, Jr., J., of falsely misrepresenting social security account number (SSAN). Defendant appealed. The Court of Appeals, Henley, Senior Circuit Judge, held that: (1) other wrongs evidence was admissible, and (2) defendant's failure to appear for state court proceedings warranted two-level enhancement for obstruction of justice.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
Preponderance of the evidence linked defendant to other similar wrongs admitted to show intent in prosecution for falsely misrepresenting social security account number (SSAN), even though no witness could identify defendant as being involved in the other wrongs; both schemes involved person opening checking accounts with minimal cash and fictitious Wisconsin identification, false SSANs at different banks all began with same five digits, defendant fit description of person posing as customer in connection with the other wrongs, and handwriting samples connected to both schemes were similar. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(3)
110k371(3)
Danger of unfair prejudice from other wrongs evidence that defendant opened checking accounts with minimal cash amounts and fictitious Wisconsin identification did not outweigh probative value to show intent in prosecution for falsely misrepresenting social security account number (SSAN) in connection with similar scheme.

[3] CRIMINAL LAW ⇐ 338(7)
110k338(7)
Balancing of probative value and danger of unfair prejudice from evidence is peculiarly within discretion of district court and should not be disturbed absent clear showing of abuse.

[3] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
Balancing of probative value and danger of unfair prejudice from evidence is peculiarly within discretion of district court and should not be disturbed absent clear showing of abuse.

[4] CRIMINAL LAW ⇐ 629.5(8)
110k629.5(8)
Government's failure to respond directly to defendant's motion requesting information regarding prior bad acts was not fatal in light of defense counsel's admission that the evidence had been fully disclosed and that he was aware of government's intention to present it. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 1253
110k1253
Defendant's failure to appear for state court proceedings warranted two-level enhancement for obstruction of justice in connected federal prosecution for falsely misrepresenting social security account number (SSAN); misrepresentation of SSAN was intimate part of conduct for which local police had arrested defendant. U.S.S.G. § 3C1.1, 18 U.S.C.A.App.

***62** Allen I. Harris, St. Louis, MO, argued, for appellant.

Jonathan I. Goldstein, St. Louis, MO, argued (Edward L. Dowd, Jr. and Jonathan I. Goldstein), on the brief for appellee.

Before RICHARD S. ARNOLD, Chief Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HENLEY, Senior Circuit Judge.

Abdul-Rahma Adediran appeals his conviction and sentence for falsely misrepresenting his Social Security Account Number (SSAN), with the intent to deceive and for the purpose of obtaining something of value, in violation of 42 U.S.C. § 408(a)(7)(B) (1991). We affirm.

I.

In late October 1991, Adediran, posing as Francis Machante and using false SSANs, opened accounts with Mail Boxes, Etc. and Answer St. Louis, a telephone answering service. In December 1991, Adediran opened checking accounts at five banks in the St. Louis area. At each bank he posed as Francis Machante, providing a false Wisconsin identification in that name. His initial deposits ranged from $100.00 to $130.00, and he used different SSANs, all of which were false, at each bank.

One of the account representatives who dealt with Adediran became suspicious when she recognized the address he gave as belonging to Mail Boxes, Etc. She alerted the local police, who, after further investigation, apprehended Adediran. Adediran was held for several days until he posted bond. He was then released with instructions to appear for arraignment on January 15, 1992. On that date, Adediran failed to appear as ordered.

On December 23, 1991, a person using the name David Bolade opened three accounts at banks in Rockford, Illinois. All of the accounts were opened with $100.00 deposits and with different SSANs, all of which were false. A fictitious Wisconsin identification was provided to each institution. In January 1992, the Rockford banks began receiving deposits for the Bolade accounts. Included in these deposits were several checks originally issued to Adediran by one of the St. ***63** Louis banks. These checks were never paid, but while the balances on the Bolade accounts remained inflated, over $10,000.00 was withdrawn from the Rockford banks. Adediran was eventually arrested in Chicago, Illinois, in April 1993.

In a seven-count indictment Adediran was charged with violating 42 U.S.C. § 408(a)(7)(B). Each count related to one of the St. Louis institutions at which he had presented a false SSAN. At trial the government presented evidence concerning events in both St. Louis and Rockford. Adediran objected to admission of the Rockford evidence, claiming the government had failed to establish that he was the person responsible for those incidents. The district court [FN1] overruled the objection and admitted the evidence under Rule 404(b) of the Federal Rules of Evidence.

FN1. The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

The jury eventually found Adediran guilty on all seven counts. The district court then imposed sentence based in part on the financial losses suffered by the Rockford institutions. In addition, the court increased Adediran's base offense level for obstruction of justice.

II.

[1] On appeal, Adediran claims the district court abused its discretion in admitting the Rockford evidence pursuant to Rule 404(b). The government argues in response that the evidence was not subject to Rule 404(b)'s requirements because it was proof of the crime charged. Alternatively, the government contends the evidence was properly admitted under that rule. Though this may well be a case where the other crime is so "inextricably intertwined" with the charged crime that Rule 404(b) is not implicated, United States v. DeLuna, 763 F.2d 897 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985), we will apply that rule's more rigorous requirements. This decision does not affect our ultimate conclusion.

Rule 404(b) prohibits admission of evidence of other crimes for the purpose of proving action in conformity therewith but allows admission for other purposes, such as proof of intent. This court has held that other crimes are admissible if (1) relevant to a material issue, (2) established by a preponderance of the evidence, [FN2] (3) more probative than prejudicial, and (4) similar in kind and close in time to the events at issue. King v. Ahrens, 16 F.3d 265, 268 (8th Cir.1994); United States v. Aranda, 963 F.2d 211, 215 (8th Cir.1992).

FN2. Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1987), establishes that a preponderance standard is appropriate. See

United States v. Aranda, 963 F.2d 211, 215 n. 5 (8th Cir.1992); United States v. Mothershed, 859 F.2d 585, 588 n. 2 (8th Cir.1988).

[2] Adediran does not contest either that the Rockford evidence was relevant to intent or that it was similar in kind and close in time to the acts for which he was prosecuted. Instead, he asserts that there was insufficient proof of his involvement in Rockford and that the evidence was more prejudicial than probative. We reject both contentions. First, we believe a preponderance of the evidence linked Adediran to Rockford. Most important in this regard was the deposit in Rockford of the very checks issued to Adediran by a St. Louis bank. Moreover, the schemes in St. Louis and Rockford were similar in several respects. In both cities, the person opening checking accounts did so with minimal cash amounts and a fictitious Wisconsin identification. False SSANs were used at different banks, but at all banks the numbers began with the same five digits. Though Adediran relies primarily on the fact that no Rockford witness could identify him at his trial, which took place some eighteen months after the Bolade accounts were opened, both testimony and photographs indicated that the person posing as David Bolade was a tall, thin, African-American male. Adediran fits this description. Finally, handwriting samples of both Francis Machante and David Bolade were submitted for the jury to compare. Similarities between the two signatures are evident.

***64** [3] As to Adediran's argument that the unfair prejudice resulting from the Rockford evidence outweighed its probative value, we note that the district court made an explicit finding to the contrary. Such balancing is peculiarly within the discretion of the district court and should not be disturbed absent a clear showing of abuse. United States v. Brown, 956 F.2d 782, 786 (8th Cir.1992). Considering the substantial probative value of the Rockford evidence, we can find no clear abuse in this case.

[4] Adediran also contends he received insufficient notice of the government's intent to introduce "other crimes" evidence. In particular, he notes that before trial he filed a motion requesting information regarding prior bad acts. The government's response failed to indicate any intention to introduce the Rockford incidents.

Rule **404(b)** provides that "upon request by the accused, the prosecution in a criminal case shall provide reasonable **notice** in advance of trial, or during trial if the court excuses pretrial **notice** on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Though the government failed to indicate its intention to introduce the Rockford events in its direct response to Adediran's motion, defense counsel admitted before trial that the Rockford evidence had been fully disclosed and that he was aware of the government's intention to present it. In light of these admissions, the failure to respond directly to Adediran's motion was not fatal.

III.

Adediran contests the sufficiency of the evidence, but his argument is conditioned on a ruling that the Rockford evidence is inadmissible. Because we have ruled adversely to Adediran on the evidentiary issue, we need not reach the sufficiency claim. Nevertheless, after careful review, we hold that, with or without the Rockford evidence, the record sufficiently supports the jury's verdict.

IV.

Adediran challenges two aspects of his sentence. First, he argues that the district court erred in considering in its calculations the losses suffered by the Rockford banks. This argument is without merit, for it is based solely on the already rejected contention that there was insufficient evidence linking Adediran to Rockford. Because we have held that a preponderance of the evidence supports a conclusion that Adediran opened the Bolade accounts, the district court did not clearly err by making that finding.

[5] Adediran next contends the district court erred in imposing a two-point enhancement for obstruction of justice. This enhancement, imposed pursuant to U.S.S.G. § 3C1.1, was based on three factors: Adediran's failure to provide his true identity to police, his momentary refusal to submit to fingerprinting, and his failure to appear for state court proceedings in January 1992. Adediran claims that none of these factors justifies the enhancement. He argues that his momentary refusal to be fingerprinted was of such short duration that it caused no hindrance, that his failure to properly

identify himself did not actually cause a significant hindrance to the investigation, and that his failure to appear is excused because it involved a state rather than a federal court. Because it is dispositive, we consider only Adediran's failure to appear.

> Section 3C1.1 provides as follows:
> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Application note 3(e) provides that "willfully failing to appear, as ordered, for a judicial proceeding" warrants an obstruction enhancement. Without a doubt, if Adediran had failed to appear for a federal court date, the enhancement would have been proper. We must therefore decide whether the mere fortuity of being charged in state court should excuse Adediran's blatant attempt to avoid the administration of justice.

***65** We note first that the Guidelines make no distinction between state and federal authorities or proceedings. Section 3C1.1 itself requires only that the obstruction occur "during the investigation, prosecution, or sentencing of the instant offense." This of course requires some connection between the obstructed state proceedings and the investigation of the federal offense. However, this requirement is easily satisfied here, for Adediran's misrepresentation of his SSAN was an intimate part of the conduct for which local police arrested him.

Few courts have explicitly dealt with the federal-state distinction in this context. However, in United States v. Lato, 934 F.2d 1080 (9th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 271, 116 L.Ed.2d 224 (1991), the Ninth Circuit rejected the argument that Adediran now proposes. That court reasoned as follows:

> The actions of Lato were certainly designed to obstruct the investigation of the offense he committed, that is to prevent the successful uncovering of his scheme to defraud insurance companies. That fraud violated federal as well as state law, and we are satisfied that Lato made no rarefied distinction between them when he sought to cover up his crime. Nor should we. Indeed, it is not likely that, absent the Guidelines, any sentencing judge would fail to consider Lato's activities when it became time to pronounce sentence. There is no reason to think that the Guidelines were intended to change that sensible approach to Lato's culpability.

Lato, 934 F.2d at 1083; see also United States v. Emery, 991 F.2d 907 (1st Cir.1993) ("[S]o long as some official investigation is underway at the time of the obstructive conduct, the absence of a federal investigation is not an absolute bar to the imposition of a section 3C1.1 enhancement.").

Moreover, several Eighth Circuit opinions have upheld enhancements even when the obstruction involved state authorities. See, e.g., United States v. Ball, 999 F.2d 339, 340 (8th Cir.1993) (because defendant was facing federal drug charges at the time, his attempt to escape from county jail following his arrest on a state assault charge constituted obstruction of federal investigation); United States v. Dortch, 923 F.2d 629, 632 (8th Cir.1991) (throwing bag of cocaine out of car during traffic stop by local police supported obstruction enhancement in federal prosecution); United States v. Paige, 923 F.2d 112, 114 (8th Cir.1991) (engaging in high speed chase with state highway patrol and throwing evidence out window supported enhancement). We conclude that this circuit does not prohibit obstruction enhancements in federal prosecutions merely because state entities were involved. Furthermore, we find the reasoning of the Lato court persuasive. Consequently, we hold that the district court did not err by imposing the two-level enhancement for obstruction of justice. [FN3]

> FN3. Adediran's failure to properly identify himself also may have justified the enhancement, for authorities were forced to run his prints through several services before discovering his true identity. Nevertheless, Adediran argues that such checks are routine and that the police therefore did nothing more than what they would have done had he properly identified himself. Consequently, he claims the evidence does not support a finding that his conduct "actually resulted in a significant hindrance," as is now required by U.S.S.G. § 3C1.1, comment. (n. 4). Because we hold that the failure to appear warrants imposition of the enhancement, we need not decide whether this argument has merit.

Accordingly, the judgment of the district court is affirmed.

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UNITED STATES of America, Plaintiff-Appellee,
v.
Darrell A. TOMBLIN, Defendant-Appellant.
No. 93-8679.
United States Court of Appeals,
Fifth Circuit.
Feb. 24, 1995.

Defendant was convicted in the United States District Court for the Western District of Texas, H.F. Garcia, J., of bribery, extortion and related offenses, and he appealed. The Court of Appeals, Emilio M. Garza, J., held that: (1) any deficiencies in affidavits in support of wiretap authorization did not require suppression; (2) bribery instruction was adequate; (3) evidence was sufficient to support bribery conviction; (4) extortion instruction was adequate; (5) because defendant was not a public official, his conviction for extortion had to be reversed; (6) introduction of evidence of defendant's character did not require reversal; (7) prosecutor was not required to give notice of intent to use other-acts evidence; and (8) upward departure in base offense level for bribery was warranted.

Affirmed in part, vacated in part and remanded.

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FN49. We note that, had we addressed Tomblin's Rule 608(b) good faith argument, we would have reached the same conclusion.

2

[37][38] Tomblin also argues that, because the prosecutor did not provide advance notice, the introduction of evidence of other bad acts when cross-examining Tomblin violated Federal Rule of Evidence 404(b). [FN50] The government contends that the other-acts evidence was proper under Rule 608(b) because it was introduced only to impeach Tomblin and was not offered in the prosecutor's case in chief. [FN51] Whether Rule 404(b) or Rule 608(b) applies to the admissibility of other-act evidence depends on the purpose for which the prosecutor introduced the other-acts evidence. United States v. Schwab, 886 F.2d 509, 511 (2d Cir.1989), cert. denied, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990). Rule 404(b) applies when other-acts evidence is offered as relevant to an issue in the case, such as identity or intent. Id. Rule 608(b) applies when other-acts evidence is offered to impeach a witness, "to show the character of the witness for untruthfulness," or to show bias. Id. The prosecutor contends that his cross-examination questions were probative of Tomblin's character for truthfulness.

FN50. Rule 404(b) requires the prosecution in a criminal case to provide notice in advance of trial of its intent to use other acts evidence. Fed.R.Evid. 404(b) advisory committee notes (stating that the purpose of the notice requirement is to reduce surprise and promote early resolution of admissibility issues).

FN51. Rule 608(b) states that: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility ... may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness ...." Fed.R.Evid. 608(b). Unlike Rule 404(b), however, Rule 608(b) does not require advance notice of the prosecutor's intent to use specific instances of defendant's conduct to impeach the defendant when he testifies. United States v. Baskes, 649 F.2d 471, 477 (7th Cir.1980) ("No rule or rationale guarantees the defense advance knowledge of legitimate impeachment before it calls a witness."), cert. denied, 450 U.S. 1000, 101 S.Ct. 1706, 68 L.Ed.2d 201 (1981).

[39][40] A defendant makes his character an issue when he testifies. Waldrip, 981 F.2d at 803; United States v. Blake, 941 F.2d

UNITED STATES of America, Plaintiff-Appellee,
v.
Hernan Francisco PEREZ-TOSTA, Gustavo Javier Correa-Patino, Erasmo Perez-Aguilera, Luis Guillermo Rojas-Valdez, Defendants-Appellants.

No. 92-4781.

United States Court of Appeals, Eleventh Circuit.

Nov. 8, 1994.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 90-6120-CR-KMM, K. Michael Moore, J., of conspiracy to distribute cocaine and two defendants also were convicted of possession of cocaine with intent to distribute. Appeals were taken. The Court of Appeals, Cox, Circuit Judge, held that: (1) evidence supported findings that two defendants voluntarily and knowingly participated in cocaine conspiracy, but did not support finding that another defendant voluntarily and knowingly participated; (2) evidence supported conviction for possession of cocaine with intent to distribute; (3) notice only minutes before voir dire was reasonable pretrial notice of intent to offer testimony on prior bad acts; and (4) ambiguous presentencing report (PSI) on amount of cocaine attributable to defendant required remand for factual finding to support calculation of offense level for conspiracy conviction.

Affirmed in part, reversed in part, and vacated and remanded in part.

[1] CRIMINAL LAW ⇐ 788
110k788
District court did not abuse its discretion in refusing to give missing witness instruction concerning witness whose testimony was likely to be unfavorable to defendant.

[2] WITNESSES ⇐ 9
410k9
District court did not abuse its discretion in refusing untimely request on afternoon of last day of trial seeking issuance of subpoena to compel appearance of witness.

[3] CRIMINAL LAW ⇐ 1139
110k1139
Denial of motion for acquittal is reviewed de novo.

[4] CONSPIRACY ⇐ 40.3
91k40.3
To convict defendant for conspiracy, evidence must show that conspiracy existed, that defendant knew of conspiracy, and that defendant, with knowledge, voluntarily joined conspiracy.

[5] CONSPIRACY ⇐ 40.1
91k40.1
Defendant may be guilty of conspiracy even if defendant plays only minor role and does not know all details of conspiracy.

[6] CRIMINAL LAW ⇐ 552(3)
110k552(3)
Reasonable inferences from circumstantial evidence, rather than mere speculation, must support jury's verdict.

[7] CONSPIRACY ⇐ 44.2
91k44.2
Inference of participation from presence and association with conspirators alone does not suffice to convict for conspiracy, but such inference is permissible in evaluating totality of circumstances.

[8] CONSPIRACY ⇐ 47(12)
91k47(12)
Evidence supported finding that defendant voluntarily and knowingly participated in cocaine conspiracy; defendant engaged in evasive driving countersurveillance measures which led government agents away from trail of coconspirator, documents found in coconspirator's house indicated relationship between defendant and coconspirator, and informant testified to defendant's prior acts in support of coconspirator's organization.

[9] CONSPIRACY ⇐ 47(12)
91k47(12)
Evidence did not support finding that defendant knowingly and voluntarily participated in conspiracy to distribute cocaine; although defendant was runner of keys and registration papers for truck containing concealed compartments and defendant rode in countersurveillance vehicle near site of cocaine transfer, it was possible that defendant was

merely unwitting dupe.

[10] CONSPIRACY ⚿ 47(12)
91k47(12)
Circumstantial evidence supported finding that defendant voluntarily and knowingly participated in cocaine conspiracy; defendant drove cocaine-laden truck into garage at coconspirator's house, 70 kilogram-sized packages of cocaine were removed from truck and placed in bedroom during 25-minute period that defendant and truck remained inside garage, and defendant implausibly testified that he left truck outside garage and merely sat alone in living room until coconspirator asked him to leave.

[11] DRUGS AND NARCOTICS ⚿ 73.1
138k73.1
To convict for possession of cocaine with intent to distribute, government must show both knowing possession and intent to distribute, but constructive possession is sufficient and intent to distribute may be inferred from quantity of cocaine involved.

[11] DRUGS AND NARCOTICS ⚿ 107
138k107
To convict for possession of cocaine with intent to distribute, government must show both knowing possession and intent to distribute, but constructive possession is sufficient and intent to distribute may be inferred from quantity of cocaine involved.

[12] DRUGS AND NARCOTICS ⚿ 123.2
138k123.2
Evidence supported conviction for possession of cocaine with intent to distribute; defendant drove truck containing cocaine to house occupied only by defendant and coconspirator, and 70 one-kilogram packages of cocaine were moved from truck to bedroom in 25-minute period.

[13] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
District court rulings on admissibility of evidence are reviewed under abuse of discretion standard.

[14] CRIMINAL LAW ⚿ 374
110k374
Factors to consider in determining reasonableness of government's pretrial **notice** of intent to introduce evidence of prior bad acts include time when government could have learned of availability of evidence through timely preparation for trial, extent of prejudice to defendant from lack of time to prepare, and how significant evidence is to government's case. Fed.Rules Evid.Rule **404(b)**, 28 U.S.C.A.

[15] CRIMINAL LAW ⚿ 374
110k374
Government gave reasonable pretrial **notice** of intent to offer testimony on prior bad acts by defendant concerning cocaine-related work for coconspirator, even though **notice** was given only minutes before voir dire; reasonable trial preparation would not have revealed testimony to prosecutor any earlier, defense counsel did not indicate additional measures that could have been taken to rebut testimony if more **notice** had been given, and testimony was significant to government's case on issue of defendant's awareness of and participation in charged conspiracy. Fed.Rules Evid.Rule **404(b)**, 28 U.S.C.A.

[16] CRIMINAL LAW ⚿ 662.7
110k662.7
Defendant's confrontation clause rights were not violated by district court's admonishment to defense counsel to avoid cross-examination on sentencing issues, in light of defense counsel's effective impeachment of witness' credibility by exposing witness' expectation that he would receive sentencing reduction in return for testifying for government. U.S.C.A. Const.Amend. 6.

[17] CRIMINAL LAW ⚿ 1134(3)
110k1134(3)
Claim of ineffective assistance of counsel could not be considered for first time on direct appeal, in light of defendant's failure to raise claim as ground for new trial motion and insufficient development of record to allow Court of Appeals to evaluate merits of claim. U.S.C.A. Const.Amend. 6.

[18] CRIMINAL LAW ⚿ 1181.5(8)
110k1181.5(8)
Presentencing report (PSI) was ambiguous on amount of cocaine attributable to defendant under Sentencing Guidelines and thus, required remand for factual finding to support calculation of offense level for cocaine conspiracy conviction; PSI stated that total amount of cocaine involved in conspiracy was 700 kilograms, but also stated that it was doubtful defendant realized quantity of cocaine transported. U.S.S.G. §§ 1B1.3(a)(1), 2D1.1(c)(2), 18

U.S.C.A.App.

[19] CRIMINAL LAW ⚿ 822(1)
110k822(1)
District court has broad discretion in formulating jury charge as long as charge as whole is correct statement of law.

[20] CRIMINAL LAW ⚿ 1172.1(1)
110k1172.1(1)
Jury instruction will not support reversal of conviction unless issues of law were presented inaccurately or charge improperly guided jury in substantial enough manner to violate due process. U.S.C.A. Const.Amends. 5, 14.

[21] CRIMINAL LAW ⚿ 772(5)
110k772(5)
Evidence did not support deliberate ignorance instruction in light of evidence of defendant's actual knowledge of cocaine hidden in truck rather than deliberate avoidance of suspicions about presence of cocaine.

[21] DRUGS AND NARCOTICS ⚿ 128
138k128
Evidence did not support deliberate ignorance instruction in light of evidence of defendant's actual knowledge of cocaine hidden in truck rather than deliberate avoidance of suspicions about presence of cocaine.

[22] CRIMINAL LAW ⚿ 1173.2(2)
110k1173.2(2)
Erroneous instruction on deliberate ignorance concerning presence of cocaine in truck driven by defendant was harmless error in light of strong circumstantial evidence that defendant had actual knowledge of cocaine hidden in truck.

***1554** Benjamin S. Waxman, Weiner, Robbins, Tunkey, Ross, Amsel & Raben, P.A., Miami, FL, for Perez-Tosta.

Oscar Arroyave, Miami, FL, for Correa-Patino.

Peter Raben, Coconut Grove, FL, for Perez-Aguilera.

William D. Matthewman, Miami, FL, for Rojas-Valdez.

Mary V. King, Asst. U.S. Atty., Miami, FL, for appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and YOUNG [FN*], Senior District Judge.

FN* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

COX, Circuit Judge:

Defendants Hernan Perez-Tosta (Tosta), Gustavo Correa-Patino (Correa), Erasmo Perez-Aguilera (Aguilera), and Luis Rojas-Valdez (Rojas) appeal convictions for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and, in Rojas's and Correa's cases, possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Because the prosecutor gave only a few minutes' pretrial notice, Aguilera challenges the district court's admission of prior bad acts evidence under Fed.R.Evid. 404(b). In addition, Aguilera, Tosta, and Rojas contend that the evidence was insufficient to support their convictions. All the appellants also raise other issues.

I. BACKGROUND

For over a year before the arrests in this case, the Drug Enforcement Agency (DEA) conducted an undercover investigation targeting a suspected cocaine trafficker, Fernando Loaiza-Alzate (Loaiza). As part of the probe, DEA agent Joseph Giuffre offered Loaiza his services as a smuggler of shipments of Colombian cocaine from the Bahamas into South Florida. For one of these shipments, Giuffre was put in touch with Adelsis Grieco. Grieco and Giuffre planned for Grieco to have the cocaine flown from northern Colombia to the southeastern Bahamas, where the cocaine would be dropped for Giuffre's men to retrieve. After Giuffre had smuggled the cocaine into South Florida, the cocaine would be transferred to Grieco's men.

One of these transfers in Florida was to take place on July 20, 1990. Grieco's organization owned two pickup trucks equipped with concealed cargo compartments under the truckbed. Grieco was to

turn the trucks over to Giuffre, who was to have the concealed compartments filled with cocaine. Giuffre would then have his people park the trucks at two southwest Miami locations that Grieco would code into Guiffre's beeper.

On July 18, 1990, Giuffre and Grieco met in a Kendall, Florida restaurant for the initial transfer of the trucks. Grieco explained the pickups' hidden compartments to Giuffre as the two of them circled the parking lot in Giuffre's car. After Grieco had told Giuffre where the trucks were, Giuffre stopped the car, and Grieco rolled down his window and whistled. Tosta appeared with an envelope containing one of the trucks' keys, registration, and insurance papers. Tosta and ***1555** Grieco exchanged a few words in Spanish and left together in Grieco's car.

On July 20, 1990, the day planned for the transfer, Tosta and Aguilera arrived at Grieco's house at 10:20 a.m. in a LeBaron rented in Aguilera's name. Grieco took the wheel, and for the next hour and a half to two hours, he drove erratically around the neighborhood and up and down U.S. 1, pulling into driveways and pulling directly out again, making U-turns, and even coming to a full stop in moving traffic on U.S. 1. Agents identified this erratic driving as countersurveillance, a ploy for Grieco to determine if he was being followed. Meanwhile, around 11:00, DEA agents parked the pickups, each carrying seventy kilograms of cocaine, in two designated shopping center parking lots on U.S. 1. Grieco's erratic route took him repeatedly past the lots where the trucks were parked.

A few minutes after DEA agents had put the cocaine-laden trucks in the lots, Rojas and Victor Manuel Estrada-Correa [FN1] arrived to drive the trucks to Grieco's storage sites. Rojas was led by a small brown car to Correa's house. The testimony is in conflict as to what happened at Correa's house. DEA agents testified that Rojas drove the truck into the garage and closed the garage door, only to emerge a little while later, driving the same truck without the load of cocaine. Rojas testified that he never parked the truck in the garage, and that he was directed by a man to sit in Correa's living room. He did so until Correa (whom Rojas had never met) appeared, wet from the shower, and told Rojas to get out of the house. Rojas then left in the pickup he had arrived in.

> FN1. Estrada-Correa is not a party to this appeal. He was tried with the other defendants and found not guilty of possession of cocaine with intent to distribute. The jury could not reach a verdict on the conspiracy to distribute charge against him.

As Rojas left, the DEA agents stopped the truck and arrested him. The agents immediately discovered that the cocaine was missing from the hidden compartments, and they returned to Correa's house. One agent discovered Correa with his body half out a window in the rear of the house. Correa went back in, and before agents could ram Correa's door in, Correa emerged from the open garage door in an attempt to flee. He was arrested. Agents then entered the house and discovered the cocaine in a bedroom.

Meanwhile, Grieco had observed the DEA agents' unmarked cars following the LeBaron's erratic maneuvers, and he got out of the car at a gas station on U.S. 1. Aguilera took the wheel and continued the erratic driving for another half hour to forty-five minutes, when agents stopped the car and arrested both Aguilera and Tosta.

After the arrests, Grieco and Giuffre remained in contact for a few more weeks, but Grieco was never arrested and remained a fugitive at the time of trial.

Aguilera, Tosta, Correa, Rojas, Grieco, and Estrada-Correa were all charged with one count of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 and one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). At trial, most of the law enforcement personnel who surveilled the defendants testified as to what they saw on July 20. However, the Government did not call Agent John Shepard, the one agent who had direct visual contact with Correa's house while Rojas and Correa were inside.

In addition to the agents and officers, the Government called Luis Zaldivar, who was not a subject of this investigation, to testify that he had seen Aguilera on at least two prior occasions working for Grieco's organization. Only a few minutes before voir dire, the Government notified Aguilera's counsel that it intended to present this

evidence under Fed.R.Crim.Evid. 404(b). Aguilera's counsel objected to the admission of the evidence with such short notice. At the hearing on the issue during trial, the district court concluded that because six days had elapsed between voir dire and the day the Government planned to call Zaldivar, the notice was in fact reasonable and the testimony therefore admissible.

The jury convicted Correa, Aguilera, Tosta, and Rojas of conspiracy to distribute cocaine. Correa and Rojas were also convicted of possession of cocaine with intent to distribute. ***1556** All defendants moved for judgments of acquittal both at the close of the Government's evidence and at the close of all the evidence. At the close of the Government's evidence, the district court denied Rojas's and Correa's motions and reserved ruling on the others. At the close of all the evidence, the district judge denied all the motions.

At the sentencing hearings, the district court ruled that the defendants would be held liable for all seven hundred kilograms of cocaine that Grieco had planned to import through Giuffre. After adjustments, the court sentenced all four defendants to 235 months' imprisonment and five years' supervised release.

II. ISSUES ON APPEAL

[1][2] Each of the four appellants raises a number of issues on appeal, and some of the issues are common to more than one appellant: [FN2]

> FN2. In addition to the issues listed in the text, Correa contends that the district court erred in refusing to give a "missing witness" instruction to the jury. Correa's argument concerns Agent John Shepard, whom the Government did not call and who was the only agent with a direct view of Correa's house. We hold that the court did not abuse its discretion in refusing to give such an instruction. Testimony at trial from agents in radio contact with Shepard showed that Shepard's testimony was likely to be unfavorable to Correa. In this circumstance, the "missing witness" instruction is inappropriate. See United States v. Link, 921 F.2d 1523, 1529 (11th Cir.), cert. denied, 500 U.S. 958, 111 S.Ct. 2273, 114 L.Ed.2d 724 (1991). Correa also asserts that the district court violated his constitutional right to compulsory process by refusing to subpoena Agent Shepard. On the afternoon of the last day of trial, Correa requested a subpoena be issued to compel Shepard's appearance. The issuance of subpoenas under Fed.R.Crim.P. 17 is within the trial court's discretion, and timeliness is one of the factors the trial court may consider. United States v. Rinchack, 820 F.2d 1557, 1566 (11th Cir.1987). The district court was well within its discretion in refusing so untimely a request.

(1) Aguilera, Rojas, and Tosta all challenge the district court's denial of their motions for acquittal, contending that the Government's evidence did not suffice to show they voluntarily participated in the conspiracy, or, in Rojas's case, to show that he knowingly possessed cocaine.

(2) Aguilera contends that the district court erred in admitting 404(b) evidence when Aguilera received notice of the Government's intent to offer the evidence only a few minutes before trial.

(3) Aguilera contends that the district court erroneously forbade him from cross-examining the Government's 404(b) witness on his knowledge of the sentencing guidelines.

(4) Rojas contends that he was denied effective assistance of counsel.

(5) Tosta and Rojas take issue with the district court's attribution of 700 kilograms of cocaine to them for sentencing purposes.

(6) Rojas argues that the district court erred in giving the jury a "deliberate ignorance" instruction.

III. DISCUSSION

A. Sufficiency of the Evidence

Three defendants, Tosta, Aguilera, and Rojas, contend that the district court improperly denied their motions for acquittal because the Government's evidence was insufficient to convict them. We find the evidence sufficient as to Aguilera and Rojas, but we hold that the evidence was insufficient to convict Tosta. After reviewing the relevant principles of law, we discuss each defendant in turn.

1. Standard of Review

[3] We review the denial of a defendant's motion for acquittal de novo. United States v. Mieres-Borges, 919 F.2d 652, 656 (11th Cir.1990), cert. denied, 499 U.S. 980, 111 S.Ct. 1633, 113 L.Ed.2d 728 (1991); United States v. Kelly, 888 F.2d 732, 739 (11th Cir.1989). In considering the sufficiency of the evidence, we draw all reasonable inferences in the Government's favor. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Keller, 916 F.2d 628, 632 (11th Cir.1990), cert. denied, 499 U.S. 978, 111 S.Ct. 1628, 113 L.Ed.2d 724 (1991). For the evidence to support a conviction, it need not "exclude every reasonable hypothesis of innocence or ***1557** be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

2. Law and Analysis

[4][5] To convict a defendant for conspiracy under 21 U.S.C. § 846, the evidence must show (1) that a conspiracy existed, (2) that the defendant knew of it, and (3) that the defendant, with knowledge, voluntarily joined it. E.g., United States v. Sullivan, 763 F.2d 1215, 1218 (11th Cir.1985). "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and collocation of circumstances.' " Glasser, 315 U.S. at 80, 62 S.Ct. at 469 (quoting U.S. v. Manton, 107 F.2d 834, 839 (2d Cir.1939)); see also United States v. Badolato, 701 F.2d 915, 920 (11th Cir.1983). Guilt may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy. Id.

[6][7] The Government's case against Aguilera, Tosta, and Rojas was circumstantial. Thus, reasonable inferences, and not mere speculation, must support the jury's verdict. United States v. Villegas, 911 F.2d 623, 628 (11th Cir.1990), cert. denied, 499 U.S. 977, 111 S.Ct. 1625, 113 L.Ed.2d 722 (1991). The inference of participation from presence and association with conspirators alone does not suffice to convict. United States v. Bell, 833 F.2d 272, 275 (11th Cir.1987), cert. denied, 486 U.S. 1013, 108 S.Ct. 1747, 100 L.Ed.2d 210 (1988). However, such an inference is permissible in evaluating the totality of the circumstances. Id.

a. Aguilera

[8] Aguilera argues that the Government failed to show that Aguilera voluntarily participated in the conspiracy. The Government's case, according to Aguilera, showed mere association and flight. Aguilera understates the Government's evidence. The Government's case against Aguilera included testimony by law enforcement agents concerning the events on the day of his arrest, testimony by an informant about Aguilera's prior work for Grieco's organization, and documentary evidence associated with Aguilera that agents found in a search of Grieco's house.

The law enforcement agents testified for the Government that on the day of Aguilera's arrest, Aguilera arrived at Grieco's house at 10:20 a.m. in a car rented in Aguilera's name. Aguilera then rode with Grieco for nearly two hours of erratic driving that the agents considered to be countersurveillance. After Grieco observed that he was being followed and left the car, Aguilera continued to drive in the same erratic fashion until he was arrested.

The Government informant, Luis Zaldivar, testified that he had seen Aguilera performing menial tasks for Grieco's organization on at least two prior occasions. [FN3] In June or July of 1988, Zaldivar met Aguilera when Aguilera showed up at Zaldivar's boat to pick up a load of cocaine for Grieco. Zaldivar also transferred cocaine to Aguilera on another occasion in late 1988 or early 1989.

> FN3. At trial, the jury heard that Zaldivar was a former cocaine addict and a drug trafficker serving a sentence that he could reduce only by providing substantial assistance to the Government under Fed.R.Crim.P. 35. (Tr. at 1044, 1045, 1057.) Nonetheless, in reviewing the sufficiency of the Government's evidence, we must resolve all credibility issues in favor of the Government and assume that the jury believed Zaldivar. See United States v. Morales, 868 F.2d 1562, 1574 (11th Cir.1989).

Finally, the Government introduced several documents associated with Aguilera that agents

found in a filing cabinet in Grieco's house. The documents included a photocopy of Aguilera's driver's license, registration papers for a boat trailer in Aguilera's name, receipts from major purchases by Aguilera, certificates of title for a pair of jetskis owned by Aguilera, a boat registration and insurance papers showing Grieco and Aguilera as co-owners, business records for GPV International, a partnership in which Aguilera and Grieco were both partners, and a check written ***1558** by Aguilera to a marina where Grieco and Aguilera's boat was docked.

This evidence supports a finding that Aguilera voluntarily participated in the conspiracy. The jury could reasonably have inferred from Aguilera's evasive driving after Grieco's exit that Aguilera was both aware of and voluntarily assisting the conspiracy. See United States v. Morales, 868 F.2d 1562, 1574 (11th Cir.1989) (including evasive driving by the defendant in a list of evidence showing involvement and active participation in a drug conspiracy). In particular, the fact that Aguilera's countersurveillance effectively led law enforcement agents astray from Grieco's trail could have supported an inference that Aguilera intentionally assisted Grieco in furthering the conspiracy. The jury could also have legitimately taken into account Aguilera's relationship with Grieco, as evidenced by the presence of documents associated with Aguilera in Grieco's house, to find that a conspiracy existed between them. Cf. United States v. Cole, 704 F.2d 554, 557 (11th Cir.1983) (alleged coconspirators' status as members of an "insular" motorcycle club a factor in finding a conspiracy). Finally, evidence of Aguilera's prior acts in support of Grieco's organization could legitimately have reinforced the jury's findings that Aguilera was not merely a bystander, but a knowing and voluntary participant in Grieco's organization. Cf. United States v. Adams, 799 F.2d 665, 672 (11th Cir.1986) (mere presence under suspicious circumstances coupled with a defendant's prior presence under similar circumstances enough to support conviction), cert. denied sub nom. Morrell v. United States, 481 U.S. 1070, 107 S.Ct. 2464, 95 L.Ed.2d 873 (1987). Thus, we affirm Agilera's conviction.

b. Tosta

[9] Tosta also challenges the district court's denial of his motion for acquittal. Tosta argues that the Government's case would not support a finding beyond a reasonable doubt that Tosta knew of and voluntarily participated in the conspiracy. We agree.

The Government's evidence showed Tosta's involvement in two events. The first was on July 18, 1990, when Grieco and Giuffre met to discuss the details of the July 20 cocaine transfer and for Grieco to turn over the trucks with concealed compartments. On July 18, Tosta appeared in response to Grieco's whistle and produced an open envelope containing the keys, registration, and insurance binder for one of the trucks. After handing over the envelope, Tosta and Grieco exchanged a few words in Spanish. [FN4] After Grieco and Giuffre concluded their meeting, Tosta and Grieco left together.

FN4. The content of their conversation is not known because Agent Giuffre speaks no Spanish.

The second event was Grieco and Aguilera's countersurveillance on July 20, 1990, the day of Tosta's arrest. On that day, Tosta was present in the car with Grieco and Aguilera, and later just Aguilera, as Grieco and then Aguilera drove erratically over a course that took them back and forth past the sites where the cocaine-laden trucks were to be parked. Agents finally stopped the car and arrested Tosta and Aguilera. When one of the agents mentioned Tosta's actions on July 18, Tosta responded, "So, what's wrong with that?"

This case is very close, but the Government's case fatally lacks evidence that would support a finding beyond a reasonable doubt that Tosta voluntarily participated in the conspiracy. The sum of the inferences from the evidence is tantamount to that presented against Evasio Garcia in United States v. Kelly, 749 F.2d 1541 (11th Cir.), cert. denied, 472 U.S. 1029, 105 S.Ct. 3506, 87 L.Ed.2d 636 (1985). In Kelly, the Government showed that Garcia had inspected a shrimpboat that was later used to import marijuana. Id. at 1548. The Government also showed that Garcia had been present at a meeting of key conspirators, and that Garcia had been sitting in a parked car near the house where the offloading crew had been preparing to go meet the shrimpboat with its load of contraband. Id. The Kelly court concluded that "all

the record shows is that [Garcia] was an acquaintance of [a key conspirator]." Id.

Tosta's case is very similar to Garcia's. Like Garcia, Tosta performed a facially innocent act that furthered the conspiracy's use ***1559** of one of its instrumentalities. Garcia inspected the shrimpboat, and Tosta was a runner for the keys and registration papers of a truck with concealed compartments. Furthermore, Tosta, like Garcia, was present in very suspicious circumstances. Garcia was sitting in a parked car where the smugglers were preparing to offload the marijuana; Tosta was riding in a countersurveillance vehicle near the site of a cocaine transfer.

The Kelly court concluded that "[a] reasonable jury could not conclude that Evasio Garcia was a co-conspirator in the importation and distribution schemes." Id. at 1549. Likewise, a reasonable jury could not ignore the doubts raised by the possibility that Tosta was an unwitting dupe in his sole action that furthered the conspiracy. See United States v. Littrell, 574 F.2d 828, 833 (5th Cir.1978). Furthermore, in the absence of any evidence that Tosta himself was on the lookout, a reasonable jury could not infer from Tosta's mere presence in Aguilera's rental car that Tosta was knowingly engaged in countersurveillance in furtherance of the conspiracy. Cf. United States v. Villegas, 911 F.2d 623, 628 (11th Cir.1990) (holding that the defendant's looking left and right in the vicinity of the defendant's brother's cocaine deal was not sufficient to show participation in the conspiracy).

Thus, we conclude that the Government's evidence was insufficient to convict Tosta of conspiracy to distribute cocaine. We therefore reverse Tosta's conviction.

c. Rojas

Rojas also challenges the district court's denial of his motion for acquittal on both the conspiracy and possession counts. Rojas argues that the evidence failed to show that he knowingly participated in the conspiracy and that he knowingly possessed cocaine. We disagree. We address the conspiracy conviction first, under the rules of law discussed above.

i. Conspiracy

[10] In Rojas's case, the evidence was ample to show Rojas's knowing and voluntary participation in the conspiracy. The Government showed that Rojas picked up the truck with the contraband and drove the truck to Correa's house, following a small brown car. Government agents testified that Rojas drove the truck into Correa's garage and closed the garage door. A little while later, Rojas emerged from the garage in the truck emptied of its load of cocaine. While Rojas was in the house, no one entered or left. Government agents testified that shortly after Rojas left they discovered the cocaine in a bedroom of Correa's house.

Rojas testified in his defense that he never drove the truck into the garage, which was occupied by the car of a man whose name he did not know. He was told to stay in Correa's living room. He sat there alone for twenty-five or thirty minutes. Then Correa, whom Rojas did not know, came out of the shower and told him to leave. He never saw anyone else in the house except Correa.

Circumstantial evidence suffices to show participation in a conspiracy, see Glasser, 315 U.S. at 80, 62 S.Ct. at 469, and the evidence here clearly supports reasonable inferences of guilt, see Villegas, 911 F.2d at 628. A jury could reasonably have inferred from Rojas's collection of the cocaine-laden truck and following of the little brown car to Correa's house that Rojas was voluntarily performing the task for the conspiracy. The jury could also reasonably have inferred that the movement of seventy one-kilogram packages of cocaine from the truck to a bedroom in twenty-five minutes occurred with Rojas's knowing cooperation and assistance. Moreover, Rojas's implausible testimony itself could legitimately support an inference of guilt. See United States v. Eley, 723 F.2d 1522, 1525 (11th Cir.1984). Thus, we conclude that a reasonable jury could have found Rojas guilty beyond a reasonable doubt.

ii. Possession

[11][12] To convict Rojas for possession of cocaine with intent to distribute, the Government must show both knowing possession and an intent to distribute. United States v. Gardiner, 955 F.2d 1492, 1495 (11th Cir.1992). Constructive possession is sufficient, and intent to distribute is inferable from the quantity of cocaine. Id. The

evidence was ***1560** also ample to convict Rojas on this charge. The Government showed that in twenty-five minutes seventy kilograms of cocaine moved from the truck that Rojas had driven to a bedroom in a house occupied only by Rojas and Correa. The jury could reasonably have inferred that Rojas was in possession of the cocaine during that twenty-five minutes. Moreover, the jury could have inferred an intent to distribute from the large quantity of cocaine. Thus, we conclude that the district court properly denied Rojas's motion for acquittal.

B. 404(b) Reasonable Notice

1. Standard of Review

[13] We review district court rulings on the admissibility of evidence under an abuse of discretion standard. United States v. Cardenas, 895 F.2d 1338, 1342 (11th Cir.1990).

2. Discussion

Because the prosecutor failed to provide notice of the testimony until immediately before jury voir dire, Aguilera asserts that the district court abused its discretion in admitting prior bad acts testimony under Federal Rule of Evidence 404(b). A few minutes before jury selection on May 26, the prosecutor notified Aguilera's counsel that she intended to call two witnesses, Fernando Loaiza-Alzate and Luis Zaldivar, to testify about Aguilera's role in Grieco's earlier drug deals. Aguilera's counsel objected to the late notice. The district court did not immediately rule on its admissibility, asking instead for memoranda from the parties.

On June 1, Aguilera's counsel again raised the issue, and after a hearing the district court found that the prosecutor had not known of the potential 404(b) testimony until Friday, May 22, and that the prosecutor had notified the defense the next business day, May 26. [FN5] Because the prosecutor did not plan to call the witnesses until June 1, the court found that the defense had in fact had six days' notice. The court concluded that six days' notice was reasonable under the rule, and that the prosecution had therefore satisfied the requirement.

FN5. Monday, May 25, 1992 was Memorial Day.

At the hearing, Aguilera called the DEA case agent, Joseph Giuffre, who testified that he had known of Loaiza's potential 404(b) testimony against Aguilera as early as the fall of 1990. However, Giuffre had not known of Zaldivar, or of Zaldivar's dealings with Grieco's organization, until the week before the trial, when the prosecutor learned of it. Ultimately, the prosecution did not call Loaiza, but did call Zaldivar. It is the admission of Zaldivar's testimony that Aguilera challenges.

Rule 404(b) was amended in 1991 to require the prosecution to provide reasonable notice in advance of trial of its intention to present 404(b) evidence, if the accused has requested the notice. [FN6] In this case, counsel for Aguilera had requested notice by adopting codefendant Tosta's motion for disclosure of extrinsic evidence, which the magistrate judge granted in September, 1990. Thus, the 404(b) testimony was admissible against Aguilera only if the prosecution's notice a few minutes before voir dire constituted "reasonable notice in advance of trial." [FN7] The construction of 404(b)'s reasonable notice requirement ***1561** is a question of first impression in this circuit.

FN6. The rule now reads: (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Fed.R.Evid. 404(b) (emphasis added).

FN7. Our analysis here does not concern whether the Government has shown the "good cause" that 404(b) requires for admission of 404(b) evidence during trial. See Fed.R.Evid. 404(b). The Government did give pretrial notice, however brief, and thus our inquiry is limited to whether this pretrial notice was reasonable. See id.

In the particular circumstances of this case, we hold that the district court did not abuse its

discretion in ruling that the prosecution had provided "reasonable notice" of Zaldivar's testimony. The policy behind 404(b) is "to reduce surprise and promote early resolution on the issue of admissibility." Fed.R.Evid. 404(b) Judiciary Committee note. The rule imposes no specific time limits beyond requiring reasonable pretrial notice, and the Committee notes explain that "what constitutes a reasonable ... disclosure will depend largely on the circumstances of each case." Id.

The Committee notes are silent as to what circumstances are relevant. To fill this gap, we analogize to other evidentiary notice provisions, such as those in the residual hearsay exceptions (Fed.R.Evid. 803(24) and 804(b)(5)), and to notice requirements imposed by discovery orders. We are mindful that the analogies cannot be taken too far, since the language of other notice requirements in the Federal Rules of Evidence is more specific than the "reasonable notice" required by 404(b). See Fed.R.Evid. 609(b), 803(24), 805(b)(5). Furthermore, discovery order notice requirements are not exactly parallel because the trial judge has more discretion in fashioning a remedy for discovery violations than for failure to give notice under 404(b). See United States v. Hartley, 678 F.2d 961, 977 (11th Cir.1982), cert. denied, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983); compare Fed.R.Crim.P. 16(d)(2) with Fed.R.Evid. 404(b). Despite these differences, we find that three circumstances appearing in the analogous caselaw comport with the language and purpose of 404(b).

First, in evaluating the sufficiency of evidentiary notice, courts have considered the motivations and circumstances of the party presenting the evidence. See, e.g., United States v. Euceda-Hernandez, 768 F.2d 1307, 1313 (11th Cir.1985) (reversing a district court's suppression of evidence not disclosed by the prosecution under a discovery order, noting among other things that the prosecution's failure to notify was unintentional); United States v. Bailey, 581 F.2d 341, 348 (3d Cir.1978) (affirming admission of hearsay despite a lack of notice under 804(b)(5) because the declarant became unavailable only after trial began, thus making it impossible for the proponent to give earlier notice); United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir.1976) (admitting hearsay under 803(24) despite a lack of notice when the hearsay unexpectedly became necessary for effective rebuttal), cert. denied, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). "Reasonable notice" under 404(b) should also take into account the circumstances of the prosecution's own discovery of the evidence. However, the notice requirement's purpose of "reduc[ing] surprise" is not served by allowing mere negligence to excuse a prosecutor's failure to give notice. To protect defendants from "trial by ambush," the Government should be charged with the knowledge of 404(b) evidence that a timely and reasonable preparation for trial would have revealed.

Second, courts have focused upon the prejudice suffered by the defendant because of the lack of notice. See, e.g., United States v. Parker, 749 F.2d 628, 633 (11th Cir.1984) (affirming the admission of hearsay under 803(24) despite a lack of notice because the opponent of the evidence had not shown he was harmed); United States v. Leslie, 542 F.2d 285, 291 (5th Cir.1976) (affirming the admission of hearsay under 803(24) although the record showed no notice, because the defendant was not harmed by the lack of notice); United States v. Doe, 860 F.2d 488, 492 (1st Cir.1988) (affirming admission of hearsay under 803(24) when defendants did not appear to be prejudiced by the lack of notice), cert. denied sub nom. Andrades-Salinas v. United States, 490 U.S. 1049, 109 S.Ct. 1961, 104 L.Ed.2d 430 (1989). Since the policy of 404(b)'s notice provision is to protect the defendant by reducing surprise, see Fed.R.Evid. 404(b) Judiciary Committee note, the possibility of prejudice to the defendant from a lack of opportunity to prepare should weigh heavily in the court's consideration.

Finally, a few courts have considered the importance of the evidence to the proponent's ***1562** case. See, e.g., Euceda-Hernandez, 768 F.2d at 1313 (reversing an order to suppress evidence not disclosed by the prosecutor under a discovery order, noting among other things that the suppressed evidence was "extremely important to the Government's case"); United States v. Burkhalter, 735 F.2d 1327, 1329 (11th Cir.1984) (reversing as too extreme a sanction an order effectively suppressing evidence not disclosed under a discovery order). As in the discovery cases, the court should take into account the significance of the evidence to the prosecution's case. The second sentence of rule 404(b) is a rule of inclusion, and 404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to

the prosecution's case.

[14] Thus, by analogy to other notice provisions, we can discern three factors the court should consider in determining the reasonableness of pretrial notice under 404(b):

(1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;

(2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and

(3) How significant the evidence is to the prosecution's case.

We now apply these factors to the circumstances of this case.

[15] First, the district court found that the prosecutor did not know of Zaldivar's potential testimony until the Friday before trial began. [FN8] The case agent testified that he did not know of Zaldivar before the prosecutor did. Although the Government's failure to timely prepare for a trial would not excuse the lack of notice, it is clear from the record that a reasonably timely preparation for trial would not have revealed Zaldivar's possible testimony before that time. Although Zaldivar had made a statement to the DEA as early as January 1992, Zaldivar was not part of the conspiracy in which the defendants were involved and that Agent Giuffre was investigating. Thus, it is not apparent how Giuffre would have learned that Zaldivar had made statements concerning Aguilera. In fact, Zaldivar's testimony came to the attention of the prosecutor only when Zaldivar himself telephoned her.

FN8. The trial began the following Tuesday.

Second, Aguilera's counsel has been vague, both during trial and in this appeal, as to what measures he might have taken, given more time, to meet the evidence. At the district court hearing on the 404(b) evidence's admissibility six days after the prosecution had notified the defense of the 404(b) evidence, Aguilera's counsel proposed only to send out his investigator to check Zaldivar's stories. If even after six days Aguilera could point to no specific actions he might take given more preparation time, it was within the district court's discretion to conclude that Aguilera would not be prejudiced by having only six days' notice. [FN9]

FN9. In cross-examination of Zaldivar, Aguilera's lawyer in fact brought out that Zaldivar was a cocaine and marijuana smuggler, that Zaldivar had lied to a Customs inspector, that he did not pay taxes on his drug profits, that his testimony was part of an effort to get out of prison sooner, that he had been granted use immunity, that Zaldivar had not mentioned Aguilera during his initial debriefing, that Zaldivar was a cocaine addict, that he tested positive for marijuana when he was first incarcerated, that at the time of his arrest three state arrest warrants had been issued for him, that he had been arrested for burglary, and that Zaldivar could not remember who his last employer was. Thus, it seems likely that even if the district court erred in admitting the 404(b) evidence on such short notice, the error was harmless.

Finally, the evidence was significant to the Government's case against Aguilera. The Government's other evidence was merely that Aguilera was present in the countersurveillance car, that Aguilera later drove the car, and that papers associated with Aguilera were in Grieco's house. Zaldivar's testimony to Aguilera's prior cocaine-related work for Grieco lent strong support to a finding that Aguilera was aware of and voluntarily participated in the conspiracy. Along with the other factors, this circumstance weighs in the Government's favor.

On the record in this case, all three considerations thus weigh somewhat in favor of finding that the Government's pretrial notice was reasonable. We therefore hold that the ***1563** district court did not abuse its discretion in admitting the evidence.

C. Other Issues

1. Exclusion of Sentencing Cross-Examination

[16] Aguilera contends that the district court's violation of his Sixth Amendment Confrontation Clause rights entitles him to a new trial. During cross-examination of Zaldivar, the Government's 404(b) witness, Aguilera's counsel attempted to elicit Zaldivar's understanding of the sentencing benefits he would earn by testifying for the

Government. [FN10] On the Government's objection, the court admonished Aguilera's counsel to "stay away from anything having to do with any sentencing." (Tr. at 1075.)

> FN10. The relevant transcript passage reads: Q. Your initial sentence was reduced from 17.7 years to nine years, is that correct? A. That is correct. Q. And by testifying here today your [sic] hoping with this story to get another sentence reduction, isn't that correct? MS. KING [prosecutor]: Objection form of the objection [sic]. THE COURT: Overruled. THE WITNESS: Yes, that is correct.
>
> . . . . .
>
> Q. How much of a reduction, sir, do you think you're going to get out of this case? A. I don't know, sir.
>
> . . . . .
>
> Q. Sir, in federal court you serve about eighty-five percent of your sentence, do you not? MS. KING: Objection, your Honor.
>
> . . . . .
>
> Q. So you're familiar with the guidelines? THE COURT: Sustained.
>
> . . . . .
>
> Q. Are you familiar with the Sentencing Guidelines? MS. KING: Objection, your Honor. A. Yes, I am. Q. Do you have an opinion as to how much--MS. KING: Objection, your Honor. THE COURT: Counsel, stay away from anything having to do with any sentencing. (Tr. at 1073-75.)

Aguilera argues that he was unable to expose Zaldivar's motive for testifying. He was thus effectively rendered unable to attack Zaldivar's credibility, in violation of his Sixth Amendment rights. See Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). We disagree. Our reading of the transcript convinces us that Aguilera not only effectively impeached Zaldivar's credibility, but also impeached it repeatedly on the very issue of sentence reduction. (Tr. at 1065, 1074, 1078-79.) Aguilera's contention is thus meritless.

2. Ineffective Assistance of Counsel

[17] Rojas challenges his conviction on the ground that he was denied effective assistance of counsel in violation of his Sixth Amendment rights. It is settled law in this circuit that a claim of ineffective assistance of counsel cannot be considered on direct appeal if the claims were not first raised before the district court and if there has been no opportunity to develop a record of evidence relevant to the merits of the claim. See United States v. Hilliard, 752 F.2d 578, 580 (11th Cir.1985); United States v. Lopez, 728 F.2d 1359, 1363 (11th Cir.), cert. denied, 469 U.S. 828, 105 S.Ct. 112, 83 L.Ed.2d 56 (1984); United States v. Griffin, 699 F.2d 1102, 1107 (11th Cir.1983). Rojas did not raise ineffective assistance of counsel as a ground for his motion for new trial, and the record is not sufficiently developed to evaluate the merits of the claim. Hence, the claim is more appropriately raised in a proceeding under 28 U.S.C. § 2255. See id.

3. Sentencing

[18] Rojas also challenges his sentence. [FN11] In calculating Rojas's offense level, the district court attributed to Rojas 700 kilograms of cocaine, the total amount of the importation Grieco and Giuffre planned. See U.S.S.G. § 1B1.3(a)(1) (1991); id. § 2D1.1(c)(2). Rojas contends that seventy kilograms, the quantity hidden in the truck Rojas drove, was the appropriate amount.

> FN11. Tosta makes a similar challenge, but our reversal of his conviction makes it unnecessary to address his contentions.

The Guidelines provide that a member of the conspiracy is liable for all conduct of others in furtherance of the conspiracy that is reasonably foreseeable by the defendant. Id. § 1B1.3(a)(1). At Rojas's sentencing ***1564** hearing, Rojas did not request an individualized finding of fact as to what quantity would have been reasonably foreseeable to him, and the district court did not make one. Under these circumstances, the district court is entitled to rely upon the factual statements in the presentencing report (PSI) without making an individualized finding. See Fed.R.Crim.P. 32(c)(3)(D). But

Rojas's PSI is at best ambiguous. It conclusorily states that "the amount of cocaine involved in this offense is approximately 700 kilograms." On that basis, the PSI fixes the offense level at 40 because the offense involves at least 500, but less than 1500 kilograms. See U.S.S.G. § 2D1.1(a)(3), (c)(2) (1991). The PSI also states, however, that Rojas served as a "hired hand" and that it "is doubtful that the defendant realized the quantity of contraband he was transporting...." It is unclear whether this latter statement refers to the contraband on Rojas's truck or to the contraband involved in the overall conspiracy. However construed, the statement casts doubt on the propriety of attributing 700 kilograms to Rojas.

Because we find the PSI ambiguous, we conclude that no factual finding supports the quantity of cocaine attributable to Rojas under the guidelines. We therefore vacate Rojas's sentence and remand for resentencing following a finding relative to the quantity of cocaine attributable to Rojas. [FN12]

> FN12. The Government does not argue that there is a finding relative to the quantity of cocaine attributable to Rojas or that Rojas waived the objection by failing to object after sentencing. The Government's argument is rather that we should uphold the sentence because the record would support a finding attributing 700 kilograms to Rojas. We prefer that the district court resolve this factual dispute.

4. Jury Instructions

a. Standard of Review

[19][20] The district court has broad discretion in formulating a jury charge as long as the charge as a whole is a correct statement of the law. United States v. Bent, 707 F.2d 1190, 1195 (11th Cir.1983), cert. denied, 466 U.S. 960, 104 S.Ct. 2174, 80 L.Ed.2d 557 (1984). We will not reverse a conviction unless we find that issues of law were presented inaccurately or the charge improperly guided the jury in such a substantial way as to violate due process. United States v. Turner, 871 F.2d 1574, 1578 (11th Cir.), cert. denied, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989).

b. Discussion

Rojas contends that the district court improperly gave the jury a "deliberate ignorance" instruction. [FN13] We agree. However, we find that the error was harmless. A "deliberate ignorance" instruction is appropriate when "the facts ... support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir.1991) (quoting United States v. Alvarado, 838 F.2d 311, 314 (9th Cir.1987)). "[A] district court should not instruct the jury on 'deliberate ignorance' ***1565** when the relevant evidence points only to actual knowledge, rather than deliberate avoidance." Id. (emphasis in original).

> FN13. The court instructed the jury: When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if a defendant is aware of a high probability of its existence unless he actually believes that it does not exist. So with respect to the issue of defendants Estrada and Rojas's knowledge in this case, if you find from all evidence beyond a reasonable doubt that a defendant believed that he possessed cocaine and deliberately and consciously tried to avoid learning that there was cocaine and deliberately and consciously tried to avoid learning of its presence in order to be able to say, if he should be apprehended, that he did not know cocaine was on or about his person, you may treat such deliberate avoidance, if so found, of positive knowledge as the equivalent of knowledge. In other words, you may find that a defendant acted knowingly if you find beyond a reasonable doubt either that the defendant actually knew that he possessed cocaine or, two, that he deliberately closed his eyes to what he had every reason to believe was the fact. I must emphasize, however, that the requisite proof of knowledge on the part of the defendant cannot be established by merely demonstrating that he was negligent, careless or foolish. (Tr. at 1774-75.)

In Rivera, the defendants were arrested while attempting to bring three false-bottomed suitcases into the country with cocaine in the false bottoms. Id. at 1565. In its analysis of the appropriateness of the instruction, the court pointed out that the defendants had not indicated in any way their awareness of the unusual construction of their

suitcases and their avoidance of positive knowledge of the contents. Id. at 1572. Nor was there any evidence that the defendants had acquired their suitcases under suspicious circumstances, but that the defendants deliberately avoided confirming their suspicions. Id. Thus, to contend that the instruction was appropriate because the defendants should have known they were carrying cocaine "skate[d] dangerously close to [urging] a negligence standard." Id.

[21] In Rojas's case, the evidence likewise pointed to actual knowledge rather than deliberate avoidance. The relevant evidence was that Rojas drove one of the cocaine-laden trucks to Correa's house and was present while seventy kilograms of cocaine were taken off the truck and placed in a bedroom of the house. The inference of knowledge based on this evidence is that Rojas, being present during such a large movement of cocaine, had to have been aware of it. No evidence suggests that Rojas strongly suspected cocaine but "purposely contrived" not to learn about it. See id. at 1572. Hence, giving the instruction was error.

[22] However, as in Rivera, we find that the error was harmless. Id. at 1572-73. The Government's evidence, though circumstantial, very strongly supported a finding that Rojas knew of the cocaine. The jury could easily have based its verdict on a finding of actual knowledge, rather than deliberate ignorance. We therefore affirm Rojas's convictions.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the convictions of Correa, Rojas, and Aguilera. However, we REVERSE Tosta's conviction, and we VACATE Rojas's sentence and REMAND for resentencing.

AFFIRMED in part; REVERSED in part; VACATED and REMANDED in part.

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UNITED STATES of America, Appellee,
v.
Garry D. KERN, Appellant.
UNITED STATES of America, Appellee,
v.
Troy P. REEVES, Appellant.

Nos. 93-1524, 93-1566.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 13, 1993.

Decided Dec. 17, 1993.

Defendants were convicted in the United States District Court for the District of Nebraska, Lyle E. Strom, Chief Judge, of bank robbery, conspiracy to commit bank robbery, and carrying of firearm during and in relation to crime of violence. Defendants appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) other acts evidence was admissible on issue of intent to conspire; (2) motion for new trial on basis of newly discovered evidence was properly denied; and (3) state's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
Government gave "reasonable **notice**" of general nature of bad act evidence to be used, when government informed defendants in hearing before magistrate judge that it might use evidence from some local robberies and when it provided the reports one week later, a week before trial. Fed.Rules Evid.Rule **404(b)**, 28 U.S.C.A.

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

[2] CRIMINAL LAW ⇐ 369.2(8)
110k369.2(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(8)
110k371(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 945(2)
110k945(2)
Police report indicating confession to hotel robbery and refusal to name accomplices would not exonerate defendants in bank robbery prosecution using evidence of defendants' involvement in the hotel robbery, and, thus, report did not entitle defendants to new trial; if the evidence had been presented to jury, it could reasonably have believed that hotel robber was merely protecting defendants, and although jury could also have inferred that hotel robbery victim improperly identified defendants, evidence of guilt warranted denial of new trial motion. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

[4] CRIMINAL LAW ⇐ 700(6)
110k700(6)
State's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady. U.S.C.A. Const.Amends. 5, 14.

***123** Mark W. Bubak, Omaha, NE, argued, for appellants.

Michael P. Norris, Asst. U.S. Atty., Omaha, NE, argued, for appellee.

Before McMILLIAN, BOWMAN, and MAGILL,

Circuit Judges.

MAGILL, Circuit Judge.

Troy B. Reeves (Reeves) and Garry D. Kern (Kern) appeal the judgment entered by the district court [FN1] following a jury's finding of guilt on three bank-robbery-related counts. Specifically, Reeves and Kern (the defendants) contend the trial court erred when it admitted evidence of another subsequent robbery, when it refused to grant a new trial after the discovery of new evidence, and when it found as a matter of law that conspiracy to commit bank robbery is a crime of violence. For the reasons addressed below, we affirm the judgment of the district court.

FN1. The Honorable Lyle E. Strom, Chief Judge, United States District Court for the District of Nebraska.

I. BACKGROUND

On June 12, 1992, an Omaha branch office of the First Federal Savings and Loan Association of Lincoln (First Federal) was robbed of approximately $12,700 by two stocking-masked males who differed significantly in height and weight. The smaller robber entered the bank first and the larger robber followed carrying a black short-barreled shotgun. The robbers left the bank and entered a recently-stolen white Buick driven by a third male. Immediately after the robbery, a stocking mask with a few human hairs was found outside the bank.

Kern's girlfriend at the time, Andrea Fraire (Fraire), testified at trial that Kern had related a plan to her to rob a jewelry store and bank in Omaha. According to Fraire, the planned robberies were to take place on June 12, 1992, and involved the use of stolen getaway cars. Fraire further testified that on the evening of June 12, 1992, Kern arrived home with $4000 to $4500 in cash.

Jack Parrott, a security guard for the shopping center in which the bank was located, testified at trial that he observed a rusted gold Oldsmobile Cutlass (Cutlass) occupied by four males in the shopping center parking lot on June 11, 1992. The next day, June 12, the same car was observed again by Parrott, again occupied by four males. Later that same morning, Parrott observed the Cutlass in a church parking lot parked beside a white Buick. The white Buick was now occupied by three of the males and the Cutlass held the fourth individual. After observing the Buick for a short time, Parrott noticed a shotgun being passed to a backseat passenger. Parrott subsequently identified Reeves from a photograph array as the frontseat passenger. Although Parrott was unable to identify Kern from a police lineup, he did identify Kern at trial as the backseat passenger.

The bank employees were unable to identify Reeves or Kern from lineups or at trial. Reeves and Kern both had alibi witnesses testify that they were elsewhere at the time of the robbery. The human hairs in the mask, however, were identified by an FBI hair and fiber expert as matching samples taken from Kern.

At trial, testimony was introduced by the government regarding the defendants' alleged participation in a hotel robbery that occurred seventeen days after the bank robbery. Kern was charged in state court with commission of this robbery. The testimony was prefaced by a limiting instruction prohibiting the jury from using this testimony to establish "bad" character and, accordingly, conformity with that character. The testimony was then introduced pursuant to Federal ***124** Rule of Evidence 404(b). The hotel robbery victim, Ashford, testified he was robbed by three armed masked males, and he identified both Reeves and Kern as two of the individuals who robbed him.

Following a jury trial, the defendants were convicted of all three counts against them. Count I charged the defendants with conspiracy to commit bank robbery in violation of 18 U.S.C. § 371. Count II charged them with the June 12, 1992 bank robbery of First Federal in violation of 18 U.S.C. § 2113(a), (d). Count III charged Reeves with carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1), and Kern was charged as Reeves' co-conspirator on that count.

After the jury convicted Reeves and Kern for the First Federal robbery, the government received from the Omaha police a supplementary report related to the hotel robbery. An individual named Stacey Lue (Lue) confessed to participating with two accomplices in the hotel robbery. Lue was

specifically asked if Reeves and Kern were his accomplices, but he denied any participation on their part. Lue, however, refused to name his two accomplices. Upon receipt, the government immediately disclosed this information to the defendants' attorneys. Following the disclosure of the Lue confession, Reeves and Kern moved for a new trial. In state court, Kern pleaded nolo contendere to the hotel robbery charge and was convicted.

II. DISCUSSION

The defendants contend that three errors of the trial court mandate reversal and a new trial: admission of Ashford's testimony, Brady [FN2] evidence and/or newly discovered evidence, and the district court's finding as a matter of law that conspiracy to commit bank robbery is a crime of violence as defined by 18 U.S.C. § 16. We find that the district court committed no reversible error, and we affirm the court's judgment.

FN2. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A. The Hotel Robbery Evidence

The defendants object to the admission into evidence of Ashford's testimony regarding the hotel robbery because they claim the government gave insufficient **notice** that it planned on using this evidence and it was not properly admissible under Federal Rule of Evidence **404(b)** (Rule **404(b)**). The district court, however, has broad discretion to admit such evidence and its decision will not be overturned unless it is clear that the evidence has no bearing on the case. United States v. Sykes, 977 F.2d 1242, 1246 (8th Cir.1992).

[1] The government gave the defendants adequate **notice** that it planned on using Rule **404(b)** evidence. The rule states the prosecution must "provide reasonable **notice** in advance of trial, or during trial ... on good cause shown, of the general nature of any such evidence." Fed.R.Evid. **404(b)**. The magistrate judge specifically ordered that any "bad act" evidence be disclosed at least fourteen days prior to trial. The government complied by informing the defendants in a hearing before the magistrate judge that the government might use evidence from some local robberies. See Tr. at 335. At that time, the government did not yet have the state reports concerning these robberies. Approximately one week before trial, when the government obtained the reports, the defendants were likewise provided with these reports. Id. We find that the government's **notice** satisfies the requirements of Rule **404(b)**; the district court did not abuse its discretion in finding that this **notice** was reasonable.

Rule 404(b) prohibits the admission of "other crimes, wrongs, or acts" to prove the character of a person, and hence, conformity with that character; that is, it prohibits propensity evidence. See id. The rule, nonetheless, specifically recognizes that evidence of "other crimes, wrongs, or acts" could be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Id.

To properly admit Rule 404(b) evidence for purposes other than to prove propensity, it must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close ***125** in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act, and (4) not have a prejudicial value that substantially outweighs its probative value. Sykes, 977 F.2d at 1246; United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991). The district court warned the jury in an instruction prior to Ashford's testimony that "the mere fact that these defendants may have committed a similar act in the past is not evidence that they committed the acts charged in this case." Tr. at 365. The district court repeated essentially the same warning in Jury Instruction No. 10. The permissible purposes enumerated by the district court for which this testimony could be considered included proof of identity, knowledge, plan, motive, and intent to conspire.

[2] We find that the hotel robbery evidence was properly admitted to prove that Reeves and Kern intended to enter into an agreement or understanding to commit robbery and that they understood the purpose of this agreement. [FN3] The court instructed the jury that in order to find the defendants guilty of conspiracy to commit bank robbery, it had to find four elements: (1) two or more persons reached an agreement to commit the crime, (2) the defendant voluntarily and

intentionally joined in the agreement, (3) at the time the defendant joined in the agreement, he knew the purpose of the agreement, and (4) that while the agreement was in effect, one or more of the persons who had joined in the agreement did an overt act in order to carry out the agreement. Thus, the hotel robbery evidence was relevant to a material fact: intent to conspire. See Cheek v. United States, 858 F.2d 1330, 1336-37 (8th Cir.1988); United States v. Scholle, 553 F.2d 1109, 1121 (8th Cir.), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977); United States v. Carlson, 547 F.2d 1346, 1354 & n. 5 (8th Cir.1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977).

> FN3. We do not decide whether the hotel robbery evidence could otherwise have been admissible as evidence of identity, plan, or motive, because we find the district court did not abuse its discretion in allowing its admission into evidence and the limiting instruction properly warned the jury not to impermissibly use this evidence as proof of propensity. However, we do not countenance the district court's use of this virtual laundry list of permissible Rule 404(b) purposes. See United States v. Mothershed, 859 F.2d 585, 589 (8th Cir.1988). Such an action, nevertheless, in itself is not a basis for reversal. See id.

As required by Sykes and Johnson, the hotel robbery evidence was similar in kind and close in time to the crime charged. The hotel robbery occurred only seventeen days after the bank robbery. Both robberies were committed by three stocking-masked males. In both robberies, the larger male carried a black short-barreled shotgun. Moreover, the smaller masked robber in both robberies vaulted over a relatively high obstacle: the teller's counter in the bank robbery and the desk in the hotel robbery.

Ashford's testimony regarding the hotel robbery was sufficient for a jury to have found that Reeves and Kern committed the hotel robbery. Ashford not only made a positive identification of the defendants at trial, but he also identified Reeves from an array of photographs soon after the hotel robbery.

Moreover, the court's limiting instruction to the jury was sufficient to prevent undue prejudice from the admission of this evidence. Therefore, because the hotel robbery evidence was admissible to prove that the defendants intended to enter into a conspiracy to rob, we find that the district court did not abuse its discretion when it allowed Ashford to testify.

B. The Supplementary Omaha Police Division Report

[3] After the defendants received the Omaha police division supplementary report (the report) indicating that Lue had confessed to the hotel robbery and refused to name his accomplices, the defendants moved for a new trial. Reeves and Kern claim that the report "exonerated" them and hence a new trial should have been granted pursuant to Federal Rule of Criminal Procedure 33 (Rule 33). Furthermore, they claim that Brady mandates a new trial because the knowledge ***126** of the Omaha police regarding this report should be imputed to the federal prosecutor. We do not agree that the new evidence exonerated the defendants or that the prosecutor withheld evidence from the defendants.

Rule 33 allows a court to grant a motion for a new trial on the basis of newly discovered evidence if the evidence is, in fact, discovered since trial; the court may infer the movant has been diligent; the evidence is not merely cumulative or impeaching; the evidence is material; and the newly discovered evidence would probably produce an acquittal. United States v. Gustafson, 728 F.2d 1078, 1084 (8th Cir.), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984); see also United States v. Wang, 964 F.2d 811, 813 (8th Cir.1992) (new trial may be granted if the defendant's substantial rights are affected). The defendants' argument fails because the report did not exonerate them; that is, it would not have been likely to have produced an acquittal. As stated by the district court, the report [FN4] would merely have "given the jury some additional information to evaluate in determining whether or not Mr. Ashford had indeed properly identified the two defendants as being participants." Tr. at 766. Had this evidence been presented to the jury, the jury could reasonably have believed that Reeves and Kern were Lue's accomplices and that Lue was merely protecting them by denying their participation in the hotel robbery. The jury could also have inferred that Ashford improperly identified Reeves and Kern as participants in the hotel robbery. The district court, however, found that this latter possibility did not warrant a new

trial. Particularly in light of the amount of evidence presented to the jury on the issue of the defendants' guilt, the district court did not abuse its discretion by denying the defendants' motion for a new trial. See Gustafson, 728 F.2d at 1084.

> FN4. The report states, in relevant part: [Lue] had committed that robbery with two other individuals. Previously arrested in connection with this robbery was a Garry KERN, and a Troy REEVES had also been identified as a suspect in this robbery also. I, Officer MAHONEY, asked Stacy LUE if these other two suspects were with him when this robbery occurred, and LUE stated that they were not; however, he would not name the other two suspects out of fear.

[4] Nor does Brady mandate a new trial in this case. See Brady, 373 U.S. at 87-88, 83 S.Ct. at 1196-97. A defendant's due process rights are violated under Brady if a prosecutor "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty." Id. In order to establish such a claim, the prosecutor must have suppressed or withheld evidence that was both favorable and material to the defense. Moore v. Illinois, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). Nothing in this record indicates that this prosecutor withheld evidence from the defendants. Here, the prosecutor simply did not have the report until the trial was over. Such a case is fundamentally different than when information is in the prosecutor's files. See State v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). We do not accept the defendants' proposal that we impute the knowledge of the State of Nebraska to a federal prosecutor. See United States v. Walker, 720 F.2d 1527, 1535 (11th Cir.1983) (refusing to impute the knowledge of state officials to a federal prosecutor), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). Consequently, we hold that the district court did not abuse its discretion when it refused to grant a new trial.

Finally, we find wholly without merit Kern's contention that conspiracy to commit bank robbery is not a crime of violence as defined by 18 U.S.C. § 16, and we reaffirm our previous holding to that effect. See United States v. Johnson, 962 F.2d 1308, 1311 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 358, 121 L.Ed.2d 271 (1992), and cert. denied, --- U.S. ----, 113 S.Ct. 1418, 122 L.Ed.2d 788 (1993).

III. CONCLUSION

Accordingly, we find that the district court did not abuse its discretion when it admitted the hotel robbery evidence and denied the defendants' motion for a new trial. Moreover, the district court properly found that conspiracy to commit bank robbery is a ***127** crime of violence. Therefore, we affirm the judgment of the district court.

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UNITED STATES of America, Appellee,
v.
Eugene Lamar SUTTON, Appellant.

No. 94-2597.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 11, 1994.

Decided Dec. 7, 1994.

Defendant was convicted in the United States District Court for the District of Minnesota, Paul A. Magnuson, Chief Judge, of bank robbery, use of firearm in course of violent crime, and being felon in possession of firearm. Defendant appealed. The Court of Appeals, McKay, Senior Circuit Judge, sitting by designation, held that: (1) district court did not abuse its discretion in excusing the government's failure to timely notify defendant that it intended to introduce evidence of defendant's prior narcotics use; (2) evidence of defendant's prior drug use was not material; (3) prejudicial impact of evidence substantially outweighed its probative effect; (4) admission of evidence of defendant's prior drug use was harmless error; (5) district court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by prosecution witness; and (6) conviction was supported by sufficient evidence.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
District court did not abuse its discretion in excusing the government's failure to notify defendant at least four days prior to trial, pursuant to district court orders, that it intended to introduce evidence of defendant's prior narcotics use in trial for bank robbery; the government discovered the evidence only five days before trial on a Friday and notified defendant on the following Monday, and defendant was on notice that his involvement with drugs would be an issue at trial. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, evidence of defendant's prior drug use was not material, where government simply asked the jury to draw a raw inference about defendant's motive from the fact that he used drugs. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, even if motive was material issue and evidence of defendant's prior drug use was probative of motive, prejudicial impact of evidence substantially outweighed its probative effect; slight probative value of knowing one possible motive for defendant to commit robbery did not outweigh likely prejudicial effect on jury of being told that defendant was crack- cocaine user. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 1169.2(3)
110k1169.2(3)
In bank robbery prosecution, admission of evidence of defendant's prior drug use was harmless error, where defendant's bad character was established by admissible evidence; defendant claimed that large amounts of cash in his possession after bank robbery were result of defendant's act of breaking into cocaine dealer's home and stealing cash, and evidence that defendant purchased large amounts of cocaine was introduced into evidence to establish a recent acquisition of wealth. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] WITNESSES ⇐ 389
410k389
District court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by one of key prosecution witnesses, where defendant failed to give prosecution witness the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand; Barrett rule allowing such evidence so long as witness is available to be recalled to explain inconsistent statements had not been adopted in circuit, and thus was optional procedure, not mandatory. Fed.Rules Evid.Rule 613(b), 28 U.S.C.A.

[6] ROBBERY ⚿ 2
342k2
Conviction of bank robbery was supported by evidence of bank surveillance photographs of robber, testimony from defendant's aunt and police officer who knew defendant well identifying defendant as man in photographs, testimony that defendant possessed large amounts of cash later on same day as robbery, and testimony of two admitted accomplices implicating defendant in crime, despite fact that accomplices had made plea bargains, and existence of minor inconsistencies in accomplices' and eyewitnesses' testimony, which were easily explained by rapidity and stress of events. 18 U.S.C.A. § 2113(a, d).

[7] CRIMINAL LAW ⚿ 1144.13(3)
110k1144.13(3)
In examining challenge to sufficiency of evidence, Court of Appeals views evidence in light most favorable to government and resolves all evidentiary conflicts in favor of the government.

***1258** Glenn P. Bruder, Minneapolis, MN, argued, for appellant.

David L. Lillehaug, U.S. Atty., Minneapolis, MN, argued (Jon M. Hopeman, on the brief), for appellee.

Before McMILLIAN, Circuit Judge, McKAY, [FN*] Senior Circuit Judge, and BOWMAN, Circuit Judge.

FN* The HONORABLE MONROE G. McKAY, Senior Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

McKAY, Circuit Judge.

Eugene Lamar Sutton appeals from a final judgment entered in the United States District Court for the District of Minnesota finding him guilty upon a jury verdict of bank robbery, use of a firearm in the course of a violent crime, and being a felon in possession of a firearm, in violation of 18 U.S.C. § 2113(a)(d), 18 U.S.C. § 924(c)(1) and (2), and 18 U.S.C. § 922(g)(1), respectively. Mr. Sutton presents three issues on appeal: (1) he challenges the admission of certain evidence; (2) he challenges the exclusion of certain evidence; and (3) he challenges the sufficiency of the evidence as a whole. We affirm the judgment of the district court.

[1] Mr. Sutton contends that the district court improperly admitted evidence of his prior narcotic use under Fed.R.Evid. 404(b). In support of this claim, he has demonstrated that he was provided notice of this evidence only two days before trial, despite the fact that the district court explicitly ordered the government to notify the defendant at least four days prior to trial of any 404(b) evidence it planned to use. The district court excused this breach for two reasons. First, the government discovered the evidence only five days prior to trial, on a Friday, and they notified the defendant on the following Monday. Second, the government had provided the defendant with a copy of the statement of another one of its witnesses over a month before the trial. This statement related to a drug buy the day of the robbery. Thus, the defendant was on notice that his involvement with drugs would be an issue at the trial and had adequate time to prepare for this type of evidence. The district court did not abuse its discretion in excusing the government's late ***1259** notification of Mr. Sutton under these circumstances.

[2] Mr. Sutton also argues, persuasively, that the evidence of his drug use does not meet our test for admissibility under Rule 404(b).

> In order for the trial court to admit evidence under Rule 404(b), the evidence must satisfy the following conditions:
> 1. The evidence of the bad act or other crime is relevant to a material issue raised at trial;
> 2. The bad act or crime is similar in kind and reasonably close in time to the crime charged;
> 3. There is sufficient evidence to support a finding by the jury that the defendant committed the other act or crime; and
> 4. The potential prejudice of the evidence does not substantially outweigh its probative value.

United States v. DeAngelo, 13 F.3d 1228, 1231 (8th Cir.) (citing United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991)), cert. denied, --- U.S. ----, 114 S.Ct. 2717, 129 L.Ed.2d 842 (1994).

Mr. Sutton contends that his prior drug use does not meet either the first or last part of this test. We agree, but find the error to be harmless.

The first part of our test under Rule 404(b) allows

evidence of prior bad acts where it is used for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The government argues that the evidence of Mr. Sutton's drug use showed a motive for the bank robbery. In other words, the government was attempting to show that he stole the money to support his drug habit. Although other circuits have allowed evidence of drug use to demonstrate motive to commit a bank robbery (see, e.g., United States v. Miranda, 986 F.2d 1283, 1285 (9th Cir.) (citing cases), cert. denied, --- U.S. ----, 113 S.Ct. 2393, 124 L.Ed.2d 295 (1993)), we have never decided this precise issue.

This court has allowed evidence of other prior bad acts to show motive in a robbery case. United States v. Mays, 822 F.2d 793, 797 (8th Cir.1987). However, that case is readily distinguishable from the present case. First, in Mays we held that motive was a material issue in that case, although we did not explain why. Furthermore, the facts that were admitted as evidence of motive were also clearly relevant to the issue of identity, which is indisputably a material issue in a robbery case. [FN1] Id. at 797. Another distinction between this case and Mays is that in Mays the evidence of motive ("to secure enough funds to start a new life together") was offered as direct testimony by a co-conspirator. In this case, motive was not a material issue; the defendant did not put his motive in issue; there was no testimony by his co-conspirators about his motive; and the facts which the government used to show motive were not also relevant to identity. The government simply asked the jury to draw a raw inference about the defendant's motive from the fact that he used drugs. We decline to approve such a tenuous link.

> FN1. The evidence related to a previous bank robbery committed by defendant that was "similar enough to establish some identity between the robberies. Both banks were located in an isolated rural area; before both robberies a four-wheel drive vehicle was stolen and later abandoned; and in both robberies a .45 caliber automatic pistol was used." Id.

[3] Even if motive were a material issue in this robbery case and drug use were probative of it, the evidence would still fail the fourth part of our test, which is derived from the general requirement of Rule 403 that the prejudicial impact of the evidence should not substantially outweigh its probative value. The admission of evidence of prior wrongful acts creates a danger that the jury will convict the accused on the basis of bad character; thus, it is normally excluded under Rule 404. We cannot say that the slight probative value of knowing one possible motive for Mr. Sutton to commit a robbery outweighs the likely prejudicial effect on the jury of being told that the defendant was a crack-cocaine user. [FN2] In any event, it could hardly come as ***1260** a surprise to the jury that Mr. Sutton was robbing a bank because he needed money for some reason. [FN3]

> FN2. There is a substantial split among the cases about whether this type of evidence should be admissible. See generally, Debra T. Landes, Annotation, Admissibility of Evidence of Accused's Drug Addiction or Use to Show Motive for Theft of Property Other Than Drugs, 2 A.L.R. 4th 1298 (1980). We think the better-reasoned cases exclude such evidence. See State v. LeFever, 102 Wash.2d 777, 690 P.2d 574 (1984) (Evidence of defendant's addiction to heroin, offered by prosecution to show motive for robbery, is inadmissible in that resulting prejudice overwhelmed any possible relevance or probativeness.); People v. Holt, 37 Cal.3d 436, 208 Cal.Rptr. 547, 554, 690 P.2d 1207, 1214 (1984) (Whatever probative value defendant's drug use might have had to show motive for robbery was outweighed by prejudicial value.).

> FN3. This brings to mind the story of a more famous bank robber with the same surname. When asked why he robbed banks, Willie Sutton replied, "That's where the money is."

[4] Although we believe that the admission of Mr. Sutton's prior drug use was erroneous, we nevertheless find the error to be harmless, because when viewed in the context of all the evidence presented at Mr. Sutton's trial, any possible prejudice that Mr. Sutton suffered was de minimis. For example, in Mr. Sutton's opening statement, his counsel referred to his association with drug dealers and how he broke into a cocaine dealer's home and stole $10,000. (Tr. [FN4] 35-36) This information was a crucial part of Mr. Sutton's defense, as it provided an alternative explanation for how Mr. Sutton came to have large amounts of cash just after

the time of the bank robbery. However, these statements also gave the government the prerogative to explore on cross-examination the basis for his knowledge that there would be large amounts of cash in the drug dealer's house and the nature of his relationship with the drug dealer. Furthermore, testimony was presented that Mr. Sutton purchased large amounts of cocaine the day of the robbery. This evidence was properly admitted because it tended to establish a recent acquisition of wealth. We think Mr. Sutton's bad character was so thoroughly established by admissible evidence (including his own) that there is no likelihood that this additional bad character evidence would have influenced the outcome in this case.

FN4. Trial Transcript.

[5] Mr. Sutton also contends that the district court improperly precluded him from presenting a witness who would have testified to inconsistent statements made by one of the key prosecution witnesses, Mr. Smith. This testimony was not allowed because Mr. Smith was not given the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand, which is normally the proper foundation for impeachment under Fed.R.Evid. 613(b). Mr. Sutton points out that the First Circuit has relaxed this requirement, requiring only that a witness be available to be recalled to explain inconsistent statements. United States v. Barrett, 539 F.2d 244, 254-56 (1st Cir.1976); United States v. Hudson, 970 F.2d 948, 955 (1st Cir.1992). However, this procedure is not mandatory, but is optional at the trial judge's discretion. Id. at 956 & n. 2. More to the point, since this circuit has never adopted the rule in Barrett, we cannot say that the district court abused its discretion in not applying it.

[6][7] Mr. Sutton has also challenged the sufficiency of the evidence. Accordingly, we must examine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. United States v. Fetlow, 21 F.3d 243, 247 (8th Cir.), cert. denied sub nom., Ferguson v. United States, --- U.S. ----, 115 S.Ct. 456, 130 L.Ed.2d 365 (1994). In examining such a claim, we view the evidence in the light most favorable to the government and resolve all evidentiary conflicts in favor of the government. United States v. Nelson, 984 F.2d 894, 899 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 2945, 124 L.Ed.2d 693 (1993).

The evidence, viewed in the light most favorable to the prosecution, indicates that a man matching the description of Mr. Sutton robbed the Chisago City Bank. (Tr. 46). There were photographs taken by bank surveillance cameras which the jury viewed and compared to Mr. Sutton. There was also testimony that his Aunt and a police officer who knew him well identified him as the man in the photos. (Tr. 145, 158).

Further testimony demonstrated that Mr. Sutton had in his possession large quantities ***1261** of cash later on the same day of the robbery. He used this money to purchase a car for $2500 in cash (Tr. 42) and $2400 worth of cocaine. (Tr. 261, 263, 265). Mr. Sutton provided conflicting and unsubstantiated claims for the origins of the money (Tr. 351, 378-79), but it is undisputed that he did not earn the money through legal gainful employment.

Furthermore, two admitted accomplices of Mr. Sutton implicated him in the crime and provided sufficient detail that the jury might rationally have found them credible. Although the accomplices had made plea bargains, the jury was properly instructed by the trial judge on this point. The inconsistencies in the accomplices' and eyewitnesses' testimony are minor and are easily explained by the rapidity and stress of the events. The bank tellers' inability to pick Mr. Sutton's photo out of a lineup may also be explained by the speed and stress of the event, plus the fact that the robber was wearing a hat and sunglasses. This weakness in the evidence was overcome by the independent identification by Mr. Sutton's aunt and the police officer.

After carefully reviewing the evidence presented in the light most favorable to the government, we conclude that there was sufficient evidence to support the jury's verdict.

Accordingly, the judgment of the district court is affirmed.

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Citation Rank(R) Page(P) Database Mode
12 F.3d 1436 R 10 OF 23 P 1 OF 41 CTA8 Page
(Cite as: 12 F.3d 1436)

UNITED STATES of America, Plaintiff-Appellee,
v.
Delano Romanus OAKIE, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Kirk Morin OAKIE, Defendant-Appellant.
Nos. 92-3268, 92-3622.
United States Court of Appeals,
Eighth Circuit.
Submitted May 11, 1993.
Decided Dec. 17, 1993.
Rehearing and Suggestion for Rehearing
En Banc Denied Jan. 27, 1994
in No. 92-3622 and
Jan. 28, 1994 in No. 92-3268.

Two defendants were convicted in the United States District Court, District of South Dakota, Donald J. Porter, J., of assault with dangerous weapon, use of firearm during crime of violence, and assaulting federal officer with dangerous weapon, and one of the defendants was also convicted for being felon in possession of firearm. Defendants appealed. The Court of Appeals, Loken,

920 (8th Cir.) (internal quotation omitted), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985). In light of the other trial evidence and the impeachment evidence available to the government, we agree with the district court that the proffered testimony of Kirk Oakie did not meet this standard.

[12] Delano next contends that he was entitled to a severance because he and Kirk presented antagonistic defenses: Kirk Oakie's cross examination of Wallace Rooks characterized Kirk and Shane Oakie as "prisoners in that car," whereas Delano's defense was that he believed he was being chased by an enemy, rather than the police, and did not know his passengers were shooting at the pursuing vehicle. To warrant severance on this ground, the co-defendants' defenses must be more than inconsistent, they must be "actually irreconcilable." United States v. Mason, 982 F.2d 325, 328 (8th Cir.1993). Kirk and Delano presented different defenses, but they were not irreconcilable or even antagonistic.

The district court did not abuse its discretion in denying Delano Oakie's motion to sever.

[13][14] B. Prior Acts Evidence. Rule **404(b)** of the Federal Rules of Evidence permits evidence of a defendant's "other crimes, wrongs, or acts" only for limited purposes and, if the defendant requests, only after reasonable **notice** of the general nature of any such evidence the prosecution intends to use. Delano requested such **notice,** and the government responded that it did

not intend to introduce any Rule **404(b)** evidence. During the government's case-in-chief, Wallace Rooks testified that he believed Delano drove away from the Avery residence because Delano "had some old warrants on him." In addition, the government impeached Shane Oakie with his statement to the grand jury that, "Delano said he had a warrant out for him and didn't want to get caught."

Delano argues that this was Rule 404(b) evidence that should have been excluded because of the government's failure to notify him of its intent to use it. We disagree.

Evidence which is probative of the crime charged ... is not "other crimes" evidence. Further, where the evidence of an act and the evidence of the crime charged are inextricably ***1442** intertwined, the act is not extrinsic and Rule 404(b) is not implicated.

DeLuna, 763 F.2d at 913 (citations omitted). See also United States v. Bettelyoun, 892 F.2d 744, 746 (8th Cir.1989). In this case, evidence regarding why Delano turned the car around and fled explained the circumstances of the charged offense and was not Rule 404(b) evidence. Because this testimony was very brief and revealed no details concerning the outstanding warrants, it was not unduly prejudicial, and the district court did not abuse its discretion by admitting it.

V. Jury Instruction Issues.

404(b) notice not reqd where acts are "inextricably intertwined" with charged offenses.

UNITED STATES of America, Appellee,
v.
Michael Anthony SEVERE, Appellant.
UNITED STATES of America, Appellee,
v.
Don Edward WITHERS, Appellant.
UNITED STATES of America, Appellee,
v.
James E. HOWARD, Jr., also known as Terence Terell Washington, Appellant.

Nos. 93-3744, 93-3746 and 93-3933.

United States Court of Appeals,
Eighth Circuit.

Submitted May 12, 1994.

Decided July 13, 1994.
Rehearing Denied
Aug. 17, 1994 in No. 93-3746.

Defendants were convicted in the United States District Court for the District of Minnesota, David S. Doty, J., of drug charges and they appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) evidence sustained finding that defendants consented voluntarily to search of motel room, and (2) evidence sustained conviction.

Affirmed.

[1] SEARCHES AND SEIZURES ⇐ 194
349k194
To justify consensual search, government has burden of proving that individual voluntarily gave consent to search; issue of consent is question of fact that requires consideration of totality of circumstances.

[1] SEARCHES AND SEIZURES ⇐ 201
349k201
To justify consensual search, government has burden of proving that individual voluntarily gave consent to search; issue of consent is question of fact that requires consideration of totality of circumstances.

[2] CRIMINAL LAW ⇐ 1158(4)
110k1158(4)
District court's determination that defendant voluntarily gave consent to search is reviewed under clearly erroneous standard.

[3] SEARCHES AND SEIZURES ⇐ 183
349k183
Finding that defendant consented to search of motel room was supported by evidence that officers knocked on the door of the room and identified themselves as law enforcement officers, that they did not use force to enter the room, that they were invited into the room, that defendant and companion were not put under arrest and were informed that they could refuse consent and were free to leave, and that both defendant and companion read, considered, and signed written consent form, even though officers told defendant that search warrant would be obtained if defendant and his companion did not consent to search.

[3] SEARCHES AND SEIZURES ⇐ 184
349k184
Finding that defendant consented to search of motel room was supported by evidence that officers knocked on the door of the room and identified themselves as law enforcement officers, that they did not use force to enter the room, that they were invited into the room, that defendant and companion were not put under arrest and were informed that they could refuse consent and were free to leave, and that both defendant and companion read, considered, and signed written consent form, even though officers told defendant that search warrant would be obtained if defendant and his companion did not consent to search.

[4] CRIMINAL LAW ⇐ 1245(1)
110k1245(1)
District court could properly consider prior uncounseled misdemeanor convictions in determining defendant's criminal history score.

[5] CRIMINAL LAW ⇐ 369.2(3.1)
110k369.2(3.1)
Testimony by witness that defendants had delivered a kilogram of crack cocaine to her duplex on March 16 was not prior bad acts testimony requiring **notice** but, rather, was testimony concerning acts intertwined with the conspiracy charged in indictment which alleged that the conspiracy continued until on or about March 17. Fed.Rules Evid.Rule **404(b)**, 28 U.S.C.A.

[6] INDICTMENT AND INFORMATION

⊜ 87(7)
210k87(7)
Indictment was not impermissibly vague with respect to its allegations of dates even though testimony of coconspirator included events which occurred two weeks prior to the "on or about" date listed in the indictment, where defendant had notice that government would present evidence of earlier delivery of cocaine base.

[7] CONSPIRACY ⊜ 28(3)
91k28(3)
To establish conspiracy to distribute narcotics, government need not establish overt act but simply must prove that defendant entered into an agreement to distribute narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[8] CONSPIRACY ⊜ 47(12)
91k47(12)
Defendant's conviction for conspiracy to distribute cocaine base was supported by evidence that he and another person brought a kilogram of cocaine to duplex, that he and the other person broke the cocaine base into one ounce quantities using an electronic scale, and that his companion was then given over $10,000 in cash. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[9] CRIMINAL LAW ⊜ 1026.10(4)
110k1026.10(4)
Defendant who entered into plea agreement acknowledging a minimum penalty of ten years' imprisonment and who had certain charges against him dropped waived right to challenge sentence on grounds that mandatory minimum sentence violated due process and equal protection. U.S.C.A. Const.Amend. 5.

***445** Thomas J. O'Connor, Chaska, MN, argued, for appellant, Severe, Lee R. Johnson, Minneapolis, MN, argued, for appellant Withers, Patrick R. Townley, Minneapolis, MN, argued, for appellant Howard (Craig E. Cascarano, on the brief).

Jon M. Hopeman, Minneapolis, MN, argued (B. Todd Jones, on the brief), for appellee.

Before MAGILL, Circuit Judge, FLOYD R. GIBSON and JOHN R. GIBSON, Senior Circuit Judges.

MAGILL, Circuit Judge.

Michael Severe challenges his conviction and sentence for conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1988), and aiding and abetting the distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). James Howard, Jr., challenges his conviction for conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. Don Edward Withers appeals the sentence imposed by the district court [FN1] after he pleaded guilty to possession with intent to distribute more than fifty grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). We affirm.

FN1. The Honorable David S. Doty, United States District Judge for the District of Minnesota.

I. BACKGROUND

On March 16, 1993, Minneapolis police officers made arrangements to purchase two ounces of cocaine base through a confidential informant. In arranging this transaction, a call was placed to a duplex on North 6th Street (6th Street Duplex) in Minneapolis. Surveillance officers observed Craig Cage and Charles Nichols arrive by car at the 6th Street Duplex. Minutes later, Cage and Nichols met with the officers' confidential informant to complete the transaction.

The officers arrested Cage and Nichols and recovered a pager from Cage that continued to activate. The officers determined that the telephone number coming into the pager originated from Room 216 of the Budgetel Motel. The officers proceeded to the motel and found that Severe and Howard were the registered occupants of Room 216. The officers asked if they could search the room. Both Severe and Howard consented to the search and signed consent-to-search forms. The officers discovered over $10,000 cash, army fatigues, and a plane ticket to Los Angeles. Based on the call from Cage's pager and the items recovered from Room 216, the officers arrested Severe and Howard.

***446** On March 17, 1993, officers executed a search warrant at an apartment located at 625 East 18th Street in Minneapolis. Avis Smith and Withers

lived in this apartment. The officers recovered cash, a gun with ammunition, several pagers, and a small quantity of cocaine base. Later that day, the officers executed another search warrant at the 6th Street Duplex and recovered 800 grams of cocaine base. The officers later arrested Carlena Wilson, who was the resident of the 6th Street Duplex.

Prior to trial, Withers pleaded guilty to a single count of possession with intent to distribute more than fifty grams of cocaine base. Severe's and Howard's consolidated jury trials commenced in August 1993. Wilson testified on behalf of the government regarding her relationship with Severe and Howard. In particular, Wilson testified that on March 16, 1993, Severe and Howard delivered a kilogram of "crack cocaine" that the officers later recovered during their March 17 search of her 6th Street Duplex. Wilson also testified that Severe and Howard had delivered another kilogram of cocaine base to her 6th Street Duplex about two weeks before the March 16 delivery.

Cage corroborated Wilson's testimony that Severe and Howard had brought the kilogram of cocaine base to the 6th Street Duplex on March 16, 1993. Cage testified that Severe and Howard broke down the cocaine base into ounce quantities using a digital scale. Cage testified that Nichols gave Howard over $10,000 cash. Finally, Nichols, a defense witness, testified on cross-examination that Severe and Howard had brought the cocaine base to Wilson's 6th Street Duplex.

The jury returned a verdict of guilty against Severe and Howard. The district court sentenced Severe to 292 months' imprisonment, Howard to 188 months' imprisonment, and Withers to 120 months' imprisonment. Severe, Howard, and Withers appealed.

II. DISCUSSION

Severe argues that the district court improperly (1) determined that Severe and Howard voluntarily consented to the search of Room 216 of the Budgetel Motel, and (2) used prior uncounseled misdemeanors in calculating his criminal history score. Howard challenges (1) the district court's admission of Wilson's testimony based on Federal Rule of Evidence 404(b) (Rule 404(b)), and (2) the sufficiency of the evidence to support the jury's verdict. Finally, Withers challenges his sentence based on the constitutionality of the 100 to 1 disparity between the sentences for cocaine base and cocaine. We address these claims in turn.

A. Severe's Conviction and Sentence

[1][2] To justify a consensual search, the government has the burden of proving that an individual voluntarily gave consent to search. United States v. Larson, 978 F.2d 1021, 1023 (8th Cir.1992). The issue of consent is a question of fact that requires consideration of the totality of the circumstances. United States v. Cortez, 935 F.2d 135, 142 (8th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 945, 117 L.Ed.2d 114 (1992). We review a district court's determination that a defendant voluntarily gave consent to search under the clearly erroneous standard. Id.

[3] Examining the totality of the circumstances, we conclude that the district court's determination that Severe voluntarily consented to the search of Room 216 was not clearly erroneous. Severe relies heavily on the fact that the officers informed him that if he and Howard refused consent, the officers would obtain a search warrant. Hearing Tr. at 117. That, however, is only one factor in the totality of the circumstances inquiry. See Larson, 978 F.2d at 1023 ("When a person consents to a search after officers state they will attempt to obtain a warrant if the person does not consent, the consent is not necessarily coerced."). The totality of the circumstances supports the district court's determination that Severe voluntarily gave consent.

First, the officers knocked on the door of Room 216 and identified themselves as law enforcement officials. Hearing Tr. at 96-97. The officers did not use force to enter Room 216; rather, they were invited into the room. ***447** Id. at 114. Severe and Howard were not put under arrest and were informed that they could refuse consent and were free to leave. Id. at 26, 97-98. Finally, Severe and Howard both read, considered, and signed a written consent form. Id. at 13, 99. We conclude that the district court's determination that Severe voluntarily consented to the search of Room 216 was not clearly erroneous. See Cortez, 935 F.2d at 142.

[4] Severe also claims that the district court erred when it considered three prior uncounseled

misdemeanor convictions when it determined his criminal history score. At sentencing, Severe also sought to attack collaterally those misdemeanor convictions. In Nichols v. United States, the Supreme Court held that a district court properly could consider prior uncounseled misdemeanors in determining a defendant's criminal history score. --- U.S. ----, ----, 114 S.Ct. 1921, 1928, 128 L.Ed.2d 745 (1994); accord United States v. Thomas, 20 F.3d 817, 823 (8th Cir.1994) (en banc). Further, in United States v. Hewitt, this court held that a district court should include a defendant's prior convictions in his criminal history score unless the defendant demonstrates that the prior convictions were "previously ruled constitutionally invalid." 942 F.2d 1270, 1276 (8th Cir.1991). Nichols and Hewitt foreclose Severe's claim.

B. Howard's Conviction

Howard argues that the district court improperly admitted Wilson's testimony in violation of the **notice** requirements of Rule **404(b)**. We review a district court's decision to admit evidence for an abuse of discretion. United States v. Davis, 882 F.2d 1334, 1343 (8th Cir.1989), cert. denied, 494 U.S. 1027, 110 S.Ct. 1472, 108 L.Ed.2d 610 (1990). Rule **404(b)** allows admission of evidence of other crimes, wrongs, or bad acts for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable **notice** in advance of trial." Fed.R.Evid. **404(b)** (emphasis added). However, "[w]here the evidence of an act and the evidence of a crime charged are inextricably intertwined, the act is not extrinsic and Rule **404(b)** is not implicated." United States v. DeLuna, 763 F.2d 897, 913 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985); see also United States v. Rankin, 902 F.2d 1344, 1346 (8th Cir.1990).

[5][6] We conclude that the district court properly admitted Wilson's testimony because that testimony concerned not prior acts, but acts intertwined with the conspiracy charged. The indictment charged Howard with conspiracy to possess with intent to distribute cocaine base "continuing to on or about the 17th day of March, 1993." Severe's App. at 1. [FN2] Wilson, who was named as a coconspirator, testified that Howard and Severe delivered a kilogram of cocaine base to her residence in the beginning of March 1993. That evidence did not implicate Rule 404(b) because it tends to prove whether a conspiracy to distribute cocaine existed, and therefore is inextricably intertwined with the conspiracy charged. See DeLuna, 763 F.2d at 913; see also Rankin, 902 F.2d at 1346. Thus, we reject Howard's Rule 404(b) claim.

FN2. We have considered Howard's claim made at oral argument that the indictment was impermissibly vague because Wilson's testimony included events that occurred two weeks prior to the date listed in the indictment, and we conclude that it lacks merit. See United States v. Turner, 975 F.2d 490, 494 (8th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993); see also United States v. Hallock, 941 F.2d 36, 40-41 (1st Cir.1991) (holding that absence of a statement of precise dates of a conspiracy does not necessarily render indictment impermissibly vague). Howard had notice that the government would present evidence of the earlier delivery of the cocaine base. Thus, any variance did not affect Howard's substantial rights or cause him actual prejudice. See United States v. Valentine, 984 F.2d 906, 911 (8th Cir.1993).

[7] Next, Howard argues that there was insufficient evidence to support the jury's verdict. In reviewing a jury verdict for sufficiency, we view the evidence in the light most favorable to the jury verdict; we accept all reasonable inferences supporting the conviction; and we must affirm the jury's verdict if substantial evidence supports it. United ***448** States v. Gaines, 969 F.2d 692, 696 (8th Cir.1992). To establish a conspiracy to distribute narcotics, the government need not establish an overt act, but simply must prove that the defendants entered into an agreement to distribute narcotics. Id.

[8] Applying this deferential standard, we conclude that substantial evidence supports the jury's verdict. At trial, Cage testified that (1) Howard and Severe brought a kilogram of cocaine base to the 6th Street Duplex; (2) Howard and Severe broke the cocaine base into one-ounce quantities using an electronic scale; and (3) Nichols then gave Howard over $10,000 cash. The pager recovered from Cage led police to Room 216 of the Budgetel Motel. Howard and Severe, the residents

of that room, consented to a search, and the officers discovered over $10,000 cash. On cross-examination, Nichols, a defense witness, admitted that Howard and Severe had delivered the cocaine base that was found in the 6th Street Duplex. We conclude that substantial evidence supports the jury's verdict.

C. Withers' Sentence

Finally, Withers challenges his mandatory minimum sentence for violation of 21 U.S.C. § 841(a)(1) because the 100 to 1 disparity between violations involving cocaine base and cocaine violates due process and denies him equal protection.

[9] Withers, however, entered into a plea agreement in which he pleaded guilty to possession with intent to distribute in excess of fifty grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Plea Agreement at 2. Withers acknowledged in the plea agreement that the charge to which he had pleaded guilty had a minimum penalty of ten years' imprisonment. Id. In return, the government dropped the charges against Withers for (1) conspiracy to possess with intent to distribute more than one kilogram of cocaine base, and (2) using and carrying a firearm in relation to a drug trafficking crime. Id. " '[A] defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal.' " United States v. Durham, 963 F.2d 185, 187 (8th Cir.) (quoting United States v. Fritsch, 891 F.2d 667, 668 (8th Cir.1989)), cert. denied, --- U.S. ----, 113 S.Ct. 662, 121 L.Ed.2d 587 (1992); accord United States v. Livingston, 1 F.3d 723, 725 (8th Cir.1993). Therefore, we conclude that Withers has waived the right to challenge his sentence.

III. CONCLUSION

For the foregoing reasons, we affirm the judgments and sentences of the district court.

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(Cite as: 766 F.2d 1426)

UNITED STATES of America, Plaintiff-Appellee,
v.
Graham Lee KENDALL, Defendant-Appellant.
No. 83-1908.
United States Court of Appeals,
Tenth Circuit.
July 3, 1985.

Defendant was convicted in the United States District Court for the Western District of Oklahoma, Ralph G. Thompson, J., of conspiracy to possess marijuana with intent to distribute and one count of violating the Traffic Act, and he appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) evidence supported convictions; (2) other acts evidence was admissible; and (3) pretrial disclosure by the government of the other acts evidence was not required.

Affirmed.

much larger conspiracy to fix horse races. The defendant had no other connection with any members of the conspiracy and was acquitted of the conspiracy charge. The court, in refusing to characterize this conduct as engaging in an illegal business enterprise, emphasized the one bet and the absence of any other participation by the defendant. Clearly, such conduct is more accurately described as casual, or sporadic, and thus not within the scope of the Travel Act.

IV.
Evidence of Other Wrongs

Kendall next argues that the trial court erred in admitting evidence of his alleged ***1436** earlier crimes, wrongs, or acts. He contends that such evidence was not admissible to prove his character and did not come within any purpose permissible under Fed.R.Evid. 404(b); that even if relevant, the value of such evidence was substantially outweighed by the danger of unfair prejudice, citing Fed.R.Evid. 403; and that the admission of such prejudicial evidence was an abuse of discretion requiring a new trial. Because the evidence was crucial to the Government's case against Kendall and because this claim raises serious evidentiary issues, we review the evidence and the actions of the trial court in detail.

[12][13] Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or

acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." [FN5] Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id.; United States v. Biswell, 700 F.2d 1310, 1317 (10th Cir.1983); United States v. Nolan, 551 F.2d 266, 270 (10th Cir.), cert. denied, 434 U.S. 904, 98 S.Ct. 302, 54 L.Ed.2d 191 (1977); United States v. Freeman, 514 F.2d 1184, 1189-90 (10th Cir.1975); United States v. Parker, 469 F.2d 884, 889 (10th Cir.1972). In Nolan, we enumerated some guidelines to test whether evidence of such crimes or acts should be admitted. The evidence (1) must tend to establish intent, knowledge, motive, identity, or absence of mistake or accident; (2) must also be so related to the charged offense that it serves to establish intent, knowledge, motive, identity, or absence of mistake or accident; and (3) must have real probative value, not just possible worth. 551 F.2d at 271. The uncharged crime or act must also be close in time to the crime charged. Id. at 272. See also United States v. Burkhart, 458 F.2d 201, 204 (10th Cir.1972) (en banc). This court has previously stated:

FN5. To fall within the scope of 404(b), an act need not be criminal, so long as it tends to impugn a defendant's character. United States v. Terebecki, 692 F.2d 1345, 1348 n. 2 (11th Cir.1982); United States v.

Beechum, 582 F.2d 898, 902 n. 1 (5th Cir.1978), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979); United States v. Cooper, 577 F.2d 1079, 1087-88 (6th Cir.1978), cert. denied, 439 U.S. 868, 99 S.Ct. 196, 58 L.Ed.2d 179 (1978).

"[E]ven relevant evidence should be excluded under Rule 403 'if its probative value is substantially outweighed by the danger of unfair prejudice.' While trial courts have discretion in striking the balance between probative value and unfair prejudice, ... they must be particularly sensitive to the potential prejudice that is always inherent in evidence of an accused's prior uncharged crimes or wrongs.... Although Rule 403 provides broad umbrella protection from unfair or undue prejudice, the specific provision in Rule 404(a) prohibiting evidence of uncharged crimes to show bad character or tendencies toward criminality not only reflects the special danger of other crimes evidence but should alert trial courts to be particularly careful in admitting such evidence."
United States v. Carleo, 576 F.2d 846, 849 (10th Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 153, 58 L.Ed.2d 152 (1978) (citations omitted).
[14][15] In Biswell, we reviewed the problems associated with Rule 404(b) evidence and the standards governing its use. In an effort to ensure that such evidence is not used in an unfair or impermissible manner, we held that where

evidence is offered under Rule 404(b), the Government bears the burden of showing how the proffered evidence is relevant to one or more issues in the case. 700 F.2d at 1317. The Biswell standard is clear. The Government must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts. In addition, the trial court must specifically identify the purpose for which such evidence is offered and a broad statement merely invoking or restating Rule 404(b) will not suffice. A specific articulation of the relevant purpose and specific inferences to be drawn from each proffer of evidence of other acts will enable the trial ***1437** court to more accurately make an informed decision and weigh the probative value of such evidence against the risks of prejudice specified in Rule 403. This requirement is an attempt to ensure that a decision to admit or exclude be made only after issues and reasons are exposed and clearly stated. See id. at 1317 n. 5. In addition, specific and clear reasoning and findings in the trial record will greatly aid an appellate court in its review of these evidentiary issues.

Before trial, Kendall sought discovery of evidence of other crimes, wrongs, or bad acts which the Government intended to present as evidence at trial. The trial court denied Kendall's request that the Government be ordered to produce such evidence before trial. The court, however, did enter a pretrial order prohibiting the Government from offering such evidence without prior court

approval. The order stated, in pertinent part:

"The evidence here in dispute is governed by the provisions of Rule 404, Federal Rules of Evidence. While the government states that it does not know whether it will use such evidence, it is clear that the potential for prejudice by the improper admission of such evidence is sufficient to require the Court to carefully consider the reasons for which the evidence would be offered.

Accordingly, counsel for the government is prohibited from offering any evidence of prior or subsequent crimes, wrongs or bad acts, not charged in the indictment, without first informing the Court and counsel for the defense of the specific evidence to be offered so that the Court may consider the arguments of counsel, outside the presence of the jury, regarding the admissibility of said evidence."

Rec., vol. II, at 356.

[16] Kendall claims the first error occurred when, in direct contravention of the pretrial order, the Government elicited testimony concerning an earlier sale by Kendall of an airplane subsequently used in drug smuggling. On direct examination, Geittmann was asked about his involvement in a prior marijuana smuggling venture that resulted in his conviction in 1975. When asked the identity of the pilot and the source of the airplane used in that venture, Geittmann responded that he had financed the purchase through the pilot, and that the pilot had purchased the airplane from Kendall. Defense counsel

promptly objected and moved for a mistrial. This motion was denied, but the trial court admonished the Government and, at the request of defense counsel, instructed the jury to disregard the testimony. The court agreed that the Government had violated the pretrial order, but concluded that the violation was an oversight that under the circumstances did not require a mistrial. Any potential prejudicial effect was minimized by the court's proper and timely admonition that the jurors disregard the testimony. There is no evidence that the Government's actions were more than an oversight and Kendall does not allege that the Government acted in bad faith. Reviewing the record as a whole, we conclude that the trial court correctly refused to declare a mistrial.

Kendall next argues that the court erred in admitting evidence of prior airplane sales by Kendall to Geittmann. Later in Geittmann's direct examination, after the Government complied with the pretrial order, Geittmann testified about two aircraft that he purchased from Kendall in 1982. Over defense objection, he testified that during the sale of the first aircraft, Kendall showed Geittmann that the aircraft had been "plumbed" to accommodate extra fuel, and that Kendall had personally demonstrated the plane and this special fuel feature to him. Finally, he testified that two weeks after this first sale he traded in the plane for a second identical model because "[it] was a little better outfitted ... it had 350 gallons of fuel built into it

which would enable me to go just about anyplace I wanted to go in Central, South America." Rec., vol. X, at 584.

[17] Kendall argues that this is not Rule 404(b) evidence. At trial, the Government ***1438** contended that the evidence of these sales and the manner in which the special fuel system was presented by Kendall was relevant to show that Kendall had dealt with Geittmann before meeting Callihan; that Kendall knew Geittmann and the nature of his business; and that the plane had been prepared and could be used for smuggling purposes. The trial court concluded that these reasons justified admission of the evidence under Rule 404(b). We agree that the evidence is within the scope of Rule 404(b) and that the Government made a sufficient showing of the purpose for, and inferences to be drawn from, the evidence. The sales were close in time to Kendall's introduction of Callihan to Geittmann, and the testimony concerning the two sales had real probative value. The evidence is relevant to whether Kendall knew of Geittmann's activities and needs, from which a jury could infer the critical element of Kendall's intent and knowledge in introducing Callihan to Geittmann. It thus meets the requirements for Rule 404(b) evidence set forth in Nolan. In addition, the Government's explanation and the trial court's findings in the record were sufficiently explicit and clear within the meaning of Biswell. The trial court did not err in admitting this evidence.

Kendall next argues that the court erred in admitting evidence of Kendall's

request that Geittmann check the status of Callihan's plane in Mexico. Over defense counsel's objection, Geittmann testified that in July or August 1982, Kendall asked him to check the airplane's tail registration numbers in Mexico. Geittmann stated that "[h]e told me the aircraft had been fired upon on one of the beaches south of Mazatlan. They were down there to pick up some marijuana. And he wanted to know if the plane was hot, if the Mexican police had gotten the numbers off the tail and if they were looking for it." Rec., vol. X, at 606. The Government complied with the pretrial order and offered its reasons for admission prior to the testimony. The Government claimed that "it shows knowledge, aiding and assisting by Mr. Kendall of Mr. Callihan in this particular venture, and that if this plane was hot, then it could not fly into Cancun for this particular venture". Rec., vol. X, at 603. The trial court agreed that the evidence was within Rule 404(b), and while acknowledging that the evidence might be damaging to Kendall, nevertheless found that it was not sufficiently prejudicial to require exclusion. The court also gave an appropriate limiting instruction to the jury.

[18] On appeal, Kendall argues that this evidence did not meet the Rule 404(b) foundation requirements and that any probative value was outweighed by the risk of substantial prejudice. We disagree. The conversation took place shortly before Kendall introduced Callihan to Geittmann. The evidence is relevant to prove that Kendall knew about Callihan's and Carr's smuggling

activities and plans; that Kendall aided and assisted them in preparing for and furthering these plans; that Kendall knew how they were using their airplane; and that Kendall knew of both Geittmann's influence in Mexico and his involvement in smuggling activities. This proof is relevant to the issue of Kendall's knowledge of, and participation in, the conspiracies charged. The evidence meets the requirements of Nolan. The Government's explanation and the trial court's findings and actions were sufficiently explicit and clear to comply with Biswell.

[19] Kendall next claims that error occurred when the Government asked Geittmann about a conversation with Kendall concerning an aircraft that Kendall owned and that had been seized in Mexico. Kendall argues that this evidence of prior acts is impermissible character evidence, does not fall within Rule 404(b), and was substantially prejudicial. We are not persuaded. Earlier, on direct examination, Geittmann had testified about a prior business relationship with Kendall, in which Geittmann had assisted Kendall in trying to recover a C-46 aircraft from Mexico. This testimony occurred at a point in the trial when the prosecution was attempting to establish the extent of prior dealings between ***1439** Kendall and Geittmann. In describing his efforts to free the plane, Geittmann stated, "I'm sure it's still down there where it had been seized or where it had been taken to after it was seized." Rec., vol. X, at 607. Defense counsel did not object to this testimony.

On redirect examination, Geittmann elaborated on the details of this seizure, and testified that Kendall told him the plane had been seized because it was carrying contraband electronics from the United States to Mexico. Although Kendall now challenges this testimony, he did not object at trial. Furthermore, Kendall's defense counsel, on recross-examination of Geittmann, persisted in discussing and explaining the events surrounding the seizure, stressing that the activities, while illegal in Mexico, were not illegal in the United States. Later, on direct examination, Kendall himself testified that the plane had violated Mexican law and had been confiscated, and that he tried to use Geittmann to recover it. On cross-examination of Kendall, the Government, over objection, attempted to inquire further into the events surrounding the aircraft's seizure. Kendall admitted that he knew that the aircraft was being used for illegal purposes, that he and Geittmann had attempted to recover the plane by bribing certain officials, and that he had relied on Geittmann to make the bribe payments.

Kendall's own testimony about the seizure on direct and cross-examination does not pose a Rule 404(b) problem. Through his counsel, Kendall raised the issue of his own knowledge of, and participation in, the events surrounding the contraband seizure of the plane. Having thus raised this issue, he cannot complain now about the Government's cross-examination in this area.

The question is whether Geittmann's direct examination testimony concerning

these events is admissible under Rule 404(b). The trial court concluded that this evidence qualified under Rule 404(b) as relevant to show Kendall's motive and lack of mistake or accident. The events surrounding the aircraft seizure occurred shortly before Kendall introduced Callihan to Geittmann. This evidence showed that Kendall, faced with the loss of a plane for carrying contraband, chose to enlist the aid of Geittmann. There was evidence introduced to show Geittmann's influential contacts with certain Mexican officials and his ability to engage in illicit activities in Mexico. This ability and influence was crucial to Geittmann's success as a drug smuggler. The extent to which Kendall knew of and relied on Geittmann's illicit influence is relevant to the issues of Kendall's knowledge of Geittmann's activities, Kendall's motives for dealing with and later assisting Geittmann, and the lack of mistake or accident by Kendall when he introduced Callihan to Geittmann. As we stated earlier, these issues were central to the conspiracy charges against Kendall. The requirements of Nolan and Biswell were met.

There was also no abuse of discretion when the trial court concluded that the evidence was not so prejudicial as to bar its admission under Rule 403. While Geittmann's testimony was certainly damaging to Kendall, its probative value sufficiently outweighed any potential prejudicial impact. Kendall's defense counsel chose to pursue the inquiry and focus attention on the seizure while examining both Geittmann and Kendall, and Kendall was acquitted on the charge

of conspiring to import marijuana. We are not persuaded that Geittmann's initial testimony was so prejudicial that its admission constitutes reversible error. The evidence was properly admitted.

[20] Finally, Kendall claims that the prosecution committed reversible error in its closing argument when it referred to the aircraft seizure in Mexico as being related to "smuggling." Rec., vol. XII, at 955. The trial court overruled defense counsel's objection that the term "smuggling" had no foundation in the record. On appeal, Kendall argues that this comment caused incurable damage and was highly prejudicial. We disagree. While Geittmann and Kendall never used the term ***1440** "smuggling" when describing the aircraft seizure in Mexico, there was ample testimony by both that the plane was carrying contraband into Mexico illegally. The prosecution's use of the term "smuggling" was thus based on a sufficient evidentiary foundation in the record. See United States v. Perez, 493 F.2d 1339, 1343 (10th Cir.1974); cf. Marks v. United States, 260 F.2d 377, 383 (10th Cir.1958), cert. denied, 358 U.S. 929, 79 S.Ct. 315, 3 L.Ed.2d 302 (1959).

[21] Moreover, not all improper comments require a new trial or reversal on appeal. It is only when a remark could have influenced the jury's verdict and the trial court failed to take appropriate steps to remove it from the jury's consideration that there is reversible error. Devine v. United States, 403 F.2d 93, 96 (10th Cir.1968), cert. denied, 394 U.S. 1003, 89 S.Ct. 1599, 22

UNITED STATES of America, Plaintiff, Appellee,
v.
Hector H. TUESTA-TORO, Defendant, Appellant.

No. 93-2182.

United States Court of Appeals,
First Circuit.

Heard June 7, 1994.

Decided July 25, 1994.

Defendant was convicted in the United States District Court for the District of Puerto Rico, Hector M. Laffitte, J., of possession of cocaine with intent to distribute, carrying firearm during drug trafficking offense, and using communication facility to facilitate drug trafficking scheme. Defendant appealed. The Court of Appeals, Cyr, Circuit Judge, held that: (1) defendant's omnibus pretrial motion was not sufficient to trigger government's responsibility to disclose "other wrongful acts" evidence as precondition to its use at trial; (2) admission of defendant's prior drug dealing was not plain error; (3) evidence supported conviction on use of communication facility counts; (4) admission of hearsay testimony was harmless error; and (5) evidence supported sentence enhancement for managerial role in offense.

Affirmed.

[1] CRIMINAL LAW ⚿ 374
110k374
In order to trigger government's responsibility to disclose "other wrongful acts" evidence as precondition to its use at trial, defendant's pretrial request, at minimum, must be sufficiently clear and particular, in objective sense, to alert prosecution that defense is invoking its specific right to pretrial notification of general nature of "other wrongful acts" evidence government intends to introduce. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⚿ 374
110k374
Defendant's omnibus pretrial motion seeking "confessions, admissions and statements" that "in any way exculpate, inculpate or refer to the defendant" was not sufficient to trigger government's responsibility to disclose "other wrongful acts" evidence as precondition to its use at trial; motion made no discernible reference to "other wrongful acts" evidence and did not request mere notification of general nature of any such evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⚿ 1036.1(8)
110k1036.1(8)
Rulings regarding admissibility of "other wrongful acts" evidence are normally reviewed for abuse of discretion, but, where defendant makes no contemporaneous objection, Court of Appeals reviews for plain error and will reverse only if error seriously affected fundamental fairness and basic integrity of proceedings. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
Rulings regarding admissibility of "other wrongful acts" evidence are normally reviewed for abuse of discretion, but, where defendant makes no contemporaneous objection, Court of Appeals reviews for plain error and will reverse only if error seriously affected fundamental fairness and basic integrity of proceedings. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⚿ 1036.1(8)
110k1036.1(8)
Admission of evidence of defendant's prior drug dealings was not plain error; evidence was admitted for limited purpose of refuting defendant's "mere presence" defense, that he was present by mistake at scene of drug transaction giving rise to charges at issue, and district court minimized any potential for prejudice with contemporaneous limiting instruction, which it reiterated in final charge. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] TELECOMMUNICATIONS ⚿ 363
372k363
Conviction for two counts of use of communication facility to facilitate felonious drug offense was supported by codefendant's testimony that he telephoned defendant twice to arrange time and place at which cocaine transaction would occur, as well as price and quantity of cocaine. Comprehensive Drug Abuse Prevention and Control

Act of 1970, § 403(b), 21 U.S.C.A. § 843(b).

[6] CRIMINAL LAW ⚿ 419(1.5)
110k419(1.5)
Drug enforcement agent's testimony that during debriefing session confidential informant stated that codefendant acted in behalf of defendant in setting up cocaine deals was hearsay; testimony was offered for sole purpose of proving truth of matter asserted, that is, defendant's role in offense, rather than as background information. Fed.Rules Evid.Rule 801, 28 U.S.C.A.

[7] CRIMINAL LAW ⚿ 1169.2(6)
110k1169.2(6)
Error in admitting drug enforcement agent's hearsay testimony that during debriefing session confidential informant stated that codefendant acted in behalf of defendant in setting up cocaine deals was harmless; testimony was cumulative of codefendant's testimony on same matter, and independent admissible evidence confirmed that defendant determined conditions of sale, supplied cocaine, and witnessed cocaine exchange from nearby while in possession of loaded firearm.

[8] CRIMINAL LAW ⚿ 1134(3)
110k1134(3)
Court of Appeals addresses ineffectiveness of counsel claims on direct appeal only if critical facts are not in dispute and sufficiently developed record exists. U.S.C.A. Const.Amend. 6.

[9] CRIMINAL LAW ⚿ 997.5
110k997.5
Ordinarily, collateral proceeding to vacate sentence is proper forum for fact-bound ineffective assistance of counsel claims. 28 U.S.C.A. § 2255; U.S.C.A. Const.Amend. 6.

[10] CRIMINAL LAW ⚿ 1035(7)
110k1035(7)
Court of Appeals would not consider ineffective assistance of counsel claim raised on direct appeal; defendant's contention that trial counsel inexplicably failed to discover identity of confidential informant was not raised in district court and was sufficiently fact-bound to preclude effective review on present record. U.S.C.A. Const.Amend. 6.

[10] CRIMINAL LAW ⚿ 1119(1)
110k1119(1)
Court of Appeals would not consider ineffective assistance of counsel claim raised on direct appeal; defendant's contention that trial counsel inexplicably failed to discover identity of confidential informant was not raised in district court and was sufficiently fact-bound to preclude effective review on present record. U.S.C.A. Const.Amend. 6.

[11] CRIMINAL LAW ⚿ 1037.1(1)
110k1037.1(1)
In absence of contemporaneous objection, Court of Appeals reviews allegations of prosecutorial misconduct for plain error and will overturn jury verdict only if government's closing argument so "poisoned the well" that it is likely that verdict was affected.

[12] CRIMINAL LAW ⚿ 1037.1(2)
110k1037.1(2)
Prosecutor's statement in closing argument that "when a person repents and wants to cooperate, we need to present the testimony to the jury so that the jury has the facts at hand" was not plain error, notwithstanding contention that prosecutor improperly vouched for codefendant's credibility; any vouching which might have occurred was so faint as to be virtually indiscernible even to trained ear, and, thus, there was no likelihood that verdicts were tainted by alleged prosecutorial misconduct.

[13] CRIMINAL LAW ⚿ 1252
110k1252
District court could deny sentence reduction for acceptance of responsibility, notwithstanding contention that court did not afford defendant adequate opportunity to evince remorse; defendant continued to assert his innocence during postconviction interview with probation officer, district court twice invited defendant at sentencing to accept responsibility by pointing out that sentencing hearing would be his last opportunity to do so, and, though defendant asked court for leniency, he said nothing which might be taken to indicate remorse. U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

[14] CRIMINAL LAW ⚿ 1313(2)
110k1313(2)
For sentence enhancement purposes, defendant's role in offense must be established by preponderance of evidence. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

[15] CRIMINAL LAW ⚿ 1158(1)
110k1158(1)
Sentencing court's factual findings are reviewed only for clear error.

[16] CRIMINAL LAW ⚿ 1251
110k1251
Exercise of decision-making authority, degree of participation in planning or organizing offense, and degree of control and authority defendant exercised over others are among factors to be considered in determining managerial role in offense for sentence enhancement purposes. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

[17] CRIMINAL LAW ⚿ 1251
110k1251
Finding, for purposes of sentence enhancement, that defendant performed managerial role in drug trafficking offense was supported by evidence that codefendant acted at defendant's direction in setting time and place of transaction and price and quantity of cocaine and by evidence of unusual purity of cocaine, which was 98% pure, which defendant supplied to codefendant. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

***773** Kevin G. Little, Los Angeles, CA, for appellant.

Jose A. Quiles Espinosa, Sr. Litigation Counsel, Hato Rey, PR, with whom Guillermo Gil, U.S. Atty., Washington, DC, and Warren Vazquez, Asst. U.S. Atty., Hato Rey, PR, were on brief, for appellee.

Before SELYA, CYR and BOUDIN, Circuit Judges.

CYR, Circuit Judge.

Following a three-day trial, a jury returned guilty verdicts on four drug-related charges against defendant-appellant Hector H. Tuesta Toro ("Tuesta"), who was sentenced to serve 128 months in prison, and this appeal ensued. Finding no reversible error, we affirm.

I
FACTS

We set out the salient facts in the light most favorable to the verdicts. United States v. Tejeda, 974 F.2d 210, 212 (1st Cir.1992). On September 2, 1992, after receiving information from a confidential informant ("CI") that Tuesta and codefendant Carlos Martinez Diaz ("Martinez") were distributing large quantities of cocaine in the San Juan metropolitan area, the United States Drug Enforcement Administration ("DEA") recorded telephone conversations during which Martinez agreed to sell the CI five kilograms of cocaine at $16,500 per kilogram and identified Tuesta as his source. Martinez in turn spoke with Tuesta by cellular phone in order to establish the price and quantity of the cocaine to be sold to the CI and the site of the drug transaction, but then lost phone contact with Tuesta.

The next day Martinez advised the CI by phone that a one-kilogram transaction (rather than the five-kilogram transaction discussed the day before) would take place that afternoon, but that Tuesta did not wish to be seen by the buyer. Martinez reestablished telephone contact with Tuesta at 2:40 in the afternoon. En route to the scene of the transaction, Martinez noted that Tuesta was carrying a gun and more than one kilogram of cocaine. At Tuesta's instruction, Martinez parked their vehicle so that Tuesta could witness the drug deal without being observed. Martinez then exited the car and delivered the cocaine to the CI, who was accompanied by an undercover DEA agent.

Shortly thereafter, Martinez and Tuesta were arrested and charged with possessing cocaine, with intent to distribute, see 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2; carrying a firearm during and in relation to a drug trafficking offense, see id. §§ 942(c)(1), 2; and with two counts of using a communication facility to facilitate a drug trafficking offense, see 21 U.S.C. § 843(b), 18 U.S.C. § 2. Martinez eventually entered into a plea agreement with the government and testified against Tuesta at trial. Following Tuesta's conviction on all counts, he was sentenced to 128 months' imprisonment.

II
DISCUSSION

A. Evidence Rule 404(b)

Prior to trial, Tuesta filed an omnibus motion to

compel discovery which included the following request:

> [a]ll confessions, admissions and statements to the United States Attorney, or any law enforcement agent, made by any other person, whether indicted or not, that in any way exculpate, inculpate or refer to the defendant, whether or not such confessions, admissions and statements have been reduced to writing.

(Emphasis added.) The motion made no mention of Rule 404(b) or "other wrongful acts" evidence.

The government responded that it intended to pursue an "open file" discovery policy and that only government agents would be called to testify against Tuesta. Following the government's response, however, Martinez entered into a plea agreement which provided that he would testify against Tuesta. ***774** Except as discussed below, Tuesta did not claim surprise.

At trial, the defense objected when the government asked Martinez how he knew Tuesta. The government responded that Martinez would testify to prior drug dealings with Tuesta. Tuesta objected on the ground that he had not been afforded pretrial notification of the government's intention to use Rule 404(b) evidence. The court admitted the evidence for the limited purpose of refuting Tuesta's "mere presence" defense, see United States v. Hernandez, 995 F.2d 307, 314 (1st Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 407, 126 L.Ed.2d 354 (1993), after ruling that its probative value was not substantially outweighed by the danger of unfair prejudice, see Fed.R.Evid. 403. The court, acting sua sponte, gave the jury a contemporaneous limiting instruction.

1. The Notification Requirement of Rule 404(b)

Tuesta first contends that the "other wrongful acts" evidence introduced through codefendant Martinez should have been excluded because the government failed to provide the pretrial notification required by Evidence Rule 404(b) in response to Tuesta's omnibus motion for discovery. The government maintains that Tuesta made no cognizable Rule 404(b) request prior to trial.

[1] The question presented is one of first impression: how particular must a pretrial discovery request be in order to trigger the government's responsibility to disclose Rule 404(b) evidence as a precondition to its use at trial? Rule 404(b), as amended in 1991, provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial.

Fed.R.Evid. 404(b) (emphasis added). As the rule speaks only of a "request by the accused" and the duty of the prosecution to provide reasonable pretrial notification "of the general nature of any such evidence it intends to introduce at trial," id., we turn elsewhere for guidance.

The advisory committee's notes to the 1991 amendment define the responsibilities of the respective parties in requesting and affording pretrial notification under Rule 404(b): "The amendment to Rule 404(b).... expects that counsel for ... the defense ... will submit the necessary request ... in a reasonable and timely manner." Fed.R.Evid. 404(b) advisory committee's notes (1991 amendment) (emphasis added). The advisory committee note simply confirms the requirement implicit in the rule itself--that the defense must submit, "in a reasonable and timely manner," its request for pretrial notification of the general nature of any evidence of other crimes, wrongs, or acts the government intends to introduce at trial for purposes of proving "motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident," Fed.R.Evid. 404(b). We think it beyond question, therefore, that a "reasonable" request for notification, at a minimum, must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification of the general nature of any Rule 404(b) evidence the prosecution intends to introduce.

[2] An overbroad pretrial request, like the present--for "confessions, admissions and statements ... that in any way exculpate, inculpate or refer to the defendant"--is insufficiently specific at the very

least, if not misleading. Cf. United States v. Carrasquillo-Plaza, 873 F.2d 10, 12 (1st Cir.1989) (noting that overbroad discovery requests, absent a specific showing of materiality, do not afford the prosecution proper notice in analogous Rule 16 context); United States v. Hemmer, 729 F.2d 10, 14-15 (1st Cir.) (same), cert. denied, 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984). The omnibus motion submitted by Tuesta made no discernible reference to anything resembling "other ***775** wrongful acts" evidence nor did it request mere notification of the general nature of any such evidence. Rather, it demanded outright pretrial disclosure of statements in any form, referring to the defendant in any way, without regard to their admissibility or the government's intention to introduce them. [FN1] See Fed.R.Evid. 404(b); cf., United States v. Williams, 792 F.Supp. 1120, 1133 (S.D.Ind.1992) (notification required in response to detailed request reciting text of Rule 404(b)); United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (similar; request specifically referencing Rule 404(b)).

> FN1. As a further condition precedent to the government's duty, we note that Rule 404(b) seemingly requires pretrial notification only of "other wrongful acts" evidence which the government presently intends, as of the time the government responds to the request, to introduce at trial. The present appeal neither requires that we determine the point nor consider its ramifications.

Accordingly, at a minimum the defense must present a timely request sufficiently clear and particular, in an objective sense, to fairly alert the prosecution that the defense is invoking its specific right to pretrial notification of the general nature of all Rule 404(b) evidence the prosecution intends to introduce at trial. The rule we describe will bring pretrial practice under Rule 404(b) in line with circuit precedent governing the prosecution's duty to provide discovery material under Federal Rule of Criminal Procedure 16. Cf. Fed.R.Evid. 404(b) advisory committee's notes (1991 amendment) (noting that amended rule "places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence" but was not intended to impose on government a greater disclosure burden than "currently ... required ... under [Fed.R.Crim.P.] 16") (emphasis added). See also supra note 1.

2. Admission of 404(b) Evidence at Trial

[3] Next, Tuesta contends that it was reversible error to admit the Martinez testimony to rebut Tuesta's "mere presence" defense. These evidentiary rulings normally are reviewed for abuse of discretion. United States v. Figueroa, 976 F.2d 1446, 1454 (1st Cir.1992), cert. denied, --- U.S. ---, 113 S.Ct. 1346, 122 L.Ed.2d 728 (1993). As Tuesta made no contemporaneous objection, however, we review for "plain error," id. at 1453, and will reverse only if the error "seriously affect[ed] the fundamental fairness and basic integrity of the proceedings," United States v. Carty, 993 F.2d 1005, 1012 n. 9 (1st Cir.1993).

[4] A Rule 404(b) proffer must undergo a two-step inquiry:

> First, under the "absolute bar" of Rule 404(b), the evidence is inadmissible if relevant solely to show the defendant's character or propensity for criminal conduct; it must have some "special relevance" to a material issue such as motive, opportunity, intent, preparation, plan or knowledge. Second, under Rule 403, the trial court must satisfy itself that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion or undue delay.

Id. at 1011 (citations omitted). The district court admitted the Martinez testimony relating to prior drug deals with Tuesta for the limited purpose of refuting Tuesta's "mere presence" defense that he was at the drug scene by "mistake." Fed.R.Evid. 404(b) (evidence admissible to prove, inter alia, knowledge, intent, absence of mistake); Carty, 993 F.2d at 1011 (prior drug-dealing evidence admitted where defendant raised "mere presence" defense); United States v. Agudelo, 988 F.2d 285, 287 (1st Cir.1993) (same). Further, after the district court ruled that the probative value of the evidence outweighed any "danger of unfair prejudice," Fed.R.Evid. 403, it minimized the potential for prejudice with a contemporaneous limiting instruction, which it reiterated in the final charge. See Tejeda, 974 F.2d at 214. We discern no error, plain or otherwise.

B. Use of Communication Facility to Effect Drug Crime

Tuesta challenges the guilty verdicts on counts

three and four, on the grounds that the district court misinterpreted 18 U.S.C. § 2 and that there was insufficient evidence that he aided and abetted Martinez in the use of a communication facility to effect the ***776** cocaine transaction, see 21 U.S.C. § 843(b). We disagree.

Section 843(b) prohibits use of a communication facility to cause or facilitate a felonious drug offense. See United States v. Cordero, 668 F.2d 32, 43 (1st Cir.1981). Tuesta's challenge to the sufficiency of the evidence requires that "[w]e view the evidence in the light most favorable to the verdict, in order to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt. All reasonable inferences are drawn in favor of the verdict and any credibility determination must be compatible with the judgment of conviction." Tejeda, 974 F.2d at 212 (citations omitted).

[5] The jury was entitled to credit Martinez's testimony that he telephoned Tuesta, on September 2 and 3, 1992, to arrange the time and place at which the cocaine transaction would occur, as well as the price and quantity of cocaine. No more was required. Thus, even if Tuesta had played no part in the two telephone conversations between Martinez and the CI, the jury rationally could have inferred, from the two telephone conversations between Martinez and Tuesta, that Tuesta knowingly used a communication facility to effect the cocaine deal. [FN2]

> FN2. Since the indictment, as well as the jury instruction on the section 843(b) charges, encompassed Tuesta's conduct as a principal and as an aider and abettor, we need not address his contention that he could not be convicted under 18 U.S.C. § 2 because there was no evidence that he instructed Martinez to use a communication device to arrange the cocaine sale.

C. "Background" Hearsay

A DEA agent testified that during a debriefing session the CI stated that Martinez acted in behalf of Tuesta in setting up cocaine deals. Tuesta contends that admission of this hearsay testimony, over timely objection, was error. We agree.

[6][7] As the government conceded at oral argument, the agent's testimony purported to relate an out-of-court statement by the CI offered for the sole purpose of proving the truth of the matter asserted (i.e., Tuesta's role in the instant offenses). See Fed.R.Evid. 801; cf. Figueroa, 976 F.2d at 1458 (noting that so-called "background" hearsay is not hearsay at all unless introduced to prove the truth of the matter asserted). Thus, its admission constituted error. We conclude, however, that the error was harmless. See id.

First, the testimony was cumulative of Martinez's testimony on the same matter. Further, independent admissible evidence confirmed that Tuesta determined the conditions of sale, supplied the cocaine, and witnessed the cocaine exchange from nearby while in possession of a loaded firearm. Thus, "we can say 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [jurors'] judgment was not substantially swayed by the error.' " Id. at 1459 (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946) ("harmless error" standard)).

D. Ineffective Assistance of Counsel

[8][9][10] Next, Tuesta attempts to present an "ineffective assistance" claim on direct appeal. As a general rule, we address such Sixth Amendment claims on direct appeal only if "the critical facts are not in dispute and a sufficiently developed record exists." United States v. Jadusingh, 12 F.3d 1162, 1169 (1st Cir.1994) (citing United States v. Daniels, 3 F.3d 25, 26-27 (1st Cir.1993)). Ordinarily, a collateral proceeding under 28 U.S.C. § 2255 is the proper forum for fact-bound ineffective assistance claims. See Jadusingh, 12 F.3d at 1170. Tuesta's contention that trial counsel inexplicably failed to discover the identity of the CI was not raised in the district court and is sufficiently fact-bound to preclude effective review on the present record.

E. Prosecutorial Misconduct

[11][12] Tuesta contends that the prosecution improperly vouched for Martinez's testimony during its closing argument. [FN3] In the absence of a contemporaneous objection, we ***777** review allegations of prosecutorial misconduct for plain error, and will overturn a jury verdict only "if the government's closing argument 'so poisoned the

well' that it is likely that the verdict was affected." United States v. Smith, 982 F.2d 681, 682 (1st Cir.1993) (citing United States v. Mejia-Lozano, 829 F.2d 268, 274 (1st Cir.1987)). Any vouching which may have occurred was so faint as to be virtually indiscernible even to the trained ear. We are confident that there is no likelihood that the verdicts were tainted by the alleged prosecutorial misconduct. Id.

FN3. Tuesta argues that the prosecutor improperly vouched for Martinez's credibility by stating that "when a person repents and wants to cooperate, we need to present the testimony to the jury so that the jury has the facts at hand." Although he states that there was no evidence that Martinez approached the government and offered to testify, Tuesta concedes that evidence was presented that the plea agreement did not require Martinez to testify. Second, Tuesta contends that the prosecutor's reference to "the facts at hand" placed the government's prestige behind Martinez.

F. Cumulative Error

As most assignments of error were baseless, we must also reject Tuesta's final contention that the conviction was tainted by cumulative error. See United States v. Barnett, 989 F.2d 546, 560 (1st Cir.) ("The Constitution entitles a criminal defendant to a fair trial, not a perfect one.") (citing Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986)), cert. denied, --- U.S. ----, 114 S.Ct. 148, 126 L.Ed.2d 110 (1993).

G. Sentencing Error

1. Acceptance of Responsibility

[13] Tuesta argues that the district court improperly denied a reduction for acceptance of responsibility, see U.S.S.G. § 3E1.1, without affording him an adequate opportunity to evince remorse.

Tuesta distorts the record. He continued to assert his innocence during a post-conviction interview with the probation officer. At sentencing, the district court twice invited him to accept responsibility, by pointing out that the sentencing hearing would be his last opportunity to do so. [FN4] Nonetheless, though Tuesta asked the court for leniency, he said nothing which might be taken to indicate remorse. Thus, he squandered several opportunities to verbalize acceptance of responsibility, leaving the district court little choice but to adopt a presentence report recommendation that no reduction be allowed. There was no error.

FN4. Prior to Tuesta's allocution, the court stated: "I haven't heard any acceptance of responsibility." Moments later, the court said: "Well, you can say some things that may be able to help you; but if you don't say them ... that's up to you."

2. Sentencing Enhancement for Managerial Role

[14][15] Finally, Tuesta challenges the two-level enhancement imposed for his managerial role in the offense, see U.S.S.G. § 3B1.1 (1993), which the district court premised in part upon the unusual purity of the cocaine supplied by Tuesta. A defendant's role in the offense must be established by a preponderance of the evidence, see United States v. Sostre, 967 F.2d 728, 731 (1st Cir.1992), and the sentencing court's factual findings are reviewed only for clear error, Jadusingh, 12 F.3d at 1169.

[16][17] The exercise of decision-making authority, the degree of participation in planning or organizing the offense, and the degree of control and authority the defendant exercised over others are among the factors to be considered in determining managerial role. See U.S.S.G. § 3B1.1, comment (n. 4). The record is replete with evidence that Martinez acted at the direction of Tuesta in setting the time and place of the drug transaction, and the price and quantity of the cocaine. United States v. Cronin, 990 F.2d 663, 665 (1st Cir.1993) (noting that such evidence supports finding of managerial role.) Additionally, the district court properly relied on the unusual purity of the cocaine (98%) Tuesta supplied to Martinez, as a further ground for inferring that Tuesta performed a managerial role. See United States v. Iguaran-Palmar, 926 F.2d 7, 9 (1st Cir.1991). There was no error.

The judgment is affirmed.

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UNITED STATES of America, Plaintiff-Appellee,
v.
Bernard C. BIRCH, Jr., aka Chubby, Defendant-Appellant.

No. 93-3348.

United States Court of Appeals,
Tenth Circuit.

Nov. 3, 1994.

Defendant was convicted in the United States District Court for the District of Kansas, Patrick F. Kelly, Chief Judge, of assault on federal officer and possession of firearm during violent crime. Defendant appealed. The Court of Appeals, Tacha, Circuit Judge, held that: (1) trial court did not abuse its discretion in allowing courtroom demonstration of defendant's version of shooting; (2) district court abused its discretion in allowing prosecution to present evidence of defendant's two previous convictions for battery on law enforcement officer, but error was harmless in light of significant evidence of defendant's guilt; (3) defendant's placement into custody of state secretary of social and rehabilitation services at time defendant was juvenile was "confinement" within meaning of sentencing guideline providing for assessment of criminal history points for juvenile convictions; and (4) orders committing defendant, when juvenile, to such custody were properly considered sentences to confinement of "at least 60 days," for purposes of that guideline.

Affirmed.

[1] CRIMINAL LAW ⊜ 650
110k650
Trial court did not abuse its discretion in allowing courtroom demonstration of defendant's version of shooting, in which chairs were placed side-by-side simulating front seat of car and defendant was asked to show how shooting by alleged passenger occurred, which was followed by testimony that bullet fired from gun in position demonstrated by defendant could not have had trajectory of bullet that wounded federal agent; defendant himself participated in demonstration and prosecution met burden of showing substantial similarity between courtroom demonstration and seating in defendant's car.

[2] CRIMINAL LAW ⊜ 1035(10)
110k1035(10)
Defense, having neither requested that court view outside jury's presence demonstrative evidence purporting to reenact events at trial, nor requested that limiting instruction be given, could not allege on appeal that trial court erred in failing to take those steps.

[3] CRIMINAL LAW ⊜ 369.13
110k369.13
District court abused its discretion in allowing prosecution to present evidence of defendant's two previous convictions for battery on law enforcement officer in prosecution for assault on federal officer, as specific purpose for admitting evidence was not apparent; notice of intent to introduce evidence stated only that purpose of evidence was "to prove the defendant's knowledge, identity and absence of mistake or accident," and did not articulate relevant purpose and specific inferences to be drawn from evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⊜ 374
110k374
District court abused its discretion in allowing prosecution to present evidence of defendant's two previous convictions for battery on law enforcement officer in prosecution for assault on federal officer, as specific purpose for admitting evidence was not apparent; **notice** of intent to introduce evidence stated only that purpose of evidence was "to prove the defendant's knowledge, identity and absence of mistake or accident," and did not articulate relevant purpose and specific inferences to be drawn from evidence. Fed.Rules Evid.Rule **404(b),** 28 U.S.C.A.

[4] CRIMINAL LAW ⊜ 374
110k374
In order to aid district court's determination of whether evidence of other criminal acts of defendant is offered to prove issue other than character, government must precisely articulate purpose of proffered evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⊜ 369.2(1)

110k369.2(1)
Even absent adherence to Tenth Circuit's requirements for admission of other crimes evidence, mandating that government precisely articulate purpose of proffered evidence and requiring trial court to specifically identify purpose for which evidence is offered, other crimes evidence is nevertheless admissible if decision to admit fulfills requirements of Supreme Court opinion noting that federal rules of evidence contain four sources of protection to prevent introduction of unduly prejudicial other crimes evidence, i.e., that evidence be offered for proper purpose, that it be relevant, that probative value not be outweighed by potential for unfair prejudice, and that jury is instructed on proper purpose for which evidence is to be considered.

[5] CRIMINAL LAW ⊜ 374
110k374
Even absent adherence to Tenth Circuit's requirements for admission of other crimes evidence, mandating that government precisely articulate purpose of proffered evidence and requiring trial court to specifically identify purpose for which evidence is offered, other crimes evidence is nevertheless admissible if decision to admit fulfills requirements of Supreme Court opinion noting that federal rules of evidence contain four sources of protection to prevent introduction of unduly prejudicial other crimes evidence, i.e., that evidence be offered for proper purpose, that it be relevant, that probative value not be outweighed by potential for unfair prejudice, and that jury is instructed on proper purpose for which evidence is to be considered.

[6] CRIMINAL LAW ⊜ 1169.1(1)
110k1169.1(1)
District court's erroneous admission of evidence does not require reversal if error was harmless.

[7] CRIMINAL LAW ⊜ 1139
110k1139
In determining whether trial court's error in admission of evidence was harmless, Court of Appeals reviews entire record de novo.

[8] CRIMINAL LAW ⊜ 1169.11
110k1169.11
Erroneous admission of defendant's two previous convictions for battery on law enforcement officer was harmless in prosecution for assault on federal officer, in light of significant evidence against defendant; while defendant claimed that passenger in car defendant was driving shot gun and then jumped out during chase, four police officers testified that they saw no one jump from defendant's car during chase, and that car was traveling too fast to allow person to jump out without injury, officer testified that he saw defendant holding gun during chase, two officers testified that defendant made incriminating statements after arrest, and prosecutor was able to discredit much of defendant's version of events through cross-examination and other testimony. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[9] CRIMINAL LAW ⊜ 1139
110k1139
In defendant's appeal of sentence determined under Sentencing Guidelines, Court of Appeals reviews factual findings by district court for clear error and interpretations of guidelines de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[9] CRIMINAL LAW ⊜ 1158(1)
110k1158(1)
In defendant's appeal of sentence determined under Sentencing Guidelines, Court of Appeals reviews factual findings by district court for clear error and interpretations of guidelines de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[10] CRIMINAL LAW ⊜ 1245(4)
110k1245(4)
Defendant's placement into custody of state secretary of social and rehabilitation services at time defendant was juvenile was "confinement" within meaning of Sentencing Guideline providing for assessment of criminal history points for juvenile convictions. U.S.S.G. § 4A1.2(d)(2)(A), 18 U.S.C.A.App.

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

[11] CRIMINAL LAW ⊜ 1245(4)
110k1245(4)
Orders committing defendant, when juvenile, to custody of state secretary of social and rehabilitation services were properly considered sentences to confinement of "at least 60 days," for purposes of Sentencing Guideline providing for assessment of

criminal history points for juvenile sentences to confinement of at least 60 days, even though commitment orders lacked release date; defendant actually served more than 60 days and, thus, maximum time he could have been confined exceeded 60 days. U.S.S.G. §§ 4A1.2(d)(2)(A), 4A1.2, comment. (n. 2), 18 U.S.C.A.App.

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

[12] CRIMINAL LAW ⊸ 1245(4)
110k1245(4)
Although actual time served should not be considered "sentence to confinement" for purposes of Sentencing Guideline providing for assessment of criminal history points for juvenile sentences of confinement of at least 60 days, time served is evidence of maximum sentence of imprisonment in cases of indeterminate sentencing. U.S.S.G. §§ 4A1.2(d)(2)(A), 4A1.2, comment. (n. 2), 18 U.S.C.A.App.

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

***1091** Cyd Gilman, Asst. Federal Public Defender for the Dist. of Kansas, Wichita, KS, for defendant-appellant.

Kim M. Fowler (Randall K. Rathbun, U.S. Atty., with her on the brief), Asst. U.S. Atty., Dist. of Kansas, Kansas City, KS, for plaintiff-appellee.

Before TACHA, LOGAN, and EBEL, Circuit Judges.

TACHA, Circuit Judge.

Bernard C. Birch, Jr. was convicted by a jury of assault on a federal officer and possession of a firearm during a violent crime. He appeals both his convictions and his sentence. Defendant alleges in his appeal that the district court erred in (1) allowing the prosecution to conduct a demonstration during cross-examination of defendant, (2) admitting evidence of defendant's prior convictions under Federal Rule of Evidence 404(b), and (3) assessing two criminal history points for each of two prior juvenile convictions of defendant. This court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742 and affirms.

I. Background

On April 28, 1993, Special Agent Randy O'Dell of the Bureau of Alcohol, Tobacco and Firearms, and Lieutenant Aaron Harrison of the Wichita Police Department were conducting surveillance of a residence occupied by defendant's girlfriend and their two children from Agent O'Dell's unmarked car. The officers observed defendant arrive at and enter the house. Defendant was driven to the house by a friend; several other friends accompanied him as well. After checking on the well-being of the occupants, defendant left the residence. Rather than leave with the friend who had brought him to the house, defendant drove away in his girlfriend's car, which had been parked in the driveway.

Meanwhile, the officers drove by the house, circled the block, and followed defendant's vehicle as he left the house. When defendant noticed he was being followed, he turned his car around and drove back towards the officers' car. As the cars passed one another, a shot was fired from defendant's car, wounding Agent O'Dell.

Defendant fled the scene in the vehicle from which the shot was fired. Agent O'Dell and Lieutenant Harrison gave chase, calling other units in as back-up. Two to three minutes later, defendant lost control of his vehicle and crashed the car into a tree. He fled on foot and was apprehended shortly thereafter.

After his arrest and at trial, defendant claimed that, although he was driving the car at the time of the shooting, there was a passenger in the car who fired the shot that wounded Agent O'Dell. According to defendant, this individual [FN1] leaped from the car during the car chase, leaving his weapon in the car with defendant.

> FN1. Defendant identified this individual as "Mike Bradford." Apparently neither police investigators nor defendant have been able to locate Mr. Bradford.

Defendant testified in his own defense at trial. On cross-examination by the prosecution, and over defense counsel's objection, defendant was asked to demonstrate his version of the shooting. Two courtroom chairs were placed side by side, simulating the front seat of the car, and defendant

was asked to show how the shooting occurred. During ***1092** this demonstration, the prosecutor asked defendant to show the jury the position of the gun when it was fired. The prosecution then called witnesses who testified that defendant's version of the shooting was impossible. These witnesses testified that a bullet fired from a gun in the position demonstrated by defendant could not possibly have the trajectory of the bullet that wounded Agent O'Dell.

II. Courtroom Demonstration

[1] This court examined the use of demonstrative evidence that purports to reenact events at trial in United States v. Wanoskia, 800 F.2d 235 (10th Cir.1986). In Wanoskia, a defendant on trial for murdering his wife maintained that his wife had shot herself. Id. at 236-37. The prosecution attempted to discredit the defendant's story by showing that it would have been impossible for the victim to shoot herself. The medical examiner testified that, based on the powder burns on the victim, the fatal shot was fired from approximately eighteen inches from the victim. Id. at 237. The prosecution then presented a demonstration to show that the victim could not have shot herself from this distance. Id. at 236.

Recognizing the highly persuasive nature of evidence purporting to reenact actual events, we declared in Wanoskia that the trial court "must take special care to ensure that the demonstration fairly depicts the events at issue." Id. at 238 (citation omitted). To ensure that such care is taken by trial courts, we announced a threshold requirement for the admission of demonstrative evidence, which we adopted from the Jackson v. Fletcher standard for experimental evidence:

> "Where ... an experiment purports to simulate actual events and to show the jury what presumably occurred at the scene ..., the party introducing the evidence has a burden of demonstrating substantial similarity of conditions. They may not be identical but they ought to be sufficiently similar so as to provide a fair comparison."

Wanoskia at 238 (quoting Jackson v. Fletcher, 647 F.2d 1020, 1027 (10th Cir.1981)).

Despite this threshold requirement for admissibility, "a trial court's decision to admit or exclude such evidence will be reversed only if the court abused its discretion." Wanoskia, 800 F.2d at 238 (citation omitted). We therefore review the district court's decision to allow the demonstration with deference.

The purpose of the demonstration in the instant case was to illustrate and clarify testimony already given by defendant on direct examination. Defendant himself participated in the demonstration. Courtroom chairs were used to simulate seating in the car; defendant sat in one chair while an ATF agent sat in the other. Defendant demonstrated his version of the events. Nothing in the record indicates that the jury was led to believe that the chairs represented anything other than the car seats. Moreover, the defense could have conducted a redirect examination to correct any part of the demonstration that was potentially misleading to the jury. Although only a limited foundation was laid by the prosecution, the prosecution nonetheless met its burden of demonstrating substantial similarity between the courtroom demonstration and the seating in defendant's car.

Defendant's argument that the demonstration here is similar to that found improper in Jackson v. Fletcher fails. In Jackson, the evidence at issue was testimony describing the results of an out-of-court reenactment of a vehicle accident. We found this evidence unduly prejudicial because the experiment lacked a substantial similarity of circumstances. Id. at 1026-28. Here, in contrast, the evidence consisted of an in-court demonstration by defendant that was sufficiently similar to actual events to provide a fair comparison.

[2] Defendant argues that the district court's failure to take the protective measures taken by the district court in Wanoskia resulted in unfair prejudice to defendant. In Wanoskia, we noted with approval that the trial court had first viewed the demonstration outside the presence of the jury and that the jury was instructed to disregard the demonstration if it determined that the testimony lacked an adequate foundation. Wanoskia, ***1093** 800 F.2d at 239. In the instant case, however, the defense neither requested that the court view the demonstration outside the jury's presence nor requested that a limiting instruction be given to the jury. As a result, the defense cannot now allege that the trial court erred in failing to take these steps.

See Robinson v. Audi NSU Auto Union, 739 F.2d 1481, 1485 (10th Cir.1984).

The courtroom demonstration, combined with the testimony regarding the bullet's trajectory, was indeed damaging to the defense. Evidence that is prejudicial to the defense is inadmissible, however, only if its probative value is substantially outweighed by its unfair prejudice to the defendant. See Fed.R.Evid. 403. [FN2] We conclude that the district court did not abuse its discretion in allowing the prosecution to conduct the demonstration using courtroom chairs to represent the front seat of defendant's car.

> FN2. Cf. United States v. Gaskell, 985 F.2d 1056, 1061 (11th Cir.1993) (probative value of demonstration in which adult male witness repeatedly shook a representation of an infant was substantially outweighed by unfair prejudicial effect to defendant on trial for involuntary manslaughter of his infant daughter).

III. Rule 404(b) Evidence

[3] Defendant also alleges that the district court erred in allowing the prosecution to present evidence of defendant's two previous convictions for battery on a law enforcement officer. Defendant argues that this evidence was inadmissible under Federal Rule of Evidence 404(b). We review the district court's decision to admit evidence under Rule 404(b) for an abuse of discretion. United States v. Record, 873 F.2d 1363, 1373 (10th Cir.1989).

Rule 404(b) governs the admissibility of evidence of other criminal acts of the defendant:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The district court must make a threshold determination that the offered evidence is " 'probative of a material issue other than character' " before admitting evidence under Rule 404(b). United States v. Martinez, 890 F.2d 1088, 1093 (10th Cir.1989) (quoting Huddleston v. United States, 485 U.S. 681, 686, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988)), cert. denied, 494 U.S. 1059, 110 S.Ct. 1532, 108 L.Ed.2d 771 (1990).

[4] In order to aid the district court's determination of whether evidence is offered to prove an issue other than character, the government must precisely articulate the purpose of the proffered evidence. United States v. Kendall, 766 F.2d 1426, 1436 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986); see also United States v. Porter, 881 F.2d 878, 884 (10th Cir.), cert. denied, 493 U.S. 944, 110 S.Ct. 348, 107 L.Ed.2d 336 (1989). Kendall further requires the trial court to "specifically identify the purpose for which such evidence is offered," noting that "a broad statement merely invoking or restating Rule 404(b) will not suffice." Kendall, 766 F.2d at 1436.

In this case, the government failed to articulate with precision the evidentiary purpose of the Rule 404(b) evidence it offered. Although the government filed a pretrial Notice of Intent to Introduce Evidence Pursuant to Rule 404(b), the Notice stated only that the evidence's purpose was "to prove the defendant's knowledge, identity and absence of mistake or accident." The Notice does not articulate "the relevant purpose and specific inferences to be drawn from ... [the] evidence of other acts" offered by the government. Kendall, 766 F.2d at 1436. At trial, evidence of defendant's prior convictions, as well as evidence of the acts that resulted in the convictions, was admitted without a more specific articulation of its purpose. Moreover, the trial court did not identify the specific permissible purpose for which the evidence was admitted.

[5] Our analysis does not end here, however. Even when the requirements of Kendall are not adhered to, the 404(b) evidence ***1094** is nevertheless admissible if the decision to admit fulfills the requirements set out by the Supreme Court in Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). United States v. Record, 873 F.2d 1363, 1375 n. 7 (10th Cir.1989). In Huddleston, the Supreme Court noted that the Federal Rules of Evidence contain four sources of protection to prevent the introduction of unduly prejudicial evidence under Rule 404(b):

> first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second,

> from the relevancy requirement of Rule 402--as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice ...; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

Huddleston, 485 U.S. at 691-92, 108 S.Ct. at 1502. To reconcile the strict requirements of Kendall with Huddleston 's logic, this court noted that if the purpose for allowing the evidence is apparent from the record and the decision to admit the evidence was correct, " 'any failure to adhere to Kendall will necessarily be harmless.' " Record, 873 F.2d at 1375 n. 7 (quoting United States v. Orr, 864 F.2d 1505, 1511 (10th Cir.1988)); see also Porter, 881 F.2d at 885. Thus, we must examine the record to determine if the specific purpose for admitting the evidence is apparent.

We are unable to find an apparent purpose, permissible under Rule 404(b), for the evidence at issue. A review of the record reveals no more specific reasoning than that already mentioned. Admission of the evidence of defendant's prior convictions was, therefore, an abuse of the trial court's discretion.

[6] Although we conclude that the admission of the evidence was error, a district court's erroneous admission of evidence does not require reversal if the error was harmless. United States v. Flanagan, 34 F.3d 949, 954-55 (10th Cir.1994). "A non-constitutional error is harmless unless it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect." United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir.1990) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946)). Accordingly, the question in this case is whether the admission of evidence of defendant's prior battery convictions had a substantial influence on "the jury's verdict in the context of the entire case against him." United States v. Short, 947 F.2d 1445, 1455 (10th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992).

[7][8] In determining whether a trial court's error was harmless, we review the entire record de novo. United States v. Perdue, 8 F.3d 1455, 1469 (10th Cir.1993). Our review of the record here reveals substantial evidence of defendant's guilt. Defendant claimed that he was driving the car but did not shoot the gun; rather, the shot was fired by a companion in the car who jumped out of the car while it was racing away from the officers. Four police officers involved in the chase testified that they saw no one jump from defendant's car during the three minute car chase which followed the shooting. These officers also testified that defendant's car was travelling too fast to allow a person to jump out without injury. An officer also testified that he saw defendant holding a gun during the car chase. Furthermore, at least two officers testified that defendant made incriminating statements after he was arrested. Finally, when defendant testified in his own defense, the prosecutor was able to discredit much of defendant's version of the events through cross- examination and other testimony.

Because of the significant amount of evidence against defendant in the record, we find that the improperly admitted evidence of defendant's prior convictions did not substantially influence the outcome of the trial. Accordingly, we conclude that the district court's error in admitting evidence of defendant's ***1095** prior battery convictions was harmless. [FN3]

> FN3. Defendant also argues that the effect of the improper admission of the rule 404(b) evidence was cumulatively prejudicial to defendant when added to the prejudicial effect of the admission of the courtroom demonstration. Because the courtroom demonstration was properly admitted, there could be no cumulative prejudice in this case.

IV. Sentencing

[9] Defendant appeals his sentence on the basis that the district court erred in assessing two criminal history points for each of defendant's two previous juvenile convictions. He argues that under the United States Sentencing Guidelines (U.S.S.G.), the district court should have assessed only one point for each of these convictions. [FN4] In a defendant's appeal of a sentence determined under the Guidelines, this court reviews factual findings by the district court for clear error and interpretations of the Guidelines de novo. United

States v. Miller, 987 F.2d 1462, 1465 (10th Cir.1993).

> FN4. The applicable provision of the Guidelines reads: (d) Offenses Committed Prior to Age Eighteen (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence. (2) In any other case, (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense; (B) add 1 point under § 4A.1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A). U.S.S.G. § 4A1.2(d). Defendant contends that his previous juvenile offenses fall under subsection (2)(B) instead of (2)(A) of this provision.

Defendant was placed on probation on December 11, 1990, for two counts of battery of a law enforcement officer. His probation was revoked in March 1991, at which time he was ordered into "the custody of the state secretary of social and rehabilitation services." The secretary ordered defendant transported to the Youth Center at Larned, Kansas, where he was confined until January 10, 1992.

[10] Defendant first argues that placement into the custody of the state secretary of social and rehabilitation services is not a "confinement" within the meaning of U.S.S.G. § 4A1.2(d)(2)(A). Section 4A1.2(d)(2)(A) requires the addition of two points "for each adult or juvenile sentence to confinement of at least sixty days." Although "sentence of confinement" is not defined in the Guidelines, "sentence of imprisonment" is defined as "a sentence of incarceration and refers to the maximum sentence imposed." U.S.S.G. § 4A1.2(b).

While this court has not yet addressed the issue, the Sixth and Eleventh Circuits have held that commitment to the custody of the state's juvenile authority constitutes "confinement" within the meaning of U.S.S.G. § 4A1.2(d)(2)(A). United States v. Fuentes, 991 F.2d 700, 702 (11th Cir.1993); United States v. Kirby, 893 F.2d 867, 868 (6th Cir.1990); United States v. Hanley, 906 F.2d 1116 (6th Cir.), cert. denied, 498 U.S. 945, 111 S.Ct. 357, 112 L.Ed.2d 321 (1990). In each case, the defendant's criminal history included a juvenile adjudication at which the defendant was committed to the custody of the appropriate state agency. The state agency then placed each defendant in a confinement facility.

Here, defendant's situation is materially indistinguishable from the circumstances in Fuentes and Kirby. Defendant was confined to the Larned Youth Center by order of the secretary, in whose custody he was placed by the court. His confinement was involuntary, so that he was not free to leave the Youth Center. We therefore hold that defendant's placement into the custody of the state secretary of social and rehabilitation services was a "confinement" within the meaning of U.S.S.G. § 4A1.2(d)(2)(A).

[11] Defendant next argues that because the orders committing him to the secretary's custody lacked a release date, they cannot be considered sentences to confinement of "at least sixty days" under U.S.S.G. § 4A1.2(d)(2)(A). Defendant bases this argument on the commentary to section 4A1.2, ***1096** which states that the "length of a sentence of imprisonment is the stated maximum.... [C]riminal history points are based on the sentence pronounced, not the length of time actually served." U.S.S.G. § 4A1.2, comment. (n. 2). The application note to section 4A1.2 gives several examples to clarify the meaning of "stated maximum":

> [I]n the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pretrial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday.

Id. The application note does not include an example which mirrors the sentence that defendant received. Clearly, the list of examples is meant to be illustrative rather than exclusive.

In defendant's case, the orders placing him into the secretary's custody lacked a maximum sentence.

Under Kansas law, however, a juvenile committed to the custody of the secretary must be released upon reaching twenty-one years of age. Kan.Stat.Ann. § 38-1675 (1993). The maximum sentence was thus for a term not to exceed defendant's twenty-first birthday.

[12] Defendant's reliance on the application note's admonition against using the length of time actually served is misplaced. The Guidelines contemplate offenses for which a defendant is sentenced to more time than is actually served. Although the actual time served should not be considered the "sentence to confinement," the time served is evidence of the maximum sentence of imprisonment in cases of indeterminate sentencing. Here, defendant actually served more than sixty days. Thus, the maximum time defendant could have been confined exceeded sixty days. Cf. Fuentes, 991 F.2d at 702. Consequently, the district court properly adopted the presentence investigation report's finding that defendant received a "sentence to confinement of at least sixty days."

V. Conclusion

For these reasons, the judgment of the district court is AFFIRMED.

END OF DOCUMENT

UNITED STATES of America,
v.
Richard I. JOHNSON, Sr., Richard I. Johnson, Jr., Joseph Rosinski and Joan Chuba, Defendants.
92-CR-39A.
United States District Court, W.D. New York
Aug. 09, 1994.

Patrick H. NeMoyer, U.S. Atty., Martin J. Littlefield, Asst. U.S. Atty., of counsel, Buffalo, NY, for U.S.
Rodney O. Personius, Buffalo, NY, for defendant Johnson, Sr.
Robert L. Boreanaz, Buffalo, NY, for defendant Johnson, Jr.
Mark J. Mahoney, Buffalo, NY, for defendant Rosinski.
David G. Jay, Buffalo, NY, for defendant Chuba.

ORDER

ARCARA, District Judge.

***1** This case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. s 636(b)(1), on March 11, 1992. Defendants filed motions for pretrial discovery, including further particulars, for severance, to strike

The Government acknowledges its responsibility under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). The court directs that all Brady material, including impeachment material, be disclosed to the defense no later than thirty days prior to the commencement of trial.

(f) Jencks Act material.

The Jencks Act provides that a defendant in a federal criminal trial, after a government witness has testified on direct examination, is entitled to receive, for purposes of cross-examination, any statements of the witness, in the government's possession which relate to the subject matter on which the witness has testified. See 18 U.S.C. s 3500(b). The district court may not, over the government's objection, compel early disclosure of Jencks Act material. See United States v. Percevault, 490 F.2d 126, 131 (2d Cir.1974); United States v. Washington, 819 F.Supp. 358, 367 (D.Vt.1993). In this case, the Government has stated that it will disclose Jencks Act material shortly before trial, and the court cannot order disclosure at an earlier or more definite time. Defendants' motion for early disclosure of Jencks material is DENIED.

(g) Rule 404(b) Evidence.

The Defendants seek disclosure of all evidence that the Government intends to offer pursuant to Fed.R.Evid. 404(b). The Government has stated that it does not intend to offer any such evidence in its direct case, but reserves the

right to respond to any defense propounded through cross-examination or by direct evidence. The Defendants regard this response as a Government attempt to evade its disclosure responsibility.

Rule **404(b)** requires the prosecution in a criminal case to provide reasonable **notice** in advance of trial of the general nature of any evidence of other crimes, wrongs, and acts it intends to introduce at trial. The Advisory Committee Notes to the 1991 amendment to the rule state that such **notice** is required "regardless of how [the Government] intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal." Accordingly, the court directs the Government to **disclose** all Rule **404(b)** evidence which it intends to offer against the Defendants to the defense no later than thirty days prior to the commencement of trial or no later than the date of the pretrial conference with Judge Arcara whichever is earlier in sufficient **detail** to permit defense counsel to prepare and file appropriate motions in limine on the issue of admissibility, if counsel is so inclined. To the extent provided above, the motion for **disclosure** of Rule **404(b)** evidence is GRANTED.

2. Severance.

The Government has consented to a severance of the "bankruptcy" counts (Counts XVI-XXI) from the "hazardous waste" counts (Counts I-XV), and will try the two conspiracies separately from this Indictment. Accordingly, the motions for

Citation | Rank(R) | Page(P) | Database | Mode
Not Reported in F.Supp. | R 141 OF 392 | P 1 OF 53 | DCT | P LOCATE
(Cite as: 1992 WL 371640 (D.Kan.))

UNITED STATES of America, Plaintiff,
v.
Perl Glen VAN PELT, Edith Wacker, aka "Edie", Edith T. Wacker, aka "Louie", John Lee Wacker, Susan Mary Boyle, aka "Van Pelt", Leroy Allen Cooley and Michael L. Lipp, aka "Mike", Defendants.
Nos. 92-40042-01-SAC to 92-40042-07-SAC.
United States District Court, D. Kansas.
Dec. 1, 1992.

Lee Thompson, U.S. Atty., Gregory G. Hough, Asst. U.S. Atty., for U.S.
Wendell Betts, Frieden, Haynes & Forbes, Topeka, Kan., for Perl Glen Van Pelt.
Allan A. Hazlett, Topeka, Kan., for Lewis T. Wacker.
F.G. Manzanares, Topeka, Kan., for John Lee Wacker.
Matthew B. Works, Works, Works & Works, P.A., Topeka, Kan., for Susan Mary Boyle.
Alex Boyle, Lawrence, Kan., Custodian.
James G. Chappas, James G. Chappas, Chtd., Topeka, Kan., for Leroy Allen Cooley.
John J. Ambrosio, John J. Ambrosio, Chtd., Topeka, Kan., for Michael L. Lipp.

MEMORANDUM AND ORDER

Notwithstanding that ruling, the government is required to disclose all favorable material evidence relevant to the defendant's guilt or punishment. [FN10] The government is reminded of its continuing obligation under Brady. In accordance with that duty, the government shall furnish any favorable material evidence relevant to the guilt or punishment of the defendant, including impeachment evidence (such as evidence of bias or motive) that it possesses as a result of the plea negotiation process.

Motions for disclosure of 404(b) evidence (Dk. 27 and 36):

Leroy Cooley seeks an order requiring the government to disclose whether or not it intends to introduce any 404(b) evidence. Michael Lipp requests that the United States provide all material which will be offered pursuant to Rule 404(b) ten days before trial.

The government indicates that it intends to produce evidence in its case in chief of certain drug offense convictions of the defendants. See Government's brief, page 16. The government has apparently given each defendant a copy of the "rap sheets" of all defendants. The government then specifically lists the prior convictions of Van Pelt, Boyle, Cooley and Lipp that it plans to introduce in its case in chief. In addition, the governments' amended notice (Dk. 92) indicates that it intends to offer certain statements arising from Van Pelt's misdemeanor conviction for possession of marijuana in Jewell County, Kansas, on September 15, 1977. At the time of sentencing, Van Pelt apparently

stated that "[i]n the days of prohibition, bootleggers used water to dilute the liquor. In the world of marijuana today, I provide the water."

***13** The government otherwise opposes the defendants' motion for pretrial disclosure of 404(b) evidence that it plans to produce at trial. The government contends that the defendants are not entitled to pretrial disclosure of either 404(b) evidence.

Rule 404(b) provides:

(b) Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. (As amended Mar. 2, 1987, eff. Oct. 2, 1987; Apr. 30, 1992, eff. Dec. 1, 1991.)

The 1991 Amendment "adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution of the issue of admissibility." 1991 Amendment Advisory Notes. "The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and

information in a reasonable and timely fashion." Id.

The government correctly argues that it is not required to fully disclose all 404(b) evidence prior to trial. In United States v. Williams, 792 F.Supp. 1120 (S.D.Ind.1992), the defendants requested that the government provide the specific evidence which it intended to offer under Rule 404(b). The court commented:

In the present case, the Defendants have requested that the Government provide the specific evidence which it intends to offer under Rule 404(b). Again, the Rules of Evidence are not rules of discovery. The purpose of the Rule 404(b) notice provision, to prevent surprise during trial, does not support providing a defendant with materials which the Government possesses and plans to offer at trial. Instead, the Defendants need only receive sufficient notice "to apprise the defense of the general nature of the evidence of extrinsic acts." Fed.R.Evid. 404 (Notes of Senate Committee on the Judiciary on the 1991 Amendment). Nothing in the rule indicates that the defendant is entitled to receive documents or other evidence from which the Government derives the prior bad act evidence. The Government merely need provide the Defendants with information sufficient to indicate the general nature of the evidence. In this instance, the court was not presented with specific facts from which to determine what reasonable notice might entail. In the absence of such specific circumstances, only these general guidelines come into play.

792 F.Supp. at 1134.

Other courts, relying on the language of the Rule and the advisory comments have also concluded that the Government only need supply the defense with the general nature of the evidence of extrinsic acts. See United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (defendant's demand for specific evidentiary **detail** including dates, times, places and persons involved is wholly overbroad; Rule **404(b)** only requires the government to **disclose** the general nature of such evidence it intends to introduce at trial); United States v. Sims, No. 92-CR-166, 1992 WL 295672, 1992 U.S.Dist. Lexis 14619, at *2-4 (N.D.Ill. September 28, 1992) (same); United States v. Swano, No. 91-CR-477-02-03, 1992 WL 137588, 1992 U.S.Dist. Lexis 7554, at *16-17 (N.D.Ill. May 29, 1992) (Rule **404(b)** not a tool for discovery; defendants' requests for specific dates, times, places, persons, etc ..., well beyond scope of Rule **404(b)**); but see United States v. Melendez, No. 92 Crim. 047 (LMM), 1992 WL 96327, 1992 U.S.Dist. LEXIS 5616, at *1 (S.D.New York April 24, 1992) ("Rule **404(b)** will be satisfied if the **notice** to be given by the government identifies each crime, wrong or act by its specific nature (e.g., sale of cocaine), place (e.g., New York City), and approximate date (e.g., July 1986) to the extent known by the government.").

***14** The government has apparently supplied the defendants with fairly detailed descriptions of the 404(b) evidence it plans to introduce at trial,

thereby satisfying the notice requirements of 404(b). The government is apparently aware of its obligation to provide the defendants general notice of the type of 404(b) evidence it plans to introduce at trial.

During oral argument and in his brief, counsel for Michael Lipp requested that the government be given a day certain by which it would provide notice of 404(b); thereafter the government would be precluded from introducing any new 404(b) evidence not previously disclosed. This request is denied. The defendant correctly notes that late disclosure of 404(b) evidence can potentially hamper the defendant's ability to prepare a defense to that evidence. Rule 404(b) requires the prosecution upon request to "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown...." Therefore, if the government can demonstrate good cause the court may allow previously undisclosed 404(b) evidence even during trial. In addition, in determining the admissibility of any evidence the court may consider the unfair prejudice to the defendant. See Fed.R.Evid. 403.

The defendants' motions for pretrial disclosure of 404(b) evidence is granted in part and denied in part.

Motions for disclosure of grand jury minutes (Dk. 48 and 24:

Pursuant to Fed.R.Crim.P. 6(e), John Wacker and Leroy Cooley seek a copy of the grand jury minutes in this case. The defendants contend that a copy of the

Also, 606 mentioned.

Citation | Rank(R) | Page(P) | Database | Mode
Not Reported in F.Supp. | R 14 OF 392 | P 1 OF 53 | DCT | P LOCATE
(Cite as: 1995 WL 221883 (N.D.Ill.))

UNITED STATES of America, Plaintiff,
v.
Marco DAMICO, et al., Defendants.
No. 94 CR 723.
United States District Court, N.D. Illinois, Eastern Division.
April 10, 1995.
MEMORANDUM AND ORDER

MANNING, District Judge.

***1** Defendants [FN1] were charged by indictment in the action USA v. Damico et al., 94 CR 723 (N.D.Ill.1994). The 10-count indictment alleges that defendants Marco Damico, Anthony R. Dote, Robert M. Abbinanti, and unknown others were engaged in an enterprise referred to as the "Damico Enterprise." The indictment further alleges that the Enterprise obtained income for the defendants through illegal activities which affected interstate commerce. More specifically, the alleged racketeering activity consisted of:

(a) operation of illegal gambling businesses, in violation of Title 18 U.S.C. s 1955;

(b) Extortion, attempt to commit extortion, and conspiracy to commit

agreed to tender all material relating to Mr. Cooley no later than April 17, 1995.

Defendant A. Dote's Motion to Require Notice of Intention of Use (sic) Other Crimes, Wrongs or Acts Evidence.

Defendant M. Damico's Motion For Notice of 404(b) Material Sixty Days in Advance of Trial.

Defendant Anthony Dote requests that the government be required to give notice of its intention to offer evidence at trial under Rule 404(b) Other Crimes Wrongs or Acts which provides the following:

"... (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, ... the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence if it intended to introduce at trial."

***4** Fed.R.Evid. 404. The government in its consolidated response replies that during the Rule 2.04 Conference, it offered to give the defendant notice of any 404(b) evidence intended to be used against him two weeks prior to trial, in accordance with the reasonable notice requirements of the rule. However, at the March-9 hearing the government agreed to provide the material

by April 24, 1995.

Pursuant to Rule **404(b)** the government shall provide reasonable **notice** ... on good cause shown, of the general nature of any such evidence it intends to introduce at trial. The defendant suggests that **404(b)** should be extended not only to the general nature of any "other acts" evidence, but also specific evidentiary **detail,** to include dates, times, locations, participants, etc. The plain language of the rule gives no specific form of **notice.**

The Advisory Committee considered and rejected a requirement that the **notice** satisfy the particularity requirements normally required of language used in a charging instrument. Fed.R.Evid. **404(b),** Advisory Committee Notes. The Committee opted for a generalized **notice** provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. Id. The committee did not intend for the Rule to supersede other rules of admissibility or **disclosure** such as the Jencks Act, 18 U.S.C. s 3500, et seq. "nor require the prosecution to **disclose** directly or indirectly the names and addresses of its witnesses." This court agrees with the government that the plain language of the rule itself, precludes the evidentiary **detail** the defendant seeks. Furthermore, the government has represented to the defendants and the court that it will provide the Rule **404(b)** evidence which it intends to use in its case-in-chief through the submission of its Rule **404(b)** proffer by April 24, 1995.

Additionally, this court is not precluded from examining in camera the specific **404(b)** evidence which the government intends to offer before it is offered or even mentioned during trial. Fed.R.Evid. **404(b).** Senate Judiciary Committee. This court may require the government to **disclose** to it the specifics of such evidentiary **detail** which the court must consider in determining admissibility. Id. Hence, this court denies this portion of Dote's request for evidentiary specificity because he is not entitled to such information, and grants the remainder of in part his motion as set forth above, with directions to the government that these materials be provided no later than April 24, 1995. This ruling applies to all defendant's.

Damico also seeks an order from the Court requiring the government to give notice of its intent to offer 404(b) evidence sixty days in advance of trial. The government states that during the Rule 2.04 Conference, it offered to give defendant notice of any 404(b) evidence it intended to use against him two weeks prior to trial, in accordance with the reasonable notice requirements of the rule. As indicated above, the motion is allowed and the government is directed (and has agreed) to provide the material by April 24, 1995.

***5** Anthony Dote seeks disclosure of "specific instances of conduct" of any defendant according to Rule 608(b). [FN4] In response, the government argues that under the law no pretrial disclosure is necessary or appropriate. United States v. Alex, 791 F.Supp. 723, 728, 728-29 (N.D.Ill.1992). The

UNITED STATES of America, Plaintiff,
v.
David A. AGUNLOYE, Defendant.

No. 95 CR 45.

United States District Court, N.D. Illinois.

June 1, 1995.

MEMORANDUM OPINION AND ORDER

ALESIA

***1** In this case, the defendant is charged in a five count indictment with various offenses, including conspiracy to launder the proceeds of narcotics trafficking. The defendant has filed four pretrial motions. The court addresses each in turn.

A. Motion to Require the Government to Disclose Whether It Will Rely on Evidence of Similar Crimes, Wrongs or Acts

Defendant moves this court to require the government to provide notice of intention to use other crimes, wrongs or acts as evidence pursuant to Federal Rule of Evidence 404(b). [FN1] Specifically, the defendant requests production of the following information: the dates, times, places, and persons involved in said other crimes, wrongs, or acts; the statements of each participant; the documents which contain such evidence, including when the documents were prepared, who prepared them, and who has possession of them; and the issue or issues to which the government believes such evidence may be relevant. The government, meanwhile, agrees to comply with the notice requirement no later than two weeks before trial but objects to the specificity of the information sought by the defendant.

The law is clear that Rule **404(b)** imposes a duty on the government only to "provide reasonable **notice** in advance of trial ... of the general nature of any such evidence ..." and is not a tool for open ended discovery. FED. R. EVID. **404(b)** (emphasis added); United States v. Sims, 808 F.Supp. 607, 611 (N.D. Ill.1992). As far as the amount of **notice** that the government must give, the court finds that, in this case, two weeks does constitute reasonable **notice.** Meanwhile, with respect to the content of the **notice,** the court holds that Agunloye's demand for specific evidentiary **detail** is wholly overbroad. Sims, 808 F.Supp. at 611. Therefore, insofar as the government has agreed to abide by the **notice** requirements of Rule **404(b),** the motion is denied as moot. To the extent the defendant requests **notice** beyond the requirements of **404(b),** defendant's motion is denied.

B. Motion to Disclose

In this motion, the defendant seeks to have the government divulge all evidence that the government may attempt to introduce under Federal Rules of Evidence 803 and 804. The defendant cites no authority, however, for this broad-sweeping request. Furthermore, the court is aware of no such authority. See United States v. Russo, 87 CR 501, 1988 WL 58594 (N.D. Ill. June 1, 1988). Therefore, defendant's motion is denied with one exception. The government is directed to comply with the notice provisions of Rules 803(24) and 804(b)(5) by August 18, 1995, in the event it intends to admit such evidence.

C. Motion for Preservation of Agent's Notes

The defendant also moves the court to enter an order directing the government agents, police officers, and all federal or state informants involved in the case to retain and preserve all of their typed or handwritten notes made in relation to the case. The motion is denied as moot given that the government has instructed the agents to preserve their notes. Government's Consolidated Response to Defendant Agunloye's Pretrial Motions, at 3.

D. Motion for Statements of the Defendant

***2** In this motion, the defendant seeks the substance of all statements, written, oral, and recorded, that the government will seek to admit under Federal Rule of Evidence 801(d)(2). Based on the government's representation that it has already provided the defendant with a full set of transcripts made from undercover tapes, the defendant's motion is denied as moot. See Government's Consolidated Response, at 4.

The defendant also seeks disclosure of any statements made by any co-defendant or alleged co-

conspirator, co-schemer, or witness to any government agent or any other person, which the government will seek to admit as evidence under any rule or theory of evidence. Again, the defendant cites no authority for such an order and the court cannot find any. Unless these statements are exculpatory or impeaching material under Brady v. Maryland, 373 U.S. 83 (1963), they are not discoverable under Rule 16. Accordingly, this portion of the defendant's motion is denied.

CONCLUSION

Defendant's motion to require the government to disclose whether it will rely on evidence of similar crimes, wrongs, or acts is denied in part and denied in part as moot. Defendant's motion to disclose is granted in part and denied in part. Defendant's motion for preservation of agent's notes is denied as moot. Defendant's motion for statements of the defendant is denied in part as moot and denied in part.

FN1. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." FED. R. EVID. 404(b).

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850 F.Supp. 1481 | R 75 OF 392 | P 1 OF 166 | DCT | P LOCATE
(Cite as: 850 F.Supp. 1481)

UNITED STATES of America, Plaintiff,
v.
Mark M. JACKSON, and Robert Martinez, Jr., Defendants.
Nos. 94-40001-01-SAC, 94-40001-02-SAC.
United States District Court,
D. Kansas.
March 30, 1994.

Defendants, who worked for private psychiatric hospital, were charged with conspiring to defraud federal government of the faithful services of Postal Service employee, bribery, aiding and abetting employee's salary supplementation, and obstruction of federal grand jury investigation. Defendants filed various pretrial motions. The District Court, Crow, J., held that: (1) defendants were not entitled to severance of their trials; (2) defendants were entitled to 30 days' notice of intent to use prior bad acts evidence; (3) aiding and abetting salary supplementation was not lesser included offense of bribery; (4) indictment was sufficient to state offenses of aiding and abetting salary supplementation and obstruction of justice; (5) indictment was not multiplicitous; (6) conspiracy could be charged under "defraud" clause of general conspiracy statute; (7) witness tampering could be charged under obstruction of justice clause of statute proscribing influencing

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attempts to conceal the crime." United States v. Silverstein, 737 F.2d 864, 867 (10th Cir.1984) (citations omitted). The defendant is wrong in assuming that Martinez' statement is inadmissible against him simply because it was made after the last payment to Garcia. A statement made after the original conspiracy ends may still be admissible as a statement made under a separate and distinct conspiracy to obstruct justice. See, e.g., United States v. Townsley, 843 F.2d 1070, 1084, modified on other grounds, 856 F.2d 1189 (8th Cir.1988), cert. dismissed, 499 U.S. 944, 111 S.Ct. 1406, 113 L.Ed.2d 461 (1991). Statements are admissible under 801(d)(2)(E) even when the particular conspiracy is not charged in the indictment. United States v. Beckham, 968 F.2d 47, 51 n. 2 (D.C.Cir.1992); United States v. Coppola, 526 F.2d 764, 770 (10th Cir.1975). " '[C]oncealment is sometimes a necessary part of a conspiracy, so that statements made solely to aid the concealment are in fact made during and in furtherance of the ... [original] conspiracy.' " United States v. Esacove, 943 F.2d 3, 5 (5th Cir.1991). The propriety of admitting this challenged statement against Jackson is not a resolved issue.

JOINT MOTION TO COMPEL NOTICE AND DISCLOSURE OF RULE 404(B) EVIDENCE (Dk. 26). The defendants seek an order compelling the United States to provide at least

thirty days before trial notice and disclosure of the nature of any evidence of other crimes, wrongs or acts it intends to introduce at trial in its case-in-chief, for impeachment, or for possible rebuttal pursuant to Rule 404(b). The government objects to placing itself in "the impossible position of speculating about" possible impeachment or rebuttal evidence. At the hearing, the government represented that the arrangement between Louis Garcia and Bowling Green Hospital is the only evidence the government intends to use that arguably falls under Rule 404(b).

[19][20][21] The pretrial **notice** requirement was recently added and became effective December 1, 1991. It was "intended to reduce surprise and promote early resolution of the issue of admissibility." Fed.R.Evid. **404(b)** Advisory Notes to 1991 Amendment. The Notes also indicate that the **notice** need not take a specific form and need only inform the defendant of the "general nature of the evidence of extrinsic acts." Id. The **notice** "need not provide precise **details** regarding the date, time, and place of the prior acts," but it must characterize the prior conduct to a degree that fairly apprises the defendant of its general nature. United States v. Long, 814 F.Supp. 72, 74 (D.Kan.1993). The **notice** requirement "is not a tool for open ended discovery." United States v. Sims, 808 ***1494** F.Supp. 607, 610-11 (N.D.Ill.1992). Nor does it require the government to produce documents or specific evidence from which the government has learned or will introduce the

bad acts. United States v. Williams, 792 F.Supp. 1120, 1134 (S.D.Ind.1992); see United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (Defendant's "demand for specific evidentiary **detail** including dates, times, places and persons involved is wholly overbroad.") Finally, the Advisory Notes make clear that the prosecution must "provide **notice,** regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment or for possible rebuttal."

[22] If it has not done so already, the government is ordered to comply with the notice requirement of Rule 404(b) as interpreted above. The court grants the defendants' motion for disclosure at least thirty days prior to trial.

JOINT MOTION TO DISMISS (Dk. 28).

Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, the defendants move to dismiss some or all of the counts on the following grounds:

(1) The charge of supplementing a government employees' salary, 18 U.S.C. s 209, is a lesser included offense of bribing a government employee, 18 U.S.C. s 201(b)(1)(A);

(2) The indictment fails to state an offense of violating 18 U.S.C. s 209;

(3) Count one improperly charges a conspiracy to violate a postal service code of conduct;

(4) Counts one through thirty-one are multiplicitous because they charge defendants with conspiring to bribe a government employee thirty one times;

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(Cite as: 819 F.Supp. 358)

UNITED STATES of America
v.
Jacob P. WASHINGTON, Robert Hickman and Jerome Washington.
Crim. A. Nos. 92-63-01, 92-63-02 and 92-63-05.
United States District Court,
D. Vermont.
March 5, 1993.

Three defendants charged with conspiring to distribute cocaine filed motions to sever and discovery motions. The District Court, Parker, Chief Judge, held that: (1) spillover effect of retaliation charge against one defendant, and related murder, were not so highly prejudicial to codefendants charged with drug and weapons offenses so as to warrant severance; (2) defendant failed to establish antagonistic defense so as to justify severance; (3) procedural devices would prove sufficient and effective in protecting defendant's right to fair trial despite joinder of ex-felon weapons charges against codefendant; and (4) weapon possession offense and witness intimidation offense were part of series of act related to drug trafficking offenses justifying joinder.

Motions granted in part; denied in part.

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to the defendants in this case one day before the witness to which the material pertains is scheduled to testify. Under Percevault, this Court does not have authority to compel earlier disclosure.

B. Rule **404(b)** Disclosure

[29] Two of the defendants, Robert Hickman and Jacob Washington, have moved this Court to direct the Government to provide notice as contemplated by Rule **404(b)** of the Federal Rules of Evidence. Robert Hickman requests an in camera disclosure to the ***368** defendant of Rule **404(b)** evidence with specific requests for the names, addresses, reports, and statements of witnesses the Government intends to call to offer such evidence. Jacob Washington requests that the Government specify the accusations that will be made and disclose the identity of witnesses it will rely on to offer the Rule **404(b)** evidence. In response, the Government simply states that it will comply with the dictates of the rule.

To the extent that the defendants are constructing an alternative means of obtaining witness statements prior to trial, the Court refers them to section II(A) above. Also, no specific time for disclosure was requested by the defendants. The rule provides only that the Government provide "reasonable notice in advance of trial." Fed.R.Evid. **404(b)**. Upon the Government's representation that it intends to comply with the dictates of Rule **404(b)**, the Court notes that this motion is not ripe and is therefore denied.

UNITED STATES of America, Plaintiff,
v.
Steve E. WILLIAMS, Bobby Lee Williams, Kimberly D. Gray, Timothy Michael Cott, Chad Stang, and Joseph Schwiebinz, aka "Joseph Bentor", Defendants.
Nos. 93-40001-01-SAC to 93-40001-06-SAC.
United States District Court, D. Kansas.
June 16, 1993.

Lee Thompson, U.S. Atty., Thomas G. Luedke, Asst. U.S. Atty., for U.S.
David R. Gilman, Overland Park, KS, J. Richard Lake, Marilyn M. Trubey, Asst. Federal Public Defender, Mark W. Works, Rene M. Netherton, Jeanine Herron, Wendell Betts, John Ambrosio, Topeka, KS, for defendants.

MEMORANDUM AND ORDER

CROW, District Judge.

***1** By the court's count, the defendants have filed thirty-four pretrial motions in this case. Having received the government's response to them and having heard oral argument on them, the court is ready to rule. A summary of the charges provides a necessary context.

On April 22, 1993, a ten-count superseding indictment was filed. Count one

detailed discovery of the government's factual proof behind the alleged conspiracy. That the defendants feel hampered by the limited discovery available under Rule 16 and Brady principles does not empower this court to legislate alternative discovery devices. The defendants' arguments go more to the perceived injustices with discovery in all criminal cases rather than any inequitable circumstances unique to this case. The mere desire for more discovery is not a legitimate reason by itself for granting a bill of particulars. The defendants' motions for a bill of particulars are denied.

Motion for 404(b) Disclosure (Dk. 38, 40, 52, and 96).

Steve Williams, Tim Cott, Kim Gray and Joseph Schwiebinz ask for the government to disclose the prior or subsequent convictions, bad acts or criminal conduct which is not charged in the indictment and which the government intends to introduce as evidence at trial.

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the

dx 608(b)

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791 F.Supp. 723	R 171 OF 392	P 1 OF 33	DCT	P LOCATE

(Cite as: 791 F.Supp. 723)

UNITED STATES of America, Plaintiff,
v.
Gus ALEX, et al., Defendants.
No. 91 CR 727.
United States District Court, N.D. Illinois, E.D.
April 17, 1992.

Defendant was indicted for RICO conspiracy based upon acts of extortion, intimidation, and arson filed various pretrial motions. The District Court, Alesia, J., held that: (1) defendant was not entitled to production of government witness list; (2) defendant was not entitled to production of government witness statements; (3) government was required to tender all rough notes not previously produced to court for in camera inspection; (4) defendant was entitled to advance notice of other crimes evidence which government intended to use at trial; (5) defendant was entitled to scientific reports produced by government experts; and (6) government was required to provide defendant with Brady and Giglio materials.

So ordered.

See also 788 F.Supp. 359.

(Cite as: 791 F.Supp. 723, *728)

Kendall, 665 F.2d at 135. Against this backdrop, we briefly address each of Alex's requests.

[8] As an initial matter, Alex cites no case law in support of his request for the names of all persons "known" and "unknown" to the grand jury with respect to Count One of the indictment. Equally telling, the government represents that "[t]here are no co-conspirators who were unknown to the grand jury but who have been subsequently discovered by the government." (Government's Response, p. 9.) Accordingly, the court denies Alex's first and second requests.

Similarly, in request number six, Alex demands the names of individuals referred to in paragraphs 21 and 24 of Count One. Once again, Alex cites no case law in support of his request for the names of unindicted co-conspirators. The government has identified unindicted co-conspirator James LaValley. In our view, Alex can adequately prepare for trial without the names of the other co-conspirators. Alex's sixth request is accordingly, denied.

[9] In three of his requests Alex seeks, among other things, detailed information regarding dates, places and parties present when he allegedly received a share of extortion proceeds and street tax proceeds collected by the Lenny Patrick Street Crew. In addition, he requests specific information on all occasions when he and others are alleged to have taken acts in furtherance of the conspiracy. In this court's view, Alex seeks evidentiary details

exceeding the proper scope of a bill of particulars. We are satisfied that the indictment provides sufficient factual details to adequately inform Alex of the charges he faces. United States v. McAnderson, 914 F.2d 934, 946 (7th Cir.1990). Alex's third, fourth and fifth requests are denied.

Finally, in his seventh request Alex seeks the names of all the alleged victims of the extortionate acts allegedly committed by Alex and his co-defendants. This portion of Alex's motion is denied as moot because the government has filed a bill of particulars specifically identifying the names and businesses of the alleged victims.

VII. Motion for Pretrial Production of Material Pursuant to the Federal Rules of Evidence

Alex requests that the court order the government to produce a variety of information in advance of trial as required by the Federal Rules of Evidence. The court addresses each category of documents in turn.

A. Motion for Disclosure of "Other Acts" Evidence

Alex filed a motion which seeks notice of the government's intention to use evidence during cross-examination, its case-in-chief and rebuttal, which is admissible at trial pursuant to Federal Rules of Evidence 404(b) and 608(b). See Federal Rule of Criminal Procedure 12(d)(2). Alex requests that such notice be provided sixty days prior to trial.

[10] Federal Rule of Evidence **404(b)** provides, in relevant part, that "upon

request by the accused, the prosecution in a criminal case shall provide reasonable **notice** in advance of trial, or during trial if the court excuses pretrial **notice** on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. **404(b).** By its terms, Rule **404(b)** only requires the government to **disclose** the general nature of such evidence in intends to introduce at trial. Alex's demand for specific evidentiary **detail** including dates, times, places and persons involved is wholly overbroad.

[11] In its consolidated response, the government represents that it will disclose to the defense no later than seven days before the trial of this case the "other acts" evidence it intends to introduce at trial. The government makes no mention of whether it intends to introduce any evidence under Rule 608(b). We disagree with Alex's assertion that the amendment to Rule 404(b) may be read to require the government to give notice of "specific instances of conduct" evidence under Rule ***729** 608(b) it intends to offer for impeachment purposes. Accordingly, the government is ordered to inform the defendants and the court of Rule 404(b) evidence, if any, it intends to use at trial on or before April 22, 1992.

B. Data Forming the Basis for Opinion Testimony

[12] Alex requests that the court order the government to provide him with information relating to lay and expert witnesses, including production of

UNITED STATES of America, Plaintiff,
v.
Clarence E. LONG and Joseph A. LUGO,
Defendants.

Crim. A. Nos. 92-40040-01DES, 92-40040-02DES.

United States District Court,
D. Kansas.

March 1, 1993.

Defendant moved to exclude other crimes evidence. The District Court, Saffels, Senior District Judge, held that government's notice of intent to use other crimes evidence was insufficient.

Ordered accordingly.

[1] CRIMINAL LAW ⇐ 374
110k374
"Generalized notice provision" of rule governing admissibility of extrinsic acts evidence requires prosecution to apprise defense of general nature of evidence of extrinsic acts. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 374
110k374
Trial court has discretion to determine whether particular notice that government will introduce extrinsic acts evidence is not reasonable due to incompleteness. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 374
110k374
Requirement that government provide defendant with notice that it will admit extrinsic acts evidence is prerequisite to admissibility of that evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 374
110k374
Government's notice of its intent to use other crimes evidence was insufficient; although notice named witness who would testify against defendant, it did not describe nature of conduct government intended to introduce through witness. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 374
110k374
Although government's notice of intent to use other crimes evidence did not comply with rule governing admissibility of other crimes evidence, government was not precluded from introducing the evidence at trial; sufficient time remained before trial for government to amend notice to provide defendant with sufficient information regarding intended evidence to enable defendant to file motion in limine to contest its admissibility if he chose to do so. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] CRIMINAL LAW ⇐ 374
110k374
Although rule governing admissibility of extrinsic acts does not require government to do so, it should consider including in its notice specific purpose, among those listed in rule, for which evidence is intended to be introduced at trial. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[7] CRIMINAL LAW ⇐ 374
110k374
Government seeking to use extrinsic acts evidence has ultimate burden of showing how defendant's past acts are relevant to disputed issue in case. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[8] CRIMINAL LAW ⇐ 374
110k374
While government seeking to use extrinsic acts evidence need not provide precise details regarding date, time, and place of prior acts it intends to introduce, or source of evidence, it must characterize conduct to sufficient degree to apprise defendant of its general nature. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

***73** Lee Thompson, U.S. Atty., Gregory G. Hough, Asst. U.S. Atty., for plaintiff.

Frank Y. Hill, Jr., Boerne, TX, Thomas D. Haney, Topeka, KS, for Clarence E. Long.

William J. Skepnek, Stevens, Brand, Golden, Winter & Skepnek, Lawrence, KS, for Joseph A. Lugo.

MEMORANDUM AND ORDER

SAFFELS, Senior District Judge.

This matter is before the court on the motion of defendant Lugo to exclude Rule 404(b) evidence (Doc. 70).

On January 8, 1993, Defendant Lugo, through his counsel, sent a written request to the United States Attorney's office, pursuant to Fed.R.Evid. 404(b), seeking reasonable notice of the government's intent to introduce evidence of other crimes, wrongs, or acts. The government had previously orally advised defendant Lugo's counsel that it might use such evidence on cross-examination of either defendant, or on rebuttal. On February 18, 1993, the Assistant United States Attorney wrote to Lugo's counsel, advising that:

> pursuant to 404(b), the Government will introduce evidence of all of the matters disclosed to you, your client, Mr. Haney and his client during discovery in this matter. Particularly, be advised that Mr. Messineo will testify consistent with his prior statement, a copy of which has been previously provided to you.

The defendant contends that this notice is inadequate because it is overbroad and unduly general. Specifically, he argues that the notice provides him insufficient information on which to base a motion in limine to determine the admissibility of the evidence the government intends to introduce. In addition, he contends that the statement referring to Mr. Messineo fails to describe the acts to which he will testify, or how they might be material to this case. As a remedy, defendant Lugo seeks an order of this court precluding the government from introducing any evidence of prior crimes, wrongs, or acts.

In response, the government contends that Lugo's counsel was previously provided a copy of Messineo's statement. The government argues that it is not required to disclose before trial all evidence it intends to introduce under Rule 404(b). Rather, it need only provide the defense with the general nature of the evidence of extrinsic acts.

Rule 404(b) was amended effective December 1, 1991, to require the government, upon request by the defendant, to provide

> reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

[1][2][3] The purpose of the 1991 amendment is to reduce surprise and promote early resolution of the issue of admissibility. The "generalized notice provision" requires the prosecution to "apprise the defense of the general nature of the evidence of extrinsic acts." See Advisory Committee Note to 1991 Amendments, reprinted in 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5231, at 341-42 (Supp.1992) (hereinafter "Advisory Committee Notes"). The court has the discretion to determine whether a particular notice is not reasonable due to incompleteness. Id. The notice requirement is a prerequisite to admissibility of the Rule 404(b) evidence. Id. Hence the offered evidence is inadmissible if the court determines that the notice requirement has not been met. Id.; see United States v. Williams, 792 F.Supp. 1120, 1134 n. 19 (S.D.Ind.1992). Although the amendment itself does not prescribe sanctions for failure to provide notice, the court in its discretion may enter appropriate orders. See Advisory Committee Notes.

[4] In this case, the court finds that the government's notice is inadequate to comply with the notice prerequisite to the admissibility of Rule 404(b) evidence. The notice does not provide the defendant information concerning the general nature of the evidence the government intends to introduce, as the rule expressly requires. At best, the notice simply forewarns the defendant that the government intends to introduce evidence of other crimes, wrongs, or acts. Although the government's notice states the name of a ***74** government witness who will testify consistent with his prior statement, the notice itself does not describe the nature of the defendant's prior conduct the government intends to introduce through Mr. Messineo. [FN1]

> FN1. The notice provision does not require the government to disclose the names of its witnesses. See Advisory Committee Notes. The fact that the prosecution did so in this case, however, does not eliminate its obligation to notify the defendant concerning the general nature of the evidence the government intends to introduce pursuant to Rule 404(b).

[5] Although the notice does not comply with Rule 404(b), the court does not agree with the

plaintiff's argument that the government should be precluded from introducing Rule 404(b) evidence at trial. The court finds that sufficient time remains before trial for the government to amend its notice to provide the defendant with sufficient information regarding the intended evidence to enable the defendant to file a motion in limine to contest its admissibility if he chooses to do so.

Contrary to the government's arguments, the defendant does not seek unduly detailed information concerning the prior acts the government intends to introduce under Rule 404(b). Compare United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (defendant's demand for specific evidentiary detail, including dates, times, places, and persons involved, determined wholly overbroad). Rather, the defendant simply seeks notice of the general nature of such evidence to permit pretrial resolution of the issue of its admissibility. This is exactly what the amended rule requires.

[6][7] The government shall provide information to the defendant regarding the general nature of the evidence it intends to introduce pursuant to Rule 404(b). Although the rule does not require the government to do so, it should consider including in its notice the specific purpose, among those listed in the rule, for which the evidence is intended to be introduced at trial. The government, of course, has the ultimate burden of showing how the defendant's past acts are relevant to a disputed issue in this case. See United States v. Harrison, 942 F.2d 751, 759 (10th Cir.1991).

[8] While the government need not provide precise details regarding the date, time, and place of the prior acts it intends to introduce, or the source of the evidence, it must characterize the conduct to a sufficient degree to apprise the defendant of its general nature. See, e.g., United States v. Van Pelt, Nos. 92-40042-01-SAC to -07-SAC, 1992 WL 371640, at *14 (D.Kan. December 1, 1992) (government provided "fairly detailed descriptions" of the evidence, thereby satisfying the notice requirement); but cf. Advisory Committee Notes (notice need not satisfy the particularity requirements normally required of language used in a charging document). The government must give enough information in the notice to apprise the defendant of the kind of prior conduct the government intends to use in evidence against him at trial.

IT IS BY THE COURT THEREFORE ORDERED that the government shall provide defendant Lugo the notice required by Rule 404(b), as further described in this order, on or before March 8, 1993.

IT IS FURTHER ORDERED that such notice shall provide sufficient information concerning the nature of the evidence the government intends to introduce pursuant to Rule 404(b) to permit the defendant to prepare a motion in limine to contest its admissibility, if defendant desires to do so.

IT IS FURTHER ORDERED that the defendant's request for an order precluding the government from introducing any evidence of prior crimes, wrongs, or acts (Doc. 70) is hereby denied at this time as premature, with leave to renew if the government fails to comply with this order in every respect.

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808 F.Supp. 607 | FOUND DOCUMENT | P 1 OF 58 | DCT | Page
(Cite as: 808 F.Supp. 607)

UNITED STATES of America, Plaintiff,
v.
Rufus SIMS, et al., Defendants.
No. 92 CR 166.
United States District Court,
N.D. Illinois, E.D.
Sept. 28, 1992.

Defendants charged in indictment with various offenses including conspiracy to possess with intent to distribute heroin and cocaine, "money laundering," criminal racketeering and murder filed various pretrial motions. The District Court, Alesia, J., held that: (1) defendants were not entitled to bill of particulars; (2) defendants were not entitled to list of government witnesses; and (3) defendant charged only with "money laundering" was not entitled to severance.

Motions granted in part, and denied in part.

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(Cite as: 808 F.Supp. 607, *610)

[hereinafter Government's Consolidated Response], at 5.

C. Motion to Require Notice of Intention to Use Other Crimes, Wrongs or Acts as Evidence

Defendant Delwin Langston moves this court to require the government to provide notice of intention to use other crimes, wrongs or acts as evidence pursuant to 404(b) and 608(b). Insofar as the government has agreed to abide by the notice requirements of Rule 404(b), [FN1] the motion is ***611** denied as moot. See Government's Consolidated Response, at 7. Rule 404(b) only requires a statement of the general nature of 404(b) evidence the government will seek to introduce. With respect to requests seeking information more specific than Rule 404(b) requires, Langston's motion is denied as overbroad. The purpose of the disclosure requirement is to "reduce surprise and promote early resolution on the issue of admissibility." FED.R.EVID. 404(b) advisory committee's note. It is not a tool for open ended discovery. United States v. Swano, No. 91 CR 477-02-03, 1992 WL 137588, *6, 1992 U.S.Dist. LEXIS 7554, * 16 (N.D.Ill. June 1, 1992).

FN1. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes ... provided that upon request by the accused, the prosecution in

a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." FED.R.EVID. 404(b).

[2] The defendant seeks production of the following information pursuant to Rule 404(b): the dates, times, places and persons involved in the specific crimes or acts; the statements of each participant; the documents which contain such evidence; and a statement of the issues to which the government believes such evidence may be relevant. The government objects to the specificity of the information sought by the defendant. The Senate Judiciary Committee "considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging document." FED.R.EVID. 404(b) advisory committee's note. Instead, the Advisory Committee "opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts." Id. No language in the rule or the Committee Notes supports the discovery of the type of specific information Langston seeks. Therefore, to the extent Langston requests notice beyond the requirements of 404(b), Langston's motion is denied.

[3] Defendant Langston also seeks disclosure before trial of the

government's intent to use "specific instances of conduct" or Rule 608(b) material. [FN2] Rule 608(b) restricts the use of specific instances of conduct of a witness to the cross-examination of that witness and even then at the discretion of the trial judge. FED.R.EVID. 608(b). Rule 12(d)(2) of the Federal Rules of Criminal Procedure allows the "defendant [to] request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations in Rule 16." FED.R.CRIM.P. 12(d)(2) (emphasis added). By its terms, Rule 608(b) evidence may not be used by the government in its case-in-chief and therefore such evidence is not discoverable under Rule 12 of the Federal Rules of Criminal Procedure. See United States v. Hartmann, 958 F.2d 774, 789 n. 5 (7th Cir.1992) ("defendants are not entitled access to Rule 608(b) materials which are not discoverable under FED.R.CRIM.P. 16"); United States v. Cerro, 775 F.2d 908, 914-15 (7th Cir.1985); United States v. Swano, No. 91 CR 477-02-03, 1992 WL 137588, *6-7, 1992 U.S.Dist. LEXIS 7554, *16-17 (N.D.Ill. June 1, 1992); United States v. Santillanes, 728 F.Supp. 1358, 1360 (N.D.Ill.1990). Therefore, Langston's request for notice of the government's intent to use Rule 608(b) evidence is denied.

FN2. Rule 608(b) provides that "[s]pecific instances of conduct of a

witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

In summary, Langston's motion is denied in part as moot since the government has agreed to provide notice as required under Rule 404(b) and denied in part insofar as Langston requests information more specific than the notice the government is required to provide under Rule 404(b) and ***612** specific instances of conduct pursuant to Rule 608(b).

D. Motion for a Bill of Particulars

[4] Defendants Ruby Chambers and Estella Sims have each filed a Motion for a Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure. Chambers requests the dates, times and locations regarding counts of the indictment that relate to her. Estella Sims seeks the names of any witnesses the government intends to call to establish the allegations in the indictment pertaining to Sims along with the time, place, and persons present.

Citation | Page(P) | Database | Mode
792 F.Supp. 1120 FOUND DOCUMENT P 1 OF 67 DCT P LOCATE
(Cite as: 792 F.Supp. 1120)

UNITED STATES of America, Plaintiff,
v.
GARY D. WILLIAMS, Sheila J. Williams, Defendants.
Nos. IP 91-145-CR-01, IP 91-145-CR-02.
United States District Court,
S.D. Indiana,
Indianapolis Division.
April 9, 1992.

Defendants moved to compel discovery in criminal case. The District Court, Tinder, J., held that: (1) statements by coconspirators or codefendants were not discoverable; (2) defendants were not entitled to pretrial discovery of exculpatory material; and (3) "reasonable notice" of general nature of evidence of other crimes, wrongs, or acts that prosecution intends to introduce at trial is at least ten days prior to start of trial.

Motion granted in part and denied in part.

792 F.Supp. 1120 FOUND DOCUMENT P 58 OF 67 DCT P LOCATE
(Cite as: 792 F.Supp. 1120, *1133)

available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.
Fed.R.Evid. 1006.

Request No. 7

[16] Defendants next ask that this court order the Government to produce:

All evidence of similar crimes, wrongs, or acts, allegedly committed by either defendant, upon which the government intends to rely to prove motive, scheme, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, including all documents relating to any such alleged "similar acts."

To support this request, the Defendants offer Federal Rule of Evidence **404(b)** which regulates the use of evidence of other crimes, wrongs, or acts. [FN17] The rule, regarding the materials requested by the Defendants, requires the prosecution in a criminal case to "provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. **404(b)**. The Government states that should it seek the admission of such evidence, "the defendants will be given reasonable notice of the Government's intent to use said evidence prior to trial." In essence, the

dispute concerns the precise meaning of the term "reasonable notice" as used in Rule **404(b)**.

FN17. This rule, as amended and effective December 1, 1991, states: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
Fed.R.Evid. **404(b)**.

The purpose of the pre-trial notice requirement of Rule **404(b)** is "to reduce surprise and promote early resolution on the issue of admissibility." Fed.R.Evid. **404(b)** (Notes of Senate Committee on the Judiciary on the 1991 Amendment). Further, no specific time limits are stated in the rule and instead "what constitutes a reasonable request or disclosure will depend largely on the circumstances." Id. Rule **404(b)** clearly requires that the

Government provide notice to the defendant in "advance of trial." Id. This Court could, and in certain circumstances may, undertake to weigh and evaluate each particular situation of **404(b)** notice presented to determine the content of "reasonable notice." However, the need of a defendant to have notice that **404(b)** evidence will be offered seems somewhat similar regardless of the particular case.

Because of this similarity, when a defendant requests the Government to provide the general nature of any evidence which the Government intends to admit for the purposes outlined in Rule **404(b)**, the Government shall give such notice to the defendant no later than ten days prior to start of the trial. By receiving notice of the general nature of **404(b)** evidence ten days before trial, surprise is avoided and the defendant has an adequate opportunity to challenge the admissibility of the information. However, some cases might present facts which necessitate an earlier disclosure of the use of **404(b)** evidence. In such a case, a defendant is free to offer to the Court any reason why a deviation from the presumptive ten-day rule is warranted. [FN18] If the Court finds that "reasonable notice" requires greater than ten days, the Court may order the Government to notify the defendant of the general nature of **404(b)** evidence earlier than ten days before trial. Similarly, if the Court finds that less than ten days is sufficient or required by ***1134** the circumstances of the case, a downward deviation from the presumptive notice is

allowable.

FN18. Likewise, the Government may seek to convince the Court that pre-trial notice should be excused. Under rule **404(b)**, the Court may excuse pre-trial notice "on good cause shown." Fed.R.Evid. **404(b)**.

[17] In the present case, the Defendants have requested that the Government provide the specific evidence which it intends to offer under Rule **404(b)**. Again, the Rules of Evidence are not rules of discovery. The purpose of the Rule **404(b)** notice provision, to prevent surprise during trial, does not support providing a defendant with materials which the Government possesses and plans to offer at trial. Instead, the Defendants need only receive sufficient notice "to apprise the defense of the general nature of the evidence of extrinsic acts." Fed.R.Evid. 404 (Notes of Senate Committee on the Judiciary on the 1991 Amendment). Nothing in the rule indicates that the defendant is entitled to receive documents or other evidence from which the Government derives the prior bad act evidence. The Government merely need provide the Defendants with information sufficient to indicate the general nature of the evidence. [FN19] In this instance, the court was not presented with specific facts from which to determine what reasonable notice might entail. In the absence of such specific circumstances, only these general guidelines come into

play.

FN19. The notes of the Senate Judiciary Committee on the 1991 Amendment indicate that reasonable notice is a condition precedent to the admissibility of **404(b)** evidence. If it is determined that the Government failed to comply with the notice requirements of rule **404(b)**, a court would seemingly have the discretion to refuse to admit such evidence.

With these specific limits, the Defendants' Request No. 7 will be GRANTED, and the Government is ordered to provide the Defendants notice, as defined above, of any evidence which they intend to introduce under Fed.R.Evid. **404(b)** no later than ten days prior to the start of trial.

Request No. 8

[18] In their eighth request, Defendants seek:

A list of the witnesses the government intends to call at trial, with any changes in the list of witnesses to be communicated as they are made. With respect to any expert witnesses the government intends to call, the name, address, qualifications, and subject of testimony of such expert, together with a copy of any report prepared by or for him or her, as well as copies of financial, accounting, scientific, technical, or other documents uses as backup by said expert.

Citation | Page(P) | Database | Mode
855 F.Supp. 725 FOUND DOCUMENT | P 1 OF 44 | DCT | P LOCATE

(Cite as: 855 F.Supp. 725)

UNITED STATES of America,
v.
Ronald J. GOLDBERG, Defendant.
No. 4:CR-94-0039.
United States District Court,
M.D. Pennsylvania.
June 21, 1994.

Defendant was charged with falsifying court order. Defendant's court-appointed attorney moved to withdraw. The District Court, McClure, J., held that motion would be granted without allowing for substitution of counsel. Motion granted.

855 F.Supp. 725 FOUND DOCUMENT P 38 OF 44 DCT P LOCATE

(Cite as: 855 F.Supp. 725, *731)

[13] (10) Motion to review all witnesses' statements even if not used at trial by the government. There is no legal authority for this motion, absent Brady, which requires disclosure only of exculpatory evidence, and does not require disclosure of all evidence for defense review.

[14] (11) Motion to produce employment files of Bureau of Prisons personnel and to produce the government's witness list. The defense is not entitled to the government's list of witnesses. Also, staff employment records are confidential, and Goldberg states no legal reason entitling him to have access to such files.

[15] (12) Motion to dismiss the indictment for an illegally constituted grand jury. The grand jury is selected from the same pool of jurors as are petit juries, see generally 28 U.S.C. ss 1861 et seq., in a manner consistent with 28 U.S.C. s 1863. See Jury Selection Plan for the Middle District of Pennsylvania, adopted March 17, 1989, docketed to Misc. No. 89-069.

(13) Motion to produce materials pursuant to Fed.R.Evid. **404(b).** These materials are produced pursuant to request directed to the government, not by motion. Regardless, notice was provided by the government on the record. See United States' Notice of Intention to Use Proof of Other Crimes as Evidence (record document no. 24).

[16][17] (14) Motion to dismiss indictment based upon selective prosecution. In order to establish a claim of selective or discriminatory

UNITED STATES of America,
v.
Frank P. ALTIMARI, a/k/a "Alti," Joseph Dinapoli, a/k/a "Joe D.," Julius Ciancola, a/k/a "Junior," and Cynthia Schott, a/k/a "Cindy," Defendants.
No. 93 Cr. 650 (LMM).
United States District Court, S.D. New York.
March 25, 1994.
MEMORANDUM AND ORDER

McKENNA, District Judge.

I.

***1** The indictment in this case, returned on August 4, 1993, charges all defendants with conspiring from January of 1983 through October of 1991 to violate 18 U.S.C. s 893 (financing extortionate extensions of credit) (Count One), and defendants Altimari and DiNapoli with conspiring from March of 1990 through October of 1991 to violate 18 U.S.C. s 894 (collections of extensions of credit by extortionate means) (Count Two).

Defendants have made various motions, which are disposed of as follows.

II.

The property whose return Ms. Schott seeks is the "Disputed Property" also sought by Mr. Altimari. Her motion is granted along with his, for the reasons set forth in Section II.5., above.

VI.

Defendants and counsel will appear on March 31, 1994 at 9:30 A.M. for a conference at which the Court will set a trial date.

SO ORDERED.

FN1. The indictment does, however, allege overt acts--two meetings--in which Mr. Altimari is said to have participated in 1990. P 4(1) and (m).

FN2. He also asks that the government be required to furnish "those acts to be considered as similar act evidence under [Fed.R.Evid. **404(b)**]." Id. at 12-13. As to this category of information, Rule **404(b)** supplies the answer to his motion: "upon request by the accused [which the Court finds to have been made], the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. **404(b)**. The government will, not less than 15 days before trial, advise all defendants, in writing and in an understandable manner, of the specific prior act evidence it intends to offer as to each.

Citation | Page(P) | Database | Mode
837 F.Supp. 570 FOUND DOCUMENT P 1 OF 25 DCT P LOCATE

(Cite as: 837 F.Supp. 570)

UNITED STATES of America
v.
Elgin RICHARDSON, a/k/a "David Lee," Defendant.
No. 93 Cr. 717 (CSH).
United States District Court,
S.D. New York.
Nov. 17, 1993.

Defendant was charged with mail theft, armed assault of mail carrier, possession of stolen mail, and use of firearm during and in relation to crime of violence. On motion to suppress, the District Court, Haight, J., held that: (1) evidentiary hearing would be conducted on factual disputes raised in motion to suppress statements; (2) pretrial identification procedure was not unduly suggestive; (3) handwriting exemplars were admissible; and (4) government would not be required to provide defendant with detailed notice of other acts evidence to be introduced at trial.

Ordered accordingly.

837 F.Supp. 570 FOUND DOCUMENT P 23 OF 25 DCT P LOCATE

(Cite as: 837 F.Supp. 570, *575)

connection is the fact that defendant's alleged possession of forged documents led to his arrest on the federal charges.

I conclude that because defendant had not yet been indicted or arraigned on the federal offenses, defendant's right to counsel had not attached at the time of the request for handwriting exemplars notwithstanding defendant's representation by counsel on pending unrelated state charges. Therefore, defendant's right to counsel was not violated by the postal inspectors' request for provision of handwriting exemplars without first notifying his counsel on the state charges. Defendant's motion to suppress the handwriting exemplars is accordingly denied, as is his request for an evidentiary hearing.

Defendant requests that in the event the Court declines to suppress the exemplars, the Court direct the government to provide defendant with any reports concerning his handwriting exemplars. The government does not object to this request. See Government's Memorandum at 10. Accordingly, the government is directed to provide any such reports in a timely fashion.

Rule **404(b)** Notice of Introduction of Defendant's Extrinsic Acts

[10] Defendant finally moves this Court to direct the government to provide defendant notice of any prior bad acts of defendant it intends to introduce at trial. The government notes that defendant appears to seek notice under Fed.R.Evid. **404(b)**. Rule **404(b)** requires that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance

of trial ... of the general nature of any [evidence of other crimes, wrongs, or acts of the accused] it intends to introduce at trial." The government has agreed to comply with the requirements of Rule **404(b)** and represents that it will provide defendant with such notice within at least 10 days of trial if it intends to seek the admission of evidence contemplated by that rule. Government's Memorandum at 10. Defendant objects to the government's agreement to provide notice of only the "general nature" of the extrinsic act evidence it intends to admit and requests that the government be directed to provide notice of the "specifics of prior bad acts."

I will not direct that the government provide more than notice of the "general nature" of the extrinsic acts evidence it will seek to admit because that is all that is required by the specific language of Rule **404(b)** and it is ***576** sufficient to allow the defendant to adequately prepare for trial. See e.g. United States v. Williams, 792 F.Supp 1120, 1134 (S.D.Ind.1992) (Rule **404(b)** requires only provision of "information sufficient to indicate the general nature of the evidence.")

Accordingly, since the government does not object to the request, the government is directed to provide any such notice within 10 days of trial, which is a reasonable amount of time. See id.

CONCLUSION

For the reasons stated above, defendant's motion is denied in its entirety.

It is SO ORDERED.

END OF DOCUMENT

UNITED STATES of America,
v.
Alvin MELENDEZ, Defendant.

No. 92 CRIM. 047 (LMM).

United States District Court, S.D. New York.

April 24, 1992.

MEMORANDUM AND ORDER

McKENNA, District Judge.

***1** Defendant's pretrial motions are disposed of as follows:

1. The government will advise defendant in writing not later than 14 days before trial of the "general nature" of evidence it intends to offer as to other crimes, wrongs, or acts, whether during the government's direct case, during cross-examination of defendant should he testify, or during the government's rebuttal case. Fed.R.Ev. 404(b) (amended effective December 1, 1991).

Neither Rule 404(b) as amended nor the Advisory Committee note is particularly helpful as to what is meant by "general nature." The parties have not cited case law construing the phrase as used in the amended Rule, nor has research disclosed any. The amendment, according to the Advisory Committee, "is intended to reduce surprise and promote early resolution on the issue of admissibility." At the same time, the Advisory Committee does not appear to contemplate that a Rule 404(b) notice need include "the specifics of such evidence which the court must consider in determining admissibility," since it refers to such specifics as something the Court may require to be disclosed in ruling in limine, a step to follow upon the notice. In the Court's view, Rule 404(b) will be satisfied if the notice to be given by the government identifies each crime, wrong or act by its specific nature (e.g., sale of cocaine), place (e.g., New York City), and approximate date (e.g., July 1986), to the extent known to the government.

2. The government states that, as far as its direct case is concerned, it intends to offer "the January 1990 tapes; evidence of occasions (on or about June 25, 1990, and July 2, 1990) on which the defendant asked the confidential informant to hold or deliver guns for him; and testimony from the informant that he saw guns in the defendant's apartment on or about June 28, 1990." Gov't Letter Brief at 2 (footnote omitted).

It appears to be defendant's position that "the CI was an agent provocateur and that everything he did on July 2, 1990 [the date of the charged offense], including the receipt of money, was done at the behest of the CI and as an accommodation to him." Ostrow Aff. at 6. See also Def's. Mem. at 3. It seems entirely possible that, once raised, such a defense--essentially of lack of intent to possess the weapon--could render admissible under Rule 404(b) the evidence cited in the government's Letter Brief. The Court cannot, however, at this time, determine precisely when and how the issue will be raised, if it is. On the present record, the evidence will not be admitted on the government's direct case, but the Court will discuss the issue with counsel prior to the commencement of trial. Defendant's intended opening is, among other things, relevant to whether the evidence might become admissible on the government's direct case.

3. All applications to exclude evidence during the cross-examination of defendant should he testify, or during the government's rebuttal case, if any, are reserved until the close of the government's direct case, when they can be considered in the context of an actual record.

***2** 4. The government has agreed to stipulate "without identifying the nature of the felony conviction, that the defendant has been convicted of a felony." Letter brief at 6. In the Court's view, the information contained in the stipulation offered by the government (to which defendant may, if he wishes, add the date of the conviction) must be put to the jury. See Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970 (1988).

SO ORDERED.

END OF DOCUMENT

Citation | Rank(R) | Page(P) | Database | Mode
144 F.R.D. 631 | R 4 OF 4 | P 1 OF 63 | ALLFEDS | Page
(Cite as: 144 F.R.D. 631)

UNITED STATES of America
v.
Donald GREEN, Norman Workman, Clayton Green, Judy Spidell Green, Anita Workman, Mia Ayers, Marilyn Barnes, John Bolden, Clyde Brooks, Lamar Brown, Howard Doran, Robert Felder, Jackie Fuller, Kevin Green, Carlos Herrera, Darryl Johnson, Nesbit E. Lee, Jose Lopez, Joe Mathews, Angelo Martinez, Lisa Medina, Doris Parker, Derwin Rodgers, Harold Smallwood, Terrence Taylor, Patricia Thomas, Defendants.
No. 92-CR-159C.
United States District Court,
W.D. New York.
Oct. 30, 1992.

In prosecution of 26 defendants for various offenses relating to alleged narcotics and racketeering conspiracy, defendants filed joint motion for discovery. The District Court, Heckman, United States Magistrate Judge, held that: (1) counsel for each defendant were entitled to their own set of documents, exceptional circumstances justified order that government bear costs of copying full set of documents, including transcripts, for the defendants who were indigent, and government was to reimburse lead defense counsel for costs of copying tape recordings government intended to use at trial in proportion to

Giglio material is of such significance that it must be provided to the defendant well in advance of the trial so as "to allow the defense to use the favorable material effectively in the preparation and presentation of its case." United States v. Pollack, 534 F.2d at 973; see United States v. Bejasa, 904 F.2d at 140-41; Grant v. Alldredge, 498 F.2d at 381-82. Other Brady and Giglio material should be disclosed with the 3500 material, which in the context of this case is at least 30 days prior to jury selection. United States v. Feola, 651 F.Supp. at 1135-36; see also, United States v. Bestway Disposal Corporation, 681 F.Supp. 1027, 1130 (W.D.N.Y.1988).

XII. PRETRIAL DISCLOSURE OF 404(b) EVIDENCE

[23][24] Defendants have moved for pretrial disclosure of any evidence the government intends to use pursuant to Rule 404(b) of the Federal Rules of Evidence. Specifically, defendants seek evidence of "any alleged criminal or immoral conduct on the part of any defendant intended to be used against any defendant on the government's direct or rebuttal case or an examination of any defendant who might testify at trial." The government has agreed to provide this evidence two weeks before commencement of trial and at an earlier date when possible.

Rule 404(b) requires the prosecution in a criminal case to provide "reasonable notice in advance of trial, or during trial if the court excuses pretrial

evidence that might be used to impeach Watson. The Assistant U.S. Attorney, however, did not disclose the content of Pate's statements to Watson about the earlier underweight drug shipment.

Later that morning, while Watson was on the witness stand, the prosecutor asked about the conversation with Pate. Watson responded, "We was talking about drugs coming through the UPS and that it was hard to trust people that was far away sending you drugs, and he stated that the last package he'd received was short. It was supposed ..." At that point, the trial judge called counsel to the bench. Defense counsel then objected to the testimony as involving "other crimes or wrongs" evidence about which it had received no prior notice from the government.

The trial judge reprimanded the Assistant U.S. Attorney for attempting to introduce evidence under Fed.R.Evid. 404(b) without giving advance notice to the court in accordance with local practice. The judge questioned, however, whether defense counsel had properly requested notice as required by the Rule. After making various findings, the trial judge ruled that the evidence was "intrinsically related" to the acts charged in the indictment and also that the evidence was admissible under Rule 404(b), although he was troubled by the government's failure to give notice of its intention to introduce Pate's admission to Watson.

Barnes was convicted of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and of carrying a firearm during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924(c). Pate, too, was convicted on the drug charge but was acquitted on the count alleging possession of a firearm during the commission of a drug trafficking offense. However, Pate was convicted on an additional count asserting that he violated 18 U.S.C. § 922(g)(1) (possession of a firearm by a convicted felon).

Barnes was sentenced to consecutive sentences aggregating 181 months. Because of his prior conviction for a felony narcotics offense, Pate received the mandatory minimum sentence of 240 months on the drug possession charge. Additionally, Pate received a concurrent sentence of 120 months on the count charging firearm possession by a convicted felon.

Both defendants have appealed the trial court's ruling on Watson's testimony. Pate has also appealed his sentence, contending that because the jury acquitted him of possessing a firearm during the commission of the drug offense, he should not have been given a two-level enhancement in calculating his sentence under U.S.S.G. § 2D1.1(b)(1) (1992).

***1147** I.

Federal Rule of Evidence 404(b), with certain exceptions, prohibits the admission of evidence of other crimes or wrongs "to prove the character of a person in order to show action in conformity therewith." In 1991, the Rule was amended to provide that if evidence is admissible for other reasons, such as proof of motive, opportunity, intent, preparation, plan, identity, etc., "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. 404(b).

The Advisory Committee explained that the amendment "is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence." Id. Advisory Committee's note (1991 amendment).

Although it does not call for any specific form of notice, "[t]he Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion." Id. The court has the discretion to determine reasonableness under the circumstances, but the Committee note cautioned that "[b]ecause the notice requirement serves as [a] condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met." Id.

A respected commentary points out that the amendment provides no specific sanction for the failure to give notice, that the notice must be of a "general nature," and that compliance can be delayed until trial if the court finds "good cause." 22 Charles A. Wright & Kenneth W. Graham, Jr.,

Federal Practice & Procedure § 5249, at 580 (Supp.1994). "This was apparently as much notice as the Justice Department was willing to tolerate; it remains to be seen if it will be of much use to criminal defendants." Id. The amendment, but another small step toward improving the discovery process in criminal trials, has not been in effect for very long and, understandably, has received little appellate scrutiny.

In United States v. Tuesta-Toro, 29 F.3d 771 (1st Cir.1994), the Court of Appeals for the First Circuit concluded that a request for notification "must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification...." Id. at 774. In that case, an omnibus defense motion requesting "confessions, admissions and statements ... that in any way exculpate, inculpate or refer to the defendant" was held to be insufficient to comply with Rule 404(b). Id.

In United States v. Matthews, 20 F.3d 538, 551 (2d Cir.1994), the Court of Appeals for the Second Circuit concluded that the government was not required to furnish pretrial notice of its intention to introduce testimony about a defendant's prior assault on one of its witnesses. In that case, the evidence was introduced on re-direct examination by the government to bolster the credibility of a witness whose character had been vigorously attacked during cross-examination. However, it is questionable whether Rule 404(b) even applied in that instance.

The Court commented that the witness was a confidential informant and that Rule 404(b) did not require disclosure of her name to the defense. Revealing the "other crimes or wrongs" testimony would have unmistakably identified the witness, and notice before trial, therefore, would have disclosed the name of the informant. In that situation, pretrial disclosure should have been a matter for the trial court's discretion in weighing all the pertinent factors.

Probably because the point was not raised, Matthews did not discuss the applicability of the Rule 404(b) notice requirement after the trial had begun and the confidential informant had already taken the stand. Although the opinion on the notice requirement is vague, it would seem that once the identity of the witness had become known, no further reason would exist to excuse the government's obligation to disclose the "other crimes" evidence.

***1148** Rule 404(b) does not discuss at what point, in ordinary circumstances, notice must be given and a response filed. In United States v. Kern, 12 F.3d 122, 124 (8th Cir.1993), the magistrate judge directed the government at a pretrial conference to furnish Rule 404(b) information at least fourteen days before trial. However, because the government was unable to obtain the necessary records until one week before the trial began, the court found that the notification at that point to the defense was reasonable.

In United States v. French, 974 F.2d 687, 694-95 (6th Cir.1992), the government notified the defense one week before trial of its intent to produce "other crimes" evidence. Although the trial apparently had taken place before the adoption of the 1991 amendment to Rule 404(b), we concluded that the district court's approval of a one-week notice to the defense did not amount to an abuse of discretion under the circumstances. See also United States v. Sutton, 41 F.3d 1257, 1258-59 (8th Cir.1994); United States v. Perez-Tosta, 36 F.3d 1552, 1560-63 (11th Cir.1994).

[1][2] Rule 404(b) does not recite whether there is a continuing obligation to disclose "other crimes" evidence that the government discovers after it has initially either provided or denied its intent to use such information. However, Fed.R.Crim.P. 16(c), referring to discovery in criminal cases, has long required a party to disclose additional evidence discovered after a previous request for information has been answered. Although Fed.R.Crim.P. 16(c) refers to evidence or material "subject to discovery or inspection under this rule," we believe that for reasons of efficiency and fairness, a similar continuing obligation to disclose applies to Fed.R.Evid. 404(b). [FN1] A contrary reading would force the defense to make numerous, periodic requests until the trial has been completed--surely a wasteful procedure.

FN1. See also Fed.R.Evid. 102 (rules of evidence should be construed to promote fairness and efficiency); Fed.R.Evid. 412(c)(1) (written notice required 15 days in advance of trial); Fed.R.Evid. 609(b) (written notice required to be given to

adverse party with a fair opportunity to contest the use of such evidence); Fed.R.Evid. 803(24) (advance notice required to give adverse party a fair opportunity to meet the evidence); Fed.R.Evid. 804(b)(5) (same).

In Tuesta-Toro, 29 F.3d at 775 n. 1, the Court speculated in a footnote that Rule 404(b), as drafted, might be read as requiring the government to provide information only as of the time the response was made. The Court, however, expressly did not decide the point.

After due consideration, we conclude that Rule 404(b) does place an initial duty on the defense to request the prosecution to furnish "other crimes" evidence. The request need not be in technical terms, but it must be such as to be, in an objective sense, reasonably understandable. Once made, the request imposes a continuing obligation on the government to comply with the notice requirement of Rule 404(b) whenever it discovers information that meets the previous request.

[3] The trial court must exercise its discretion in determining whether the government is excused from submitting a timely response or whether the circumstances are such that compliance must await further events. Factors for consideration might include a concern about the identification of a confidential informant or a credible belief that the protection of a witness is required.

In the case at hand, we are troubled--as was the trial judge--by the government's failure to disclose the asserted Rule 404(b) evidence before the witness was questioned in front of the jury. Although we credit the government's position that it did not learn of the specific evidence until the trial was already in progress, the defense and the trial court could nevertheless have been notified before Watson took the stand.

There is also difficulty with the defense's contention that it submitted a suitable request under Rule 404(b). Although we do not insist on a request that specifically cites Rule 404(b), cf. United States v. Williams, 792 F.Supp. 1120, 1133-34 (S.D.Ind.1992), United States v. Alex, 791 F.Supp. 723, 728-29 (N.D.Ill.1992), we agree with Tuesta-Toro that an overly broad and generalized discovery request does not comply with the Rule.

[4] By the same token, however, the government's notice must characterize the prior ***1149** conduct to a degree that fairly apprises the defendant of its general nature. United States v. Birch, 39 F.3d 1089, 1093-94 (10th Cir.1994); **United States v. Jackson, 850 F.Supp. 1481, 1493 (D.Kan.1994).** Moreover, the notice given to the defense regarding "other crimes" evidence must be sufficiently clear so as "to permit pretrial resolution of the issue of its admissibility." United States v. Long, 814 F.Supp. 72, 74 (D.Kan.1993). See generally Colleen A. O'Leary et al., Project, Eighth Survey of White Collar Crime: Discovery, 30 Am.Crim.L.Rev. 1049, 1075-78 (1993). The notice requirement is now firmly embedded in Rule 404(b), and courts should rebuff efforts to nullify the Rule's aim of enhancing fairness in criminal trials.

In this case, the defense simply asked for a list of witnesses the government intended to call and their anticipated testimony. That request was so broad that it is questionable that it should have fairly alerted the government to supply evidence under Rule 404(b). We do note, however, that the government represented in its pretrial statement that it was "unaware of any specific trial problems which should be anticipated by the Court." Although we might expect Rule 404(b) admissibility to fall into such a category, the lesson that might be gleaned from this case is that it is more prudent for defense counsel to include a reference to Rule 404(b) in the boilerplate request for discovery under Fed.R.Crim.P. 16.

[5][6] Although the defendants have vigorously pressed this case on the basis of the government's failure to supply Rule 404(b) information, we prefer to follow another route--that the disputed testimony was not within the scope of the Rule. In United States v. Torres, 685 F.2d 921, 924 (5th Cir.1982) (per curiam), the Court of Appeals explained that Rule 404(b) does not apply where the challenged evidence is "inextricably intertwined" with evidence of the crime charged in the indictment.

When the other crimes or wrongs occurred at different times and under different circumstances from the offense charged, the deeds are termed "extrinsic." "Intrinsic" acts, on the other hand, are those that are part of a single criminal episode. Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of

illegal activity. When that circumstance applies, the government has no duty to disclose the other crimes or wrongs evidence.

The 1991 Advisory Committee note to Rule 404(b) is in agreement: "The amendment does not extend to evidence of acts which are 'intrinsic' to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir.1990)...." For similar holdings, see United States v. Dozie, 27 F.3d 95, 97 (4th Cir.1994) (per curiam), United States v. Nicholson, 17 F.3d 1294, 1298 (10th Cir.1994), United States v. Sparks, 2 F.3d 574, 581 (5th Cir.1993), and United States v. Lambert, 995 F.2d 1006, 1007-08 (10th Cir.1993).

In this case, there was a direct connection between the earlier "short" drug shipment and the receipt of the one for which defendants were charged. The trial court concluded that the evidence could stand for the proposition that the drugs which were the subject of the indictment were "to make up for a prior shipment which was short." We agree that the challenged testimony was intrinsic to the conduct alleged in the indictment, and consequently, Rule 404(b) was not implicated. We therefore reject the defendants' contention that the introduction of Watson's testimony was erroneous. [FN2]

> FN2. We also find no merit in the defendants' contention that Watson's testimony was inadmissible under Fed.R.Evid. 403.

II.

[7] Defendant Pate has raised an additional issue, a challenge to his sentence. As noted earlier, Pate was acquitted of the charge of using or carrying a firearm during the commission of a drug trafficking offense, 18 U.S.C. § 924(c), but was found guilty of being a convicted felon in possession of a firearm, 18 U.S.C. § 922(g)(1).

During the sentencing hearing, the trial judge stated that he intended to apply a two-level increase to the Guideline computation ***1150** pursuant to U.S.S.G. § 2D1.1(b)(1). The judge pointed out that he was not sentencing under the count on which defendant had been acquitted, but "with the evidence that I have in front of me on this matter, I will find that he did possess this weapon in the commission of this offense ...," and accordingly, the enhancement was proper.

Section 2D1.1(b)(1) provides that "[i]f a dangerous weapon (including a firearm) was possessed [during the commission of a drug offense], increase by 2 levels." In United States v. Duncan, 918 F.2d 647, 652 (6th Cir.1990), a case similar to the one before us, we held that the sentencing judge properly applied the enhancement notwithstanding the fact that the jury had found the defendant not guilty of the charge of violating 18 U.S.C. § 924(c), the same section pertinent here. Hence, it is clear that Duncan controls, and we must reject Pate's attack on his sentence.

[8][9] Even if we were to conclude that Duncan is not dispositive on this issue, we observe that the district court properly sentenced Pate to 240 months imprisonment. When the maximum Guideline sentence is less than the statutorily required mandatory minimum, the latter is the effective sentence. U.S.S.G. § 5G1.1(b) (1992); see also United States v. Goff, 6 F.3d 363, 366-67 (6th Cir.1993). Because Pate had previously been convicted of a felony drug violation and the current offense involved more than one kilogram of a methamphetamine substance, the district court was required to apply the 20-year mandatory minimum in 21 U.S.C. § 841(b)(1)(A)(viii). Even assuming that the enhancement should not have been applied, the applicable Guideline range would have been less than the mandatory minimum, and consequently, even if considered to be an error, adding the enhancement had no effect on Pate's sentence.

Accordingly, the judgments of the district court will be affirmed.

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Citation 30 AMCRLR 1049 (Cite as: 30 Am. Crim. L. Rev. 1049) FOUND DOCUMENT Page(P) P 1 OF 85 Database AMCRLR Mode P LOCATE

American Criminal Law Review
Spring, 1993

Eighth Survey of White Collar Crime
Procedural Issues

*1049 DISCOVERY

Colleen A. O'Leary
Kelly G. LaPorte
Jacob Schatz

I. CONSTITUTIONAL REQUIREMENTS OF DISCOVERY 1050
A. The Brady Doctrine: Exculpatory Evidence 1050
B. Materiality 1050

of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation." [FN216]

A trial court has wide discretion in deciding whether to grant a motion to quash or modify a Rule 17(c) subpoena, and the court's decision is not immediately appealable. [FN217] Appellate review is limited to whether the trial *1075 court abused its discretion. [FN218]

Along with the Jencks Act and Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, Rule 17 provides an additional means for the production of evidentiary material in any criminal proceeding. The rule implicates a number of constitutional safeguards which ensure a defendant's access to witnesses and documents and protect a defendant from unreasonable or oppressive government subpoenas.

V. FEDERAL RULE OF EVIDENCE 404(b)

More than a decade after the District of Columbia Court of Appeals suggested "that in future cases the Government exercise the discretion given it by Fed. R. Crim. P. 12(b)(1) and notify the defense before trial of its intention to introduce any evidence of prior bad acts," [FN219] Federal Rule of Evidence 404(b) was amended to mandate such pretrial notification, now allowing evidence of other acts "be admissible ..., provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance

of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." [FN220]

Because Rule **404(b)** is one of the most cited Rules of Evidence, [FN221] the notice requirement adds a crucial step in criminal proceedings with the intent "to reduce surprise and promote early resolution on the issue of admissibility." [FN222] To fulfill this intent, the amended rule requires the accused to first request that notice be given in order to trigger the requirement of notice. [FN223] Failure to make a request may operate as a pre-waiver by the defendant. With the introduction of the amended Rule **404(b)** pre-trial notice requirement, the following four issues may arise as to whether the evidence offered under Rule **404(b)** is admissible: (1) Was notice given at all? (2) If notice was given in advance of trial, was the notice "reasonable?" (3) If the notice was given during trial, did the court excuse pre-trial notice on "good cause shown?" (4) Did the notice include the "general nature" of the evidence offered at trial?

Other Federal Rules of Evidence, Rule 412 (written motion of intent ***1076** required to offer evidence under rule), Rule 609(b) (written notice of intent required to offer conviction older than ten years), and Rules 803(24) and 804(b)(5) (notice of intent required to use residual hearsay exceptions) have similar pre-notice requirements which Rule **404(b)** may ultimately parallel.

A. Remedial Exclusion

The most contentious issue to arise from the newly amended rule is the admissibility of evidence offered by the prosecution when notice has not been given. Although Rule **404(b)** may implicate exclusion, federal courts are split on how rigidly to apply similar notice requirements. The First Circuit took a strict view in United States v. Benavente Gomez, stating "[i]t seems to us clear that, in a criminal case, where no explanation for failing to meet the notice requirement [in Federal Rule of Evidence 803(24)] has been made ... a party may not avoid the requirements of the specific rule ... simply by reading the notice requirement out of existence." [FN224] Other federal appellate courts have taken a similarly literal view of notice requirements, such as the Second Circuit in United States v. Ruffin [FN225] and United States v. Oates [FN226] and the Fifth Circuit in United States v. Davis. [FN227]

On the other hand, several circuits have argued that a flexible approach should be taken in considering whether or not to admit evidence when no required notice was given. This approach has been taken by the First Circuit in United States v. Doe, [FN228] the Second Circuit in United States v. Iaconetti, [FN229] and the Fifth Circuit in United States v. Leslie. [FN230] The courts in these cases have tended to be more flexible in admitting evidence prior to trial.

***1077** B. "Reasonable Notice"

The reasonableness of notice given depends upon the timing of the notice and the manner in which notice was given. The Ninth Circuit, in United States v. Brown, held that the required notice for Rule 803(24) must be given "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to meet it." [FN231] In Mutuelles Unies v. Kroll and Lindstrom, the same court viewed notice given three days prior to trial as adequate. [FN232] For notice given during trial, the First Circuit held in United States v. Panzardi-Lespier that sufficient notice was given after the initiation of proceedings but seven days before the specific evidence was introduced at trial. [FN233]

Though the timing of the notice may be sufficient, the manner of notification given might be unsatisfactory. The Third Circuit held in both United States v. Furst [FN234] and in United States v. Pelullo [FN235] that the notice provision requires "the proponent to give notice of its intention specifically to rely on the rule as grounds for admissibility." [FN236] In Pelullo, the government gave documents to Pelullo months before trial but did not state that the evidence would be introduced under Rule 803(24) as the basis for admissibility; [FN237] the Third Circuit barred admission of the evidence: "Although the Federal Rules of Evidence are to be liberally

construed in favor of admissibility, this does not mean that we may ignore requirements of specific provisions ...." [FN238] However, the First Circuit in United States v. Benavente Gomez [FN239] held that notification of the existence of the evidence alone constituted sufficient notification.

C. "Good Cause" Shown for Notice Given During Trial

The standard adopted by the First Circuit in admitting evidence with ***1078** notice given during trial is enunciated in United States v. Doe, where the court stated that a "flexible approach is warranted only when pretrial notice is wholly impractical." [FN240]

For notice given during trial, there still must be adequate time for the adverse party to challenge the proposed evidence; in Doe, the First Circuit stated that "even under a flexible approach, evidence should be admitted only when the proponent is not responsible for the delay and the adverse party has an adequate opportunity to examine and respond to the evidence." [FN241]

D. "General Notice" of the Evidence

Another manner in which notice may fail to satisfy the requirements of Rule **404(b)** is when the notification is not specific enough to allow the accused to identify the content of the evidence sought to be introduced. In United States v. Chu Kong Yin, the Ninth Circuit held that notice under Rule 803(24) which

did not include the identity and the addresses of declarants of the hearsay evidence made the notice unsatisfactory and barred introduction of that evidence. [FN242]

FN1. Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (noting that the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded).

FN2. 373 U.S. 83 (1963).

FN3. Id. at 87-88 (suppression by prosecution of evidence favorable to accused violates due process); see also United States v. Bagley, 473 U.S. 667, 675 (1985) (Blackmun, J.) (prosecutor is required only to disclose evidence that, if suppressed, would deprive defendant of a fair trial).

FN4. 18 U.S.C. s 3500 (1982).

FN5. FED. R. CRIM. P. 16, 17, 26.2

FN6. In addition, the Freedom of Information Act may provide a useful tool for compelling disclosure of federal agency records. 5 U.S.C. s 552 (1988).

FN218. See United States v. Arditti, 955 F.2d 331, 345 (5th Cir. 1991) (trial court did not abuse its discretion in quashing the Rule 17(c) subpoena).

FN219. United States v. Foskey, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980) (evidence of prior arrest for possession of drugs inadmissible in illegal possession of drugs trial).

FN220. FED. R. EVID. **404(b)**.

FN221. See generally EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1984) (discussing the importance and heavy reliance on Rule **404(b)**).

FN222. SENATE COMM. ON JUDICIARY, FED. RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 24 (1974) (committee comment on amended Rule **404(b)**).

FN223. A notice request may, therefore, become a standard element of defendants' discovery requests.

FN224. United States v. Benavente Gomez, 921 F.2d 378, 384-85 (1st Cir. 1990) (cocaine conspiracy case where admission into evidence of telephone

records under residual hearsay exception was error).

FN225. 575 F.2d 346, 357-58 (2d Cir. 1978) (income tax evasion case where Internal Revenue Service printout was inadmissible hearsay).

FN226. 560 F.2d 45, 72 n.30 (2d Cir. 1977) (possession with intent to distribute heroin case where United States Customs chemist's statement deemed inadmissible hearsay).

FN227. 571 F.2d 1354, 1360 n.11 (5th Cir. 1978) (illegal possession of firearm case where form documents from a government bureau were not admissible within hearsay exception).

FN228. 860 F.2d 488, 491-92 (1st Cir. 1988) (rape shield case which reiterated importance of notice requirement).

FN229. 540 F.2d 574, 578, n.6 (2d Cir. 1976) (bribe solicitation case where a business partner's account of what was said to the company president deemed not inadmissible hearsay), cert. denied, 429 U.S. 1041 (1977).

FN230. 542 F.2d 285, 291 (5th Cir. 1976) (transportation of stolen

automobile case where statements previously given to the FBI by accomplices were admissible).

FN231. United States v. Brown, 770 F.2d 768, 771 (9th Cir. 1985) (drug offense case where defendant's passports were admissible under the general exception to the hearsay rule).

FN232. Mutuelles Unies v. Kroll and Lindstrom, 957 F.2d 707, 713 (9th Cir. 1992) (French corporation's legal malpractice action against American law firm where unavailable witness's statement deemed admissible).

FN233. United States v. Panzardi-Lespier, 918 F.2d 313 (1st Cir. 1990) (conspiracy to possess with intent to distribute heroin case where tape recordings made by informant held admissible).

FN234. 886 F.2d 558, 574 (3d Cir. 1989) (embezzlement case where evidentiary ruling errors held harmless).

FN235. 964 F.2d 193, 202 (3d Cir. 1992) (wire fraud and racketeering case where documents not admissible under residual hearsay exception).

FN236. Id.

FN237. Id.; see also United States v. Tafollo-Cardenas, 897 F.2d 976, 980 (9th Cir. 1990) (prosecutor must give notice of Rule 803(24) as basis for admissibility).

FN238. United States v. Pelullo, 964 F.2d at 204.

FN239. 921 F.2d 378, 384 (1st Cir. 1990) (cocaine conspiracy case where error of admitting evidence of phone records did not require reversal).

FN240. United States v. Doe, 860 F.2d 488, 492 n.3 (1st Cir. 1988).

FN241. Id.

FN242. United States v. Chu Kong Yin, 935 F.2d 990, 1000 (9th Cir. 1991) (immigration case where government's introduction of Hong Kong records were inadmissible hearsay).

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813 F.Supp. 294 FOUND DOCUMENT P 1 OF 37 FED3-ALL Page
36 Fed. R. Evid. Serv. 1523
(Cite as: 813 F.Supp. 294)

UNITED STATES of America, Plaintiff,
v.
Mark EVANGELISTA, et al., Defendants.
Crim. No. 92-503.
United States District Court,
D. New Jersey.
Jan. 7, 1993.

Defendants moved for severance and for production of evidence. The District Court, Irenas, J., held that: (1) defendant's confession could be sufficiently redacted to be admissible without violating confrontation rights of codefendants; (2) defendants were not entitled to production of list of government's witnesses; and (3) production of Jencks Act material on the eve of trial was soon enough.

Ordered accordingly.

At oral argument, the government offered to provide defendants with all Jencks Act material on the eve of trial. While the government was clearly under no legal obligation to do so, the court is persuaded that this offer strikes an appropriate balance and will order production of Jencks Act material on Friday, January 8, 1992.

D. Federal Rule of Evidence 404(b) Material

[8] Federal Rule of Evidence 404(b) was amended effective December 1, 1991 to require the prosecution in a criminal case to "provide reasonable notice in advance of trial" of any such evidence it intends to introduce at trial. Cases interpreting the phrase "reasonable notice" are few in number so far.

In U.S. v. Williams, 792 F.Supp 1120, 1133 (S.D.Ind.1992), the court held that ten days prior to trial would be the reasonable period for advance notice required under the amendment. In U.S. v. Alex, 791 F.Supp. 723, 729 (N.D.Ill.1992), the court held seven days would be reasonable advance notice.

At oral argument the government offered to provide this information to defendants 7 or 10 days in advance of trial. Because the alleged incidents occurred more than five years ago, defendants' preparation to respond to the government's Rule 404(b) material may require more effort than if the incidents had occurred more recently. The court will order the government to provide this information to defendants and the court on Monday, December 28, 1992 (10

business days prior to trial, excluding weekends but not excluding New Year's Day).

E. Witness List and Tape Recording

[9][10] It is well established that criminal defendants have no right in advance of trial to see a list of witnesses the prosecution will or may call. Government of the Virgin Islands v. Martinez, 847 F.2d 125, 128 (3d Cir.1988) (government is not required to disclose names of witnesses in non-capital cases, but trial court in its discretion may order such discovery); United States v. White, 750 F.2d 726, 728 (8th Cir.1984) (defendants have no right to such pretrial discovery, but in its discretion district court may order it); U.S. v. Zolp, 659 F.Supp 692 (D.N.J.1987); U.S. v. Vastola, 670 F.Supp 1244, 1268 (D.N.J.1987) (witness lists and statements of non-testifying witnesses not required to be disclosed as Brady material). The court will not order the government to disclose its list of prospective witnesses.

The court need not rule on defendant's request for a copy of the tape recording of a consensually recorded conversation between defendant, Mark Evangelista, and one David Pachucki because the government has provided defendants with a copy which defense counsel stated was audible. [FN12]

FN12. Additionally the court instructed counsel that transcripts of any

recorded conversations that any party intends to use at trial must be prepared well in advance of trial, and the transcript of the Evangelista and Pachucki recording must be delivered to the court by close of business on December 24, 1992.

The court will enter an appropriate order in conformance with this opinion.

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Citation | Page(P) | Database | Mode
855 F.Supp. 955 CITING CASE | P 1 OF 68 | FED7-ALL | Page

(Cite as: 855 F.Supp. 955)

UNITED STATES of America, Plaintiff,
v.
Christopher R. MESSINO, Clement A. Messino, Michael Homerding, Donald Southern, William Underwood, Christopher B. Messino, Blaise Messino, Paul Messino, Thomas Hauck, Gary Chrystall, Daniel Shoemaker, and Lawrence Thomas, Defendants.

No. 93 CR 294.

United States District Court,
N.D. Illinois,
Eastern Division.

June 24, 1994.

Defendants charged with drug and money laundering conspiracy filed various pretrial motions. The District Court, Alesia, J., held that: (1) hearing was required on motion to suppress evidence seized and removed from defendant's home pursuant to warrant obtained ex parte pursuant to civil forfeiture proceeding; (2) grand juror's misconduct did not require dismissal of indictment; and (3) defendants were not entitled to severance.

Motions granted in part, denied in part, and referred in part.

855 F.Supp. 955 CITING CASE | P 46 OF 68 | FED7-ALL | Page

(Cite as: 855 F.Supp. 955, *965)

Thereof is granted.

11. Defendant Christopher Richard Messino's Motion for Access to Original Tape-recordings and Physical Evidence

The government has agreed to comply with defendant's request. Accordingly, Defendant Christopher Richard Messino's Motion for Access to Original Tape-recordings and Physical Evidence is denied as moot.

12. Defendant Christopher Richard Messino's Motion to Compel MCC to Make a Tape-recorder Available to Defendant and Counsel

The government represents that the MCC (Metropolitan Correctional Center) is complying with defendant's request. Accordingly, Defendant Christopher Richard Messino's Motion to Compel MCC to Make a Tape-recorder Available to Defendant and Counsel is denied as moot.

13. Motions for Notice of Government's Intention to Introduce Certain Specified Categories of Evidence

Defendant Michael Homerding has moved for an order that the government reveal any intention to introduce Rule 404(b) evidence. Defendants Clement Messino, Donald Southern, Thomas Hauck, and Daniel Shoemaker have filed similar motions, with the added element of seeking evidence under Rule 608. Finally Christopher Richard Messino and William Underwood have filed a motion seeking Rule 404(b) evidence, Rule 608 evidence, and other various categories of evidence.

A. Rule 404(b) Evidence

Rule 404(b) of the Federal Rules of Evidence establishes that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED.R.EVID. 404(b). The rule provides, however, that evidence of "other crimes, wrongs, or acts" may be admissible for other specified purposes. But to invoke a Rule 404(b) exception the government must meet the rule's disclosure requirement: "[U]pon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial." FED.R.EVID. 404(b).

Defendants' motions constitute a "request by the accused." The prosecution is therefore required to provide reasonable notice in advance of trial, an obligation the government acknowledges. (Government's Consolidated Response at 22.) As far as the amount of notice the government will give, it has agreed to provide notice at least 30 days before trial, an amount of time the court views as reasonable. Indeed, that period of time is approximately that requested by one of the defendants. (See Defendant Michael Homerding's Motion for Notice of Intention to Use Evidence of Other Crimes, Acts and Wrongs of Any Defendant at 2 ("[D]efendant requests reasonable notice before trial, and thus requests notice four weeks prior to trial.").)

As far as the content of the notice is concerned, the government is correct in

noting that Rule 404(b) only requires that the notice inform defendants of the "general nature" of the evidence. The level of specificity called for by some of the defendants is simply not contemplated by Rule 404(b).

B. Rule 608 Evidence

[11] Defendants Christopher Richard Messino, Clement Messino, Donald Southern, Thomas Hauck, William Underwood, and Daniel Shoemaker also seek notice of intended use of Rule 608(b) evidence, or evidence of specific instances of conduct. This court has previously held that defendants generally are not entitled to special pretrial notice of the introduction of Rule 608(b) evidence, and the court reaffirms that holding for the reasons then given. See **United States v. Sims, 808 F.Supp. 607, 611** (N.D.Ill.1992).

C. Data Forming the Basis for Opinion Testimony

Defendants Christopher Richard Messino and William Underwood seek information behind ***966** any expert opinion the government intends to offer. The government acknowledges its Rule 16(a)(1)(E) obligations in that regard. Defendants' detailed requests do, as the government argues, exceed those obligations. The court, on the government's representation, assumes that the government's stated intent to follow Rule 16 will be fulfilled. However, the court adds that it is troubled by the following statement by the government: "The United States herein agrees to disclose to defendants prior to trial whether it will rely upon expert testimony, but defendants' request for

Citation | Rank(R) | Page(P) | Database | Mode
46 F.3d 1369 | R 3 OF 148 | P 1 OF 124 | ALLFEDS | P LOCATE
(Cite as: 46 F.3d 1369)

UNITED STATES of America, Plaintiff-Appellee,
v.
Darrell A. TOMBLIN, Defendant-Appellant.
No. 93-8679.
United States Court of Appeals,
Fifth Circuit.
Feb. 24, 1995.

Defendant was convicted in the United States District Court for the Western District of Texas, H.F. Garcia, J., of bribery, extortion and related offenses, and he appealed. The Court of Appeals, Emilio M. Garza, J., held that: (1) any deficiencies in affidavits in support of wiretap authorization did not **require** suppression; (2) bribery instruction was adequate; (3) evidence was sufficient to support bribery conviction; (4) extortion instruction was adequate; (5) because defendant was not a public official, his conviction for extortion had to be reversed; (6) introduction of evidence of defendant's character did not **require** reversal; (7) prosecutor was not **required** to give **notice** of intent to use other-acts evidence; and (8) upward departure in base offense level for bribery was warranted.

Affirmed in part, vacated in part and remanded.

46 F.3d 1369 | R 3 OF 148 | P 112 OF 124 | ALLFEDS | P LOCATE
(Cite as: 46 F.3d 1369, *1388)

FN49. We note that, had we addressed Tomblin's Rule 608(b) good faith argument, we would have reached the same conclusion.

2

[37][38] Tomblin also argues that, because the prosecutor did not provide advance notice, the introduction of evidence of other bad acts when cross-examining Tomblin violated Federal Rule of Evidence 404(b). [FN50] The government contends that the other-acts evidence was proper under Rule 608(b) because it was introduced only to impeach Tomblin and was not offered in the prosecutor's case in chief. [FN51] Whether Rule 404(b) or Rule 608(b) applies to the admissibility of other-act evidence depends on the purpose for which the prosecutor introduced the other-acts evidence. United States v. Schwab, 886 F.2d 509, 511 (2d Cir.1989), cert. denied, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990). Rule 404(b) applies when other-acts evidence is offered as relevant to an issue in the case, such as identity or intent. Id. Rule 608(b) applies when other-acts evidence is offered to impeach a witness, "to show the character of the witness for untruthfulness," or to show bias. Id. The prosecutor contends that his cross-examination questions were probative of Tomblin's character for truthfulness.

directed at Tomblin's alleged acts of fraud, bribery, and embezzlement. [FN52] As such, the prosecutor's questions were probative of Tomblin's character for truthfulness and were permissible under Rule 608(b). Accordingly, we conclude that the provision of Rule 404(b) that **requires** the prosecutor to give **notice** of his intention to use other-acts evidence does not apply here. [FN53]

FN52. Rule 608(b) does require a good-faith basis for the questions. Tomblin, however, did not raise lack of good faith in a contemporaneous objection. Further, the record shows that the prosecutor gathered his foundation from the wiretaps.

FN53. In a pretrial hearing, Tomblin stated that if the prosecutor intended to introduce Rule 404(b) evidence, Tomblin would seek to limit its use through his motion in limine. The prosecutor responded that he did not intend to introduce Rule 404(b) evidence, but he reserved the right to introduce evidence of other misconduct to impeach Tomblin should Tomblin testify. It is not clear that the judge gave a ruling on this part of the motion. Because we find the evidence permissible under Rule 608(b), we do not address Tomblin's argument that the evidence violated his 404(b) motion.

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80-2 USTC P 9679, 7 Fed. R. Evid. Serv. 975
(Cite as: 649 F.2d 471)

UNITED STATES of America, Plaintiff-Appellee,
v.
Roger S. BASKES, Defendant-Appellant.
No. 77-2178.
United States Court of Appeals,
Seventh Circuit.
Argued April 28, 1978.
Decided Sept. 18, 1980.

Defendant was convicted in the United States District Court for the Northern District of Illinois, Bernard M. Decker, J., of conspiring with others to defraud the United States by impeding and obstructing the assessment and collection of income and gift taxes and he appealed. The Court of Appeals, Fairchild, Chief Judge, held that: (1) defendant lacked standing to suppress documents seized from a third party not before the court; (2) witnesses' hopeful expectation that they could avoid criminal or civil proceedings by disclosing to government attorneys what they knew about the transactions in issue, even when supplemented by evidence that a government attorney used language concerning possibility of granting informal immunity, did not amount to a promise of leniency such that witnesses' denial that they had received

[2] In the present case the defendant has not established the required undisclosed agreement of leniency.[FN3] Defendant has not offered any direct evidence of promises of leniency in exchange for testimony. Instead, defendant asks us to infer promises from Schoenberg's hope that his clients could, if necessary, avoid exposure to criminal or civil fraud proceedings by disclosing what they knew of the transactions. Such a hopeful expectation even when supplemented by evidence that a government attorney ***477** used language concerning the possibility of granting informal immunity is not sufficient to warrant a new trial under the rationale of Giglio. See United States v. Ramirez, 608 F.2d 1261, 1266-67 (9th Cir. 1979); United States v. Piet, 498 F.2d 178, 182 (7th Cir.), cert. denied, 419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 664 (1974). The situation is too equivocal to deem the witnesses' answers false and the government under a duty to correct or qualify them.

FN3. In cases in which courts have ordered a new trial based on Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104, an undisclosed agreement of leniency between the government and the witness prior to the testimony was clearly established. See Giglio, 405 U.S. at 152-53, 92 S.Ct. at 765; Campbell v. Reed, 594 F.2d 4, 7 (4th Cir. 1979); United States v. Butler, 567 F.2d 885, 888 (9th Cir. 1978); United States v. Harris, 498 F.2d 1164, 1169 (3d Cir.), cert. denied,

419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 665 (1974); United States v. Gerard, 491 F.2d 1300, 1304 (9th Cir. 1974).

IV. Court's Refusal to Require Disclosure of Intended Cross-Examination

Defendant argues that the district court erred in not compelling the government to disclose the specific instances of defendant's conduct which it intended to use in cross-examination of defense character witnesses, prior to the time they were to testify. As a result, defendant claims he was forced to withhold significant character testimony rather than risk its impeachment by undisclosed and unverified conduct.

We find no rule which mandates such disclosure. This circuit requires the trial judge to consider the truth of the basis for impeaching questions prior to cross-examination of a character witness. United States v. Jordan, 454 F.2d 323, 325 (7th Cir. 1971).[FN4] However, the purpose of the inquiry is to prevent improper questioning which might have a prejudicial impact on the jury and which cannot be adequately cured by instructions. Disclosure is merely ancillary to verification of the conduct to be incorporated in the questions. No rule or rationale guarantees the defense advance knowledge of legitimate impeachment before it calls a witness.

FN4. We note that there is some conflict among the circuits on this issue.

Jordan was decided on the basis of Gross v. United States, 394 F.2d 216, 223 (8th Cir. 1968), on appeal after new trial, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013, 90 S.Ct. 1245, 25 L.Ed.2d 427 (1970). However, the Eighth Circuit has since drawn into question its holding in Gross. Mullins v. United States, 487 F.2d 581 (8th Cir. 1973). In Mullins the Eighth Circuit found that the propriety of impeaching questions need not be decided "either before trial or before questioning if the matter is satisfactorily resolved during trial." Id. at 588.

The scope of character testimony is generally left to the discretion of the trial court since it is in the best position to consider the context in which it is to be presented.

(C)ourts of last resort have sought to overcome danger that the true issues will be obscured and confused by investing the trial court with discretion to limit the number of (character) witnesses and to control cross-examination. Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject. (Footnote omitted.)

Michelson v. United States, 335 U.S. 469, 480, 69 S.Ct. 213, 220, 93 L.Ed.

168 (1948). Among these considerations are concerns for fairness and efficiency as they emerge from the conduct of the trial. Normally the judge will be free to exercise his discretion in weighing these concerns and deciding when to rule on a specific issue.

[3] Accordingly, we find no abuse of discretion in the trial court's refusal to rule on the scope of cross-examination without benefit of having heard the direct testimony. While there may be some advantages to deciding the matter before the witnesses take the stand, there are also compelling reasons for waiting to hear them first. "(U)nless the judge has a grasp of how much ground has been . . . traversed by the offering on good character, he cannot define the ground which the cross-examination may cover in attempting to discredit that testimony." United States v. Lewis, 482 F.2d 632, 644 (D.C.Cir.1973). The trial court must decide for itself when it has enough information to make a proper ruling. While the court had much of the information found lacking in Lewis, we cannot find it unreasonable in having required more, particularly in light of the absence of prejudice to defendant's right to prior consideration.

***478** The defense asked for a ruling on this issue at the close of the government's case. While the court declined to rule at that time, it made it clear that it would fully consider the matter after a witness had testified and before the cross-examination began. Furthermore, it indicated that this consideration would take place outside the hearing of the jury. Given these

precautions, the defendant would have been amply protected from the likelihood of improper questioning of his witnesses. The decision by the defense to withhold character testimony was freely made and based on no greater risk than that inherent in all trial proceedings. The defendant is bound by the consequences of that decision.

V. Restrictions on Cross-Examination

The defendant next claims that the trial court erred in refusing to permit him to ask a question of a key prosecution witness.

Alan Hammerman, an attorney practicing in the same law firm as the defendant, was named in the indictment as a co-conspirator. At the government's request, Hammerman was severed for trial from defendant with the understanding that if Hammerman testified consistently with a prior statement his indictment would be dismissed. Hammerman testified that he worked under defendant's supervision in structuring and implementing the Cavanaugh transaction and he also testified to various aspects of the sales transaction.

On cross-examination defendant's counsel asked Hammerman:

Mr. Hammerman, did you unlawfully, knowingly and wilfully conspire to defraud the United States together with Sam Zell, Roger Baskes and/or Burton Kanter?

Mr. Hammerman, did you unlawfully, knowingly and wilfully combine and agree together with Roger Baskes, Burton Kanter and Sam Zell to defraud the United States of America?

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(Cite as: 45 F.3d 933)

UNITED STATES of America, Plaintiff-Appellee,
v.
Albert G. BUSTAMANTE, Defendant-Appellant.
No. 93-8705.
United States Court of Appeals,
Fifth Circuit.
Feb. 13, 1995.

Rehearing and Suggestion for Rehearing En Banc Denied April 5, 1995.

Former United States Representative was convicted in the United States District Court for the Western District of Texas, Edward C. Prado, J., of violating Racketeer Influenced and Corrupt Organizations Act (RICO), and he appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that evidence supported conviction.

Affirmed.

45 F.3d 933 | R 4 OF 148 | P 57 OF 64 | ALLFEDS | P LOCATE

(Cite as: 45 F.3d 933, *945)

B. Improper closing argument

[15] Bustamante argues that, during its closing argument, the government improperly suggested that Jaffe, Garcia and Heard were guilty of criminal conduct and called attention to Bustamante's decision not to call them as witnesses. However, as the government points out, Bustamante's own counsel had already repeatedly highlighted the fact that the government did not call these witnesses. The district court overruled Bustamante's objection to this argument. The district court did not err in permitting the government to respond to Bustamante's own argument suggesting that the jury draw unfavorable inferences from the government's failure to call these witnesses.

C. Improper cross-examination of Bustamante

[16] Bustamante first complains that the government suggested that he had received other uncharged illegal gratuities by asking him twice "You've never gotten anything from Doug Jaffe?" At trial, Bustamante's attorney objected on the ground that the government was trying to introduce evidence of extraneous bad acts prohibited by Federal Rule of Evidence (FRE) 404(b). The government responded that these inquiries were directly relevant to the Falcon bribe, in addition to being fair impeachment questions. The district court apparently agreed, but limited the government's questioning to Jaffe's involvement in the $35,000 payment Bustamante received from Garcia. Bustamante now argues that the question itself was improper because it implied Bustamante had received

other gratuities from Jaffe. We disagree. The record leads us to conclude that a reasonable jury would interpret this question as referring to the gratuity with which Bustamante had been charged, a matter which the government was entitled to explore.

[17] Bustamante next complains that the government twice asked questions intimating that Bustamante had done other improper things in his past, then stated in the jury's presence that it had outside evidence to support these questions. Bustamante contends that the government thus gave unsworn testimony about his prior bad acts. However, the record reveals that the government made these statements after Bustamante's attorney suggested in front of the jury that the government asked these questions in bad faith. In this context, the government's statements were not improper. In any event, these statements certainly do not amount to plain error, which is the applicable standard given that Bustamante never objected to them.

[18] Bustamante also complains about two series of questions the government asked regarding two other specific instances of uncharged prior conduct: Bustamante's failure to report or pay taxes on certain income, and Bustamante's solicitation of an unrelated bribe in 1987. At trial, Bustamante objected that the government was introducing FRE 404(b) evidence without first **disclosing** it to the defense as **required** by a pretrial order. The government correctly responded that, because it was using this evidence to impeach

Bustamante's credibility, FRE 404(b) did not apply. United States v. Tomblin, 42 F.3d 263, 282-83 (5th Cir.1994). The district court allowed both lines of questioning. Bustamante now contends that these questions were highly prejudicial.

Bustamante's argument places the cart before the horse. We assess the prejudicial quality of these questions only if we conclude that they were improper. United States v. MMR Corp., 907 F.2d 489, 501 (5th Cir.1990), cert. denied, 499 U.S. 936, 111 S.Ct. 1388, 113 L.Ed.2d 445 (1991). They were ***946** not. FRE 608(b) allows the government to inquire into specific instances of conduct relevant to Bustamante's character for truthfulness. Both the failure to report income and the solicitation of bribes are relevant to the issue of honesty. E.g., Tomblin, 42 F.3d at 282-83. The record reveals that, prior to embarking on each series of questions, the government informed the district court of the factual support for its inquiries, thus establishing a good faith basis for its questions. We conclude that the district court did not err in permitting these questions.

Lastly, Bustamante asserts that the government commented on his assertion of his fifth amendment rights before the grand jury. At the start of his direct examination, Bustamante stated "I've been waiting a long time for this day to come." On cross-examination, the government asked "You were given an opportunity to come in and tell the government your version [of the facts],

weren't you?" and "I sent your attorney a letter inviting you to come in to the grand jury and tell your story under oath, at that time, didn't I?" The district court sustained Bustamante's objections to both questions.

[19] [20] On appeal, the government argues that these questions were properly designed to impeach Bustamante's earlier testimony. We disagree. The rule is well established that a witness generally may not be cross-examined about her choice to invoke the fifth amendment privilege in grand jury proceedings. United States v. Robichaux, 995 F.2d 565, 568 (5th Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 322, 126 L.Ed.2d 268 (1993). We need not consider the relationship between this rule and the government's right to impeach a witness, because in Bustamante's case the government was not fairly impeaching his earlier statement. Bustamante's general introductory remark that he had been waiting a long time for his trial date to arrive cannot be interpreted as a complaint that he had never before had a chance to speak to the government or the grand jury. The government's remarks were thus improper.

This, however, is not the end of the inquiry. We will only find reversible error if the government's improper comments cast serious doubt on the jury's verdict. United States v. Rocha, 916 F.2d 219, 234 (5th Cir.1990), cert. denied, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991). In making this evaluation, we consider (1) the likelihood and degree that the jury was prejudiced by the remarks; (2) the effectiveness of any

UNITED STATES of America, Appellee,
v.
Philip SCHWAB, Defendant-Appellant.

No. 1360, Docket 89-1048.

United States Court of Appeals,
Second Circuit.

Argued June 1, 1989.

Decided Sept. 28, 1989.

Defendant was convicted in the United States District Court for the Eastern District of New York, Eugene H. Nickerson, J., of bribery and offering to bribe a public official, and he appealed. The Court of Appeals, Jon O. Newman, J., held that (1) it was error to permit cross-examination of defendant about prior misconduct which had resulted in acquittal, but (2) error was harmless.

Affirmed.

[1] CRIMINAL LAW ⇐ 369.15
110k369.15
Evidence of misconduct may be relevant to an issue in the case such as identity or intent and, when offered for that purpose, it is governed by rule relating to evidence of prior misconduct. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[1] CRIMINAL LAW ⇐ 371(1)
110k371(1)
Evidence of misconduct may be relevant to an issue in the case such as identity or intent and, when offered for that purpose, it is governed by rule relating to evidence of prior misconduct. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 344(2)
410k344(2)
Evidence of misconduct may be relevant to impeachment of a witness, including the defendant, because it tends to show the character of the witness for untruthfulness; when offered for that purpose, prior misconduct is governed by rule which precludes proof by extrinsic evidence and limits the inquiry to cross-examination of the witness. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 352
410k352
Evidence of misconduct may be relevant to impeachment of a witness, including the defendant, because it tends to show the character of the witness for untruthfulness; when offered for that purpose, prior misconduct is governed by rule which precludes proof by extrinsic evidence and limits the inquiry to cross-examination of the witness. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 374(1)
410k374(1)
Evidence of prior misconduct may be relevant to impeachment of a witness on some ground other than character of a witness for truthfulness, such as to show bias of a witness; when offered for that purpose, misconduct is not limited by rule which precludes proof of extrinsic evidence and limits the inquiry to cross-examination of the witnesses. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[4] WITNESSES ⇐ 337(4)
410k337(4)
Even if fact that defendant has been acquitted on charges of misconduct does not estop the prosecution from eliciting the fact of the prior misconduct to impeach the defendant, it will normally alter the balance between probative force and prejudice for purposes of determining the admissibility of the evidence. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[5] WITNESSES ⇐ 337(4)
410k337(4)
It was error to permit cross-examination of defendant as to whether he had ever engaged in tax evasion where the matter had arisen 18 years prior to trial and defendant had been acquitted. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[6] WITNESSES ⇐ 337(4)
410k337(4)
It was error for prosecutor to cross-examine defendant about alleged prior misconduct without alerting the court of his intended course, where defendant had been tried and acquitted on the matter.

[7] CRIMINAL LAW ⇐ 11701/2(6)
110k11701/2(6)

Error in allowing cross-examination of defendant about prior misconduct which had resulted in acquittals was harmless where defendant denied the misconduct, no evidence was introduced to dispute his denials, and the trial judge issued appropriate instructions.

[8] CRIMINAL LAW ⇐ 671
110k671
It was not error to permit cross-examination of defense witness concerning criminal charges against him, even though it was determined during cross-examination that charges against him had been dropped, where prosecutor had not learned the identity of the witness until trial and had only then been able to initiate an investigation of him.

[8] WITNESSES ⇐ 350
410k350
It was not error to permit cross-examination of defense witness concerning criminal charges against him, even though it was determined during cross-examination that charges against him had been dropped, where prosecutor had not learned the identity of the witness until trial and had only then been able to initiate an investigation of him.

[9] WITNESSES ⇐ 350
410k350
It was not error to permit cross-examination of defense witness about prior charges against him, even though defense counsel informed the court that the charges had resulted in an acquittal, where there was nothing in the record to support that claim and prosecutor had only learned while the witness was testifying that there was a "rap" sheet indicating criminal charges against the witness.

***510** Michael Washor, New York, N.Y. (Washor, Greenberg & Washor, New York City, Leonard W. Yelsky, Angelo F. Lonardo, Yelsky & Lonardo Co., Cleveland, Ohio, on the brief), for defendant-appellant.

George B. Daniels, Asst. U.S. Atty. (Andrew J. Maloney, U.S. Atty., John Gleeson, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for appellee.

Before KAUFMAN, NEWMAN and MINER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

The principal issue on this appeal is whether a prosecutor may seek to impeach a defendant's credibility by asking the defendant on cross-examination about prior misconduct that the prosecutor knows has been the subject of a trial and an acquittal. The issue arises on an appeal by Philip B. Schwab from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge), convicting him, upon a jury verdict, of bribing and offering to bribe a public official, in violation of 18 U.S.C. § 201(b)(1)(A) (Supp. V 1987). We conclude that the cross-examination was improper but harmless error under the circumstances of this case. We therefore affirm.

The evidence overwhelmingly established that Schwab paid $25,000 to a compliance officer of the United States Environmental Protection Agency and offered to pay him an additional $25,000. Schwab paid the money to the EPA officer to overlook the fact that Schwab's demolition company had not complied with regulations governing asbestos removal. The evidence included tape recordings of conversations between Schwab and the EPA officer.

On appeal, Schwab contends that he should receive a new trial because of the prosecutor's cross-examination of himself and two defense witnesses. On cross-examination, the prosecutor asked Schwab: "[I]sn't it a fact that you committed income tax fraud in 1970?" and "Isn't it a fact that you committed perjury in October of 1965?" Schwab answered "No" to both questions. At a sidebar conference after these questions were asked and answered, defense counsel informed Judge Nickerson that the defendant had been tried and acquitted on the tax fraud and perjury charges and moved for a mistrial. Counsel also reported that he had previously informed the prosecutor of the acquittals. The perjury charge in fact had resulted in a dismissal. See People v. Schwab, 62 Misc.2d 786, 310 N.Y.S.2d 436 (Erie County Ct.1970). [FN1] The Government has not denied, ***511** either at trial or on appeal, that it had previously been informed that both charges had been resolved favorably to Schwab. The judge then said to the prosecutor, "You never told me that he was acquitted of the income tax fraud." The prosecutor replied that he did not think it was "significant." [FN2] Judge Nickerson denied the mistrial motion, but promptly instructed the jury that, though there had been questions asked about tax fraud and

perjury, "[t]here's no evidence in the record of that at all. Please disregard that. Remember the questions aren't evidence."

FN1. In the state court case, Schwab was indicted for three counts of perjury, two concerning allegedly false testimony given in March 1963 in a civil suit and one concerning allegedly false testimony given before a county grand jury in October 1963. The first two counts were dismissed in 1970 because Schwab had unlawfully been required to waive immunity before the grand jury that indicted him. People v. Schwab, supra. The third count was dismissed in 1972 on motion of the district attorney because of the "time lapse and trial history," which included two mistrials. People v. Schwab, No. 30,893 A & B, order dismissing action at 2 (Sup.Ct. Feb. 8, 1972).

FN2. The prosecutor's view that the acquittal lacked significance evidently persists on appeal: In arguing that cross-examination concerning the tax fraud charge was proper, the Government's brief makes no mention of the acquittal. Indeed, the Government does not distinguish itself by stating, "Schwab had a criminal record indicating tax fraud and perjury." Brief for Appellee at 15.

Rule 608(b) of the Federal Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness....

In the Government's view, the prosecutor was entitled to ask the defendant whether he had committed tax fraud and perjury, notwithstanding the acquittal on the first charge and the dismissal of the second. The Government acknowledges that the prosecutor would be bound by the answers in the sense that he could not dispute denials with extrinsic evidence.

[1][2][3] In analyzing the issue, it will be helpful to distinguish among the various purposes for which prior misconduct may have evidentiary value. First, the misconduct may be relevant to an issue in the case, such as intent or identity. When offered for that purpose, prior misconduct is governed by Fed.R.Evid. 404(b). Second, the misconduct may be relevant to impeachment of a witness, including the defendant, because it tends to show the character of the witness for untruthfulness. When offered for that purpose, prior misconduct is governed by Fed.R.Evid. 608(b), which precludes proof by extrinsic evidence and limits the inquiry to cross-examination of the witness. Third, the misconduct may be relevant to impeachment of a witness on some ground other than the character of a witness for untruthfulness. The most typical example is misconduct offered to show bias of the witness. When offered for that purpose, misconduct is not limited by the strictures of Rule 608(b). See United States v. James, 609 F.2d 36, 45-46 (2d Cir.1979), cert. denied, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980). The pending case falls within the second category, but unlike the typical situation where a witness, including a defendant, is cross-examined about uncharged misconduct, Schwab was cross-examined about alleged misconduct--tax fraud--for which he had been charged, tried, and acquitted.

An acquittal establishes that the defendant's perpetration of the charged misconduct has not been proven beyond a reasonable doubt. It is therefore arguable that whether the misconduct occurred may be inquired about within the constraints of Rule 608(b) and Rule 403 since the reasonable doubt standard applies to the jury's ultimate determination of guilt and does not apply to its assessment of each subsidiary fact that may contribute to that determination, such as the credibility of the defendant. See United States v. Viafara-Rodriguez, 729 F.2d 912, 913 (2d Cir.1984); United States v. Valenti, 134 F.2d 362, 364 (2d Cir.), cert. denied, 319 U.S. 761, 63 S.Ct. 1317, 87 L.Ed. 1712 (1943). This argument ***512** has had a mixed reception in the various contexts in which it has been made.

Where prior misconduct has been offered to prove a fact significant to the establishment of guilt, the cases are divided as to whether a prior acquittal bars the evidence. Compare United States v. Dowling, 855 F.2d 114, 120-22 (3d Cir.1988) (barring evidence but error harmless), cert. granted, --- U.S. ----, 109 S.Ct. 1309, 103 L.Ed.2d 579 (1989);

United States v. Keller, 624 F.2d 1154 (3d Cir.1980) (barring evidence); United States v. Mespoulede, 597 F.2d 329 (2d Cir.1979) (same); United States v. Day, 591 F.2d 861 (D.C.Cir.1979) (same); Wingate v. Wainwright, 464 F.2d 209 (5th Cir.1972) (same); and United States v. Kramer, 289 F.2d 909, 913-18 (2d Cir.1961) (same), with United States v. Van Cleave, 599 F.2d 954, 956-57 (10th Cir.1979) (allowing evidence); Oliphant v. Koehler, 594 F.2d 547, 550-55 (6th Cir.) (same), cert. denied, 444 U.S. 877, 100 S.Ct. 162, 62 L.Ed.2d 105 (1979); United States v. Etley, 574 F.2d 850, 852-53 (5th Cir.) (same), cert. denied, 439 U.S. 967, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978); United States v. Rocha, 553 F.2d 615 (9th Cir.1977) (same); United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir.1972) (same), cert. denied, 410 U.S. 916, 93 S.Ct. 971, 35 L.Ed.2d 278 (1973); United States v. Castro-Castro, 464 F.2d 336 (9th Cir.1972) (same), cert. denied, 410 U.S. 916, 93 S.Ct. 971, 35 L.Ed.2d 278 (1973); and United States v. Feinberg, 383 F.2d 60, 71-72 (2d Cir.1967) (same), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968). Cf. Lee v. United States, 368 F.2d 834 (D.C.Cir.1966) (reversing conviction where extrinsic evidence was introduced to impeach defendant's denial of prior misconduct for which he had been tried and acquitted).

Some of the cases do not stand in quite the stark opposition that the above listing might indicate since particular circumstances, rather than a general rule, contributed to the outcomes. See, e.g., United States v. Feinberg, supra (collateral estoppel inapplicable because prosecuting sovereigns were different and uncertainty existed as to whether prior acquittal had conclusively established the fact subsequently sought to be proved). We have cast considerable doubt on the pertinence of the difference in standards of proof in the prior and subsequent proceedings, see United States v. Kramer, 289 F.2d at 913, although the Supreme Court case relied upon, Coffey v. United States, 116 U.S. 427, 6 S.Ct. 432, 29 L.Ed. 681 (1886), was accorded perhaps more weight than was warranted. But see United States v. Etley, 574 F.2d at 853 (allowing evidence of prior crime resulting in acquittal because of difference in standards of proof). It is not entirely clear whether the decisions precluding use of prior acts resulting in an acquittal are grounded on technical application of collateral estoppel, which might limit the preclusion to instances where the same sovereign prosecuted both cases, or rest on more general considerations of fairness, see, e.g., United States v. Mespoulede, 597 F.2d at 335 ("simply ... inequitable"); Wingate v. Wainwright, 464 F.2d at 215 ("fundamentally unfair and totally incongruous with our basic concepts of justice").

In the context of sentencing, where prior misconduct is offered not to prove guilt but solely to determine the extent of punishment, we have ruled that a sentencing judge may take into account evidence of a defendant's prior misconduct established by a preponderance of the evidence, notwithstanding an acquittal. See United States v. Sweig, 454 F.2d 181 (2d Cir.1972). But the sentencing context is entirely different from the context of cross-examination of a defendant during trial. At sentencing, the facts concerning the prior misconduct may be developed by extrinsic evidence, and the judge may take evidence of the misconduct into account if satisfied that it has been established by a preponderance of the evidence, despite the fact that a jury was not persuaded beyond a reasonable doubt. However, when witnesses are cross-examined as to alleged prior misconduct for which they have been tried and acquitted, there is no opportunity to present extrinsic evidence bearing on whether the misconduct occurred.

The trial context, in which prior misconduct is offered to prove a fact relevant to a ***513** subsequent prosecution, is more pertinent to the issue in this case than is the sentencing context. Though the prior misconduct was sought to be elicited in this case to impeach the defendant's credibility rather than prove a fact such as intent or knowledge, there is a strong argument that the same considerations that precluded the evidence in Mespoulede should bar it here.

[4] However, we need not rest decision on collateral estoppel nor on more general considerations of fundamental fairness since the evidence is inadmissible under the standards of Rules 608(b) and 403. Rule 608(b) provides that specific instances of misconduct may be inquired into on cross-examination "in the discretion of the court, if probative of truthfulness or untruthfulness." Rule 403 obliges the trial judge to exclude relevant evidence "if its probative value is

substantially outweighed by the danger of unfair prejudice," among other factors. Both rules thus require the exercise of discretion with respect to admission of prior acts of misconduct. Whether or not an acquittal technically estops the prosecution from eliciting the fact of prior misconduct, it will normally alter the balance between probative force and prejudice, which is already a close matter in many cases where prior misconduct of a defendant is offered. See United States v. Phillips, 401 F.2d 301 (7th Cir.1968). Moreover, there is the blunt reality that a witness who has been acquitted will almost certainly deny the misconduct, either because he did no wrong or because he may understandably believe that when asked about it after an acquittal, he is entitled to have the law regard him as innocent. Thus, the only purpose served by permitting the inquiry is to place before the jury the allegation of misconduct contained in the prosecutor's question, an allegation the jury will be instructed has no evidentiary weight. To permit the inquiry risks unfair prejudice, which is not justified by the theoretical possibility that the witness, though acquitted, will admit to the misconduct. When the witness is the defendant, the significance of the prejudice is magnified.

[5] In the pending case, not only had the alleged prior misconduct concerning the tax charge resulted in an acquittal, but the matter had arisen eighteen years prior to the trial at which it was sought to be probed on cross-examination. Moreover, the prosecutor had no information in his possession to indicate that Schwab was guilty of the misconduct. Under these circumstances, cross-examination concerning the tax matter was beyond the discretion confided in the trial judge by Rules 608(b) and 403.

[6] The prosecutor was at fault in this case not only for cross-examining as to matters for which the defendant had been tried and acquitted but also for pursuing the inquiry without alerting the trial court, either by pretrial memorandum or sidebar conference, of his intended course. Since, as far as we can ascertain, no decision has approved cross-examination of this sort, it was extremely imprudent for the prosecutor to preempt the trial judge's opportunity to consider, before any damage might be done, whether to allow such novel questioning. The failure to alert the trial judge is especially serious since the prosecutor had been told about the acquittal and had no contrary information. Had the prosecutor known only of the charges and not the outcome, it would still have been prudent to raise the matter at sidebar so that the trial judge could decide whether to conduct a voir dire inquiry as to the outcome of the charges.

The significance of the prosecutor's omission is compounded still further by the fact that the matters the prosecutor inquired about were charges made twenty-three and eighteen years prior to the trial. If these matters had resulted in convictions, the fact that such convictions would have been more than ten years old would have **required** the prosecutor to give the defendant **notice** of his intent to use them, Fed.R.Evid. 609(b), and the trial judge could have admitted them only upon an explicit finding that their probative value substantially outweighed their prejudicial effect, id. Though Rule **608(b)** has no ten-year rule comparable to Rule 609, the discretion that ***514** trial judges are obliged to use in deciding whether to permit cross-examination concerning ancient misconduct cannot be exercised before the well has been poisoned unless the prosecutor alerts the judge by an offer of proof out of the hearing of the jury. [FN3]

> FN3. In enacting Rule 608(b), Congress deleted the limitation in the rule as submitted by the Supreme Court that the prior misconduct not be "remote in time," and instead left the matter of timeliness to "the discretion of the court." H.R.Rep. No. 650, 93d Cong., 1st Sess. 10 (1973).

[7] Though the cross-examination of the defendant was improper, we are satisfied that the error was harmless. Schwab denied the misconduct, and no evidence was introduced to dispute his denials. Moreover, the trial judge promptly issued appropriate instructions. Most significantly, the evidence of guilt, which included Schwab's recorded incriminating conversations, was overwhelming.

[8] Appellant's objection to the cross-examination of two defense witnesses is not cause for concern. With respect to the first witness, Martin Haitz, the prosecutor, not previously alerted to the identity of the witness, initiated an investigation while Haitz was testifying and learned that criminal charges of fraud and larceny had been brought against him; the investigation did not ascertain the ultimate disposition. The prosecutor alerted the trial judge to his proposed cross-examination and received

approval to inquire pursuant to Rule 608(b). Haitz testified that fraud charges based on the issuance of bad checks had been brought against him, but that the charges were dropped after he explained that the checks were issued by a corporation after he had sold it. Though it might have been preferable for the District Judge to have elicited the testimony out of the presence of the jury so that the judge could make the Rule 403 assessment before permitting the cross-examination, we cannot say that it was error not to do so.

[9] With respect to the second witness, Robert Gibbs, the prosecutor also learned, apparently while the witness was testifying, that an FBI "rap" sheet indicated criminal charges, including mail fraud, arising out of Gibbs' alleged embezzlement from a bank. At a sidebar conference, the prosecutor, who had not yet obtained a fax copy of the "rap" sheet, said there "may" be a conviction; defense counsel said there had been an acquittal. Judge Nickerson permitted cross-examination. Gibbs denied embezzling funds from a Florida bank that had employed him, admitted agreeing to a judgment to repay some $253,000 to a different Florida bank, and said that the repayment had nothing to do with his bank employment. He denied committing mail fraud in connection with either bank. On redirect, Gibbs said he had never been convicted of any federal or state crime. Nothing in the record supports defense counsel's claim at sidebar that Gibbs had been tried for a banking crime and found not guilty.

As with the cross-examination of Haitz, we see no error. The prosecutor had a plausible basis for cross-examining as to prior misconduct and did so within the limits of Rule 608(b).

Appellant's remaining contentions, which do not warrant discussion, are without merit.

The judgment of the District Court is affirmed.

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(Cite as: 1995 WL 12300 (N.D.Ill.))

UNITED STATES of America, Plaintiff,
v.
Sherman OLLISON, Defendant.
No. 92 CR 365.
United States District Court, N.D. Illinois, Eastern Division.
Jan. 10, 1995.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

***1** Defendant requests the court to grant several pretrial motions arising from his detention and the search of his luggage by federal officials in May of 1992. After a brief recitation of the facts, the court will address defendant's motions seriatim.

FACTS

The parties offer competing characterizations of the events leading up to defendant's arrest for narcotics possession in violation of 21 U.S.C. s 841(a)(1) (1988). According to defendant, on May 6, 1992, he was approached by two Drug Enforcement Agency ("DEA") agents as he disembarked from Amtrak Train No. 22, which had just arrived at Chicago's Union Station from Houston, Texas.

at an appropriate time.

IV. Motion to Require Notice of Intention to Use Other Crimes, Wrongs or Acts Evidence

This motion consists of two parts. The first part requests an order **requiring** the government to provide **notice** of its intention to introduce at trial evidence of defendant's other crimes or wrongs as those terms are used in Fed.R.Evid. 404(b). The second part asks for the same notice with respect to specific instances of defendant's conduct the government may wish to use to impeach his credibility under Fed.R.Evid. **608(b).**

A. Defendant's Rule 404(b) motion.

The court orders the government to produce the Rule 404(b) information it will use no later than 10 business days before trial. In its response, the government argues that "Rules 12(d) and 16, and case law provid[e] that Rule 404(b) evidence need not be disclosed prior to trial." (Gov't. resp. at 10.) From this premise, the government states that it will voluntarily disclose the information requested, but reserves the right to choose when it will disclose the Rule 404(b) information it plans to use. (See id.)

The government's assertion that Rule 404(b) permits it to choose whether or not it will disclose Rule 404(b) information, however, is incorrect. Rule 404(b) was amended in 1991 in order to align it with other evidentiary rules containing notice and disclosure provisions. See Fed.R.Evid. 412; Fed.R.Evid.

609; Fed.R.Evid. 803(24); Fed.R.Evid. 804(b)(5). The rule now contains a pretrial notice provision which states that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. 404(b). In choosing to obscure such an elementary, and indeed codified, point, the government has forfeited any discretion it may have had concerning voluntary disclosure. Beyond the specific ruling relating to time for disclosure, defendant's Rule 404(b) motion is moot.

B. Defendant's Rule 608(b) motion.

***8** Defendant's Rule **608(b)** motion is denied. In contradistinction to Rule 404(b), Rule **608(b)** has no self-contained notice provision. Moreover, Rule 12(d)(2) of the Fed.R.Crim.P. limits a defendant's pretrial discovery under Rule 16 to evidence that the government will offer in its case in chief--precisely the situation governed by Fed.R.Evid. 404(b). See Fed.R.Crim.P. 12(d)(2); Fed.R.Evid. 404(b). Rule **608(b)**, however, is focused on impeachment. Thus, it is well-settled that the "government is not **required** to **disclose** evidence of past crimes or misconduct that will be used on cross-examination...." U.S. v. Padilla, 744 F.Supp. 1425, 1427 (N.D.Ill.1990); accord U.S. v. Alex, 791 F.Supp. 723, 728-29 (N.D.Ill.1992).

V. Motion to Unseal File No. 92 M 245

The government has agreed to this request and thus defendant's motion is moot.

UNITED STATES of America
v.
Tadeusz ZEGLEN, et al., Defendants.

No. 93 Cr 862.

United States District Court, N.D. Illinois, Eastern Division.

Oct. 18, 1994.

MEMORANDUM OPINION AND ORDER

NORDBERG, District Judge.

***1** Before the Court are Defendants Tadeusz Zeglen's, Andrew Walkosz's and Dorothy Walkosz's Pre-trial Motions.

1. Motion for Favorable Evidence/Motion for Disclosure Regarding Emotional Illness Disorders and Drug and Alcohol Abuse

Defendants file their Motion for Favorable Evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Under Brady, the Government is required to disclose all evidence that is both favorable to the accused and material to either guilt or punishment. According to Giglio, exculpatory evidence includes evidence that the defense might use to impeach a government witness by showing bias or interest. As the Government is aware of its obligation under Brady, and has disclosed all exculpatory information of which it is aware, and has agreed to make further disclosures if and when it acquires additional exculpatory evidence, the Defendants' motions are DENIED as moot.

2. Motion for Order Requiring the Government to Give Notice of its Intention to Use Evidence of Other Crimes, Wrongs or Acts Evidence

Defendants request that this Court order the Government to give notice of its intention to use "other crimes, wrongs or acts" evidence as that phrase is used in Federal Rule of Evidence 404(b). The Government acknowledges its obligation under Rule 404(b) and has no objection to compliance therewith. The Government states that at present, it does not have any Rule 404(b) evidence concerning Defendants. However, the Government recognizes its obligation to give notice of its intention to use Rule 404(b) evidence and has agreed to give opposing counsel such notice one month before trial if possible. Accordingly, Defendants' motion is DENIED as moot.

Included in Defendants' motion for an order **requiring** the Government to give **notice** of its intention to use "other crimes, wrongs or acts" evidence is a request for an order **requiring** the Government to give **notice** of its intention to use evidence of "specific instances of conduct" of the Defendants as that phrase is used in Federal Rule of Evidence **608(b).** Rule **608(b)** allows inquiry on cross-examination into specific instances of conduct bearing on the credibility of the witness. Unlike Rule 404(b), which explicitly provides for pre-trial discovery of relevant evidence, Rule **608(b)** contains no such provision. The Defendants have not directed this Court to any authority for ordering such disclosure. In the absence of such authority, Defendants' motion insofar as it requests pretrial disclosure of Rule **608(b)** evidence is DENIED.

3. Motion for Early Disclosure of Witness Statements

The Jencks Act requires the government to provide defendants with prior statements of government witnesses after the witnesses have testified at trial. 18 U.S.C. § 3500. The Jencks Act generally requires production of Jencks material after the government witnesses have testified.

However, according to the Government, virtually all previous statements of likely government witnesses have already been disclosed to the defense. Furthermore, the Government has agreed to turn over any new material on an on-going basis. Consequently, Defendants' Motion for Early Disclosure of Witness Statements is DENIED as moot.

4. Motion for Pre-trial Disclosure of Co-conspirators' Statements/Motion for Disclosure of Names of Co-conspirators

***2** The Government notes that its Santiago proffer will be filed thirty days before the trial in this case. See United States v. Santiago, 582 F.2d 1128 (7th Cir.1978). Accordingly, Defendants' Motions for Pre-trial Disclosure of Co-conspirators' statements

and for Disclosure of the Names of Co-conspirators are DENIED as moot.

To the extent names of co-conspirators are not revealed in the Government's Santiago proffer, the Court notes that the Government has acknowledged its obligation under Brady and Giglio to disclose information favorable to the Defendants and material to either guilt or punishment.

5. Motion for an In Camera Production of Probation Officers' Presentence Investigation Reports

Defendants have moved for production of the presentence investigation reports of Tadeusz Morawa and Andrew Schechula, both of whom are likely government witnesses in this case.

The Government has agreed to an in camera inspection of the presentence investigation reports of Morawa and Schechula so that the Court can determine whether the reports contain exculpatory information and/or impeachment material useful in cross-examining the Government's witnesses. See U.S. v. Canino, 949 F.2d 928, 942-43 (7th Cir.1991), cert. denied, 112 S.Ct. 3058 (1992).

Defendants' Motion for Production of the Presentence Investigation Reports of Morawa and Schechula is DENIED. However, the Court will review the reports in camera to determine if they contain exculpatory information or material useful for impeachment purposes.

6. Motion for List of Government Witnesses Together with Addresses and Phone Numbers

A defendant has no right to a list of government witnesses prior to trial although the court has authority to require the government to provide such a list. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977); U.S. v. Sims, 808 F.Supp. 607, 613 (N.D.Ill.1992) (citing United States v. Braxton, 877 F.2d 556, 560 (7th Cir.1989); United States v. Naupe, 834 F.2d 1311, 1317 (7th Cir.1987); United States v. Bouye, 688 F.2d 471, 473-74 (7th Cir.1982); United States v. Jackson, 508 F.2d 1001, 1006-1008 (7th Cir.1975), rev'd on other grounds, 474 U.S. 302 (1986)).

However, the parties have agreed that the Government will provide Defendants with a list of government witnesses. The parties have further agreed that, instead of providing Defendants with the home addresses and telephone numbers, the Government will arrange for defense counsel to meet with listed government witnesses, who have not already been located by independent defense investigation, so that defense counsel can request interviews.

Consequently, Defendants' Motion for a List of Government Witnesses is DENIED as moot.

7. Motion for Production of Personnel Files of Law Enforcement Officers for In Camera Inspection

***3** Defendants request that this Court order the Government to turn over the personnel files of any testifying agent for in camera inspection so that the Court can determine whether the files contain exculpatory information and/or impeachment material useful in cross-examining the agents. However, Defendants give no support for their contention that the personnel files might contain evidence which is favorable to the Defendants and material to the issue of guilt or punishment.

In United States v. Andrus, 775 F.2d 825, 843 (7th Cir.1985), the Seventh Circuit held that the defendant was not entitled to the personnel files of the law enforcement witnesses where there was not even a hint that impeaching material was contained in the files. The Seventh Circuit relied on a prior opinion in United States v. Navarro, 737 F.2d 625, 631 7th Cir.), cert. denied, Mugercia v. U.S., 469 U.S. 1020 (1984) where it stated,

> Mere speculation that a government file may contain Brady material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert Brady into a discovery device and impose an undue burden on the district court.

A defendant's request for Brady material does not entitle him to "embark upon an unwarranted fishing expedition through government files, nor does it mandate a trial judge conduct an in camera inspection of the government's files in every case." U.S. v. Phillips, 854 F.2d 273, 278 (7th Cir.1988). See also, U.S. v. Quintanilla, 760 F.Supp. 687, 696-97 (N.D.Ill.1991), aff'd 2 F.3d 1469 (7th Cir.1993).

As a request by Defendants does not automatically trigger an in camera review of the personnel files of any testifying agent, Defendants' motion is DENIED. To the extent these personnel files contain information favorable to the Defendants and material to the issues of guilt and punishment, the Court notes that the Government has recognized its continuing obligation under Brady and Giglio to disclose such information.

8. Motion to Continue Trial or for Alternate Relief

Defendants request that this Court grant judicial immunity for four defense witnesses who can allegedly exonerate Defendants, but who refuse to testify because of the fear of self-incrimination. Alternatively, Defendants ask the Court to stay the trial date until December 10, 1995 allowing the statute of limitations to run so that the witnesses testimony could not be used to prosecute them. The language of 18 U.S.C. §§ 6002, 6003, which governs a federal prosecutor's right to grant immunity to a witness, provides the government with considerable discretion and does not obligate the government to grant defense witnesses immunity. U.S. v. Hooks, 848 F.2d 785, 798-99 (7th Cir.1988). The trial court does not have the power to direct the government to seek immunity for a defense witness who exercises his fifth amendment privilege against self-incrimination. Id. at 799. However, the prosecutor's unfettered discretion to grant immunity is limited by due process considerations. Id. See also, U.S. v. Schweihs, 971 F.2d 1302, 1315 (7th Cir.1992). The prosecutor cannot use his power to grant immunity "to distort the judicial fact-finding process." Hooks, 848 F.2d at 799.

***4** The Defendants have not made the requisite substantial evidentiary showing that the Government, by refusing to grant immunity to the four defense witnesses, intended "to distort the judicial fact-finding process." Id. at 802. In fact, the Government has not refused to apply for statutory immunity "in any final sense." Rather, the Government has decided that it simply does not have enough information at this point to determine whether granting these witnesses immunity would be appropriate and in the public interest.

The Defendants' vague and cursory description of the testimony of the four witnesses makes it difficult to determine whether their anticipated testimony is cumulative of that of other witnesses, whether the exclusion of the supposed incriminating statements would prejudice the Defendants and whether the testimony is in fact protected by the fifth amendment privilege against self-incrimination. Defendants have not presented substantial evidence to show a clear abuse of prosecutorial discretion, and thus a violation of due process rights.

For the foregoing reasons, Defendants' motion is DENIED.

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UNITED STATES of America, Plaintiff,
v.
Emery L. GOAD and William R. Wood, Defendants.

CRIM. A. Nos. 89-10062-01, 89-10062-02.

United States District Court, D. Kansas.

June 15, 1990.

MEMORANDUM AND ORDER

THEIS, District Judge.

*1 This matter is before the court on several pretrial motions filed by one or both defendants. The court held a hearing on March 12, 1990, at the conclusion of which the court announced it would take the motions under advisement. At the request of the defendants, the court held an evidentiary hearing on June 4, 1990. The court has previously granted defendant Goad's motion to sever. Defendants Goad and Wood are charged with possessing, concealing, and storing a stolen pickup truck which had crossed a state boundary after being stolen and for conspiracy to commit the same offense, in violation of 18 U.S.C. §§ 2313, 2, and 371.

The indictment charges the existence of a conspiracy from on or about November 22, 1985, and continuing through on or about February 8, 1989. Eight separate overt acts are listed in the indictment and are summarized as follows. On or about November 1, 1985, defendant Goad located a stolen Ford pickup truck in a parking lot at 550 West Central, Wichita, Kansas. On or about November 22, 1985, Goad refused to disclose to the Hanover Insurance Company, Birmingham, Alabama, the location of the stolen pickup truck. On or about December 1, 1985, Goad and Leonard Young towed the stolen pickup truck to the residence of defendant Wood. On or about January 29, 1986, defendant Wood hired Douglas Maib to key the ignition and door locks on the pickup truck. At some point after January 1986, the pickup truck was driven to Wood's lake property in Greenwood County, Kansas. During the spring or summer of 1988, Wood, an attorney, contacted a client of his, George E. Creekmore, requesting that Creekmore obtain a vehicle identification plate from an automobile salvage yard so that the plate in the stolen pickup truck could be switched, thereby allowing Wood to obtain a new title for the stolen pickup truck. At some time during the summer of 1988, Wood arranged for Creekmore to drive the stolen pickup truck from Greenwood County, Kansas, to Creekmore's residence in Sedgwick County, Kansas, to assist Creekmore in switching the vehicle identification plates. On or about October 1, 1988, Creekmore returned the stolen pickup truck to Wood's residence in Sedgwick County, Kansas.

The facts, as summarized by defendant Wood in his motion to dismiss (Doc. 29), are as follows. On September 30, 1984, a pickup truck was discovered missing from Larry Salvage Chevrolet in Huntsville, Alabama. The truck was reported missing and an insurance claim was made. Later that fall, Sedgwick County District Court Judge Nicholas Klein observed an apparently abandoned truck in the parking lot of the apartment complex where he lived. After the truck had remained there for about a year, Judge Klein told Goad, a private investigator, of the vehicle's location. Goad obtained the vehicle identification number, determined the truck was stolen, and contacted the Huntsville Police. Goad thereafter contacted the insurance company which had paid the claim on the vehicle. When the insurance company refused to pay Goad a finder's fee, Goad refused to tell the insurance company of the location of the vehicle. The vehicle was towed to Wood's home. The locks were changed by Douglas Key and Lock Company in January 1986. The truck was taken to Wood's lake house in the summer of 1986. In the summer of 1988, the truck was driven back to Wood's residence. On October 31, 1988, the truck was taken to a barn in Rose Hill, Kansas, where it was stored until it was turned over to the police on or about February 18, 1989.

1. Motion for bill of particulars (Doc. 20-21, filed by Goad)

*2 Goad's motion for a bill of particulars seeks very specific details about the alleged offenses: the place(s), including street address(es), where the conspiracy was initially formed, and where each defendant and each coconspirator joined the conspiracy; the date(s) and time(s) when each defendant and each coconspirator joined the

conspiracy; the period(s) of time during which each defendant and each coconspirator remained in the conspiracy; the circumstances under which, and the words or conduct by means of which each defendant and each coconspirator joined the conspiracy; the objects of the conspiracy; what the defendant Goad agreed to do in further of the conspiracy; the specific words or conduct of defendant Goad constituting overt acts in furtherance of the conspiracy; specific information regarding any overt acts not included in the indictment; the names of coconspirators; whether any defendant or coconspirators were acting on behalf of any governmental entity at the time of the conspiracy; and whether any defendant has furnished information to law enforcement authorities with respect to the conspiracy. Doc. 20.

Goad alleges that he needs this information to prepare for trial and to avoid surprise at trial, given the delay in prosecution. Goad merely asserts that the delay has resulted in prejudice to him. The affidavit of Goad's attorney states that: the indictment alleges that the conspiracy to violate 18 U.S.C. § 2313 existed from November 22, 1985 through February 8, 1989; that the indictment fails to state with particularity the locations, dates, and times when the defendants joined the conspiracy and committed the overt acts, and which defendants or coconspirators committed which overt acts; that the indictment fails to allege all the matters requested in the motion for a bill of particulars; and that Goad does not know the theory upon which the government intends to proceed. Doc. 21.

Wood has adopted this motion. Doc. 30.

The government has responded, asking the court to deny the motion for a bill or particulars. Doc. 38. The government argues that the indictment adequately informs the defendants of the charges against them. The government states that it has provided a complete copy of its investigative file to each defendant. All reports or records have been provided to the defendants. Further, the facts are so well known to the defendants that they have entered into a stipulation of facts, filed with defendant Wood's motion to dismiss (Doc. 29).

"The purpose of a bill of particulars is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." United States v. Dunn, 841 F.2d 1026, 1029 (10th Cir.1988) (quoting United States v. Cole, 755 F.2d 748, 760 (11th CIr.1985)). "It is not the function of a bill or particulars 'to disclose in detail the evidence upon which the Government will rely at the trial.' " United States v. Barbieri, 614 F.2d 715, 719 (10th Cir.1980) (quoting Cefalu v. United States, 234 F.2d 522, 524 (10th Cir.1956)). An indictment is generally sufficient if it sets forth the offense in the words of the statute, as long as the statute adequately states the elements of the offense. United States v. Salazar, 720 F.2d 1482, 1486 (10th Cir.1983), cert. denied, 469 U.S. 1110 (1985). The determination of the sufficiency of the indictment, however, is governed by practical rather than technical considerations. Dunn, 841 F.2d at 1029. Moreover, this determination is left to the sound discretion of the trial court. United States v. Wright, 826 F.2d 938, 942 (10th Cir.1987).

***3** Applying these standards, the court finds that the defendants are not entitled to a bill of particulars setting forth the requested matters. The indictment tracks the language of the statute, and is thus specific in terms of the statute. The overt acts listed in the conspiracy count inform the defendants of the charges against them with sufficient precision to allow them to prepare their defense. The defendant's motion is a request for evidentiary detail and impermissible discovery material. Accordingly, the motion for a bill of particulars shall be denied.

2. Motion for disclosure of impeaching information/Motion for discovery (Doc. 24-25, filed by Goad)

Goad requests information regarding: (1) prior felony convictions and juvenile adjudications of all witnesses; (2) all prior misconduct or bad acts of witnesses; (3) all consideration or promises made to witnesses; (4) any threats made to or directed against witnesses; (5) all occasions when the witness has testified before any tribunal about this case; (6) all occasions when any witness who is an informer, accomplice, or coconspirator has ever testified before any tribunal; (7) all personnel files on law enforcement witnesses; (8) any and all records or information which may be impeaching; and (9) the same information with respect to any

non-witness whose statements may be offered in evidence.

Wood has adopted this motion. Doc. 27-28.

The government has responded, asking that the motion be denied except as otherwise agreed to. Addressing each category of Goad's request, the government states: (1) it is not aware of any juvenile convictions, but such convictions are confidential and should not be disclosed; (2) it will provide arrest and conviction data of which it is aware; no other information will be provided; (3) all promises or consideration will be disclosed; (4) no threats have been made; (5) prior testimony is Jencks material and will be disclosed at the time required by law; (6) identity of persons who have previously testified is not required to be disclosed pretrial; (7) personnel files are not discoverable; (8) it is unaware of any further information. The government does not address category (9) specifically.

The court will address each category of defendant's motion in turn. (1) The court will grant defendant's motion for discovery of arrest and conviction data for adult offenses. The court agrees with the government that juvenile adjudications, if any witnesses have had such adjudications, should remain confidential. (2) Under Fed.R.Evid. **608(b),** cited by the defendant, prior bad acts may not be proven by extrinsic evidence. In the discretion of the court, they may be inquired into on cross examination, if probative of truthfulness or untruthfulness. The requested discovery is not provided for in the criminal rules. The court will deny the requested discovery. (3) and (4) All promises, consideration, and threats shall be disclosed. (5) Prior testimony and statements come within the provisions of the Jencks Act, 18 U.S.C. § 3500(e), and are not subject to disclosure until after the witness testifies. Id. § 3500(a)-(b). (6) The identity of witnesses is not discoverable under Fed.R.Crim.P. 16. (7) The defendant has not provided the court with any Tenth Circuit authority **requiring** the **disclosure** of the personnel files of law enforcement witnesses; consequently, the court will deny the motion. (8) Since the government states that it is unaware of any information fitting within this catch-all category, the requested discovery will be denied. (9) If the government is intending to introduce the statements of non-witnesses, the government shall respond to this requested category of discovery.

3. Motion to dismiss (Doc. 29, filed by Wood)

***4** Defendant Wood argues that the indictment charges defendant with possessing a vehicle which had been stolen and then crossed a state line. The indictment does not charge that the vehicle was involved in interstate commerce at the time the vehicle was in the defendants' possession. Wood makes three arguments in his motion to dismiss: (1) Congress has unconstitutionally extended its authority under the commerce clause to matters purely local in nature; (2) the statute is overbroad; and (3) the vehicle had ceased to be a part of interstate commerce.

Prior to its amendment in October 1984, 18 U.S.C. § 2313 provided:

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2313 (emphasis added). This statute was in effect at the time the vehicle was reported missing in September 1984. The statute was amended effective October 25, 1984 to read:

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2313 (emphasis added).

Wood argues that prior to the amendment, for a violation of the statute to occur, the vehicle must have been involved in interstate commerce at the time of the defendant's involvement with it. The amended statute, which took effect after the theft of the vehicle, requires only that the vehicle crossed a state line at some point in time. There is no requirement that the vehicle still be involved in

interstate commerce. This, Wood argues, is an ex post facto law. Additionally, this involves the federal government in matters of a purely local nature involving stolen property. Defendant argues the statute is overbroad since it makes no exception for police officers and repossessors who knowingly deal with stolen vehicles.

Goad has adopted this motion for the most part, Doc. 26, except for the portion of Wood's brief which states that Goad towed the vehicle to Wood's home. Goad states that one Leonard Young towed the vehicle to Wood's home, where it remained until it was turned over to the police. Doc. 32.

The government has responded to this motion, asking that it be denied. Doc. 39, 52.

The amendment of the statute in 1984 cannot form the basis for an ex post facto challenge, since the defendants' conduct occurred after the effective date of that amendment. The defendants argue that since the theft of the truck occurred before the amendment to the statute, all further charges arising out of that theft must be based on the pre-amendment version of the statute. The date of the theft of the truck is not relevant to the ex post facto inquiry, since the defendants are not charged with stealing the truck. The relevant dates are the dates of the defendants' conduct in possessing, concealing, and storing the truck. "The key ex post facto inquiry is the actual state of the law at the time the defendant perpetrated the offense." Watson v. Estelle, 886 F.2d 1093, 1096 (9th Cir.1989). Since the defendants' conduct occurred well after the 1984 amendment to the statute, no ex post facto problem is presented. Cf. United States v. Gillies, 851 F.2d 492, 495-96 (1st Cir.), cert. denied, 109 S.Ct. 147 (1988) (that transportation of firearm in interstate commerce may have occurred prior to enactment of firearm statute, 18 U.S.C. § 922(g)(1), does not violate ex post facto clause; defendant engaged in possession of firearm seven months after the law's enactment).

***5** It is undisputed that Congress may legislate in this area only because interstate commerce is involved. Prior to the 1984 amendment, 18 U.S.C. § 2313 specified "interstate commerce" as an element of the offense. Congress changed the elements of the offense in the 1984 amendment to the statute; however, Congress did not remove the link to interstate commerce. The crossing of state boundaries constitutes interstate commerce.

Wood also argues that the pickup truck was no longer involved in interstate commerce at the time of their involvement with it. Under the old statute, whether the vehicle was still in the stream of commerce when the defendant dealt with it was ordinarily a question of fact for the jury. See United States v. Radtke, 799 F.2d 298, 306 (7th Cir.1986); United States v. Hiscott, 586 F.2d 1271, 1274 (8th Cir.1978). The 1984 amendment to the statute has removed this requirement. The crime of possessing, concealing, and storing a stolen motor vehicle has four essential elements: (1) that the vehicle was stolen; (2) after it was stolen, the vehicle was moved across a state line; (3) after the vehicle had been stolen and moved across a state line, the defendant possessed, concealed, and stored it; and (4) at the time the defendant concealed and stored the vehicle, he knew it had been stolen. See Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 6.18.2313 (West rev. ed. 1989). The amended statute provides that federal criminal jurisdiction continues over a stolen vehicle once it crosses a state line even after it ceases to be part of interstate commerce. Id. Committee Comments. This is a constitutional exercise of Congress' commerce clause powers. Cf. Scarborough v. United States, 431 U.S. 563 (1977) (the interstate commerce nexus requirement in firearm statute, 18 U.S.C. App. § 1202(a), is satisfied by proof that the firearm had previously travelled in interstate commerce); United States v. Gillies, 851 F.2d 492, 493 (1st Cir.), cert. denied, 109 S.Ct. 147 (1988) (words "affecting commerce" in firearm statute, 18 U.S.C. § 922(g), signal Congress' intent to exercise its commerce clause powers broadly, "perhaps as far as the Constitution permits;" statutory language applies to possession of firearm that previously moved in interstate commerce).

Finally, the defendant argues that the statute is overbroad since it makes no exception for those who legitimately deal with stolen vehicles. This argument warrants little discussion. The court is unaware of any criminal statutes which contain specific exceptions for law enforcement personnel. However, a person whose employment requires him or her to deal with contraband would necessarily lack the criminal intent required for a violation of the law to occur.

4. Motion to dismiss for preaccusatory delay (Doc. 18-19, filed by Goad)

Defendant Goad moves to dismiss the indictment on the grounds that there was a delay of 45 months between November 1985, the time of his alleged involvement in the offense, and August 1989, when the indictment was returned. Goad alleges that the delay was attributable solely to the government and that he has suffered substantial actual prejudice thereby. Goad alleges that the Wichita Police and the Kansas Highway Patrol were aware of his involvement with the truck and of the location of the truck in the fall of 1985. Goad alleges prejudice from the inability to locate certain witnesses and the loss or destruction of evidence.

***6** Wood has joined in this motion. Doc. 31. The government has filed a response. Doc. 51.

Based on the testimony given and the June 4 hearing, the court makes the following findings of fact. Jerry Dunbar, a private investigator, worked for defendant Goad from approximately late 1985 through the summer of 1987. Dunbar testified that in approximately the fall of 1987, Leonard Young, who contracted with Goad to tow repossessed cars, told Dunbar that Goad had taken a stolen vehicle and given it to defendant Wood following a dispute with an insurance company. Young told Dunbar that he wanted to talk with the authorities.

Dunbar met with Sheriff Mike Hill in October or November 1987. Dunbar told Hill that a local private investigator and a local attorney were allegedly involved with a stolen vehicle which was taken by one and then taken to the other's house. Dunbar related that a witness wanted to talk, but did not know whom to contact. Hill telephoned Dunbar the next day to set up a meeting with United States Attorney Benjamin L. Burgess, Jr. At the meeting with Burgess, Dunbar related the story Young had told him.

Around January 1989, Dunbar was contacted by an agent of the Kansas Bureau of Investigation regarding the truck.

On cross-examination, Dunbar admitted that he did not recall the dates exactly. The meeting with Hill and Burgess may have occurred in October 1986, although Dunbar thought it occurred in October 1987. Dunbar admitted that he had no personal knowledge of the matter, where the truck was located, whether Young was telling the truth, or whether Young had further contact with law enforcement.

Former United States Attorney Benjamin L. Burgess, Jr., submitted an affidavit (Doc. 50). Burgess' affidavit states that he has been informed that Jerry Dunbar claims to have met with him and Sheriff Mike Hill in October 1986 regarding the events giving rise to this criminal prosecution. Burgess states that he cannot remember whether such a meeting occurred. Burgess stated that he did vaguely remember a meeting with representatives of law enforcement agencies in late 1986 or early 1987, at which time there was some discussion about defendant Goad.

According to Kansas Bureau of Investigation reports, shortly after Goad contacted the insurance company regarding the stolen pickup truck, two Wichita Police Department Detectives contacted Goad. Goad advised the police that he did not know the current location of the truck. In October 1986, Dunbar met with Hill and Burgess regarding the truck. Hill and Burgess allegedly asked Dunbar to help them develop information which might lead to the filing of charges against Goad. Dunbar declined to become involved in the investigation. Doc. 53, Exh. 3.

The due process clause of the fifth amendment to the Constitution requires dismissal of an indictment when the defendant is able to demonstrate that delay in charging him with a particular crime "was the product of deliberate action by law enforcement personnel designed to gain a tactical advantage resulting in actual prejudice to the accused, thereby depriving him of his right to a fair trial." United States v. Comosona, 614 F.2d 695, 696 (10th Cir.1980). Several elements must be considered. First, there must be a demonstration of actual prejudice to the defendant resulting from the delay. This prejudice generally takes the form of a loss of witnesses and/or physical evidence. Second, the length of the delay must be considered. Third, the government's reasons for the delay must be carefully considered. Id. Something more than ordinary negligence on the part of the government is required; the government's delay must be intentional and purposeful. Id. at 696 n. 1 (citing

United States v. Glist, 594 F.2d 1374 (10th Cir.1979)).

*7 The defendant must make a prima facie showing of fact that the delay in charging him has actually prejudiced his ability to defend, and that the delay was intentionally or purposely designed by the government to gain some tactical advantage over or to harass him. Once the defendant makes a prima facie showing, the burden of going forward with the evidence shifts to the government. Once the government presents evidence showing that the delay was not improperly motivated, the defendant bears the ultimate burden of establishing the government's due process violation by a preponderance of the evidence. Id. at 696-97.

The defendant has failed to make a prima facie showing. The defendant may have shown some prejudice. The evidence presented shows that witnesses' memories have begun to fail, leading to a loss of evidence.

The delay, however, is not so lengthy as to be fatal to the case. The indictment charges a conspiracy, which continues from its inception in November 1985 until February 1989. A conspiracy is by nature a continuing enterprise. The conspiracy charged here begins with the finding of the truck in 1985, continues through the hiding of the truck, and ends with the discovery of the truck in 1989. Charges were brought later that year.

Finally, the defendant has failed to show any improper motive on the part of the government. The evidence presented by the defendant supports at most an inference of negligence--that the United States Attorney was informed about this crime yet failed to investigate promptly. The defendant has presented nothing which would demonstrate an intentional and purposeful delay on the part of the government.

The court shall deny the defendant's motion to dismiss for preaccusatory delay. The issue presented by defendant Goad is a matter of proof for trial. The court would consider the issue again at the close of the government's case or at the close of all the evidence.

IT IS BY THE COURT THEREFORE ORDERED that defendant Goad's motion for a bill of particulars (Doc. 20-21), joined in by defendant Wood (Doc. 30), is hereby denied.

IT IS FURTHER ORDERED that defendant Goad's motion for disclosure of impeaching information (Doc. 24-25), joined in by defendant Wood (Doc. 27-28), is hereby granted in part and denied in part as specified in this opinion and order.

IT IS FURTHER ORDERED that defendant Wood's motion to dismiss (Doc. 29), joined in by defendant Goad (Doc. 26, 32), is hereby denied.

IT IS FURTHER ORDERED that defendant Goad's motion to dismiss for preaccusatory delay (Doc. 18-19), joined in by defendant Wood (Doc. 31), is hereby denied.

END OF DOCUMENT

R 404(b) - immed. disclosure

UNITED STATES of America, Plaintiff,
v.
James Richard BERRY, Jr., Lisa Ann Berry, Daniel Wayne Connell and Deana Marie Sandoval, Defendants.
Nos. 92-40043-01-SAC to 92-40043-04-SAC.
United States District Court, D. Kansas.
Nov. 23, 1992.

Lee Thompson, U.S. Atty. for the District of Kansas, Thomas G. Luedke, Asst. U.S. Atty., for U.S.

John J. Ambrosio, John J. Ambrosio, Chartered, Topeka, Kan., for James Richard Berry, Jr.

Marilyn M. Trubey, Federal Public Defender's Office, Topeka, Kan., for Lisa Ann Berry.

Michael M. Jackson, Topeka, Kan., for Daniel Wayne Connell.

MEMORANDUM AND ORDER

CROW, District Judge.

***1** On October 21, 1992, the grand jury returned a four count superseding indictment charging all of the defendants in Count I with one count of

Cf.Fla.Stat.Ann s 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supersede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. s 3500, et seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

***3** The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When rules in limine, the court may require the government to disclose to it the specifics of such evidence which

the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir.1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b).

Id.

During oral argument, the government basically indicated that it did not intend to introduce any evidence that was extrinsic to the crimes charged. Therefore, the notice requirements of Rule 404(b) appear to be satisfied. Upon inquiry, the government gave examples of the type of evidence it believed to be "intrinsic" to the crime charged. As a specific example, the government indicated that an act intrinsic to the alleged conspiracy of growing and distributing of marijuana would include the acquisition of supplies to raise marijuana. The defendants did not directly respond to government's characterization of those acts as intrinsic or extrinsic.

In light of the government's response, the court will briefly discuss the distinction between "extrinsic" and "intrinsic" acts. This discussion is not intended to express any opinion as to whether the evidence offered by the government in this case is "intrinsic" or "extrinsic," but is simply intended to provide a brief overview of this issue.

The distinction between evidence of "intrinsic" acts and evidence of "extrinsic" acts is crucial and sometimes subtle. Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. United States v. Record, 873 F.2d 1163, 1372 n. 5 (10th Cir.1989). Conversely, acts intrinsic to the crimes charged are not excludable under 404(b). An uncharged act may not be extrinsic if:

(1) The act was part of the scheme for which a defendant is being prosecuted; Record, 873 F.2d at 1372 n. 5, or

(2) The act was "inextricably intertwined with the charged crime such that a witness' testimony 'would have been confusing and incomplete without mention of the prior act.' " Record, 873 F.2d at 1372 n. 5 (quoting United States v. Richardson, 764 F.2d 1514, 1521-22 (11th Cir.), cert. denied, 474 U.S. 952 (1985).

See United States v. Williams, 900 F.2d 823, 825 (5th Cir.1990) (" 'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged.") (citations omitted).

***4** In the event the government does obtain 404(b) evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on **good cause** shown, of the general nature of any **404(b)** it

plans to introduce at trial. See United States v. Williams, 792 F.Supp. 1120, 1134 (S.D.Ind.1992) (Government only need supply the defense with **information** sufficient to indicate the general nature of the evidence of extrinsic acts); United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (defendant's demand for specific evidentiary detail including dates, times, places and persons involved is wholly overbroad; Rule 404(b) only requires the government to disclose the general nature of such evidence it intends to introduce at trial); United States v. Sims, No. 92-CR-166, 1992 WL 295672, 1992 U.S.Dist. Lexis 14619, at *2-4 (N.D.Ill. September 28, 1992) (same); United States v. Swano, No. 91-CR-477-02-03, 1992 WL 137588, 1992 U.S.Dist. Lexis 7554, at *16-17 (N.D.Ill. May 29, 1992) (Rule 404(b) not a tool for discovery; defendants' requests for specific dates, times, places, persons, etc. ..., well beyond scope of Rule 404(b)); but see United States v. Melendez, No. 92 Crim. 047 (LMM), 1992 WL 96327, 1992 U.S.Dist. LEXIS 5616, at *1 (S.D. New York April 24, 1992) ("Rule 404(b) will be satisfied if the notice to be given by the government identifies each crime, wrong or act by its specific nature (e.g., sale of cocaine), place (e.g., New York City), and approximate date (e.g., July 1986) to the extent known by the government."). The defendants' motions for 404(b) disclosure is granted. The government is reminded of its continuing obligation to provide notice of the general nature of the 404(b) evidence it intends to use at trial.

INSTA-CITE

CITATION: 1992 WL 372181

Direct History

=> 1 **U. S. v. Berry,** 1992 WL 372181 (D.Kan., Nov 23, 1992)
(NO. 92-40043-01-SAC, 92-40043-02-SAC, 92-40043-03-SAC, 92-40043-04-SAC)

Related References

2 U.S. v. Sandoval, 812 F.Supp. 1156 (D.Kan., Feb 09, 1993)
(NO. 92-40043-04-SAC)

UNITED STATES of America, Appellee,
v.
Eugene Lamar SUTTON, Appellant.

No. 94-2597.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 11, 1994.

Decided Dec. 7, 1994.

Defendant was convicted in the United States District Court for the District of Minnesota, Paul A. Magnuson, Chief Judge, of bank robbery, use of firearm in course of violent crime, and being felon in possession of firearm. Defendant appealed. The Court of Appeals, McKay, Senior Circuit Judge, sitting by designation, held that: (1) district court did not abuse its discretion in excusing the government's failure to timely notify defendant that it intended to introduce evidence of defendant's prior narcotics use; (2) evidence of defendant's prior drug use was not material; (3) prejudicial impact of evidence substantially outweighed its probative effect; (4) admission of evidence of defendant's prior drug use was harmless error; (5) district court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by prosecution witness; and (6) conviction was supported by sufficient evidence.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
District court did not abuse its discretion in excusing the government's failure to notify defendant at least four days prior to trial, pursuant to district court orders, that it intended to introduce evidence of defendant's prior narcotics use in trial for bank robbery; the government discovered the evidence only five days before trial on a Friday and notified defendant on the following Monday, and defendant was on notice that his involvement with drugs would be an issue at trial. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, evidence of defendant's prior drug use was not material, where government simply asked the jury to draw a raw inference about defendant's motive from the fact that he used drugs. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, even if motive was material issue and evidence of defendant's prior drug use was probative of motive, prejudicial impact of evidence substantially outweighed its probative effect; slight probative value of knowing one possible motive for defendant to commit robbery did not outweigh likely prejudicial effect on jury of being told that defendant was crack- cocaine user. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 1169.2(3)
110k1169.2(3)
In bank robbery prosecution, admission of evidence of defendant's prior drug use was harmless error, where defendant's bad character was established by admissible evidence; defendant claimed that large amounts of cash in his possession after bank robbery were result of defendant's act of breaking into cocaine dealer's home and stealing cash, and evidence that defendant purchased large amounts of cocaine was introduced into evidence to establish a recent acquisition of wealth. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] WITNESSES ⇐ 389
410k389
District court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by one of key prosecution witnesses, where defendant failed to give prosecution witness the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand; Barrett rule allowing such evidence so long as witness is available to be recalled to explain inconsistent statements had not been adopted in circuit, and thus was optional procedure, not mandatory. Fed.Rules Evid.Rule 613(b), 28 U.S.C.A.

[6] ROBBERY ⚿ 2
342k2
Conviction of bank robbery was supported by evidence of bank surveillance photographs of robber, testimony from defendant's aunt and police officer who knew defendant well identifying defendant as man in photographs, testimony that defendant possessed large amounts of cash later on same day as robbery, and testimony of two admitted accomplices implicating defendant in crime, despite fact that accomplices had made plea bargains, and existence of minor inconsistencies in accomplices' and eyewitnesses' testimony, which were easily explained by rapidity and stress of events. 18 U.S.C.A. § 2113(a, d).

[7] CRIMINAL LAW ⚿ 1144.13(3)
110k1144.13(3)
In examining challenge to sufficiency of evidence, Court of Appeals views evidence in light most favorable to government and resolves all evidentiary conflicts in favor of the government.

***1258** Glenn P. Bruder, Minneapolis, MN, argued, for appellant.

David L. Lillehaug, U.S. Atty., Minneapolis, MN, argued (Jon M. Hopeman, on the brief), for appellee.

Before McMILLIAN, Circuit Judge, McKAY, [FN*] Senior Circuit Judge, and BOWMAN, Circuit Judge.

FN* The HONORABLE MONROE G. McKAY, Senior Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

McKAY, Circuit Judge.

Eugene Lamar Sutton appeals from a final judgment entered in the United States District Court for the District of Minnesota finding him guilty upon a jury verdict of bank robbery, use of a firearm in the course of a violent crime, and being a felon in possession of a firearm, in violation of 18 U.S.C. § 2113(a)(d), 18 U.S.C. § 924(c)(1) and (2), and 18 U.S.C. § 922(g)(1), respectively. Mr. Sutton presents three issues on appeal: (1) he challenges the admission of certain evidence; (2) he challenges the exclusion of certain evidence; and (3) he challenges the sufficiency of the evidence as a whole. We affirm the judgment of the district court.

[1] Mr. Sutton contends that the district court improperly admitted evidence of his prior narcotic use under Fed.R.Evid. 404(b). In support of this claim, he has demonstrated that he was provided notice of this evidence only two days before trial, despite the fact that the district court explicitly ordered the government to notify the defendant at least four **days prior** to **trial** of any **404(b)** evidence it planned to use. The district court excused this breach for two reasons. First, the government discovered the evidence only five **days prior** to **trial,** on a Friday, and they notified the defendant on the following Monday. Second, the government had provided the defendant with a copy of the statement of another one of its witnesses over a month before the trial. This statement related to a drug buy the day of the robbery. Thus, the defendant was on notice that his involvement with drugs would be an issue at the trial and had adequate time to prepare for this type of evidence. The district court did not abuse its discretion in excusing the government's late ***1259** notification of Mr. Sutton under these circumstances.

[2] Mr. Sutton also argues, persuasively, that the evidence of his drug use does not meet our test for admissibility under Rule 404(b).

In order for the trial court to admit evidence under Rule 404(b), the evidence must satisfy the following conditions:

1. The evidence of the bad act or other crime is relevant to a material issue raised at trial;
2. The bad act or crime is similar in kind and reasonably close in time to the crime charged;
3. There is sufficient evidence to support a finding by the jury that the defendant committed the other act or crime; and
4. The potential prejudice of the evidence does not substantially outweigh its probative value.

United States v. DeAngelo, 13 F.3d 1228, 1231 (8th Cir.) (citing United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991)), cert. denied, --- U.S. ----, 114 S.Ct. 2717, 129 L.Ed.2d 842 (1994).

Mr. Sutton contends that his prior drug use does not meet either the first or last part of this test. We agree, but find the error to be harmless.

The first part of our test under Rule 404(b) allows

evidence of prior bad acts where it is used for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The government argues that the evidence of Mr. Sutton's drug use showed a motive for the bank robbery. In other words, the government was attempting to show that he stole the money to support his drug habit. Although other circuits have allowed evidence of drug use to demonstrate motive to commit a bank robbery (see, e.g., United States v. Miranda, 986 F.2d 1283, 1285 (9th Cir.) (citing cases), cert. denied, --- U.S. ----, 113 S.Ct. 2393, 124 L.Ed.2d 295 (1993)), we have never decided this precise issue.

This court has allowed evidence of other prior bad acts to show motive in a robbery case. United States v. Mays, 822 F.2d 793, 797 (8th Cir.1987). However, that case is readily distinguishable from the present case. First, in Mays we held that motive was a material issue in that case, although we did not explain why. Furthermore, the facts that were admitted as evidence of motive were also clearly relevant to the issue of identity, which is indisputably a material issue in a robbery case. [FN1] Id. at 797. Another distinction between this case and Mays is that in Mays the evidence of motive ("to secure enough funds to start a new life together") was offered as direct testimony by a co-conspirator. In this case, motive was not a material issue; the defendant did not put his motive in issue; there was no testimony by his co-conspirators about his motive; and the facts which the government used to show motive were not also relevant to identity. The government simply asked the jury to draw a raw inference about the defendant's motive from the fact that he used drugs. We decline to approve such a tenuous link.

FN1. The evidence related to a previous bank robbery committed by defendant that was "similar enough to establish some identity between the robberies. Both banks were located in an isolated rural area; before both robberies a four-wheel drive vehicle was stolen and later abandoned; and in both robberies a .45 caliber automatic pistol was used." Id.

[3] Even if motive were a material issue in this robbery case and drug use were probative of it, the evidence would still fail the fourth part of our test, which is derived from the general requirement of Rule 403 that the prejudicial impact of the evidence should not substantially outweigh its probative value. The admission of evidence of prior wrongful acts creates a danger that the jury will convict the accused on the basis of bad character; thus, it is normally excluded under Rule 404. We cannot say that the slight probative value of knowing one possible motive for Mr. Sutton to commit a robbery outweighs the likely prejudicial effect on the jury of being told that the defendant was a crack-cocaine user. [FN2] In any event, it could hardly come as *1260 a surprise to the jury that Mr. Sutton was robbing a bank because he needed money for some reason. [FN3]

FN2. There is a substantial split among the cases about whether this type of evidence should be admissible. See generally, Debra T. Landes, Annotation, Admissibility of Evidence of Accused's Drug Addiction or Use to Show Motive for Theft of Property Other Than Drugs, 2 A.L.R. 4th 1298 (1980). We think the better-reasoned cases exclude such evidence. See State v. LeFever, 102 Wash.2d 777, 690 P.2d 574 (1984) (Evidence of defendant's addiction to heroin, offered by prosecution to show motive for robbery, is inadmissible in that resulting prejudice overwhelmed any possible relevance or probativeness.); People v. Holt, 37 Cal.3d 436, 208 Cal.Rptr. 547, 554, 690 P.2d 1207, 1214 (1984) (Whatever probative value defendant's drug use might have had to show motive for robbery was outweighed by prejudicial value.).

FN3. This brings to mind the story of a more famous bank robber with the same surname. When asked why he robbed banks, Willie Sutton replied, "That's where the money is."

[4] Although we believe that the admission of Mr. Sutton's prior drug use was erroneous, we nevertheless find the error to be harmless, because when viewed in the context of all the evidence presented at Mr. Sutton's trial, any possible prejudice that Mr. Sutton suffered was de minimis. For example, in Mr. Sutton's opening statement, his counsel referred to his association with drug dealers and how he broke into a cocaine dealer's home and stole $10,000. (Tr. [FN4] 35-36) This information was a crucial part of Mr. Sutton's defense, as it provided an alternative explanation for how Mr. Sutton came to have large amounts of cash just after

the time of the bank robbery. However, these statements also gave the government the prerogative to explore on cross-examination the basis for his knowledge that there would be large amounts of cash in the drug dealer's house and the nature of his relationship with the drug dealer. Furthermore, testimony was presented that Mr. Sutton purchased large amounts of cocaine the day of the robbery. This evidence was properly admitted because it tended to establish a recent acquisition of wealth. We think Mr. Sutton's bad character was so thoroughly established by admissible evidence (including his own) that there is no likelihood that this additional bad character evidence would have influenced the outcome in this case.

FN4. Trial Transcript.

[5] Mr. Sutton also contends that the district court improperly precluded him from presenting a witness who would have testified to inconsistent statements made by one of the key prosecution witnesses, Mr. Smith. This testimony was not allowed because Mr. Smith was not given the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand, which is normally the proper foundation for impeachment under Fed.R.Evid. 613(b). Mr. Sutton points out that the First Circuit has relaxed this requirement, requiring only that a witness be available to be recalled to explain inconsistent statements. United States v. Barrett, 539 F.2d 244, 254-56 (1st Cir.1976); United States v. Hudson, 970 F.2d 948, 955 (1st Cir.1992). However, this procedure is not mandatory, but is optional at the trial judge's discretion. Id. at 956 & n. 2. More to the point, since this circuit has never adopted the rule in Barrett, we cannot say that the district court abused its discretion in not applying it.

[6][7] Mr. Sutton has also challenged the sufficiency of the evidence. Accordingly, we must examine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. United States v. Fetlow, 21 F.3d 243, 247 (8th Cir.), cert. denied sub nom., Ferguson v. United States, --- U.S. ----, 115 S.Ct. 456, 130 L.Ed.2d 365 (1994). In examining such a claim, we view the evidence in the light most favorable to the government and resolve all evidentiary conflicts in favor of the government. United States v. Nelson, 984 F.2d 894, 899 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 2945, 124 L.Ed.2d 693 (1993).

The evidence, viewed in the light most favorable to the prosecution, indicates that a man matching the description of Mr. Sutton robbed the Chisago City Bank. (Tr. 46). There were photographs taken by bank surveillance cameras which the jury viewed and compared to Mr. Sutton. There was also testimony that his Aunt and a police officer who knew him well identified him as the man in the photos. (Tr. 145, 158).

Further testimony demonstrated that Mr. Sutton had in his possession large quantities *1261 of cash later on the same day of the robbery. He used this money to purchase a car for $2500 in cash (Tr. 42) and $2400 worth of cocaine. (Tr. 261, 263, 265). Mr. Sutton provided conflicting and unsubstantiated claims for the origins of the money (Tr. 351, 378-79), but it is undisputed that he did not earn the money through legal gainful employment.

Furthermore, two admitted accomplices of Mr. Sutton implicated him in the crime and provided sufficient detail that the jury might rationally have found them credible. Although the accomplices had made plea bargains, the jury was properly instructed by the trial judge on this point. The inconsistencies in the accomplices' and eyewitnesses' testimony are minor and are easily explained by the rapidity and stress of the events. The bank tellers' inability to pick Mr. Sutton's photo out of a lineup may also be explained by the speed and stress of the event, plus the fact that the robber was wearing a hat and sunglasses. This weakness in the evidence was overcome by the independent identification by Mr. Sutton's aunt and the police officer.

After carefully reviewing the evidence presented in the light most favorable to the government, we conclude that there was sufficient evidence to support the jury's verdict.

Accordingly, the judgment of the district court is affirmed.

END OF DOCUMENT

INSTA-CITE

CITATION: 41 F.3d 1257

Direct History

=> 1 **U.S. v. Sutton,** 41 F.3d 1257, 41 Fed. R. Evid. Serv. 708 (8th Cir.(Minn.), Dec 07, 1994) (NO. 94-2597)
Certiorari Denied by
2 Sutton v. U.S., 115 S.Ct. 1712, 131 L.Ed.2d 572, 63 USLW 3754 (U.S., Apr 17, 1995) (NO. 94-8309)

UNITED STATES of America
v.
Rafael CRUZ, a/k/a "Esa," Defendant.

No. S1 94 CR. 313 (CSH).

United States District Court, S.D. New York.

Oct. 20, 1995.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

*1 In Counts Fifty-Three and Seventy-Seven of the 78-count superseding indictment in this case, defendant Rafael Cruz is charged with conspiracy to distribute and to possess with the intent to distribute heroin in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846 and 18 U.S.C. § 2, and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §§ 924(c) and 2. By Notice of Motion dated September 29, 1995 Cruz requests the following relief: (1) provision of a bill of particulars; (2) an order striking any prejudicial surplusage from the indictment; (3) an order allowing defendant to inspect the minutes of the Grand Jury proceeding with regard to evidence supporting County Fifty-Three of the indictment; (4) an order granting defendant discovery under Federal Rule of Criminal Procedure 16; (5) a Federal Rule of Evidence 404(b) order directing the government to provide advance notice of any evidence of prior bad acts or criminal convictions of the defendant the government intends to introduce at trial; (6) an order requiring the government to disclose before trial all prior conduct by which the government would seek to impeach defendant; (7) an order compelling the government to comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963). For the reasons stated below, defendant's applications are denied with the exception of his motion concerning superfluous counts in the indictment, his motion for discovery of surveillance photographs, and his motion for Rule 404(b) evidence and impeachment evidence.

DISCUSSION

1. Bill of Particulars

Cruz seeks an order directing the government to provide a bill of particulars pursuant to Fed. R. Crim. P. 7(f). He asks for provision of the date, time, and location of the occurrence of any overt acts the government intends to prove at trial as well as the names and addresses of any unindicted co-conspirators and the dates on which they joined the alleged conspiracy.

The decision whether to require the government to provide a bill of particulars rests within the sound discretion of the district court. See United States v. Cephas, 937 F.2d 816, 823 (2d Cir. 1991), cert. denied, 502 U.S. 1037 (1992); United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987) (per curiam). Its function is to "'provide defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial."' United States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990), quoting 1 C. Wright, Federal Practice and Procedure § 129, at 434-35 (2d ed. 1982), cert. denied, 498 U.S. 906 (1990). A bill of particulars is required "'only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused."' Id. at 234, quoting United States v. Feola, 651 F. Supp. 1068, 1132 (S.D.N.Y. 1987), aff'd, 875 F.2d 857 (2d Cir. 1989), cert. denied, 493 U.S. 834 (1989); see also Bortnovsky, 820 F.2d at 574 (per curiam) (bill of particulars only appropriate when necessary to "prevent surprise").

*2 "The test is not whether the particulars sought would be useful to the defense. Rather, a more appropriate inquiry is whether the information in question is necessary to the defense." United States v. Guerrerio, 670 F. Supp. 1215, 1224 (S.D.N.Y. 1987) (emphasis in original) (citation omitted). "Generally if the information sought by defendant is provided in the indictment or in some acceptable alternate form, no bill of particulars is required." Bortnovsky, 820 F.2d at 574; see also Feola, 651 F. Supp. at 1133 ("In deciding whether the bill of particulars is needed, the court must determine whether the information sought has been provided elsewhere, such as in other items provided by discovery.... and the indictment itself.").

Applying these precepts, Cruz has not demonstrated the necessity of a bill of particulars. The superseding indictment specifies the approximate beginning and end dates of the

narcotics conspiracy and the corresponding time frame of the defendant's possession and use of a firearm. It also supplies the general vicinity and mechanics of the operation of the narcotics conspiracy of which he is alleged to have been a member. The government has also provided the defendant with abundant discovery materials, and the defendant has available to him the transcript of the earlier trial of a member of the conspiracy to which he is allegedly party. In the aggregate, this information satisfies the need a bill of particulars is designed to fulfill: it enables Cruz to adequately prepare his defense and prevents the possibility of unfair surprise at trial.

Although this information does not expose every detail of the crimes alleged to have been committed, the government is not obligated to particularize all of its evidence before trial. Details concerning the date on which the conspiracy was formed and the date and means by which Cruz entered into it need not be revealed before trial. [FN1] See United States v. Persico, 621 F. Supp. 842, 868 (S.D.N.Y. 1985). Nor is the government required to set forth the location of each predicate act or details concerning meetings at which the defendant was present. United States v. Wilson, 565 F.Supp. 1416, 1438-39 (S.D.N.Y. 1983) (Weinfeld, J.). Cruz's request for the names of unindicted co-conspirators also fails. The indictment names thirteen of defendant's alleged co-conspirators in the conspiracy with which he is charged. A more "exhaustive list" of the participants is not necessary. United States v. Benevento, 649 F. Supp. 1379, 1388 (S.D.N.Y. 1986) (Weinfeld, J.), partially vacated on other grounds, 836 F.2d 60 (2d Cir. 1987), cert. denied, 486 U.S. 1043 (1988); see also United States v. Santobello, 1994 WL 525053, * 6 (S.D.N.Y. September 23, 1994) (where indictment named twelve individuals involved in conspiracies, government was not required to provide names and addresses of all unindicted accomplices through bill of particulars).

***3** Since the indictment and the other information provided to the defendant adequately apprise him of the nature of the crimes with which he is charged so as to prevent the risk of double jeopardy and undue surprise at trial, Cruz's request for a bill of particulars is unwarranted.

2. Striking Surplusage In The Indictment

Defendant moves to strike certain of the superseding indictment's allegations he deems "surplusage," in particular, what he deems to be superfluous counts and superfluous references to aliases. Defendant argues first that he is named in a seventy-eight count indictment which alleges acts of murder, kidnapping, extortion and assault by the C&C enterprise, but that he himself is not alleged to have been a member of that enterprise. Defendant is accused of aiding, abetting, and conspiring with that organization, not of having been a member of it nor a co-conspirator in the RICO charge of the indictment.

The government, in its memorandum, concedes that the information deemed surplusage by the defendant "is not necessarily relevant to prove the elements of Counts Fifty-Three and Seventy-Seven." Govt's Mem. at 4. The government then states that it is willing to confer with defense counsel and the Court in an effort to reach agreement about removal of "surplusage" from the indictment. Id. Given that the parties share common ground on this issue, the Court orders them to confer on this issue and inform the Court of their decisions concerning any surplusage in the indictment and the appropriate changes that will be made. The parties may request Court participation in this process if they are unable to reach an agreement.

Defendant also objects to the use of an alias in the indictment, arguing that the alias will raise prejudicial suspicion in jurors' minds, and has no probative value on the question of his identity in this case. The government responds that defendant was known to his alleged co-conspirators as "Esa," not as "Rafael Cruz," and that the alias is therefore necessary to establish defendant's identity.

The Court is convinced that preservation of the alias "Esa" in the indictment will not unfairly prejudice jurors against the defendant. The Second Circuit explicitly allows the use of aliases at trial if the alias is necessary to prove defendant's identity. United States v. Miller, 381 F.2d 529, 536 (2d Cir. 1967), cert. denied, 392 U.S. 929 (1968), reh'g denied, 393 U.S. 902 (1968). This case presents just such a situation: since the government's witnesses know defendant only by the name of "Esa" and not as "Rafael Cruz," their accurate identification of defendant depends upon allowing the government to elicit testimony from them using the name "Esa."

Furthermore, this case is easily differentiated from United States v. Williams, 739 F.2d 297 (7th Cir. 1984), in which the alias "Fast Eddie" was stricken from the indictment on the grounds of undue prejudice to the defendant. Defendant proffers no evidence that the alias "Esa" carries the same negative connotations as the alias in Williams, and the Court sees no reason to so assume. Defendant's request to strike his alias from the indictment is denied.

3. Disclosure of Grand Jury Minutes

*4 Defendant requests that the Court order the disclosure of the portion of the Grand Jury minutes relating to the narcotics charge against him, or, in the alternative, allow him to inspect the minutes in camera.

Federal Rule of Criminal Procedure 6(3)(C)(ii) allows such disclosure "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." "Grand Jury proceedings carry a 'presumption of regularity."' Torres, 901 F.2d at 232, quoting Hamling v. United States, 418 U.S. 87, 139 n.23 (1974). The Supreme Court has "consistently construed the Rule ... to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983). See also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). In this context, "a review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." Torres, 901 F.2d at 233.

Defendant argues that the evidence upon which the government relies is insufficient to sustain an indictment unless the government misrepresented the evidence. This assertion does not provide the kind of specific allegation needed to justify opening Grand Jury minutes, and is insufficient to convince the Court to take the unusual step of opening the Grand Jury minutes to scrutiny by defendant. Defendant's motion on this point is denied.

4. Discovery Under Federal Rule of Civil Procedure 16

a. Reports, Logs, Photographs, Videotapes

Defendant requests that the government produce all reports, logs, photographs, and videotapes to him before trial. The government states that it has no such evidence that include the defendant, but that the government is in possession of surveillance photographs of members of the C&C gang and associates of the gang and of defendant, and that it has no objection to making these surveillance photographs available to defendant. The Court orders the government to do so at a time convenient for both the government and defendant.

b. Grand Jury Dates, Adjournments, Instructions, Voting Records, and Court Transcripts of Returned Indictment

The Court rejects defendant's further requests to gain information about the grand jury proceedings. Federal Rule of Criminal Procedure 16 does not require the government to disclose such information, except as permitted under Fed. R. Crim. Pro. 6. As discussed above, Rule 6(3)(C)(ii) allows such disclosure "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Because defendant has not made any such showing, his motion is denied.

c. Government's Witness List

With respect to defendant's request for a government witness list, Rule 16 "does not require the Government to furnish the names and addresses of its witnesses in general." United States v. Bejasa, 904 F.2d 137, 139 (2d Cir. 1990), cert. denied, 498 U.S. 921 (1990); see also United States v. Victor Teicher & Co., L.P., 726 F. Supp. 1424, 1443 (S.D.N.Y. 1989) (Haight, J.). Although this Court has the authority to require the government to disclose the identity of its witnesses, such an order will only be granted if the defendants make "a specific showing that disclosure was both material to the preparation of [the] defense and reasonable in light of the circumstances surrounding [the] case." Bejasa, 904 F.2d at 140 (quoting United States v. Cannone, 528 F.2d 296, 300 (2d Cir. 1975)) (emphasis and alterations in Bejasa). "Especially in narcotics cases, where the dangers of witness intimidation, subornation of perjury or actual injury to witnesses are great, the defendant's request for a witness list should not be granted absent a particularized showing of need." United States v.

Taylor, 707 F. Supp. 696, 703 (S.D.N.Y. 1989) (citation omitted). "[A]n abstract, conclusory claim that such disclosure [is] necessary," is not adequate to make the requisite showing. Cannone, 528 F.2d at 301-02.

*5 Defendant represents that the identities of the government's witnesses are generally unknown to the defendants and that without this knowledge and the opportunity to interview the witnesses, the defense will be unprepared to meet the government's evidence at trial. While there is some force to this contention, the generalized need Cruz professes is not sufficient under Second Circuit authority. In addition, the availability in this case of the transcript from the prior trial of a conspirator further diminishes defendant's professed need. Having failed to make a particularized showing of need for the government's witness list the request must be denied.

5. Federal Rule of Evidence 404(b) Evidence

Cruz requests an order directing the government to provide advance notice, 14 days prior to trial, of any evidence of other crimes, wrongs or acts committed by him it intends to introduce at trial pursuant to Rule 404(b) of the Federal Rules of Evidence ("Fed. R. Evid."). The Rule itself requires the government to provide "reasonable notice" of such evidence in advance of trial, but does not define "reasonable." It is therefore left to the Court to give meaning to that term in each particular case. This Court has generally required such notification ten days before trial. [FN2]

The government represents that it has not yet finalized its decisions concerning what evidence it will seek to introduce at trial. The government is nevertheless ordered to furnish notification ten calendar days in advance of trial, failing which the evidence will be precluded. To the extent the government determines after that point that it intends to introduce such evidence, the government must seek a ruling as to its admissibility and show good cause for its failure to provide notice within the appointed time frame.

6. Impeachment Material

Cruz also requests an order from the Court pursuant to Rule 404(b) requiring the government to advise him prior to trial of any evidence of his prior criminal conduct or immoral acts it plans to use for the purpose of impeaching him on cross-examination with such evidence. The government agrees to provide reasonable notice of impeachment material. The Court orders the government to produce this material ten days before trial.

7. Brady Material

Cruz seeks an order directing the government to produce material favorable to the defense pursuant to Brady v. Maryland, 373 U.S. 83 (1963).

The government represents that it is cognizant of its obligations under Brady and is currently unaware of any material falling under its mandate. In light of this representation, an order directing the production of such material is unnecessary at the present time. Of course, I expect the government to honor its commitment to disclose forthwith any Brady material of which it subsequently becomes aware.

CONCLUSION

Defendant's applications are denied with the exception of his motion concerning superfluous counts in the indictment, his motion for discovery of surveillance photographs, and his motion for Rule 404(b) evidence and impeachment evidence.

*6 It is SO ORDERED.

FN1. Defendant's request for particulars concerning every overt act the government intends to prove at trial is misguided. The government is not required to prove the commission of an overt act to establish the existence of the narcotics conspiracy charged. See United States v. Shabani, 115 S.Ct. 382, 385 (1994). Thus, defendant cannot show a need for this information sufficient to justify a bill of particulars.

FN2. Consistent with Rule 404(b), the Court also allows the government to provide such notice during trial if pre-trial notice can be excused for good cause.

END OF DOCUMENT

INSTA-CITE

CITATION: 1995 WL 617220

Direct History

=> 1 **U.S. v. Cruz,** 1995 WL 617220 (S.D.N.Y., Oct 20, 1995)
(NO. S1 94 CR. 313 (CSH))

Related References

2 U.S. v. Padilla, 1994 WL 681812 (S.D.N.Y., Dec 05, 1994)
(NO. S1 94 CR. 313 (CSH))

3 U.S. v. Padilla, 1995 WL 5920 (S.D.N.Y., Jan 05, 1995)
(NO. S1 94 CR. 313 (CSH))

4 U.S. v. Cherry, 1995 WL 66595 (S.D.N.Y., Feb 15, 1995)
(NO. S1 94 CR. 313 (CSH))

5 U.S. v. Cherry, 876 F.Supp. 547, 63 USLW 2566 (D.N.Y., Feb 17, 1995)
(NO. S1 94 CR.313 (CSH))

6 U.S. v. Cherry, 1995 WL 77719 (S.D.N.Y., Feb 23, 1995)
(NO. S1 94 CR. 313 (CSH))

7 U.S. v. Boggio, 1995 WL 77722 (S.D.N.Y., Feb 23, 1995)
(NO. S7 94 CR. 313 (CSH))

8 U.S. v. Padilla, 1995 WL 105280 (S.D.N.Y., Mar 13, 1995)
(NO. S1 94 CR. 313 (CSH))

9 U.S. v. Padilla, 1995 WL 261513 (S.D.N.Y., May 03, 1995)
(NO. S1 94 CR. 313 (CSH))
On Reconsideration

10 U.S. v. Padilla, 1995 WL 301348 (S.D.N.Y., May 16, 1995)
(NO. S1 94 CR. 313 (CSH))

11 U.S. v. Jones, 57 F.3d 1071 (6th Cir.(Ohio), Jun 09, 1995)
(TABLE, TEXT IN WESTLAW, NO. 94-3092)

12 U.S. v. Cruz, 1995 WL 463107 (S.D.N.Y., Aug 04, 1995)
(NO. S1 94 CR. 313 (CSH))

13 U.S. v. Cruz, 1995 WL 640546 (S.D.N.Y., Oct 31, 1995)
(NO. S1 94 CR.313CSH)

14 U.S. v. Cruz, 907 F.Supp. 87 (D.N.Y., Dec 04, 1995)
(NO. S11 94 CR. 313 (CSH))

UNITED STATES of America, Appellee,
v.
Garry D. KERN, Appellant.
UNITED STATES of America, Appellee,
v.
Troy P. REEVES, Appellant.

Nos. 93-1524, 93-1566.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 13, 1993.

Decided Dec. 17, 1993.

Defendants were convicted in the United States District Court for the District of Nebraska, Lyle E. Strom, Chief Judge, of bank robbery, conspiracy to commit bank robbery, and carrying of firearm during and in relation to crime of violence. Defendants appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) other acts evidence was admissible on issue of intent to conspire; (2) motion for new trial on basis of newly discovered evidence was properly denied; and (3) state's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
Government gave "reasonable notice" of general nature of bad act evidence to be used, when government informed defendants in hearing before magistrate judge that it might use evidence from some local robberies and when it provided the reports one week later, a week before trial. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

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

[2] CRIMINAL LAW ⇐ 369.2(8)
110k369.2(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(8)
110k371(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 945(2)
110k945(2)
Police report indicating confession to hotel robbery and refusal to name accomplices would not exonerate defendants in bank robbery prosecution using evidence of defendants' involvement in the hotel robbery, and, thus, report did not entitle defendants to new trial; if the evidence had been presented to jury, it could reasonably have believed that hotel robber was merely protecting defendants, and although jury could also have inferred that hotel robbery victim improperly identified defendants, evidence of guilt warranted denial of new trial motion. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

[4] CRIMINAL LAW ⇐ 700(6)
110k700(6)
State's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady. U.S.C.A. Const.Amends. 5, 14.

***123** Mark W. Bubak, Omaha, NE, argued, for appellants.

Michael P. Norris, Asst. U.S. Atty., Omaha, NE, argued, for appellee.

Before McMILLIAN, BOWMAN, and MAGILL,

Circuit Judges.

MAGILL, Circuit Judge.

Troy B. Reeves (Reeves) and Garry D. Kern (Kern) appeal the judgment entered by the district court [FN1] following a jury's finding of guilt on three bank-robbery-related counts. Specifically, Reeves and Kern (the defendants) contend the trial court erred when it admitted evidence of another subsequent robbery, when it refused to grant a new trial after the discovery of new evidence, and when it found as a matter of law that conspiracy to commit bank robbery is a crime of violence. For the reasons addressed below, we affirm the judgment of the district court.

FN1. The Honorable Lyle E. Strom, Chief Judge, United States District Court for the District of Nebraska.

I. BACKGROUND

On June 12, 1992, an Omaha branch office of the First Federal Savings and Loan Association of Lincoln (First Federal) was robbed of approximately $12,700 by two stocking-masked males who differed significantly in height and weight. The smaller robber entered the bank first and the larger robber followed carrying a black short-barreled shotgun. The robbers left the bank and entered a recently-stolen white Buick driven by a third male. Immediately after the robbery, a stocking mask with a few human hairs was found outside the bank.

Kern's girlfriend at the time, Andrea Fraire (Fraire), testified at trial that Kern had related a plan to her to rob a jewelry store and bank in Omaha. According to Fraire, the planned robberies were to take place on June 12, 1992, and involved the use of stolen getaway cars. Fraire further testified that on the evening of June 12, 1992, Kern arrived home with $4000 to $4500 in cash.

Jack Parrott, a security guard for the shopping center in which the bank was located, testified at trial that he observed a rusted gold Oldsmobile Cutlass (Cutlass) occupied by four males in the shopping center parking lot on June 11, 1992. The next day, June 12, the same car was observed again by Parrott, again occupied by four males. Later that same morning, Parrott observed the Cutlass in a church parking lot parked beside a white Buick. The white Buick was now occupied by three of the males and the Cutlass held the fourth individual. After observing the Buick for a short time, Parrott noticed a shotgun being passed to a backseat passenger. Parrott subsequently identified Reeves from a photograph array as the frontseat passenger. Although Parrott was unable to identify Kern from a police lineup, he did identify Kern at trial as the backseat passenger.

The bank employees were unable to identify Reeves or Kern from lineups or at trial. Reeves and Kern both had alibi witnesses testify that they were elsewhere at the time of the robbery. The human hairs in the mask, however, were identified by an FBI hair and fiber expert as matching samples taken from Kern.

At trial, testimony was introduced by the government regarding the defendants' alleged participation in a hotel robbery that occurred seventeen days after the bank robbery. Kern was charged in state court with commission of this robbery. The testimony was prefaced by a limiting instruction prohibiting the jury from using this testimony to establish "bad" character and, accordingly, conformity with that character. The testimony was then introduced pursuant to Federal ***124** Rule of Evidence 404(b). The hotel robbery victim, Ashford, testified he was robbed by three armed masked males, and he identified both Reeves and Kern as two of the individuals who robbed him.

Following a jury trial, the defendants were convicted of all three counts against them. Count I charged the defendants with conspiracy to commit bank robbery in violation of 18 U.S.C. § 371. Count II charged them with the June 12, 1992 bank robbery of First Federal in violation of 18 U.S.C. § 2113(a), (d). Count III charged Reeves with carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1), and Kern was charged as Reeves' co-conspirator on that count.

After the jury convicted Reeves and Kern for the First Federal robbery, the government received from the Omaha police a supplementary report related to the hotel robbery. An individual named Stacey Lue (Lue) confessed to participating with two accomplices in the hotel robbery. Lue was

specifically asked if Reeves and Kern were his accomplices, but he denied any participation on their part. Lue, however, refused to name his two accomplices. Upon receipt, the government immediately disclosed this information to the defendants' attorneys. Following the disclosure of the Lue confession, Reeves and Kern moved for a new trial. In state court, Kern pleaded nolo contendere to the hotel robbery charge and was convicted.

II. DISCUSSION

The defendants contend that three errors of the trial court mandate reversal and a new trial: admission of Ashford's testimony, Brady [FN2] evidence and/or newly discovered evidence, and the district court's finding as a matter of law that conspiracy to commit bank robbery is a crime of violence as defined by 18 U.S.C. § 16. We find that the district court committed no reversible error, and we affirm the court's judgment.

FN2. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A. The Hotel Robbery Evidence

The defendants object to the admission into evidence of Ashford's testimony regarding the hotel robbery because they claim the government gave insufficient notice that it planned on using this evidence and it was not properly admissible under Federal Rule of Evidence 404(b) (Rule 404(b)). The district court, however, has broad discretion to admit such evidence and its decision will not be overturned unless it is clear that the evidence has no bearing on the case. United States v. Sykes, 977 F.2d 1242, 1246 (8th Cir.1992).

[1] The government gave the defendants adequate notice that it planned on using Rule **404(b)** evidence. The rule states the prosecution must "provide reasonable notice in advance of trial, or during trial ... on **good cause** shown, of the general nature of any such evidence." Fed.R.Evid. **404(b)**. The magistrate judge specifically ordered that any "bad act" evidence be disclosed at least fourteen days prior to trial. The government complied by informing the defendants in a hearing before the magistrate judge that the government might use evidence from some local robberies. See Tr. at 335. At that time, the government did not yet have the state reports concerning these robberies. Approximately one week before trial, when the government obtained the reports, the defendants were likewise provided with these reports. Id. We find that the government's notice satisfies the requirements of Rule 404(b); the district court did not abuse its discretion in finding that this notice was reasonable.

Rule 404(b) prohibits the admission of "other crimes, wrongs, or acts" to prove the character of a person, and hence, conformity with that character; that is, it prohibits propensity evidence. See id. The rule, nonetheless, specifically recognizes that evidence of "other crimes, wrongs, or acts" could be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Id.

To properly admit Rule 404(b) evidence for purposes other than to prove propensity, it must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close ***125** in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act; and (4) not have a prejudicial value that substantially outweighs its probative value. Sykes, 977 F.2d at 1246; United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991). The district court warned the jury in an instruction prior to Ashford's testimony that "the mere fact that these defendants may have committed a similar act in the past is not evidence that they committed the acts charged in this case." Tr. at 365. The district court repeated essentially the same warning in Jury Instruction No. 10. The permissible purposes enumerated by the district court for which this testimony could be considered included proof of identity, knowledge, plan, motive, and intent to conspire.

[2] We find that the hotel robbery evidence was properly admitted to prove that Reeves and Kern intended to enter into an agreement or understanding to commit robbery and that they understood the purpose of this agreement. [FN3] The court instructed the jury that in order to find the defendants guilty of conspiracy to commit bank robbery, it had to find four elements: (1) two or more persons reached an agreement to commit the crime, (2) the defendant voluntarily and

intentionally joined in the agreement, (3) at the time the defendant joined in the agreement, he knew the purpose of the agreement, and (4) that while the agreement was in effect, one or more of the persons who had joined in the agreement did an overt act in order to carry out the agreement. Thus, the hotel robbery evidence was relevant to a material fact: intent to conspire. See Cheek v. United States, 858 F.2d 1330, 1336-37 (8th Cir.1988); United States v. Scholle, 553 F.2d 1109, 1121 (8th Cir.), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977); United States v. Carlson, 547 F.2d 1346, 1354 & n. 5 (8th Cir.1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977).

FN3. We do not decide whether the hotel robbery evidence could otherwise have been admissible as evidence of identity, plan, or motive, because we find the district court did not abuse its discretion in allowing its admission into evidence and the limiting instruction properly warned the jury not to impermissibly use this evidence as proof of propensity. However, we do not countenance the district court's use of this virtual laundry list of permissible Rule 404(b) purposes. See United States v. Mothershed, 859 F.2d 585, 589 (8th Cir.1988). Such an action, nevertheless, in itself is not a basis for reversal. See id.

As required by Sykes and Johnson, the hotel robbery evidence was similar in kind and close in time to the crime charged. The hotel robbery occurred only seventeen days after the bank robbery. Both robberies were committed by three stocking-masked males. In both robberies, the larger male carried a black short-barreled shotgun. Moreover, the smaller masked robber in both robberies vaulted over a relatively high obstacle: the teller's counter in the bank robbery and the desk in the hotel robbery.

Ashford's testimony regarding the hotel robbery was sufficient for a jury to have found that Reeves and Kern committed the hotel robbery. Ashford not only made a positive identification of the defendants at trial, but he also identified Reeves from an array of photographs soon after the hotel robbery.

Moreover, the court's limiting instruction to the jury was sufficient to prevent undue prejudice from the admission of this evidence. Therefore, because the hotel robbery evidence was admissible to prove that the defendants intended to enter into a conspiracy to rob, we find that the district court did not abuse its discretion when it allowed Ashford to testify.

B. The Supplementary Omaha Police Division Report

[3] After the defendants received the Omaha police division supplementary report (the report) indicating that Lue had confessed to the hotel robbery and refused to name his accomplices, the defendants moved for a new trial. Reeves and Kern claim that the report "exonerated" them and hence a new trial should have been granted pursuant to Federal Rule of Criminal Procedure 33 (Rule 33). Furthermore, they claim that Brady mandates a new trial because the knowledge ***126** of the Omaha police regarding this report should be imputed to the federal prosecutor. We do not agree that the new evidence exonerated the defendants or that the prosecutor withheld evidence from the defendants.

Rule 33 allows a court to grant a motion for a new trial on the basis of newly discovered evidence if the evidence is, in fact, discovered since trial; the court may infer the movant has been diligent; the evidence is not merely cumulative or impeaching; the evidence is material; and the newly discovered evidence would probably produce an acquittal. United States v. Gustafson, 728 F.2d 1078, 1084 (8th Cir.), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984); see also United States v. Wang, 964 F.2d 811, 813 (8th Cir.1992) (new trial may be granted if the defendant's substantial rights are affected). The defendants' argument fails because the report did not exonerate them; that is, it would not have been likely to have produced an acquittal. As stated by the district court, the report [FN4] would merely have "given the jury some additional information to evaluate in determining whether or not Mr. Ashford had indeed properly identified the two defendants as being participants." Tr. at 766. Had this evidence been presented to the jury, the jury could reasonably have believed that Reeves and Kern were Lue's accomplices and that Lue was merely protecting them by denying their participation in the hotel robbery. The jury could also have inferred that Ashford improperly identified Reeves and Kern as participants in the hotel robbery. The district court, however, found that this latter possibility did not warrant a new

trial. Particularly in light of the amount of evidence presented to the jury on the issue of the defendants' guilt, the district court did not abuse its discretion by denying the defendants' motion for a new trial. See Gustafson, 728 F.2d at 1084.

> FN4. The report states, in relevant part: [Lue] had committed that robbery with two other individuals. Previously arrested in connection with this robbery was a Garry KERN, and a Troy REEVES had also been identified as a suspect in this robbery also. I, Officer MAHONEY, asked Stacy LUE if these other two suspects were with him when this robbery occurred, and LUE stated that they were not; however, he would not name the other two suspects out of fear.

[4] Nor does Brady mandate a new trial in this case. See Brady, 373 U.S. at 87-88, 83 S.Ct. at 1196-97. A defendant's due process rights are violated under Brady if a prosecutor "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty." Id. In order to establish such a claim, the prosecutor must have suppressed or withheld evidence that was both favorable and material to the defense. Moore v. Illinois, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). Nothing in this record indicates that this prosecutor withheld evidence from the defendants. Here, the prosecutor simply did not have the report until the trial was over. Such a case is fundamentally different than when information is in the prosecutor's files. See State v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). We do not accept the defendants' proposal that we impute the knowledge of the State of Nebraska to a federal prosecutor. See United States v. Walker, 720 F.2d 1527, 1535 (11th Cir.1983) (refusing to impute the knowledge of state officials to a federal prosecutor), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). Consequently, we hold that the district court did not abuse its discretion when it refused to grant a new trial.

Finally, we find wholly without merit Kern's contention that conspiracy to commit bank robbery is not a crime of violence as defined by 18 U.S.C. § 16, and we reaffirm our previous holding to that effect. See United States v. Johnson, 962 F.2d 1308, 1311 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 358, 121 L.Ed.2d 271 (1992), and cert. denied, --- U.S. ----, 113 S.Ct. 1418, 122 L.Ed.2d 788 (1993).

III. CONCLUSION

Accordingly, we find that the district court did not abuse its discretion when it admitted the hotel robbery evidence and denied the defendants' motion for a new trial. Moreover, the district court properly found that conspiracy to commit bank robbery is a *127 crime of violence. Therefore, we affirm the judgment of the district court.

END OF DOCUMENT

INSTA-CITE

CITATION: 12 F.3d 122
=> 1 **U.S. v. Kern,** 12 F.3d 122, 39 Fed. R. Evid. Serv. 1428 (8th Cir.(Neb.), Dec 17, 1993) (NO. 93-1524, 93-1566)

Citation Rank(R) Page(P) Database Mode
763 F.2d 897 R 16 OF 19 P 1 OF 182 CTA8 P LOCATE
18 Fed. R. Evid. Serv. 465
(Cite as: 763 F.2d 897)

UNITED STATES of America, Appellee,
v.
Carl Angelo DeLUNA, Appellant.
UNITED STATES of America, Appellee,
v.
Carl James CIVELLA, Appellant.
UNITED STATES of America, Appellee,
v.
Charles David MORETINA, Appellant.
UNITED STATES of America, Appellee,
v.
Carl Wesley THOMAS, Appellant.
UNITED STATES of America, Appellee,
v.
Anthony CHIAVOLA, Sr., Appellant.
UNITED STATES of America, Appellee,
v.
Carl James CIVELLA, Appellant.
Nos. 83-2408 to 83-2411, 83-2462 and 84-1047.

Tropicana in 1978. Agosto testified that he met with Nick Civella in a light projection room of the Tropicana to discuss this interest. Following instructions from Chicago and the Civellas, Agosto paid the Bakers $375,000 of his own money in order to buy out this interest. Agosto testified that this was in keeping with the agreements with the Civellas that the Civellas would eliminate the Bakers as rivals to Agosto's control of the Tropicana and would protect Agosto from other people who might attempt to assert interests at the Tropicana.

***915** The government argues that the evidence does not indicate criminal activity by any appellant. The government further argues that the evidence is highly probative of the conspiracy charged, that is, that appellants had a hidden interest in the Tropicana and exercised management and control over the Tropicana. We agree with the government's position and hold that the district court did not abuse its discretion in admitting the evidence.

Misconduct of Carl Thomas

[26] The government was permitted to present recorded conversations of Carl Thomas (Marlo tape, Ex. 199), wherein he stated that he had been involved in skimming at many casinos in Las Vegas for many years. This conversation occurred during a meeting wherein appellants discussed various methods of skimming and Thomas related his experience with skimming and recommended ways of skimming.

Appellants argue that the evidence was highly prejudicial and should have been excluded under Fed.R.Evid. 404(b). The government argues that the evidence was not other crimes evidence because the references were **inextricably** intertwined in the offense charged and because the evidence established Thomas' role in the **conspiracy.** Alternately, the government argues that the evidence is admissible under Fed.R.Evid. 404 as proof of intent.

[27] We hold that the evidence was admissible. "The rule limiting admissibility of uncharged misconduct does not shield an accused from the reception of evidence that he boasted of his past experience in crime in order to reassure a prospective vender or co-worker of his skill and reliability." United States v. Stokes, 12 M.J. 229, 10 Mil.L.Rep. (Pub.L.Educ.Inst.) 2185, 2190 (C.M.A.1982). Moreover, Thomas' statements, to the extent they prove bad character and Rule 404(b) is implicated, are admissible to prove Thomas' intent to engage in the charged conspiracy because Thomas had consistently taken the position that he had no intent to join a conspiracy.

List of Excluded Persons (Black Book)

[28] The government was permitted to introduce evidence that Carl and Nick Civella appeared in the List of Excluded Persons (commonly referred to as the Black Book). The Black Book is a list of people who must be excluded from Nevada casinos by a gaming licensee. The Black Book is issued by the State Gaming Control Board and adopted and promulgated by the Nevada Gaming

Citation | Rank(R) | Database | Mode
763 F.2d 897 | R 16 OF 19 | CTA8 | P LOCATE
(Cite as: 763 F.2d 897)

United States Court of Appeals,
Eighth Circuit.
Submitted Sept. 10, 1984.
Decided May 10, 1985.

Rehearing Denied July 9, 1985 in Nos. 83-2408 to 83-2410, 83-2462 and 84-1047.
Rehearing and Rehearing En Banc Denied July 12, 1985 in No. 83-2411.

Defendants were convicted in the United States District Court for the Western District of Missouri, Joseph E. Stevens, Jr., J., on charges arising out of a casino skimming conspiracy, and they appealed. The Court of Appeals, McMillian, Circuit Judge, held that: (1) Travel Act convictions were properly predicated upon violations of Nevada state law resulting from the conduct of gambling operations without the necessary licenses and the indirect receipt of gambling monies without the necessary licenses; (2) coconspirator's statements contained sufficient "indicia of reliability," and therefore admission of such statements did not violate confrontation clause rights of codefendants; (3) there was no variance between indictment and the evidence, which established a single conspiracy to skim money from casino and transport it to persons in other states who had a hidden interest in the casino, rather than establishing multiple conspiracies; and (4) trial court did not abuse its discretion in denying defendants' motions for severance on grounds of any "spillover effect."

Affirmed.

INSTA-CITE

CITATION: 763 F.2d 897

Direct History

=> 1 **U.S. v. DeLuna,** 763 F.2d 897, 18 Fed. R. Evid. Serv. 465
(8th Cir.(Mo.), May 10, 1985) (NO. 83-2408, 83-2409, 83-2410, 83-2411, 83-2462, 84-1047)
Certiorari Denied by
2 Thomas v. United States, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336
(U.S.Mo., Nov 12, 1985) (NO. 85-423)

Negative Indirect History

Declined to Follow by
3 Government of Virgin Islands v. Joseph, 964 F.2d 1380,
35 Fed. R. Evid. Serv. 877
(3rd Cir.(Virgin Islands), Jun 01, 1992) (NO. 91-3424)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
15 C.J.S. Commerce Sec.132 Note 19.10 (Pocket Part)
22A C.J.S. Criminal Law Sec.611 Note 23
22A C.J.S. Criminal Law Sec.621 Note 66
23 C.J.S. Criminal Law Sec.825 Note 60
23 C.J.S. Criminal Law Sec.1059 Note 88
23 C.J.S. Criminal Law Sec.1063 Note 39
23 C.J.S. Criminal Law Sec.1128 Note 23
79 C.J.S. Searches and Seizures Sec.183 Note 66

ERIC JASO – LEGAL RESEARCH – REDIRECT/404(b) – CODEFENDENTS

ATTORNEY WORK PRODUCT

Redirect – 404(b) – codefendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
v.	)	No. LR-CR-95-173
JAMES B. MCDOUGAL, JIM GUY TUCKER, and SUSAN H. MCDOUGAL	)	

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ADMISSIBILITY OF TESTIMONY REGARDING PRIOR CONSPIRACY

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Memorandum in support of the admissibility of testimony regarding a previous conspiracy between Defendant Jim Guy Tucker and David L. Hale. Counsel for Tucker did not object to co-defendant Susan H. McDougal's ("McDougal") counsel's line of questioning on cross examination which elicited Hale's testimony regarding this conspiracy. Further, the questions McDougal's counsel asked Hale and the answers elicited to those questions implied that Hale's testimony regarding the charged conspiracy defied common sense and was therefore incredible. The United States has the right to clarify the facts for the jury and attempt to dispel the doubts McDougal's counsel attempted to cast on Hale's testimony. Having stood by silently and benefited from a co-defendant's cross examination, Tucker may not now object to the government's effort to set the record straight on the basis of unfair "prejudice."

Hale should be permitted to describe the prior conspiracy to the jury.

ARGUMENT

A. Counsel for Susan H. McDougal attempted to impeach Hale by implying it was unreasonable for Hale to Jim Guy Tucker knew they were agreeing to commit crimes

On cross examination, counsel for Defendant Susan H. McDougal asked Hale the following series of questions:

Q: So then there at this meeting -- you weren't social friends with Jim McDougal, were you?

A: No.

* * *

Q: And you knew that Jim Guy Tucker was a former prosecuting attorney, didn't you?

A: And congressman and Attorney General.

Q: I was going to get to that.

A: Yes, sir.

Q: Thank you. And you knew that you had been a chief prosecuting attorney?

A: Yes, sir, that's correct.

Q: Wouldn't you agree it's kind of risky for someone to just out of the clear blue throw up a criminal scheme to somebody that's a chief prosecuting attorney? That's a kind of risky proposition for somebody, isn't it, that had never dealt with them on a criminal scheme before, just out of the clear blue?

A: Well, we had --

Q: Yes or no? Wouldn't that be a risky proposition?

A: It wasn't the first time.

Q: Oh, okay. Prior criminal schemes between you and Jim McDougal?

A: Not Jim McDougal, no, sir.

(Tr. 4180-81) (emphasis added).

Plainly, this line of questioning presupposed that Hale and Tucker had "never dealt with [each other] on a criminal scheme before," and sought to give the jury the impression that a reasonable person would not propose a criminal scheme to persons he had never conspired with before, particularly where two of the conspirators had law enforcement backgrounds. Needless to say, counsel did not pursue Hale's truthful reply, that "[i]t wasn't the first time." Having been led to believe that the charged conspiracy was proposed "out of the blue," the jury is entitled to hear Hale's testimony to the contrary.

Hale would testify that in 1983, Tucker asked Hale to lend money from Capital Management Services ("CMS") to Tucker's former congressional aide, John Niven, who was in financial straits, but who owned a vacation lake home. The lake home had been financed by Savers Federal Savings & Loan, which was demanding payment on the mortgage from Niven. Tucker told Hale he would arrange for James B. McDougal to have Madison Guaranty Savings & Loan ("MGSL") assume the mortgage on the lake home and pay off Savers, which was accomplished. Tucker then formed two shell corporations, Greenfield Properties, Inc., which Tucker put in

his own name, and Niven Real Estate, which was in Niven's name. CMS then loaned Niven Real Estate $80,000 for the stated purpose of "working capital;" however, the proceeds were misapplied to pay off Niven's personal debts, among other things. Niven conveyed the lake home to Greenfield Properties, and Tucker conveyed the stock of Greenfield Properties to Hale, who used the lake home to his own benefit. Hale's testimony to this effect would demonstrate that Tucker had conspired with Hale on at least one previous occasion to obtain fraudulent loans from CMS to their own benefit and to the benefit of their associates.

The United States is entitled "to correct false inferences left by defense counsel after cross-examination" of a witness. United States v. Womochil, 778 F.2d 1311, 1316 (8th Cir. 1985). This ability is all the more important where the "false inference" is that a defendant did no previous wrong. Id. Tucker objects to permitting the United States to rebut the false impression caused by his co-defendant's questioning. However, the time to object was when counsel for McDougal elicited the purportedly unfairly prejudicial information. The Seventh Circuit has addressed this issue squarely:

> Although it was Sullivan's co-defendant Cain who elicited the response from Montgomery which 'opened the door' for the government, Sullivan acquiesced in Cain's cross-examination and thus waived his right to prohibit the government's exploration of the matter on redirect examination. Sullivan could not sit back, let the "door opening" evidence come in unchallenged during cross-examination, and then assert that the government's redirect examination on that issue provided testimony which was unfairly prejudicial under Rule 404(b).

United States v. Sullivan, 911 F.2d 2, 7-8 (7th Cir. 1990). Having benefited from his co-defendant's cross-examination and the false impression it left with the jury that the charged conspiracy came "out of the blue," Tucker may not not object to the government's effort to set the record straight. And in any event, Tucker may not object under Rule 404(b). Defendants received notice of the government's intention to introduce evidence regarding the Niven deal at paragraph 12 of its 404(b) letter dated February 28, 1996.

CONCLUSION

For the foregoing reasons, the United States should be permitted to conduct redirect examination of David L. Hale regarding a previous conspiracy involving Defendant Jim Guy Tucker.

April 11, 1996
Little Rock, Arkansas

Respectfully submitted,

KENNETH W. STARR
Independent Counsel

By: 

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CERTIFICATE OF SERVICE

I, Eric H. Jaso, do hereby certify that on April 11, 1996, I caused a true and correct copy of the foregoing to be served by hand delivery on the following:

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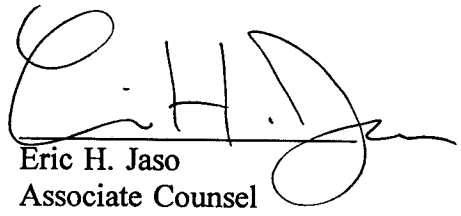

Eric H. Jaso
Associate Counsel

social friends with Jim McDougal either, had you?

A. No, sir.

Q. You just were a casual acquaintance, weren't you?

A. More than a casual acquaintance, but I hadn't --

Q. And you knew that Jim Guy Tucker was a former prosecuting attorney, didn't you?

A. And congressman and Attorney General.

Q. I was going to get to that.

A. Yes, sir.

Q. Thank you. And you knew that you had been a chief prosecuting attorney?

A. Yes, sir, that's correct.

Q. Wouldn't you agree it's kind of risky for someone to just out of the clear blue throw up a criminal scheme to somebody that's a chief prosecuting attorney? That's kind of a risky proposition for somebody, isn't it, that had never dealt with them on a criminal scheme before, just out of the clear blue?

A. Well, we had --

Q. Yes or no? Wouldn't that be a risky proposition?

A. It wasn't the first time.

Q. Oh, okay. Prior criminal schemes between you and Jim McDougal?

A. Not Jim McDougal, no, sir.

Q. All right. Now, this criminal scheme then involving two prosecuting attorneys and somebody that was very politically

active was hatched; correct?

A. Who are you talking about?

Q. I'm talking about you and your contention that Jim McDougal and Jim Guy Tucker hatched a criminal conspiracy.

A. That's correct.

Q. Okay. And it was hatched to make fraudulent transactions involving Madison Guaranty; correct?

A. That's correct.

Q. Knowing that auditors were on the way; correct?

A. No, I didn't know auditors were on the way.

Q. You didn't know auditors were on the way?

A. No, sir.

Q. So at the time this conspiracy was hatched, you didn't know the auditors were coming?

A. No, sir.

Q. Certainly didn't know they were coming in January, did you?

A. No, sir.

Q. Okay. But you did know that Madison Guaranty was an institution that had auditors? You knew that, didn't you?

A. Yes, sir.

Q. And you knew that your SBA had auditors?

A. Yes, sir.

Q. And so it's your contention then you were setting up a fraudulent scheme so that it could be looked at not by one set

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<key1> UNITED STATES OF AMERICA, PLAINTIFF VS. JAMES B. MCDOUGAL, GOV. JIM GU
TUCKER, SUSAN MCDOUGAL, DEFENDANTS, CASE NUMBER LR-CR-95-173 </key1>
<key2> </key2>
<key3> </key3>

establish foundation for admission, Your Honor.

THE COURT: Mr. Sutton?

MR. SUTTON: I don't have any trouble with the document. I would like for it to be left for identification.

THE COURT: Okay. What is the government's position.

MR. BENNETT: We have no objection to it remaining identified as Tucker 218.

THE COURT: All right.

CROSS EXAMINATION

BY MR. SUTTON:

Q. Now, you were saying, however, that you were aware of that, that a hundred percent of the stock was acquired?

A. Yes, sir.

Q. And were you aware or were you knowledgeable as to who the directors of the company were at the time that was done?

A. No, sir.

Q. Was Ken Koone one of them?

MR. BENNETT: Objection. The witness has just testified he doesn't know who the directors were and reading through a laundry list off of this document that is not in evidence is not going to permit the truthful testimony of this witness who has already said he doesn't

know.

MR. SUTTON: I can cross examine the witness by leading questions.

THE COURT: Yes. Overruled, go ahead.

BY MR. SUTTON:

Q. Did you know whether Ken Koone was one of them?

A. I knew Mr. Koone, I knew he was associated with Mr. Hale and with the insurance company. I did not know his position with the insurance company.

Q. Is he a political figure?

A. He has been at times, yes, sir.

Q. In the Republican party?

A. Yes, sir.

Q. Running for office now?

MR. BENNETT: Your Honor, I don't quite see the relevance of this. I know Mr. Sutton thinks it's important to mention the name of every Republican who has come into play in any way in this case, but I don't see how it's relevant that Mr. Koone is now running for political office as a Republican. This is a document that

purports to be dated back in 1989, and I simply fail to see the relevance.

MR. SUTTON: It's not important to me, I'll withdraw it.

THE COURT: Beg your pardon?

MR. SUTTON: It's not important to me, I'll withdraw.

MR. BENNETT: Would you instruct the jury to disregard?

THE COURT: Yes. Disregard the question and any comments pertaining to Mr. Koone's running for a position.

CROSS EXAMINATION

BY MR. SUTTON:

Q. Judge Watt, I want to call your attention to the time that you testified before the grand jury 24 days after expressing the opinion to Mr. Denton or making a statement to Mr. Denton that these people wanted you to lie on Tucker.

MR. SUTTON: And may I approach the witness?

THE COURT: Yes.

BY MR. SUTTON:

Q. I want to show you a transcript from those proceedings.

MR. BENNETT: Which proceeding, Counsel?

MR. SUTTON: Grand jury. And the copy that you gave me was not numbered, but I have numbered it, and the way I have numbered them, I'm looking at page 2, to begin with.

BY MR. SUTTON:

be the corporate attorney?
A. Yes, which would place him in an agent relationship, whic
was the other part of that definition that you did not --
Q. That would pertain to Bob Leslie.
A. An agent. Anyone who served, I would think, providing
legal work to the licensee.
Q. Would you say any lawyer would be an agent if he took one
case for CMS?
A. At that particular time. At that particular time.
Q. The word "agent" -- even though they specifically describ
a lawyer as being a person on retainer in the capacity of
attorney at law, that wouldn't control it? It would be
something else?
A. You just asked for my understanding of it and that's my -
Q. You notice that a lawyer, Bob Leslie, did the regulatory
writing?
A. Yes.
Q. And you know, do you not, that Bob Leslie was the
principal of Liberty Mortgage that had a phony loan from CMS.
Do you know that?
A. No.
Q. Do you know that Mr. Leslie was the head of the Republica

party in our state?

MS. ST. EVE: Objection, Your Honor. There is absolutely no foundation for this in the record.

Carolyn S. Fant
United States Court Reporter

MR. COLLINS: I believe it's the fact, Judge.

THE COURT: What is the Government's --

MR. JAHN: Your Honor, if he makes an assertion it's fact doesn't make it a fact. I can sit here and assert the moon is made out of blue cheese and that doesn't make it a fact.

THE COURT: I will sustain the objection.

BY MR. COLLINS:

Q. Ma'am, do you have any familiarity with any loans relatin to Bob Leslie?

A. No.

Q. Do you have any familiarity with any gifts made to Bob Leslie of $20,000 or so?

A. No, I don't.

Q. And do you know whether or not Bob Leslie was a person regularly serving this SBIC on retainer or in the capacity of attorney at law?

A. I don't know if he was on retainer. I know he wrote lega opinions for the licensee, yes.

Q. In fact he wrote at least, you can think of, six of them, didn't he?

A. Several. Several. Quite a few.

Q. And each one was written to get money for the licensee?

A. Yes.

Q. And when we say "the licensee" what we mean is Capital

Carolyn S. Fant
United States Court Reporter

Management Systems?
A. Capital Management Services, Inc., yes.
Q. I'm going to drop this on the floor. Not out of disrespec but I have no place to put it.
Now, you have told us, have you not, that you were pretty well fooled by David Hale?
A. Yes.
Q. Now, he was actually in your office at times talking to you, wasn't he?
A. Yes.
Q. And he came to see with you a Mr. Matthews once, did he not?
A. Yes.
Q. And they really snowed you pretty good, didn't they?
A. Well, they just discussed plans for future changes at CMS. Their ideas for plans.
Q. Did they get $900,000 out of you?
A. Not as a result of that meeting, no.
Q. But they did get $900,000 from you, didn't they?
MS. ST. EVE: Objection, Your Honor. We're talking about 1989 time period.
MR. COLLINS: That's all right. I'm talking about

her relationship with David Hale. She's testified to that.

MS. ST. EVE: Can we have a side bar, Your Honor?

THE COURT: Yes.

Carolyn S. Fant
United States Court Reporter

and over to the fact that Jim Guy Tucker was a lawyer and that he was a lawyer for David Hale, he was a lawyer for Jim McDougal and these companies from time to time. Do you remember that? Jim Guy Tucker is a lawyer, but he was not functioning as a lawyer for these companies in these transactions that we're talking about in this case.

I want to call to your attention that in the Dean Paul deal that they put up on the board and said was a fraudulent deal and they got $500,000.00 of money into Capital Management as a result of that deal, there was a lawyer who had to do an opinion to send in to the SBA to say that that was legal and all of that was okay and that they ought to get new funds from the SBA to do that. That was this lawyer right here, Bob Leslie (indicating). Sat in the next office to David Hale. H did the opinion that said all of that was legal. In this case with this kind of thing going on, he's going to do it again. He's going to say that this is okay, and that they are entitle to get money based on $275,000.00 of new money that's coming i to Capital Management from that woman's account. He is going to endorse that 275,000-dollar check as president of Liberty Mortgage. He's going to get it, instead of using it for Liberty Mortgage, he's going to endorse it and give it right

back to David Hale. Now, if you don't know that there's something wrong with that, you know, you don't know very much as a lawyer. And then he's going to do an opinion to say that

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that's all okay.

Now, my client, Jim Guy Tucker, has been charged, criminally, on some of the things that you've heard about. An to my knowledge, this man has not been charged with anything. He was former Chairman of the Republican Party in Arkansas.

I'm going to now go back with you and talk to these specific things that have been brought against my client and the Governor of the State of Arkansas, Jim Guy Tucker, and to tell you that this started, as I said, in the summer of 1993, because when David Hale was caught in the things that I have just shown you, there was no way out except for someone who wa very, very clever. The broker in the matter was a lawyer and broker, but he was not that clever, and he pled guilty for his part and went to jail. The lawyer in the part pled guilty and he's kind of rethinking his now and thinking about withdrawing his plea of guilty. But David Hale, after he had consulted three lawyers, caught in this mess, began to leak to the press and leak to the U.S. Attorney's Office that he might give evidence against some big people in order to save his skin. " might deliver to you the President of the United States, and I might deliver to you the Governor of the State of Arkansas." And as Mr. Heuer has stated, the U.S. Attorney, who is no

dummy, in effect, said, "Buzz off". But that story was kept going, kept pushing until an independent prosecutor, Office of Independent Counsel, was created, and they heard something the

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liked. It had a ring of things that they liked. And the gist of this is going to go back and take you back where I want to take you now, into the period of the '80s.

In the period of the '80s there had been certain laws passed. Almost everybody agrees now, those laws were a mistake. But the purpose of them at the time was good, if the had worked well, been all right, but the purpose was to loosen up the savings and loans and put some money in circulation, an that was the era of the '80s. And you know something about that. Those were the biggest financial disasters that this country has seen in many a time. Ladies and gentlemen, Madiso Savings & Loan, Madison Guaranty Savings & Loan was little bitty, I mean it was really infinitesimally small. Right here in Arkansas we had FirstSouth, which was big; we had First Federal, which was big, old; we had Savers, which was big and old, and on and on and on, one savings and loan institution after another went under as a result of these policies. Even in the case of Madison Guaranty Savings & Loan, which as Mr. Heuer has pointed out, went under three years after Jim McDougal, I think most experts would tell you that it had to d with vicious sways back and forth on rather complex things involved in the cost of money, interest rates, and that sort o

thing. But, anyway, that was the '80s. I want to talk about Jim Guy Tucker in the '80s.

In 1982, after he had been defeated by Bill Clinton in hi

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UNITED STATES Of America, Plaintiff-Appellee,
v.
Russell PREVATTE and Robert A. Soy, Defendants-Appellants.
Nos. 92-3370, 92-3535.
United States Court of Appeals,
Seventh Circuit.
Argued June 10, 1993.
Decided Feb. 15, 1994.

Defendants were convicted in the United States District Court for the Northern District of Indiana, Rudy Lozano, J., of maliciously destroying property by means of explosive, resulting in death, and conspiracy, and were sentenced to life imprisonment. Defendants appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) other acts evidence respecting burglaries was admissible, and (2) district court committed plain error in sentencing defendants to life imprisonment without jury direction.

Remanded for resentencing.

c. motive

At trial, the district court determined that

the uncharged crimes in issue are probative in proving defendants' motive as well as their preparation and plan in committing a series of burglaries and/or robberies. The defendants' motive behind the uncharged crimes of burglary and robbery is financial gain which is the same motive for the conspiracy charged in the indictment.

Tr. IV at 503-04. The defendants treat this justification as ruse; they argue that "the stated motive, that of 'financial gain' is next to useless in determining whether it was more likely that these Defendants committed the burglaries and the bombings." Appellant Soy's Br. at 15.

[5] In the context of Rule 404(b), we believe that district courts should approach a general claim of "financial gain" as a motive with great circumspection. In this case, however, we cannot say that the district court's determination can be characterized fairly as an abuse of discretion. In light of the early successes of this group, the district court was entitled to conclude that knowledge of the motive of financial gain would aid the jury in understanding the reasons for the formation and continuance of the bombing-burglary scheme at issue. In the summer of 1990, Prevatte, Williams, and Bergner burglarized M & G Metals in Chicago. Each gained approximately $300 for one night's work. The following summer, Williams and Prevatte stole $1000

from the Wolf Lake Park. After unsuccessfully trying to raid the safe at the Whiting License Branch, Prevatte, Soy, and Bergner successfully absconded with $20,000 from Nick's Liquors in Hammond. On the record, the jury would be entitled to reason that the group, encouraged by the result of these earlier endeavors, became more audacious and attempted other burglaries. As the group expanded its horizons, it did not limit itself to the methods with which it began. The defendants tested the concept of cutting telephone wires at the Currency Exchange in Hammond and eventually branched out into bombings as diversionary tactics. We cannot say, therefore, that the motive of financial gain, as evidenced by these earlier acts, was without significance to the jury's assessment. In any event, these incidents were also admissible as evidence of modus operandi, scheme, and background. [FN8]

FN8. Three acts listed by defendants do not fit easily into the above categories. First, Jerry Williams testified to Prevatte's theft of a jet ski and their commission of two instances of insurance fraud. Although somewhat more attenuated than the burglaries listed above, these acts do establish the affiliation of the parties in the conspiracy and the reasons why the alleged conspiracy may have formed. In addition, we agree with the government that these acts are admissible because defendant Prevatte opened the door. Counsel for defendant Prevatte conceded that the specific

instances mentioned could be validly admitted outside the scope of 404(b) so long as one of the defendants opened the door. This occurred during defendant Prevatte's cross-examination of Williams. On cross, Williams was questioned regarding why he cooperated with the activities of Prevatte and Soy; specifically counsel inquired if they had something on Williams. The counsel for the government on redirect simply resumed this line of questioning to clarify a point already made by counsel for Prevatte.

***777** [6][7] With respect to two acts of uncharged misconduct, we believe that the government failed to establish admissibility. The government introduced one of these acts during the testimony of Officer Thomas of the Hammond Police Department. Officer Thomas testified to pulling over Prevatte in the Lever Brothers Credit Union parking lot for having an expired registration. The relevance of this incident to the crimes at issue is tenuous at best. Nevertheless, we do not think that the defendants were in any way prejudiced by its introduction. In a transcript of over 2000 pages, this incident was described in less than six. In addition, counsel for the defendants brought out on cross that the police officer's concern for criminal activity was unfounded, that no burglary implements were found in the car, and that both defendants were very cooperative with the police. These added elements, in conjunction with the general limiting instruction given by the

INSTA-CITE

CITATION: 16 F.3d 767

Direct History

=> 1 **U.S. v. Prevatte,** 16 F.3d 767, 40 Fed. R. Evid. Serv. 499 (7th Cir.(Ind.), Feb 15, 1994) (NO. 92-3370, 92-3535)
Appeal After Remand
2 U.S. v. Prevatte, 66 F.3d 840 (7th Cir.(Ind.), Sep 14, 1995) (NO. 94-3360, 94-3361)

Related References

3 U.S. v. Bergner, 800 F.Supp. 659 (N.D.Ind., Jun 10, 1992) (NO. HCR 92-042(4))
4 U.S. v. Bergner, 800 F.Supp. 666 (N.D.Ind., Jun 10, 1992) (NO. HCR 92-042(3))

UNITED STATES of America, Plaintiff-Appellee,
v.
Ronald S. SULLIVAN, Defendant-Appellant.

No. 89-2233.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 15, 1989.

Decided Aug. 28, 1990.

Defendant was convicted in the United States District Court for the Northern District of Indiana, Rudy Lozano, J., of racketeering, conspiring to engage in racketeering activity, four counts of bribery, and conspiring to defraud United States. He appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) evidence that administrative assistant of defendant, who was administrator of city job-creating program under the Comprehensive Employment and Training Act (CETA), solicited bribe from contractor was admissible to show defendant's plan or intent to operate agency through pattern of bribery and corruption; (2) defendant, by failing to object to **cross-examination** of prosecution witness by **codefendant's** counsel which "opened the door" for testimony on **redirect** examination implying that defendant had accepted uncharged bribe, waived right to object to Government's follow-up questioning eliciting such evidence; and (3) evidence established that defendant had hidden ownership interest in corporation which allegedly received bribes, and thus supported convictions of four counts of bribery.

Affirmed.

[1] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
On review of decision to admit evidence, Court of Appeals will rarely disturb district court's exercise of discretion and will reverse only for an abuse of discretion.

[2] CRIMINAL LAW ⇐ 371(1)
110k371(1)
Evidence that administrative assistant of defendant, who was administrator of city job-creating program under CETA, solicited bribe from contractor was admissible in racketeering and bribery prosecution to show defendant's plan or intent to operate agency through pattern of bribery and corruption. Comprehensive Employment and Training Act of 1973, § 2 et seq., as amended, 29 U.S.C.(1976 Ed.Supp.V) § 801 et seq.; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 369.2(1)
110k369.2(1)
Evidence of uncharged crime may be admitted only if evidence is directed toward establishing matter in issue other than defendant's propensity to commit charged crime, evidence shows that other act is similar enough and close enough in time to be relevant to matter in issue, there is sufficient evidence to support finding by jury that defendant committed similar act, and probative value of evidence is not substantially outweighed by danger of unfair prejudice. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 698(1)
110k698(1)
Defendant, by failing to object to **cross-examination** of prosecution witness by **codefendant's** counsel which "opened the door" for testimony on **redirect** examination implying that defendant had accepted uncharged bribe, waived right to object to Government's follow-up questioning eliciting evidence implying such uncharged crime, in racketeering and bribery prosecution; district court had repeatedly warned defendant and finally ruled that pursuit of purported bribe of prosecution witness on cross-examination would open door for redirect examination by Government further exploring issue.

[5] CRIMINAL LAW ⇐ 1169.11
110k1169.11
Any error in trial court's permitting prosecution witness to testify on redirect examination as to statement implying that defendant had accepted uncharged bribe was harmless, in racketeering and bribery prosecution; declarant testified on rebuttal that he did not have any conversation about bribes with prosecution witness and accused witness of soliciting bribes. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] BRIBERY ⇐ 11

63k11
Evidence was sufficient to establish that defendant, who was administrator of city agency administering CETA program, hid his ownership interest in corporation to which contractors allegedly paid bribes, and thus was sufficient to support his convictions of four counts of bribery; testimony was presented that defendant had acknowledged that he was one-third owner of corporation's operation, and defendant was one of signatories on bank accounts of corporation. Comprehensive Employment and Training Act of 1973, § 2 et seq., as amended, 29 U.S.C.(1976 Ed.Supp.V) § 801 et seq.; 18 U.S.C.A. § 201(c).

[7] CONSPIRACY ⇦ 47(6)
91k47(6)
Conviction of defendant, who was administrator of city agency that administered CETA job training program, of conspiracy to defraud United States for allegedly forming corporation with two others and financing it through use of CETA funds was supported by sufficient evidence, despite defendant's contention that he did not know that companies bribing defendant's corporation were receiving CETA funds to which they were not entitled; evidence was presented of discussions regarding formation of defendant's corporation, contribution of funds to corporation by companies, and defendant's relationship with those who formed companies. 18 U.S.C.A. § 371; Comprehensive Employment and Training Act of 1973, § 2 et seq., as amended, 29 U.S.C.(1976 Ed.Supp.V) § 801 et seq.

[8] BRIBERY ⇦ 10
63k10
Testimony that witness saw defendant take shoe box containing $31,500 in cash from defendant's office to open two bank accounts for his corporations was admissible, in bribery and racketeering prosecution, to establish that prosecution witness paid substantial bribes to defendant, both in person and through third party.

[8] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ⇦ 121
319Hk121
Testimony that witness saw defendant take shoe box containing $31,500 in cash from defendant's office to open two bank accounts for his corporations was admissible, in bribery and racketeering prosecution, to establish that prosecution witness paid substantial bribes to defendant, both in person and through third party.

***4** Andrew B. Baker, Jr., Asst. U.S. Atty., Office of the U.S. Atty., Hammond, Ind., for plaintiff-appellee.

Gary S. Germann and Clark W. Holesinger, Portage, Ind., for defendant-appellant.

Before CUDAHY, EASTERBROOK and KANNE, Circuit Judges.

KANNE, Circuit Judge.

An eleven-count indictment was returned against Ronald S. Sullivan and two others charging them with crimes relating to the operation of a municipal government agency which administered a job-training program. The seven counts against Sullivan charged him with racketeering, conspiring to engage in racketeering activity, four counts of bribery, and conspiring to defraud the United States. A jury convicted him on all counts. Sullivan appeals his convictions. We affirm.

I. FACTUAL BACKGROUND

Sullivan was placed in charge of a program which had the worthy goal of providing training and employment to disadvantaged and unemployed individuals in Gary, Indiana. Unfortunately, Sullivan's personal goals were not as worthy. The Gary Manpower Administration ("GMA") was organized in 1974 as an agency of the City of Gary to administer the (now-repealed) federal Comprehensive Employment and Training Act ("CETA"). GMA disbursed CETA funds to contractors who provided job-training programs. Sullivan was the administrator of GMA from 1974 until 1983 when the agency began phasing out.

Several steps to ensure that CETA funds were properly disbursed to quality contractors were supposed to be employed by GMA. The solicitation of bids for contracts was to be well publicized. Contracts were to be awarded after bids were evaluated by several committees and individuals. The performance of contracts was to be monitored by an independent monitoring unit. However, Sullivan and others in GMA were able to subvert

these accountability procedures and control the disbursement of the CETA funds. The solicitation of bids was not publicized. The awarding of contracts was essentially at the sole discretion of Sullivan. The monitoring process was also undermined. For example, the head of the monitoring unit in the late 1970's, Shirley Montgomery, complained to Sullivan about contractors not complying with contract requirements. Sullivan took no action. Montgomery then made the mistake of complaining to Sullivan about the absenteeism of a GMA employee, Sheila Quarles. Soon thereafter, Sullivan transferred Montgomery and placed Quarles in charge of the monitoring unit. Not coincidentally, Quarles was Sullivan's girlfriend.

In 1979, Leonard Perkins and Carl Deloney formed a business partnership known as Plus, Ltd. After its formation, Plus was awarded a contract for a CETA training program. Before the first payment under the contract was made, Carl Deloney advised Perkins that there was a "cost of doing business in Gary." Carl Deloney told him that to do business in Gary money had to be paid to Sullivan. Perkins complied. He gave kickback money to Carl Deloney who then gave it to Sullivan.

Subsequently, more kickbacks were made to Sullivan in exchange for the awarding of contracts to Plus. Perkins ***5** began recording the payments, with certain codes, on checkbook stubs. In addition to having Carl Deloney deliver the kickbacks, Perkins delivered some payments to Sullivan personally. Perkins later learned that a Joe Cain also had to be paid. Cain was the director of operations of GMA and second in command to Sullivan. Perkins quit making the payments in 1981. After he stopped paying the kickbacks Perkins continued to submit bids but was not awarded any more contracts.

After his association with Perkins ended, Carl Deloney formed a company called VOTEC to carry out training contracts with GMA. When Carl died in 1982, his wife Bernice Deloney took over VOTEC. Just before he left GMA in September, 1981, Cain helped form and finance a company called DECAR.

In the fall of 1982, Sullivan and others began exploring the possibility of leasing the Visions Lounge and Gazebo Restaurant in the Sheraton Hotel in downtown Gary. Sullivan, Cain, Deloney and others met on two occasions and a new corporation called DVR was formed to lease the operation of the lounge and restaurant. To satisfy state liquor license requirements, the ownership of the corporation was publicly represented to be 60% owned by Cain through DECAR and 40% by Deloney through VOTEC. However, there was evidence showing that the actual ownership of DVR was one-third each by Sullivan, Deloney and Cain.

VOTEC and DECAR were awarded large contracts and increases by Sullivan while GMA was being phased out in 1982. The claims for payment submitted by VOTEC showed that many of its trainees were placed at either VOTEC, DVR or the Gazebo Restaurant. Indeed, some of these people testified that they either had never worked for these entities or had not been placed in full-time jobs.

In August of 1982, Adlee Hodges, the manager of training programs for GMA, was told by Sullivan that her position was being phased out because of lack of funding. However, Sullivan told her that she could continue working for GMA by becoming a contractor. Although Hodges had no business experience, she formed a job-training company with the help of Fred McKinney, the fiscal officer of GMA. Soon thereafter she submitted a proposal to GMA. Hodges was awarded a contract for $84,702.00 with the condition that she hire a friend of Sullivan. GMA provided furniture for Hodges's office and also assisted in moving the furniture. Hodges hired Sullivan's friend and her company was subsequently awarded more contracts. Later, Sullivan told Hodges that there was a way for contractors to say "thank you" for contracts. Soon thereafter, Hodges received a call from Sullivan's administrative assistant telling her to pay $2,000.00 to DVR. Hodges delivered a check to GMA for that amount payable to DVR.

During the course of his tenure as head of GMA, Sullivan, accompanied by Fred McKinney, made a trip to Sullivan's bank. Consistent with his "entrepreneurial skills" and in the tradition of other public officials who receive payback for favors bestowed, Sullivan produced a shoebox containing $31,500.00 in cash. Sullivan used these funds to open an account for two of his corporations.

II. PROCEDURAL BACKGROUND

In 1989, a federal grand jury returned an eleven-count indictment against Sullivan, Cain and Deloney. Count One charged Sullivan and the co-defendants with conducting an enterprise through a pattern of racketeering activities in violation of 18 U.S.C. § 1962(c). The count alleged thirty-three acts of racketeering in violation of 18 U.S.C. § 201(b) and (c). Count Two charged Sullivan and the co-defendants with conspiring to conduct an enterprise through a pattern of racketeering in violation of 18 U.S.C. § 1962(d). Counts Three, Five, Seven and Nine charged Sullivan with being a public official and soliciting and accepting something of value for himself or another in return for being influenced in the performance of an official duty, in violation of 18 U.S.C. § 201(c). Count Eleven charged Sullivan and the co-defendants ***6** with conspiring to defraud the United States in violation of 18 U.S.C. § 371.

Sullivan entered a plea of not guilty. After a jury trial, Sullivan was found guilty on all counts. He was sentenced to three years of imprisonment on Counts One and Two, and to two years of imprisonment on the remaining counts, with all sentences to run consecutively. In addition, Sullivan was fined a total of $55,000.00.

III. DISCUSSION

Sullivan raises a variety of issues on appeal but the primary focus is on evidentiary rulings concerning the testimony of two witnesses, Adlee Hodges and Shirley Montgomery.

A. Evidentiary Rulings

Two government witnesses, Hodges and Montgomery, were permitted to testify to certain conversations regarding Sullivan. Sullivan claims that the testimony of Hodges was admitted contrary to the requirements of Federal Rule of Evidence 404(b). Similarly, he claims that the testimony of Montgomery, although initially blocked under 404(b), was ultimately admitted in violation of that rule.

[1] On review of a decision to admit evidence, we will rarely disturb the district court's exercise of discretion and will reverse only for an abuse of discretion. United States v. Zapata, 871 F.2d 616, 621 (7th Cir.1989); United States v. Beasley, 809 F.2d 1273 (7th Cir.1987); United States v. Byrd, 771 F.2d 215, 219 (7th Cir.1985).

1. Testimony of Adlee Hodges

[2][3] Sullivan claims that the testimony of Hodges concerning the solicitation of a bribe by a Sullivan aide should have been excluded under Rule 404(b). [FN1] Evidence of other crimes not charged in the indictment may be admitted under Rule 404(b) only if: (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) there is sufficient evidence to support a finding by the jury that the defendant committed the similar act; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. United States v. Monzon, 869 F.2d 338, 344 (7th Cir.), cert. denied, --- U.S. ----, 109 S.Ct. 2087, 104 L.Ed.2d 650 (1989); United States v. Manganellis, 864 F.2d 528, 531-32 (7th Cir.1988); Zapata, 871 F.2d at 620. The rule excludes evidence of "other crimes" to show conformity with character, but permits the admission of such evidence for another purpose such as to show intent or plan.

> FN1. Federal Rule of Evidence 404(b) reads: Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Adlee Hodges testified that Sullivan told her there were ways for contractors to say "thank you" for being awarded contracts. Soon thereafter, she received a call from Sullivan's administrative assistant--Lisa Chapa. Before allowing the substance of Hodges's conversation with Chapa to be introduced into evidence, the district court evaluated the proffered testimony under the four-part test and found it to be admissible. Hodges then testified that Chapa told her that she was to contribute $2,000.00 to a closeout party for GMA

and to make the check payable to DVR. Hodges knew that Sullivan had an ownership interest in DVR, and she delivered the $2,000.00 check to Chapa at GMA.

As the district court determined, the evidence was directed toward establishing the issue of Sullivan's plan or intent to operate GMA through a pattern of bribery and corruption. The evidence was similar to and virtually contemporaneous with the other acts of bribery solicitation by Sullivan. The evidence could support a jury finding that Sullivan committed the act and its probative value was not substantially ***7** outweighed by the danger of unfair prejudice. Thus, we hold that the district court did not abuse its discretion by admitting this evidence.

2. Testimony of Shirley Montgomery

[4] Late in 1981, the Private Industry Council was incorporated. It had independent authority to approve certain kinds of CETA contracts without going through GMA. Shirley Montgomery was the head of the Council.

During its case-in-chief, in the course of the direct examination of Montgomery, but out of the presence of the jury, the government made an offer of proof that she was offered a bribe by Avatus Stone, owner of a company that had contracts with GMA. The government proffered that Stone told Montgomery that he would pay her "enough money to retire" if she would get his contract approved by the Council. Montgomery further indicated in the offer of proof that when she refused, Stone told her "you are certainly stupider than Ron [Sullivan] and Fred McKinney." The court considered the admissibility of this evidence under the Rule 404(b) test. The court determined that the evidence was not sufficient to show Sullivan committed a similar act and it would be unfairly prejudicial to Sullivan to admit the testimony.

After the court initially ruled that the proffered testimony would be inadmissible, counsel for co-defendant Cain informed the court that on cross-examination he intended to elicit from Montgomery the fact that she testified to the grand jury that Stone offered her a bribe. Cain's counsel stated that this questioning would lay a foundation for him to impeach Montgomery by calling Stone as a witness to deny making the bribe. The court informed counsel for the defendants that Cain's **cross-examination** might "open the door" on this matter and allow the government to pursue the bribe conversation in detail on **redirect** examination. Significantly, Sullivan raised no objection to the course outlined by **co-defendant** Cain.

The government then concluded Montgomery's testimony without any mention of the bribe conversation with Stone. The jury was excused for the day. The judge met with the attorneys and Cain's counsel reiterated his intention to ask Montgomery whether she told the grand jury that Stone attempted to bribe her. Again, no objection was raised by Sullivan. The next morning the judge again met with counsel outside the presence of the jury and Cain's counsel repeated his intention to pursue the matter for the purpose of impeachment. The court then ruled: [FN2]

> FN2. This procedure utilized by the court for making an advanced ruling on the admissibility of evidence was in accordance with Fed.R.Evid. 103(c).

> It is the court's position right now, unless I hear argument otherwise, gentlemen, that I have no choice but to allow [Cain's counsel] to go into it for the purpose [of impeachment]. Are there going to be any objections?

Notwithstanding the court's indication of its position regarding the admissibility of the Stone-Montgomery bribe conversation and call for any objections, Sullivan remained silent. On cross-examination, Cain's counsel, without objection from Sullivan, elicited from Montgomery her statement that Stone offered her a bribe. As expected, on redirect examination the government sought to bring out the rest of the conversation about the bribe.

> (Redirect Examination by the government:)
> Q What did he say?
> A Told me if I would get a contract passed through my Board of Directors that he would give me enough money to retire; I wouldn't ever have to work again.
> Q What did you tell him?
> A I told him he--there was no way he could do that. You know, I did not--would not take myself and try to present to the board why we should do a contract with him with all of his contracts showed that he did not do what he was supposed

to do, having done contracts with Gary Manpower for a long time; that he did not--I *8 could not show the council performance where people had gone through his training and had been placed, and I would not subject myself to what I knew I would get from my council.
Q So you said no deal, I won't take it?
A That's right.
Q What did he say to you?
A Told me how dumb and stupid I--
MR. GERMANN (Sullivan's Counsel): Objection.
MR. MILNER (Government Counsel): Excuse me, ma'am.
MR. GERMANN: Objection, Your Honor, two reasons. One, for the reasons that I had indicated earlier yesterday, and secondly, beyond the scope of cross examination of Mr. Jones (Cain's counsel).
THE COURT: With regards to what was mentioned earlier I gave counsel an opportunity to object earlier; they did not. That's overruled and it's overruled insofar as being outside the scope of cross examination. That was gone into.
MR. MILNER:
Q What did--what did Mr. Jones say to you when you told him you didn't want the bribe?
A Mr. Stone.
Q Mr. Stone, I'm sorry?
A Told me how stupid I was, how dumb and stupid I was, and he was certainly glad that Ron and Fred McKinney wasn't dumb as I was.
(Tr. Vol. 5, p. 1018-20.)

The issue presented is whether, by failing to interpose any objection to the cross-examination by Cain's counsel, which "opened the door" for the redirect examination testimony that implied that Stone had bribed Sullivan, Sullivan waived his right to object to the government's follow-up questioning. The court had repeatedly warned counsel for the defendants and finally ruled that the pursuit of Stone's purported bribe of Montgomery on cross-examination would open the door for redirect examination by the government on that issue. Once the subject of the bribe offer was before the jury, the court reasoned that it would be unfair to prohibit the government from exploring the matter further. It was clear to all trial participants, including Sullivan, exactly what additional testimony would be given by Montgomery on **redirect** examination.

Although it was Sullivan's **co-defendant** Cain who elicited the response from Montgomery which "opened the door" for the government, Sullivan acquiesced in Cain's **cross-examination** and thus waived his right to prohibit the government's exploration of the matter on **redirect** examination. Sullivan could not sit back, let the "door opening" evidence come in unchallenged during cross-examination, and then assert that the government's redirect examination on that issue provided testimony which was unfairly prejudicial under Rule 404(b). The response was not beyond the scope of the cross-examination. The district court did not abuse its discretion in overruling Sullivan's objection and allowing the government to pursue the full conversation between Montgomery and Stone on redirect examination.

[5] Even if this were not the case, any error in the admission of this brief statement would have been harmless. The only testimony the government elicited in this area dealing with Sullivan was that single answer to the question of Stone's response when Montgomery refused the bribe: "Mr. Stone ... told me how stupid I was, how dumb and stupid I was, and he was certainly glad that Ron and Fred McKinney wasn't dumb as I was." The adverse effect of Montgomery's testimony on Sullivan was slight given the single response which merely cast an inference of wrongdoing compared to the substantial amount of other evidence introduced against Sullivan. In addition, Sullivan was actually aided by Stone's rebuttal testimony which served to offset that of Montgomery. Stone denied having any conversation about bribes with her, denied paying any bribes with regard to GMA, and accused Montgomery of soliciting bribes.

B. Sufficiency of the Evidence

1. Standard of Review

An appellant challenging the sufficiency of the evidence to support a jury verdict *9 bears a "heavy burden" in his attempt to overturn the verdict. United States v. Nesbitt, 852 F.2d 1502, 1509 (7th Cir.1988), cert. denied, 488 U.S. 1015, 109 S.Ct. 808, 102 L.Ed.2d 798 (1989). We review all the evidence and all reasonable inferences drawn therefrom in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942);

United States v. Vega, 860 F.2d 779, 793 (7th Cir.1988). We must uphold a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); United States v. Grier, 866 F.2d 908, 922 (7th Cir.1989).

2. The Bribery Counts

[6] Sullivan argues that the evidence was insufficient to support his convictions under 18 U.S.C. § 201(c) [FN3]--the four bribery counts. These counts related to payments by Cain and Deloney to DVR. Specifically, Sullivan challenges the sufficiency of the evidence on the element of soliciting or receiving something of value. The government introduced evidence to show Sullivan's ownership interest in DVR and his attempts to gain political favor with Gary city officials who wanted to prevent the closing of the downtown Sheraton Hotel. Sullivan received nothing of value, he argues, because he was not an employee of DVR and any political stature or influence which he gained is intangible and cannot be considered as "anything of value" under the statute.

> FN3. As applicable to Sullivan, 18 U.S.C. § 201(c) reads: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act; or (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (3) being induced to do or omit to do any act in violation of his official duty.

This argument must fail. We need not address the assertion that an intangible, such as the enhancement of political influence or stature, does not qualify as something of "value" under the statute. Regardless of the claim of intangible benefits, there was sufficient evidence for the jury to find that Sullivan had a very tangible hidden ownership interest in DVR. He received tangible value from the payments made to DVR. For instance, the manager of the Visions Lounge testified that Sullivan acknowledged that he was a one-third owner of the operation. Later, Cain confirmed to the manager that the lounge was owned by Sullivan, Deloney and Cain. Deloney told a tax advisor that Sullivan, Cain and he were each one-third owners of DVR. In addition, Sullivan was one of the signatories on the bank accounts of DVR. The determination that Sullivan had an ownership interest in DVR was one for the jury and there was substantial evidence presented to support that proposition. Because the evidence was sufficient to support the other elements of the bribery counts as well, we affirm the convictions.

3. The Racketeering and Racketeering Conspiracy Counts

Sullivan was convicted in Count One of conducting an enterprise through a pattern of racketeering activity under 18 U.S.C. § 1962(c) and in Count Two of conspiring to conduct such an enterprise under 18 U.S.C. § 1962(d). He argues that his conviction on Count One should fail because that charge required, pursuant to the jury instruction given, that at least one act of bribery occur after June 22, 1983. This argument, however, is contingent on our finding insufficient evidence to support the four bribery convictions because they were the charged racketeering acts which occurred after June 22, 1983. Sullivan's challenge to Count Two is also contingent on the success of his challenge to the bribery convictions. Because we affirmed the bribery convictions, these arguments are unavailing and the evidence is sufficient to ***10** support the convictions on Counts One and Two.

4. The Conspiracy to Defraud the United States Count

[7] Count Eleven charged Sullivan, Cain and Deloney with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The count alleged Sullivan, Cain and Deloney, by agreement, formed DVR and financed it through the use of CETA funds. Sullivan challenges the sufficiency of the evidence to support the verdict because, he argues, the evidence did not show that he knew DECAR and VOTEC were receiving CETA funds to which they were not entitled. However, the evidence of Sullivan's control over the distribution of CETA funds, the dubious placement of trainees

by VOTEC and DECAR, the discussions regarding the formation of DVR, the contribution of funds to DVR by VOTEC and DECAR, and Sullivan's relationship with Cain and Deloney combined to provide substantial evidence from which the jury could infer his knowledge and participation in the conspiracy. The money which DECAR and VOTEC funnelled to DVR came from GMA as CETA funds. Thus, there was sufficient evidence to support the verdict.

C. Admission of Evidence of Cash in a Shoebox

[8] Sullivan argues that the district court erred by admitting testimony of McKinney that he saw Sullivan take a shoebox containing $31,500 in cash from his office to open two bank accounts for his corporations. The district court admitted the evidence over Sullivan's objection that it was unduly prejudicial under Federal Rule of Evidence 403.

As we previously stated, we give much deference to a district court's determination to admit evidence and will reverse only for abuse of discretion. Zapata, 871 F.2d at 621; United States v. Jackson, 886 F.2d 838 (7th Cir.1989); United States v. Allen, 798 F.2d 985, 1001 (7th Cir.1986). Here, the district judge did not abuse his discretion in balancing the relevancy of the evidence with any danger of unfair prejudice. Much of the evidence against Sullivan was to establish that Perkins paid substantial bribes to Sullivan, both in person and through Carl Deloney. The evidence which disclosed a large amount of cash maintained in a shoebox was highly probative of the bribe payments, and served to corroborate the testimony of Perkins. Its probative value was not substantially outweighed by the danger of any prejudice to Sullivan.

IV. CONCLUSION

For the foregoing reasons, the convictions of Ronald Sullivan are

AFFIRMED.

END OF DOCUMENT

INSTA-CITE

CITATION: 911 F.2d 2
=> 1 **U.S. v. Sullivan,** 911 F.2d 2, 31 Fed. R. Evid. Serv. 106 (7th Cir.(Ind.), Aug 28, 1990) (NO. 89-2233)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
23A C.J.S. Criminal Law Sec.1232 Note 7+ (Pocket Part)

UNITED STATES of America, Plaintiff-Appellee,
v.
Ramon Vasquez MORENO, Defendant-Appellant.

No. 80-1280.

United States Court of Appeals,
Fifth Circuit.
Unit A

June 30, 1981.

Defendant was convicted before the United States District Court for the Southern District of Texas at Brownsville, James DeAnda, J., of possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute, and he appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) evidence on the possession count was sufficient to show that defendant had joint dominion or control over the marijuana, and (2) in light of other testimony given by government witness without objection connecting defendant's brother specifically and defendant's family in general with past marijuana transactions, and considering the statements and actions of the trial court during the Government's redirect examination of the aforesaid witness, the trial court did not abuse its discretion in admitting into evidence references during the witness' redirect examination to the past marijuana dealings of defendant's brothers.

Affirmed.

[1] CRIMINAL LAW ⇐ 1144.13(5)
110k1144.13(5)
Standard of review in a criminal case when issue is the sufficiency of the evidence is whether jury could have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence, and in applying that standard, the Court of Appeals must consider the evidence and all reasonable inferences therefrom in light most favorable to the government.

[1] CRIMINAL LAW ⇐ 1159.2(1)
110k1159.2(1)
Standard of review in a criminal case when issue is the sufficiency of the evidence is whether jury could have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence, and in applying that standard, the Court of Appeals must consider the evidence and all reasonable inferences therefrom in light most favorable to the government.

[2] CRIMINAL LAW ⇐ 510
110k510
Generally, a conviction may be based solely on the uncorroborated testimony of an accomplice if the testimony is not incredible or otherwise insubstantial on its face.

[3] DRUGS AND NARCOTICS ⇐ 65
138k65
Possession of a controlled substance with intent to distribute it may be either actual or constructive. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

[4] DRUGS AND NARCOTICS ⇐ 67
138k67
As with actual possession, constructive possession of contraband may be exclusive or joint and is susceptible of proof by circumstantial as well as direct evidence.

[4] DRUGS AND NARCOTICS ⇐ 123.2
138k123.2
Formerly 138k123(2), 138k123
As with actual possession, constructive possession of contraband may be exclusive or joint and is susceptible of proof by circumstantial as well as direct evidence.

[5] DRUGS AND NARCOTICS ⇐ 65
138k65
Constructive possession of contraband may be shown by "ownership, dominion or control over the contraband itself, or dominion or control over the premises or the vehicle in which the contraband was concealed."--Id.

[6] DRUGS AND NARCOTICS ⇐ 123.2
138k123.2
Formerly 138k123(2), 138k123
On the evidence presented, jury could have reasonably concluded beyond a reasonable doubt that, instead of being a mere "messenger," defendant was an integral part of narcotics distribution operation and that he enjoyed a close and continuous

working relationship with those who may have had actual physical possession of the marijuana; this evidence was sufficient to show that defendant had joint dominion or control over the drug. Comprehensive Drug Abuse Prevention Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

[7] DRUGS AND NARCOTICS ⚿ 65
138k65
Physical custody of narcotics by an employee or agent whom one dominates, or whose actions one can control, is sufficient to constitute constructive possession by the principal.

[8] WITNESSES ⚿ 328
410k328
Government witness' testimony connecting defendant's two brothers with past marijuana transactions in which he had engaged was relevant to the prosecution of defendant for marijuana offenses; it was relevant to the extent that it tended to rehabilitate the credibility of the witness' memory after it was somewhat impeached on cross-examination by several questions of two defense counsel concerning the witness' inability to remember most of the people with whom he had worked in past marijuana transactions. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; Fed.Rules Evid. Rules 403, 403 comment, 28 U.S.C.A.

[9] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
Process of balancing the probative value of evidence against its potential prejudicial effect is within discretion of trial judge, whose determination is to be upheld unless an abuse of discretion is found. Fed.Rules Evid. Rules 403, 403 comment, 28 U.S.C.A.

[10] CRIMINAL LAW ⚿ 338(7)
110k338(7)
In light of other testimony given by government witness without objection connecting defendant's brother specifically and defendant's family in general with past marijuana transactions, and considering the statements and actions of the trial court during the Government's redirect examination of the aforesaid witness, the trial court did not abuse its discretion in admitting into evidence references during the witness' redirect examination to the past marijuana dealings of defendant's brothers. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; Fed.Rules Evid. Rules 403, 403 comment, 28 U.S.C.A.

***311** Phil Harris, Weslaco, Tex., for defendant-appellant.

James R. Gough, Asst. U. S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, THORNBERRY and JERRE S. WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Ramon Vasquez Moreno, appellant, was convicted by a jury of possession of marijuana with intent to distribute it in violation of 21 U.S.C. s 841(a)(1) (1976), and of conspiracy to possess marijuana with intent to distribute it in violation of 21 U.S.C. ss 841(a)(1) and 846 (1976). Appellant now appeals these convictions on two grounds: (1) the alleged insufficiency of the evidence on the possession count; and (2) the error allegedly committed by the district court in admitting into evidence certain references to the past marijuana dealings of appellant's brothers. Since we find that the evidence was sufficient to sustain appellant's conviction on the possession count, and that the district court did not abuse its discretion on the evidentiary point, we affirm.

I. Facts

Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), the facts are as follows.

Appellant operated Moreno's Gulf Service Station in Los Fresnos, Texas, located in the Rio Grande Valley of Texas. According to the uncorroborated testimony of Johnny Lee Guidry, an unindicted co-conspirator, appellant, while at his service station on August 16, 1977, told Guidry to load 1,936 pounds of marijuana which was owned by appellant's

brother, Carlos Moreno. The marijuana, contained in burlap sacks, and the tractor-trailer, upon which the marijuana was to be loaded, were concealed in a shed located about 20 miles away in Las Llesgas, Texas. Carlos Moreno also owned the tractor-trailer. Surprisingly, the record does not reflect the ownership of the shed.

Guidry, Juan Vasquez, and a third, unidentified person drove to the shed and loaded the sacks containing the marijuana onto the trailer, covering the sacks with grain and the trailer itself with a tarpaulin. Upon completing these tasks, the three men returned to appellant's service station and informed appellant that the trailer had been loaded. Guidry and the other two men were to be paid $200.00 each by either Carlos or Ramon Moreno for their work. Payment was to be made after the marijuana had reached its destination of Austin, Texas, and payment therefor had been received.[FN1]

FN1. None of these men received payment for his services because the marijuana never reached its destination.

When the day turned to night, Guidry, Juan Vasquez, Julian Henry Garza, Paulino Pena, and Vicente Arredondo went to the shed and connected the trailer to the tractor. Then, Arredondo, driving the marijuana-ladened tractor-trailer, and Pena and Garza, following in an automobile, left the shed for Austin. The latter two men were supposed to call Ramon Moreno, appellant here, to report whether the tractor-trailer had gotten through the border patrol checkpoint in Sarita, Texas, located between Las Llesgas and Austin. After the tractor-trailer departed, Guidry and Vasquez returned to appellant's service station. Pena and Garza eventually called the service station, ***312** informing everyone that the border patrol agents at the border patrol checkpoint had discovered the marijuana. The next morning, appellant, his brother Carlos, Guidry, Pena, Garza, and two or three other people met at appellant's service station and discussed the preceding night's events.

Appellant, along with three other codefendants,[FN2] was indicted for conspiracy to possess marijuana with intent to distribute it, and for possession of marijuana with intent to distribute it. Appellant was convicted on both counts. He does not challenge the sufficiency of the evidence on the conspiracy count. He does, however, challenge the sufficiency of the evidence on the possession count. He further contends that both of his convictions should be reversed on the ground that the district court committed reversible error in permitting the government to elicit on its redirect examination of Guidry references to the past marijuana dealings of appellant's brothers. We address each contention separately.

FN2. Julian Henry Garza, Juan Vasquez, and Paulino Pena.

II. Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to support his conviction for the substantive offense of possession of marijuana with intent to distribute it. He argues that there was insufficient evidence to show that he "possessed" the marijuana, and claims that he instead was a mere messenger who simply conveyed an instruction from his brother Carlos to Guidry. Appellant notes that the only testimony relating to him was that of Guidry, whose testimony was given as part of a plea bargaining agreement in connection with a previous conviction for possession of cocaine.

[1] The standard of review in a criminal case when the issue is the sufficiency of the evidence is whether the jury could have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence. United States v. Rodgers, 624 F.2d 1303, 1306 (5th Cir. 1980), cert. denied, -- U.S. --, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981); United States v. Witt, 618 F.2d 283, 284 (5th Cir. 1980), cert. denied, --U.S. --, 101 S.Ct. 234, 66 L.Ed.2d 107 (1980). In applying this standard, we must consider the evidence and all reasonable inferences therefrom in a light most favorable to the government. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Thompson, 603 F.2d 1200, 1204 (5th Cir. 1979).

[2] We note at the outset that the absence of corroboration of Guidry's testimony regarding appellant does not by itself bar conviction. Generally, a conviction may be based solely upon the uncorroborated testimony of an accomplice if the testimony is not incredible or otherwise insubstantial on its face. United States v. Garner, 581 F.2d 481,

486, n. 2 (5th Cir. 1978); United States v. Kelley, 559 F.2d 399, 400 (5th Cir. 1977), cert. denied, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 497 (1977).

[3] It is well settled that possession of a controlled substance with the intent to distribute it, in violation of 21 U.S.C. s 841(a)(1) (1976), may be either actual or constructive. United States v. Martinez, 588 F.2d 495, 498 (5th Cir. 1979); United States v. Felts, 497 F.2d 80, 82 (5th Cir. 1974), cert. denied, 419 U.S. 1051, 95 S.Ct. 628, 42 L.Ed.2d 646 (1974).

[4][5] As with actual possession, constructive possession may be exclusive or joint, United States v. Martinez, 588 F.2d at 498, and is susceptible of proof by circumstantial as well as direct evidence. United States v. Maspero, 496 F.2d 1354 (5th Cir. 1974). Constructive possession may be shown by "ownership, dominion or control over the contraband itself, or dominion or control over the premises or the vehicle in which the contraband was concealed." United States v. Martinez, 588 F.2d at 498, quoting United States v. Salinas-Salinas, 555 F.2d 470, 473 (5th Cir. 1977). "(M)ere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession." United ***313** States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973) (citations omitted).

Since there is no evidence that appellant was ever in actual, physical possession of the marijuana, his conviction for possession may stand only if the evidence establishes constructive possession. Having carefully reviewed the record, we find that the evidence is sufficient to establish that appellant had dominion or control over the marijuana throughout the transaction. While at his service station, appellant instructed Guidry to go to the shed and load the marijuana into the tractor-trailer. Either appellant or his brother Carlos was to pay Guidry and the other men who participated in the operation for their work in loading and delivering the marijuana. After the men loaded the marijuana, they immediately returned to appellant's service station and informed appellant that the loading had been performed. When the tractor-trailer departed for its intended destination, the participants who remained in Los Fresnos congregated at appellant's service station that night. Further, it was appellant who was to receive the telephone call from Pena and Garza informing everyone whether the tractor-trailer managed to get past the border patrol station without the marijuana being discovered.[FN3] Finally, appellant's service station was the location at which the participants in this distribution scheme, including appellant, met the morning after the marijuana was discovered.

FN3. The record does not indicate who actually received the telephone call.

[6][7] From this evidence, the jury could have reasonably concluded beyond a reasonable doubt that, instead of being a mere "messenger," appellant was an integral part of the narcotics distribution operation and that he enjoyed a close and continuous working relationship with those, such as his brother Carlos or Guidry, who may have had actual physical possession of the marijuana. This evidence is sufficient to show that he had joint dominion or control over the drug. See United States v. Candanoza, 431 F.2d 421, 424-25 (5th Cir. 1970); Cazares-Ramirez v. United States, 406 F.2d 228, 233-34 (5th Cir. 1969), cert. denied, 397 U.S. 926, 90 S.Ct. 933, 25 L.Ed.2d 106 (1970); United States v. McGruder, 514 F.2d 1288, 1290 (5th Cir. 1975), cert. denied, 423 U.S. 1057, 96 S.Ct. 790, 46 L.Ed.2d 646 (1976); cf. United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973) (insufficient working relationship found). Not only did appellant instruct and monitor the progress of the men who had actual possession of the marijuana, but he, along with his brother Carlos, also had the authority and the responsibility to pay them for their services. Physical custody of narcotics by an employee or agent whom one dominates, or whose actions one can control, is sufficient to constitute constructive possession by the principal. United States v. Maroy, 248 F.2d 663 (7th Cir. 1957), cert. denied, 355 U.S. 931, 78 S.Ct. 412, 2 L.Ed.2d 414 (1958); United States v. Hernandez, 290 F.2d 86, 90 (2d Cir. 1961).

We accordingly cannot say that, as a matter of law, reasonable conclusions other than guilt could be drawn from the evidence viewed most favorably to the government. We will not disturb the jury verdict on the possession count.

III. Admissibility of Evidence

Appellant's second contention on appeal is that the district court erred in allowing the prosecution to elicit, over objection, testimony from government witness Guidry concerning past marijuana dealings of appellant's brothers. After having carefully reviewed the context in which this testimony was given, and having considered the nature of similar testimony given earlier during the course of Guidry's testimony, we find that this contention is without merit.

During the cross-examination of Guidry by counsel for one of the codefendants in this case, counsel elicited the fact that Guidry had loaded marijuana approximately fifty times in the preceding four or so years. Defense counsel for some of the codefendants then conducted a general attack on Guidry's credibility by attempting to show a disparity between Guidry's memory of past loadings and his memory of the ***314** transaction that is the subject of the prosecution in this case. Counsel for one codefendant asked Guidry to recount some of the specifics of his past loadings, such as the number of sacks involved in each transaction and the incidents in which he had not received payment for his services. Guidry had noticeable difficulty recalling these facts, even though he could do so with respect to the transaction at hand. Defense counsel then asked Guidry, without objection from appellant's counsel, whether it was true that Guidry could remember the names of only some of the people with whom he had worked in past marijuana transactions. He then elicited the fact that Guidry could not recall the names of everyone with whom he had worked in the past transactions. Counsel for another codefendant continued this line of attack, eliciting the fact that the transaction involved in this case was one of only a very few transactions with respect to which Guidry could recall specific people, and the only one about which he had made specific identifications to law enforcement authorities. The purpose behind all of this cross-examination, of course, was to suggest that Guidry's unusually good memory as to the marijuana transaction involved in this case was either mistaken, fabricated by Guidry, or coached by the government.

On redirect examination,[FN4] government counsel asked Guidry whether the occasions ***315** on which he had loaded marijuana in the past, as Guidry had testified he had done on cross-examination, had been for "the same Moreno family." Appellant's attorney's objection was overruled on the ground that the government was referring to Carlos Moreno, appellant's brother, whose name, according to the court, "(had) been bandied around in this case both by the defense and the prosecution " Record, vol. 2, at 86. Government counsel responded affirmatively to the court's query whether Carlos Moreno was indeed the subject of the government's question. The government then narrowed its question to one concerning Carlos Moreno, asking whether any arrests had arisen in any of Carlos Moreno's past transactions. After asking a few questions about a Carlos Berrera from Mexico, the government then asked Guidry, over defense counsel's objection, whether he became involved with Carlos Moreno when he (Guidry) first began to engage in marijuana transactions. An ensuing discussion between defense counsel and the court on the propriety of the questioning prevented Guidry from ever answering the question. Then, over defense counsel's objection, the government elicited the fact that Guidry knew a Eugenio Moreno, that Eugenio Moreno was "(o)ne of the brothers," and that Guidry had "work(ed) for him at the same time (he had) worked for Carlos Moreno." Record, vol. 2, at 88. At this point, the court sustained appellant's attorney's objection to any further questions along this line. The court stated that the government had been permitted to ask about the names of people in past transactions, but that it was not to inquire into the specifics of any past transaction.

FN4. The relevant portion of the government's redirect examination of Guidry proceeded as follows: BY MR. DE LUNA: Q Now, Mr. Guidry, you were asked on cross-examination about all of these many times you have loaded marijuana before. Do you recall that? A Yes. Q Was that for the same Moreno family? A Yes, it was. MR. WEISFELD: We will object to that. There is one man here at trial and there is not the Moreno family. I am representing Ramon Moreno and that's it. THE COURT: Well, Carlos Moreno's name has been bandied around in this case both by the defense and the prosecution, and I will overrule the objection. I assume that's what he is referring to. MR. DE LUNA: Yes, sir. BY MR. DE LUNA: Q And as you were working for Mr. Moreno, at the time for Carlos Moreno, the tractor-trailers you loaded, did some of them get busted? A This one did. Q But at any of the other times

you have been asked about, did some of the others get busted? A I don't believe so. Q Is that the reason strike that. You testified there were some people also from the Mexican side involved. Do you know a person by the name of Carlos Berrera? A Yes, I do. Q Who is that? A A person that I used to get pot from, marijuana. Q Where is he from? A Matamoros. At least he lives there. Q Now, when you first became involved in these marijuana deals, did you become involved with Carlos Moreno? A Would you repeat that? MR. WEISFELD: Your Honor, we will object to the continued examination along this line. It has nothing to do with the case THE COURT: Well, he has been asked on cross about various transactions and had been berated because he didn't remember some of the names, and I guess he is trying to go into those matters. I will overrule your objection. MR. MORENO (counsel for a codefendant): If it please the Court, with all due respect, those questions were addressed to the matter of impeachment, whether or not this witness was telling the truth. It doesn't go to the issue of what happened here on August 16 and 17 of 1977. THE COURT: Well, defense counsel went into it. I am going to overrule the objection. BY MR. DE LUNA: Q Do you know Eugenio Moreno? A Yes, I do. Q Who is he? A One of the brothers. MR. WEISFELD: Your Honor, may we approach the Bench, please? THE COURT: No, sir. I will let you approach the Bench during the recess. BY MR. DE LUNA: Q Did you work with him? A Yes, I had. Q Did you work for him at the same time you worked for Carlos Moreno? A Yes, I have. MR. WEISFELD: Would you note our exception to this line of questioning, Your Honor? THE COURT: I don't mind him mentioning other names because I think he was asked on cross. MR. DE LUNA: They opened the door, Your Honor. THE COURT: Well, I am not going to open the door. We are going to try these defendants and nobody else, Mr. De Luna. MR. DE LUNA: Judge, they questioned that he couldn't remember the other people, and I am asking him if he remembers the other people. THE COURT: That's fine. You have asked him, but don't go into any other transactions because I have sustained the objection. MR. DE LUNA: That's fine. BY MR. DE LUNA: Q Do you know whether Eugenio Moreno is related to Ramon Moreno? THE COURT: I will sustain the objection. The jury will not consider that for any purpose whatsoever. Don't go into it any more, Mr. De Luna, please.

The basis of appellant's objection to Guidry's testimony apparently was that the testimony was irrelevant and that, even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice that it presented. See Fed.R.Evid. 403.

[8] Contrary to appellant's first assertion, Guidry's testimony connecting appellant's two brothers with past marijuana transactions in which he had engaged was relevant to the case. It was relevant to the extent that it tended to rehabilitate the credibility of Guidry's memory after it was somewhat impeached on cross-examination by the several questions of two defense counsel concerning Guidry's inability to remember most of the people with whom he had worked in past marijuana transactions.

[9] The more difficult question, however, is whether the relevance of this testimony was substantially outweighed by the danger of unfair prejudice. "Unfair prejudice," within the meaning of Rule 403 of the Federal Rules of Evidence, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed.R.Evid. 403, Advisory Committee's Note. The process of balancing the probative value of evidence against its potential prejudicial effect is within the discretion of the trial judge, whose determination is to be upheld unless an abuse of discretion is found. United States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978); United States v. McRae, 593 F.2d 700, 707-08 (5th Cir. 1979), cert. denied, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979); United States v. Vitale, 596 F.2d 688, 689 (5th Cir. 1979), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979).

***316** Viewed in isolation, without considering his entire testimony, Guidry's testimony on redirect examination concerning appellant's brothers appears to have posed some danger of unfair prejudice in that it could have led the jury to convict appellant either because he was somehow "guilty by association" or because he was a member of a family that had dealt with marijuana in the past.

Nevertheless, it was within the district court's discretion to determine both whether the evidence

presented "an undue tendency to suggest a decision on an improper basis," Fed.R.Evid. 403, Advisory Committee's Note (emphasis added), and, even if it did, whether this unfair prejudice substantially outweighed the probative value of the evidence. Fed.R.Evid. 403; United States v. McRae, 593 F.2d at 707. After carefully reviewing the record as a whole and the dialogue during the redirect examination of Guidry in particular, we hold that the district court did not abuse its discretion in allowing into evidence Guidry's testimony concerning the past marijuana transactions of appellant's brothers.

In the first place, Guidry's testimony on **redirect** examination about appellant's brothers was largely cumulative to testimony elicited by defense counsel themselves on **cross-examination.** Earlier, during **cross-examination** by counsel for one of appellant's **codefendants,** Guidry testified, without objection from appellant's counsel, that he had loaded marijuana for Carlos Moreno in the past. Guidry further testified on cross-examination, again without objection, that one difference between the transaction involved in this case and past transactions in which he had been involved was that, in the transaction involved here, "(t)he Morenos had their own trailer now." Guidry then added that "(t)hey had used other people's trailers." Like his testimony during redirect examination, this testimony strongly suggests that at least some members of the Moreno family have been involved in marijuana transactions in the past. In fact, on direct examination Guidry testified, without objection from defense counsel or further elaboration by Guidry, that appellant himself had "sent" Guidry to the shed in Las Llesgas "before." Guidry's testimony on redirect examination regarding appellant's brothers thus was largely cumulative of his earlier testimony. The trial court apparently recognized this fact to some extent when it noted during the government's redirect examination of Guidry that "Carlos Moreno's name has been bandied around in this case both by the defense and the prosecution " Record, vol. 2, at 86. The trial court properly could view this cumulative effect as significantly reducing any unfair prejudice Guidry's testimony on redirect examination may have had. See United States v. Jackson, 576 F.2d at 49, n. 5. If there were prejudice, it was created largely by defense counsel themselves in their cross-examination of Guidry.

In addition to the largely cumulative effect of Guidry's redirect examination testimony, any unfair prejudice caused by this testimony was further reduced by the trial court's statements and actions during the testimony. When Guidry testified that he had loaded marijuana for "the same Moreno family" before, the court narrowed "the Moreno family" to Carlos Moreno, about whose past marijuana dealings there already had been substantial testimony. Further, after allowing the government to ask a few questions about appellant's brother Eugenio, the court cut off any further questions along that line and instructed the jury not to consider "for any purpose whatsoever" the government's question whether Eugenio Moreno was related to appellant. The court properly allowed the government to inquire into the names of people in past transactions. This questioning was a direct response to the trial strategy of defense counsel, who had first asked questions concerning names. Beyond this inquiry into names, however, the court did not permit the government to delve into the specifics of any past transaction.

[10] Accordingly, in light of the other testimony given by Guidry without objection connecting appellant's brother Carlos specifically and appellant's family in general with past marijuana transactions, and ***317** considering the statements and actions of the trial court during the government's redirect examination of Guidry, we cannot say that the trial court abused its discretion in admitting into evidence the references during Guidry's redirect examination to the past marijuana dealings of appellant's brothers. See United States v. Brown, 482 F.2d 1226 (8th Cir. 1973) (rehabilitation of attacked memory with testimony regarding narcotics traffic and habits of narcotics dealers in area); United States v. Vaughn, 486 F.2d 1318 (8th Cir. 1973) (after impeachment suggesting improbability, rehabilitation showing recent similar heroin transactions by other persons allowed).

Since we reject both of appellant's contentions on this appeal, we affirm his conviction on both counts.

AFFIRMED.

END OF DOCUMENT

INSTA-CITE

CITATION: 649 F.2d 309

Direct History

=> 1 **U. S. v. Moreno,** 649 F.2d 309, 8 Fed. R. Evid. Serv. 1041 (5th Cir.(Tex.), Jun 30, 1981) (NO. 80-1280)

Negative Indirect History

Declined to Extend by
2 Lewis v. Velez, 149 F.R.D. 474, 39 Fed. R. Evid. Serv. 402 (S.D.N.Y., May 19, 1993) (NO. 89 CIV. 5085 (MJL))

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
28 C.J.S. Drugs and Narcotics Sec.190 Note 60
28 C.J.S. Drugs and Narcotics Sec.191 Note 74
98 C.J.S. Witnesses Sec.488 Note 61 (Pocket Part)

Citation | Rank(R) | Page(P) | Database | Mode
640 F.2d 1000 | R 11 OF 24 | P 1 OF 54 | ALLFEDS | Page
7 Fed. R. Evid. Serv. 1678
(Cite as: 640 F.2d 1000)

UNITED STATES of America, Appellee,
v.
Gary HALBERT, Appellant.
No. 78-3278.
United States Court of Appeals,
Ninth Circuit.
Argued Sept. 4, 1979.
Submitted Jan. 28, 1980.
Decided March 6, 1981.

The United States District Court for the Central District of California, Malcolm M. Lucas, J., convicted defendant of mail fraud in connection with scheme to market items commemorating the Nation's Bicentennial, and defendant appealed. The Court of Appeals held that: (1) prosecutor's references to guilty pleas of codefendants were permissible; (2) reversal was required by lack of appropriate instructions to jury on limited purpose for which guilty pleas could be used; (3) materiality of misrepresentations was clearly established by the evidence, and thus failure to instruct on materiality was not error; (4) evidence was sufficient for jury; (5) employment of alias could evidence fraudulent activity under mail fraud statute; (6) trial judge did not

substantive evidence of guilt. Baker v. United States, supra, 393 F.2d at 614. Furthermore, introduction of the guilty plea as evidence of credibility requires that the plea be brought to the jury's attention, but does not sanction allowing the subject to be disproportionately emphasized or repeated.

B.

Applying the principles we have outlined to this case, the issues are two: (1) did the prosecution offer the evidence of the guilty pleas for a permissible purpose such as establishing witness credibility and (2) if the purpose was legitimate, did the trial court's instructions adequately explain to the jury the purpose for which the evidence could be used.

(1)

[8] Reviewing the record here, we find that the prosecutor carefully limited his inquiries about the guilty pleas. On direct examination, questioning did no more than elicit the fact that guilty pleas were entered. No editorial comment or unnecessary elaboration occurred. The brief questioning about the existence of the pleas was clearly relevant as evidence bearing on the witnesses' credibility.

***1006** [9] The prosecutor was also within his rights on this record in asking Bucklan on redirect again about his guilty plea. On cross examination, defense counsel had elicited numerous statements that Bucklan lacked intent to defraud and that he believed that he would be able to fulfill the promises he

and Halbert had made to the customers they allegedly defrauded. On redirect, Bucklan admitted in response to the prosecutor's questions that he was aware that false statements were made to customers and he had pleaded guilty to a crime requiring such knowledge. This questioning was intended to dispel any impression of unwitting misrepresentation and the suggestion that the actions of defendant and the witness were innocent. This was not improper or undue reiteration of the guilty plea.

[10] Similarly, reference to the pleas in the prosecution's closing argument was in response to comments by the defense. Defense counsel discussed the guilty pleas in his closing argument, contending that Bucklan and Halbert lacked intent to defraud:

> Now, I think you must consider that statement (Bucklan's lack of intent) in light of the facts, and both Mr. Culbertson and Mr. Bucklan said that, and I think that puts into proper perspective their pleas of guilty to one count and their making a deal, because they got up here and said, when presented by the government, that they hadn't done any wrong, so there are a lot of reasons why people can do things when it is to their advantage.

The prosecutor responded:

> (The defense) has referred to (Bucklan and Culbertson) as the government's star witnesses. Well, I can't say that I'm too happy with that. When you are presenting the evidence of a crime, you have to present the evidence of

INSTA-CITE

CITATION: 640 F.2d 1000
=> 1 **U. S. v. Halbert,** 640 F.2d 1000, 7 Fed. R. Evid. Serv. 1678 (9th Cir.(Cal.), Mar 06, 1981) (NO. 78-3278)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
72 C.J.S. Post Office Sec.29 Note 59
72 C.J.S. Post Office Sec.39 Note 48
72 C.J.S. Post Office Sec.39 Note 49
72 C.J.S. Post Office Sec.43 Note 17
98 C.J.S. Witnesses Sec.472 Note 40.10 (Pocket Part)

UNITED STATES of America, Plaintiff-Appellee,
v.
Luis BELTRAN-RIOS, Defendant-Appellant.

No. 88-5279.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 2, 1989.

Decided July 6, 1989.

Defendant was convicted in the United States District Court for the Southern District of California, Judith Nelson Keep, J., of importation of controlled substance and possession of controlled substance with intent to distribute, and he appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) drug courier profile evidence was admissible to rebut defense efforts to characterize defendant as "poor simple farmer," and (2) duress defense instruction did not improperly make immediate surrender element of defense.

Affirmed.

[1] CRIMINAL LAW ⚿ 376
110k376
Criminal profiles generally have no place as substantive evidence of guilt at trial.

[2] CRIMINAL LAW ⚿ 378
110k378
In narcotics prosecution, trial court did not abuse its discretion in permitting prosecution to adduce drug courier profile evidence for limited purpose of rebutting defense efforts to characterize defendant as "poor simple farmer.".

[3] CRIMINAL LAW ⚿ 662.8
110k662.8
Permitting police officer's drug courier profile testimony did not violate defendant's confrontation rights despite his contention that testimony was in part based on information obtained from DEA and that admission of such hearsay testimony thus deprived defendant of effective opportunity to confront adverse witnesses through cross-examination; officer himself had 16 years' experience and had worked on hundreds of drug cases, and defendant had ample opportunity to cross-examine officer about his opinion. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW ⚿ 38
110k38
Before defendant is entitled to instruction on defense of duress, he must establish prima facie case of elements of that defense by establishing immediate threat of death or serious bodily injury, well-grounded fear that threat will be carried out, and lack of reasonable opportunity to escape threatened harm; requirement that defendant submit to proper authorities after attaining position of safety has independent significance only in prison escape case.

[5] CRIMINAL LAW ⚿ 772(6)
110k772(6)
Duress defense instruction that permitted jury to consider whether narcotics defendant took opportunity to escape harm with which he allegedly had been threatened by submitting to authorities at first reasonable opportunity did not improperly make submission to authorities independent element of defense but only permitted jury to consider factor in evaluating defendant's reasonable opportunity to escape.

***1209** Janice Hogan, Federal Defenders of San Diego, Inc., San Diego, Cal., for defendant-appellant.

Patrick K. O'Toole, Asst. U.S. Atty., San Diego, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California.

Before FLETCHER, NELSON and NORRIS, Circuit Judges.

FLETCHER, Circuit Judge:

Beltran-Rios was convicted of importation of a controlled substance and possession of a controlled substance with intent to distribute. He appeals the conviction, contending that the district court erred in allowing the Government to introduce expert testimony describing the "profile" characteristics of drug couriers, and that the jury instruction on the elements of Beltran's duress defense was erroneous.

We affirm.

I.
FACTS

At approximately 9:00 a.m. on February 16, 1988, Luis Beltran-Rios entered the pedestrian inspection area of the Calexico, California Port of Entry. Customs Agent Donald Hylton performed a pat-down search of Beltran and found three small packages of heroin in Beltran's shoes. Beltran was placed under arrest, and was questioned by Customs and DEA agents. During the course of this questioning, Beltran gave several conflicting explanations for the presence of heroin in his shoes.

On February 22, 1988, a two count indictment was filed in the United States District Court for the Southern District of California, charging Beltran with violations of 21 U.S.C. §§ 952, 960 (importation of a controlled substance) and 21 U.S.C. § 841(a)(1) (possession of a controlled substance with intent to distribute). On February 26, Beltran pleaded not guilty. Beltran filed a motion to suppress physical evidence as well as statements he made to Customs and DEA agents. The district court denied this motion after an April 25 hearing. A jury trial began on May 17, 1988.

Beltran offered duress as his major defense at trial. Beltran argued that he brought heroin into the United States ***1210** against his will because an individual named Jesus Holguin Lopez approached him and demanded that he do so. Lopez allegedly threatened to kill Beltran or his family if he did not comply. Beltran presented testimony from a Father Augustin Gonzalez-Magana attesting to Beltran's good reputation and Lopez's reputation as a dangerous drug trafficker. In his opening statement, defense counsel also emphasized Beltran's vulnerability to Lopez's threats, portraying Beltran as a simple, poor farmer. Counsel pursued a related theme in cross-examination, questioning witnesses about Beltran's appearance in an effort to emphasize that Beltran dressed poorly, and did not display flashy or expensive jewelry.

Allegedly to rebut the "poor simple farmer" theme, the Government introduced expert testimony describing the characteristics of the typical drug courier, or "mule." The Government's expert witness, Deputy Sheriff Jose Moreno-Nava, testified that mules were generally poor, sympathetic-looking individuals, who went into the drug courier trade because it is the only way for such individuals to make money quickly. This testimony was admitted over defense counsel's objection.

After the presentation of the evidence, counsel and the trial judge conferred concerning the instructions. The judge indicated that she would not give the defendant's proposed duress instruction, but would give a modified version of the Ninth Circuit Model Jury Instruction on duress. Defense counsel objected, contending that the instruction improperly introduced a requirement of prompt surrender to the authorities as an element of the defense.

On May 20, 1988, the jury returned a verdict of guilty on both counts. On July 11, 1988, Beltran was sentenced to 33 months in custody, and a term of three years of supervised release. This appeal follows. We have jurisdiction under 28 U.S.C. § 1291.

II.
DISCUSSION

A. Admission of Nava's Testimony

Over the objection of defense counsel, the district court permitted Nava to testify about the characteristics of the typical drug courier. Nava testified that "[y]our typical mule would be a poorer individual, who does not wear flashy clothes or jewelry, and is, like I say, in the--he's the bottom of the totem pole in the organization but he is a paid individual by that organization." Reporter's Transcript (RT) vol. II at 275. [FN1] Beltran argues that admission of this testimony was an abuse of discretion because the use of such profiles is of limited probative value and is extremely prejudicial. The district court has broad discretion to admit or exclude expert testimony. The court's decision to admit Nava's "drug courier profile" testimony therefore is reviewed for abuse of discretion. United States v. Gillespie, 852 F.2d 475, 478 (9th Cir.1988).

FN1. The trial judge instructed the jury to disregard the portion of Nava's testimony in which he stated that "[t]he individual that is generally doing the muling is an older individual...." RT at 274.

[1] The use of criminal profiles as evidence of guilt in criminal trials has been severely criticized. As the Eleventh Circuit has pointed out,

> [d]rug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers.... Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity. Drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation.... [W]e denounce the use of this type of evidence as substantive evidence of the defendant's innocence or guilt.

United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir.1983). Similarly, in Gillespie, 852 F.2d at 479-80, we found the admission of the testimony of a clinical psychologist describing the common characteristics *1211 of child molesters to be reversible error.

The hostility exhibited by the lower courts to the use of criminal profiles as substantive evidence of guilt is not undermined by the Supreme Court's recent decision in United States v. Sokolow, --- U.S. ----, ----, 109 S.Ct. 1581-1586, 104 L.Ed.2d 1 (1989). Sokolow merely establishes that a law enforcement official may make an investigative stop based on observed behavior consistent with DEA drug courier profiles. There is no indication that the Court's approval of profiles to help establish reasonable suspicion warranting further investigation extends to use of profile evidence at trial. Beltran's argument that such profiles generally have no place as substantive evidence of guilt at trial is still valid.

[2] The Government, while conceding that profile testimony is generally undesirable as evidence of guilt, argues that Nava's testimony was permissible in this case because defense counsel "opened the door" to this line of questioning by emphasizing Beltran's apparent poverty. The record clearly demonstrates defense counsel's efforts to raise an inference that Beltran was not a drug courier because his life-style was inconsistent with that line of business. In cross-examination of the Government's first witness, Customs Agent Donald Hylton, the following exchange took place:

> Mr. Ainbinder: Does he [Beltran] look essentially the same as he did on the 16th?
> A: Yes.
> Q: You don't remember any gold rings on his fingers?
> A: No. I can't recall any--
> Q: Rolex watches?
> A: No, sir.
> Q: Gold chains?
> A: No.
> Q: Expensive jewelry, that kind of thing?
> A: No.
> Q: And as you inspected him in secondary and then in the pat-down area, I take it you went through his things pretty carefully?
> A: Yes.
> Q: Did you find any large amounts of money?
> A: No.

RT vol. I at 182.

Defense counsel pursued a similar line of questioning in cross-examination of DEA Agent Eddie Marquez:

> Q: Now, I would like you to take a look at Mr. Beltran as he is seated here today. I know his exact clothing is a little different, but does he appear to be about the same as he was on the 16th of February?
> A: Yes, he was.
> Q: He's not missing any thing like expensive jewelry or something--
> A: No, sir.
> Q: Same simple sort of clothes?
> A: Yes.
> Q: And as he sits here today, is that the same calm look you saw when you entered in the little detention room?
> A: Yes.
> Q: Now, you said he had a lot of receipts. Have you gone through them all?
> A: Yes. I have made xerox copies of everything.
> Q: And what we see in those receipts are literally years of collections. Years. Isn't there?
> A: That's correct.
>
> * * *
>
> Q: Now, in those receipts is there anything to reflect purchases of things like T.V.'s?
> A: None.
> Q: Automobiles?
> A: None.
> Q: Anything to reflect bank accounts with large sums of money?
> A: Not that I could tell.

Q: Investments in stocks, bonds or certificates of deposit?
A: No sir.
Q: No documents showing the purchase of a number of head of cattle recently?
***1212** A: Not recently. I know there is one said how many he may have owned, but I don't recall exactly.
Q: No purchase of jewelry or that kind of thing?
A: No sir.
Q: You had a chance to go through the rest of Mr. Beltran's things. Do you recall at any time, can you tell us today, did he have a large amount of cash on him?
A: I don't believe he did.
RT vol. II at 235-37.

The purpose of this questioning is clear--counsel is trying to suggest to the jury that Beltran is not part of a smuggling operation because he lacks the accoutrements of wealth associated with such a profitable activity. In light of this testimony, the district court concluded that the Government should have an opportunity to rebut the inference that defense counsel was trying to raise.

What I am going to do is allow limited inquiry. I am worried about too much prejudice on it.... So at least I think by having everybody look, you had him stand up, did he have on gold chains, did he appear wealthy, did he have a lot of cash, I think at least it would be proper to say that most of the couriers that they see, that he's aware of are not wealthy and wearing gold chains. They are not on that end of the distribution scheme. Because there's been a suggestion raised by you that, because he's not in gold chains and having a lot of money, he's clearly not involved.

RT vol. II at 271-72. The Government then elicited the testimony from Deputy Nava that Beltran challenges here.

We previously have allowed the Government to introduce otherwise excludable testimony when the defendant "opens the door" by introducing potentially misleading testimony. See e.g., United States v. Segall, 833 F.2d 144, 148 (9th Cir.1987) (defense counsel's introduction of cross-examination evidence creating a false impression that defendant retained in her bank account funds under investigation "opened the door" to re-direct testimony that only a fraction of that money was retained); United States v. Giese, 597 F.2d 1170, 1188-90 (9th Cir.), cert. denied, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979) (defense testimony relating to 18 books owned and read by defendant suggesting his left-wing but non-violent, non-revolutionary political views "opened the door" to cross-examination on other books defendant had sold, owned or read).

This type of rebuttal testimony may include criminal profile testimony. For example, in United States v. Taylor, 716 F.2d 701 (9th Cir.1983), the defendant, Steven Pressler, who was convicted of conspiracy to manufacture amphetamines, argued that the trial court erred in not sustaining his objections to certain questions asked by the Government at trial. Pressler's role in the amphetamine manufacturing enterprise was apparently limited to picking up necessary chemicals at a chemical supply store. On cross-examination, defense counsel asked the DEA agent witness whether drug manufacturers use third parties to pick up chemicals to insulate themselves from detection. On re-direct, the prosecuting attorney asked the witness whether, in his experience, these third parties are always, sometimes, or never involved in the illegal manufacturing operation. The witness replied that, in his experience, "innocent" third parties were not used to pick up chemicals. We found that defense counsel "opened the door" to that line of questioning. 716 F.2d at 710.

However, the case most closely on point is the Second Circuit's decision in United States v. Khan, 787 F.2d 28 (2d Cir.1986). In Khan, the defendant, a Pakistani accused of selling narcotics in the U.S., argued that the trial court erred in allowing the introduction of "irrelevant and unfairly prejudicial" expert testimony about heroin trafficking in Pakistan. The expert witness, a DEA agent, testified that (1) heroin was extremely inexpensive in Pakistan; (2) it was common for Pakistani dealers to advance heroin to each other without immediate payment; (3) heroin dealers in Pakistan, like other Pakistanis, wore the same ***1213** national dress--pantaloon, baggy pants, and a knee length top. 787 F.2d at 34.

The appellate court ruled that this evidence was relevant, and that it was within the discretion of the trial court to allow it. The court noted that

Khan attempted to rebut the government's portrayal of him as a major drug dealer by

> suggesting that he was a poor man.... The expert testimony was relevant to rebut Khan's arguments to the jury and show that (1) Khan did not need a large sum of money to deal in large amounts of heroin in Pakistan, and (2) even if Khan had made a great deal of money in the heroin trade, it would not necessarily show from the manner of his dress.

Id.

Although Beltran is correct that this type of profile evidence is potentially dangerous, the cases suggest that it is permissible in certain limited circumstances. The district court determined that Nava's testimony was necessary to rebut the inference that defense counsel attempted to create. The district court was aware of the potential prejudice, and attempted to keep it at a minimum by sustaining several objections, and striking one portion of Nava's testimony from the record. We conclude that the district judge did not abuse her discretion. [FN2]

> FN2. We emphasize that the holding in this case is a relatively narrow one. The Government may introduce profile testimony of this sort only to rebut specific attempts by the defense to suggest innocence based on the particular characteristics described in the profile.

B. Witness Confrontation

[3] Beltran also argues that Nava's drug courier profile testimony, which was based in part upon information obtained from DEA officials, was hearsay, and that admission of this testimony deprived Beltran of an effective opportunity to confront adverse witnesses through cross-examination. Whether Beltran's sixth amendment right to confront witnesses against him was violated is a question of law, reviewed de novo. United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). Beltran's confrontation argument is without merit.

Nava testified that in his sixteen years as a law enforcement official, he has worked on hundreds of drug cases, with as many as four hundred directly involving smuggling of drugs into the United States. RT vol. II at 251. He also testified that he worked as an undercover agent in Mexico for two years, and that he personally had received drugs from couriers on as many as one hundred occasions. Id. at 263. Thus, his opinion about the typical characteristics of drug couriers is derived largely from personal experience. [FN3] Defense counsel unquestionably had ample opportunity to cross-examine Nava about his expert opinion, and the sources of information upon which that opinion was based. This is a sufficient basis upon which to reject Beltran's confrontation clause argument.

> FN3. To the extent that Nava's testimony was based upon information obtained other than through personal observation, it was permissible, being based upon information of the type reasonably relied upon by experts in forming expert opinions. See United States v. Golden, 532 F.2d 1244 (9th Cir.), cert. denied, 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976) (holding it proper to admit DEA agent's testimony about market value of heroin where that testimony was based in part upon information obtained from other undercover agents; such information is of the type reasonably relied upon by experts determining prevailing prices in clandestine markets). Beltran does not dispute that Nava is an expert on narcotics smuggling.

C. The Duress Instruction

[4] Before a defendant is entitled to an instruction on the defense of duress, he must establish a prima facie case of the three elements of that defense: (1) an immediate threat of death or serious bodily injury; (2) a well-grounded fear that the threat will be carried out; and (3) lack of a reasonable opportunity to escape the threatened harm. United States v. Jennell, 749 F.2d 1302, 1305 (9th Cir.1984), cert. denied, 474 U.S. 837, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985); United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir.1984). We noted in Jennell that a fourth ***1214** element is also sometimes required; the defendant must submit to the proper authorities after attaining a position of safety. 749 F.2d at 1305. However, this fourth element has independent significance only in prison escape cases. Id.

[5] The district court gave the following instruction relating to duress:

> The defendant has offered evidence to show that at the time the crime charged in the indictment was committed, defendant was in fear of his life and

the lives of his mother and sister.
A defendant is not guilty of a crime if the defendant participated in it only because of a belief with good reason:
1. That defendant or his family would suffer immediate and serious injury or death if the defendant did not participate; and
2. That defendant had no other reasonable way of escaping such immediate injury or death.
The Government must prove the defendant's guilt beyond a reasonable doubt. To do so, the Government must prove beyond a reasonable doubt either one of the two following elements:
1. That when the defendant committed the crime, defendant did not have a reasonable belief that serious and immediate injury would follow, or
2. That at that time defendant had a reasonable opportunity to escape such serious and immediate injury or death. In evaluating a reasonable opportunity to escape, you may consider whether defendant took the opportunity to escape the threatened harm by submitting to authorities at the first reasonable opportunity.

RT vol. II, at 522-23 (emphasis added). Beltran argues that this instruction is erroneous because it permits the Government to satisfy its burden of proof by showing that Beltran did not immediately surrender to the proper authorities upon his initial entry in to the United States. Beltran insists that the highlighted language in the instruction imports a fourth element into the duress defense that is inappropriate outside the context of prison escape cases. Jury instructions are considered as a whole to determine if they are misleading or inadequate. United States v. Burgess, 791 F.2d 676, 680 (9th Cir.1986). The trial judge has substantial latitude in tailoring the instructions, and challenges to the formulation adopted by the court are reviewed for abuse of discretion. Id.

The major flaw of Beltran's argument is that the instruction as given does not make submission to the authorities an independent fourth element to a duress defense. The instruction quite clearly invites the jury to consider submission to the authorities as one factor in evaluating the third prong of the duress defense, lack of reasonable opportunity to escape. Nothing in the wording of the instruction suggests that failure to submit to the authorities precludes a finding of duress.

Considering submission to the authorities as an element of opportunity to escape does not appear to be inconsistent with Ninth Circuit authority on duress. As we noted in Contento-Pachon:

> In cases not involving escape from prison there seems to be little difference between the third basic requirement that there be no reasonable opportunity to escape the threatened harm and the obligation to turn oneself in to the authorities on reaching a point of safety. Once a defendant has reached a position where he can safely turn himself in to the authorities he will likewise have a reasonable opportunity to escape the threatened harm.

723 F.2d at 695 (emphasis added). See also Jennell, 749 F.2d at 1305 (quoting Contento-Pachon). The challenged instruction appears to embody fairly the view expressed in Jennell and Contento-Pachon; as a practical matter, whether the defendant submits to the proper authorities at the first reasonable opportunity is closely related to whether the defendant has a reasonable opportunity to escape the threatened harm. Taken as a whole, the duress instruction does not appear to be misleading, and the trial judge did not abuse her discretion in adopting this particular formulation.

*1215 III. CONCLUSION

Under the circumstances of this case, the district court's carefully considered decision to allow testimony describing the profile characteristics of drug couriers was not an abuse of discretion. The defendant's right to confront witnesses against him was not abridged. The district court's formulation of the jury instructions on duress was not misleading, and was within the discretion of the district court.

AFFIRMED.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 04/10/96

INSTA-CITE

CITATION: 878 F.2d 1208
=> 1 **U.S. v. Beltran-Rios,** 878 F.2d 1208, 28 Fed. R. Evid. Serv. 127 (9th Cir.(Cal.), Jul 06, 1989) (NO. 88-5279)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 04/10/96
THE CURRENT DATABASE IS ALLFEDS
YOUR TERMS AND CONNECTORS QUERY:

"OPEN THE DOOR" /30 "OTHER CRIMES" 404(B)

Citation | Rank(R) | Page(P) | Database | Mode
69 F.3d 419 | R 2 OF 32 | P 1 OF 108 | ALLFEDS | P LOCATE
43 Fed. R. Evid. Serv. 225

(Cite as: 69 F.3d 419)

UNITED STATES of America, Plaintiff-Appellee,
v.
Milton EDWARDS, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Terry RATLIFF, Sr., Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
William Thomas LAWRENCE, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Kerry CHAPLIN, Defendant-Appellant.
Nos. 94-5202 to 94-5204 and 95-5003.
United States Court of Appeals,
Tenth Circuit.
Oct. 24, 1995.

Defendants were convicted of conspiracy to possess with intent to distribute and to distribute cocaine, and two defendants were convicted of use of communication facility in facilitating violation of federal narcotics laws, in

69 F.3d 419 | R 2 OF 32 | P 88 OF 108 | ALLFEDS | P LOCATE

(Cite as: 69 F.3d 419, *434)

innocence.' " Williams, 45 F.3d at 1484 (quoting Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993)). "Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the 'spillover effect' [of damaging evidence] is sufficient to warrant severance." United States v. Levine, 983 F.2d 165, 167 (10th Cir.1992) (quotations omitted).

[32] We conclude Defendant has failed to show the requisite prejudice warranting severance. As we have stated, the facts of this case were not so intricate as to render the jury unable to segregate the evidence associated with each defendant's individual actions. See supra part III.B.2. Moreover, the district court minimized any possible prejudice by instructing the jury that "[i]t is your duty to give separate and individual consideration to the evidence as it relates to each individual defendant [and] leav[e] out of consideration entirely any evidence admitted solely against some other defendant or defendants." See ***435** Vol. I, Tab 96, p. 6; Zafiro, 113 S.Ct. at 938 ("[L]imiting instructions ... often will suffice to cure any risk of prejudice."). Under these circumstances, we conclude the district court did not abuse its discretion in denying Defendant's motion to sever.

V. 404(b) Evidence

[33] Defendants Edwards and Lawrence contend the district court erred in admitting evidence of prior bad acts pursuant to Fed.R.Evid. 404(b). We review

the district court's decision to admit evidence under Rule 404(b) for an abuse of discretion. United States v. Patterson, 20 F.3d 809, 812 (10th Cir.), cert. denied, --- U.S. ----, 115 S.Ct. 128, 130 L.Ed.2d 72 (1994).

During trial, the government moved to admit excerpts from testimony given by Edwards and Lawrence as government witnesses at an unrelated 1991 cocaine conspiracy trial in the Northern District of Oklahoma. The excerpts included testimony in which Edwards and Lawrence testified that they had known each other for at least five or six years and became involved in the cocaine business in 1986. Edwards testified that he had purchased two to three kilograms of cocaine from Lawrence in 1986 and began purchasing cocaine in Los Angeles and Houston for resale in Tulsa, in 1988. Lawrence testified that he and Edwards had made two or three trips to Houston to purchase cocaine, and would place the cocaine inside a spare tire before returning to Tulsa.

[34] The government offered the prior testimony in order to rebut Defendants' contention that they were not involved in a cocaine conspiracy with each other and with J. Grist. Thus, under Rule 404(b), the government contended that the prior testimony showed knowledge of the charged conspiracy and an absence of mistake. Defendants objected to the admission of the testimony contending that even if the evidence was admitted for a proper purpose under Rule 404(b), the evidence was more prejudicial than probative and should be excluded. The district court overruled the objection stating that

"[i]t's the view of the Court that such evidence of prior statements, activities would ... go to the issues of motive, knowledge, opportunity, and absence of mistake or accident, and would therefore be appropriate." [FN11] Vol. XI at 804. The court therefore admitted the prior testimony.

FN11. Defendant Lawrence appears to suggest that the district court erred in admitting the prior testimony because it failed to articulate the specific purpose for which the evidence was admitted, but instead merely restated the language of Rule 404(b). We disagree.
We have held that "a broad statement merely invoking or restating Rule 404(b) will not suffice" to identify the specific purpose for which a district court admitted Rule 404(b) evidence. United States v. Kendall, 766 F.2d 1426, 1436 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986). However, even if the district court fails to specifically articulate the basis for admission, the error is harmless as long as a proper purpose is apparent from the record. United States v. Record, 873 F.2d 1363, 1373 (10th Cir.1989). As our analysis indicates, the specific purpose for admitting the prior testimony in the instant case is apparent from the record.

[35] Defendants contend the district court improperly admitted the prior

testimony under Rule 404(b) because the evidence related to events which occurred in 1988 and was thus too remote in time to the events charged in the instant case. Consequently, Defendants contend that the probative value of the evidence was substantially outweighed by its prejudicial impact. [FN12]

FN12. Fed.R.Evid. 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of a defendant's prior crimes, wrongs, or acts is "admissible only for limited purposes and only when various prerequisites are satisfied." United States v. Robinson, 978 F.2d 1554, 1558 (10th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1855, 123 L.Ed.2d 478 (1993). Rule 404(b) requires that

(1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the ***436** probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed.R.Evid. 105, the

trial court shall, upon request, instruct the jury that the evidence of similar acts is to be considered only for the proper purpose for which it was admitted. United States v. Johnson, 42 F.3d 1312, 1315 (10th Cir.1994) (quotation omitted). " 'We have previously recognized the highly probative value of uncharged prior acts evidence to show motive, intent, knowledge or plan in the context of a conspiracy prosecution.' " United States v. Easter, 981 F.2d 1549, 1554 (10th Cir.1992) (quoting United States v. Record, 873 F.2d 1363, 1375 (10th Cir.1989)), cert. denied, --- U.S. ----, 113 S.Ct. 2448, 124 L.Ed.2d 665 (1993). This is particularly true where the uncharged acts are **similar** in method to the charged **conspiracy** and sufficiently close in time. Id.

Here, Defendants' prior acts involved their joint efforts regarding distribution of cocaine purchased in and transported from Houston, Texas--a similar scheme with which Defendants were eventually charged--and were sufficiently close in time to the charged conduct. See United States v. Wint, 974 F.2d 961, 967 (8th Cir.1992) (narcotics offense committed five years earlier was "reasonably close in time" to charged offense), cert. denied, --- U.S. ----, 113 S.Ct. 1001, 122 L.Ed.2d 151 (1993); United States v. Drew, 894 F.2d 965, 970 (8th Cir.) (evidence of defendant's participation in running drug house three years earlier to offense in question probative of issues of intent, knowledge, and plan), cert. denied, 494 U.S. 1089, 110

S.Ct. 1830, 108 L.Ed.2d 959 (1990). In this context, the prior acts evidence was highly relevant to show Defendants' knowledge of the plan or scheme to possess and distribute cocaine. Furthermore, the prior acts evidence rebutted Defendants' claim that they were not involved in a cocaine conspiracy with each other. See Easter, 981 F.2d at 1554 (upholding the admission of prior acts evidence under similar circumstances).

In addition, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. Although the district court did not explicitly rule on the prejudicial impact of the evidence, the court admitted the evidence following Defendants' objections based upon prejudice. Thus, "we can assume the judge weighed the prejudicial impact against the probative value of the evidence", Patterson, 20 F.3d at 814, before making the final determination to admit the prior testimony. Because "[w]e are required to give the trial court 'substantial deference' in Rule 403 rulings", id. (quoting Easter, 981 F.2d at 1554), we will not disturb the district court's implicit determination regarding the probative value of the evidence. See id. Moreover, the district court's jury instructions included an instruction limiting the use of the prior acts evidence. Under these circumstances, we conclude the district court did not abuse its discretion in admitting the prior acts evidence pursuant to Rule 404(b).

VI. Defendant Edwards' Pro Se Issues

INSTA-CITE

CITATION: 69 F.3d 419

Direct History

=> 1 **U.S. v. Edwards,** 69 F.3d 419, 43 Fed. R. Evid. Serv. 225 (10th Cir.(Okla.), Oct 24, 1995) (NO. 94-5202, 95-5003, 94-5203, 94-5204)
Petition for Certiorari Filed, 64 USLW 3593 (Feb 23, 1996) (NO. 95-1355)

=> 2 **U.S. v. Edwards,** 69 F.3d 419, 43 Fed. R. Evid. Serv. 225 (10th Cir.(Okla.), Oct 24, 1995) (NO. 94-5202, 95-5003, 94-5203, 94-5204)
Petition for Certiorari Filed (Feb 29, 1996) (NO. 95-8147)

=> 3 **U.S. v. Edwards,** 69 F.3d 419, 43 Fed. R. Evid. Serv. 225 (10th Cir.(Okla.), Oct 24, 1995) (NO. 94-5202, 95-5003, 94-5203, 94-5204)
Petition for Certiorari Filed (Mar 04, 1996) (NO. 95-8134)

Citation | Page(P) | Database | Mode
894 F.2d 965 FOUND DOCUMENT P 1 OF 45 CTA Page
30 Fed. R. Evid. Serv. 244
(Cite as: 894 F.2d 965)

UNITED STATES of America, Appellee,
v.
Earl D. DREW, a/k/a Derrick/Dereck Drew, Appellant.
UNITED STATES of America, Appellee,
v.
Dennis Edward DREW, Appellant.
UNITED STATES of America, Appellee,
v.
Hampton David STEWART, Jr., a/k/a Snookie, Appellant.
Nos. 88-2661, 88-2662 and 88-2668.
United States Court of Appeals,
Eighth Circuit.
Submitted June 12, 1989.
Decided Jan. 17, 1990.

Defendants were convicted in the United States District Court for the Western District of Missouri, Scott O. Wright, Chief Judge, for conspiracy and substantive offenses arising out of operation of drug house. Defendants appealed. The Court of Appeals, Bowman, Circuit Judge, held that: (1) evidence supported one defendant's conviction for using or carrying firearm

sufficient evidence to find that Earl Drew participated in the operation of a drug house, that a gun was present at the drug house and in Drew's possession and control, and that Drew "use[d]" a firearm during the commission of a drug trafficking crime.

C.

Earl Drew raises two separate issues concerning the government's closing argument. ***969** We review the trial court's rulings on objections to statements made in closing argument under an abuse of discretion standard. United States v. Flynn, 852 F.2d 1045, 1055 (8th Cir.), cert. denied, --- U.S. ----, 109 S.Ct. 511, 102 L.Ed.2d 546 (1988).

First, appellant again invokes his theory on the meaning of "use" under the firearm statute in arguing that the government misstated the law in closing argument thereby denying appellant his due process rights under the Fifth Amendment of the Constitution. [FN2] Because we find Drew's interpretation of the law as requiring an actual or threatened discharge of a firearm contrary to any plausible reading of s 924, [FN3] we obviously find no error in the government's failure to present appellant's version of the law to the jury during closing argument.

FN2. In our opinion, the challenged portion of the government's closing argument, cut short by appellant's objection at trial, was rather generous

in its inclusion of appellant's theory of the gun's purpose:

And you need not find that that was the only possible use for the gun. I mean, you might use it to protect yourself, you might use it for target shooting, you might use it to do whatever you want to do for sport, for show, whatever, but if one day a week or one night a week he used that gun to protect those drugs, to protect his money or to protect himself when he came to the door early in the morning, and you've heard testimony that that's what it was about--.

Tr. Vol. 4 at 11.

FN3. We note that appellant's objection at trial, that "[a]nyone in this country can protect themselves with a [hand]gun in the morning when someone comes to the door at 4:00 [a.m.]," Tr. Vol. 4 at 11-12, happens to be an incorrect statement of the law in several localities in this country including the seat of federal government. See D.C.Code Ann. s 6-2312(4) (1989 Repl.Vol.).

[5] Appellant's second complaint with the closing argument is that government counsel misstated the law by describing "beyond a reasonable doubt" as equivalent to being "sure" or "certain." The relevant definitions given by Webster's Third New International Dictionary (unabridged) (1981), for "certain"

are: "not to be doubted as a fact: INDISPUTABLE ... given to or marked by complete assurance and conviction, lack of doubt ... through or as if through infallible knowledge." Id. at 367. And those for "sure" are: "assured in mind: having no doubt ... marked by ... feelings of confident certainty and conviction esp. of the rightness of one's judgment ... objectively certain: admitting of no doubt ... marked by unquestionable fact, verity, or substantiation." Id. at 2299.

To the extent that the words "sure" and "certain" differ in meaning from "beyond a reasonable doubt," it is not the defendant who should be protesting: the definitions of "sure" and "certain" appear to encompass even doubts that do not merit the qualifier "reasonable." Although we think prosecutors would be well advised to avoid trying to explain to the jury the meaning of "beyond a reasonable doubt" (this is a function properly performed only by the trial judge), the error here favored the defendants and was harmless beyond a reasonable doubt. We therefore decline to reverse on this ground.

D.

Earl Drew next contends that evidence of his drug dealing prior to the period covered in the indictment was improperly admitted. The admissibility of prior bad acts evidence is governed by Rule 404(b) of the Federal Rules of Evidence.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The decision to admit evidence of prior bad acts is within the sound discretion of the trial judge, see, e.g., United States v. Gustafson, 728 F.2d 1078, 1083 (8th Cir.), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984), subject only to an abuse of discretion standard of review by this Court. United States v. Bowman, 798 F.2d 333, 337 (8th Cir.1986), cert. denied, 479 U.S. 1043, 107 S.Ct. 906, 93 L.Ed.2d 856 ***970** (1987). Indeed, "reversal is only commanded when 'it is clear that the questioned evidence has no bearing upon any of the issues involved.' " United States v. Thompson, 503 F.2d 1096, 1098 (8th Cir.1974) (quoting Wakaksan v. United States, 367 F.2d 639, 645 (8th Cir.1966), cert. denied, 386 U.S. 994, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967)). We find no reason to reverse the District Court's ruling.

There is no question that the evidence of appellant's prior narcotics transactions has some bearing on his guilt in the charged narcotics offenses as showing, among other things, opportunity, intent, preparation, and plan. That this evidence is relevant to a material issue raised is not even challenged by appellant.

[6] While conceding that evidence of his previous narcotics transactions was

relevant on a material issue, appellant argues that three other requirements for admission were not met. Appellant first claims that his previous operation of a drug house was not sufficiently close in time to the charged offense. See United States v. Marshall, 683 F.2d 1212, 1215 (8th Cir.1982). Government witness Frank Biondo testified that Drew had operated a drug house as far back as 1985 and that at some point in 1986 the operation moved to a different house. His testimony did not suggest, however, that there had been any significant interruption in Drew's operation of drug houses.

[7] Although proximity in time combined with similarity in type of crime virtually guarantees admittance of prior bad acts evidence, see, e.g., United States v. Anderson, 879 F.2d 369, 378 (8th Cir.), cert. denied, --- U.S. ----, 110 S.Ct. 515, 107 L.Ed.2d 516 (1989), these are only factors tending to negate the possibility that the evidence was improperly introduced to "prove the character of a person in order to show action in conformity therewith." Fed.R.Evid. 404(b). The ultimate question always remains whether the evidence "is admissible to prove any relevant issue other than the character of the defendant or his propensity toward criminal activity." United States v. McDaniel, 773 F.2d 242, 247 (8th Cir.1985).

We have frequently sustained the admission of prior bad acts evidence without so much as a passing mention of closeness in time and similarity of the prior act to the charged offense when it was relevant to an issue other than the

character of the defendant, such as motive, intent, or absence of mistake. See United States v. Felix, 867 F.2d 1068, 1072 (8th Cir.1989); United States v. Pierce, 792 F.2d 740, 743 (8th Cir.1986). In the case of "signature" crimes, or "other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused," C. McCormick, McCormick on Evidence s 190(3), at 559 (E. Cleary 3d ed. 1984), the time factor is obviously much less important than in the typical 404(b) case. Evidence offered to prove motive by showing the existence of a larger plan, on the other hand, could properly include evidence of a wholly different prior bad act committed in connection with the charged offense. Id. See, e.g., Grandison v. State, 305 Md. 685, 735-36, 506 A.2d 580, 605, cert. denied, 479 U.S. 873, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986) (indictment in federal narcotics case admissible in state prosecution for hiring an assassin to kill witness in federal case). Proximity in time and similarity of conduct are only factors that may be considered by the trial judge in deciding whether to admit evidence of prior bad acts; they are not requirements for admission.

Moreover, whether under the rubric of "intent," "knowledge," or "common plan or scheme," we have repeatedly upheld the admission of prior drug transactions in cases charging narcotics violations. See, e.g., United States v. Haynes, 881 F.2d 586, 590 (8th Cir.1989); United States v. Maichle, 861 F.2d 178, 180 (8th Cir.1988); United States v. Norton, 846

F.2d 521, 524 (8th Cir.1988). We may add Drew's case to the list without delving into the precise timing of his prior drug dealings which, in any event, apparently continued straight up to, indeed through, the time period of the charged conspiracy.

***971** [8] Drew next argues that the evidence of his prior drug dealing did not satisfy the "clear and convincing" standard, which until recently was the requirement for such evidence in this Circuit. More than one month before Drew went to trial, however, the Supreme Court rejected the "clear and convincing" standard, holding that evidence of prior bad acts may be admitted "if there is sufficient evidence to support a finding by the jury that the defendant committed the [prior acts]." Huddleston v. United States, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988); see also id. at 685 n. 2, 108 S.Ct. at 1499 n. 2 (distinguishing requirements for admission of such evidence among the circuits). The government's evidence of Drew's prior drug transactions consisted of the testimony of Frank Biondo, one of the government's principal witnesses throughout the trial. We cannot say the District Court abused its discretion in admitting this evidence under either the "clear and convincing" standard or the Huddleston standard.

Finally, Drew invokes the residual complaint available under Rule 403 of the Federal Rules of Evidence that the "probative value [of the evidence was] substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403.

INSTA-CITE

CITATION: 894 F.2d 965

Direct History

=> 1 **U.S. v. Drew,** 894 F.2d 965, 30 Fed. R. Evid. Serv. 244 (8th Cir.(Mo.), Jan 17, 1990) (NO. 88-2661, 88-2662, 88-2668)
Certiorari Denied by
2 Drew v. U.S., 494 U.S. 1089, 110 S.Ct. 1830, 108 L.Ed.2d 959 (U.S.Mo., Apr 16, 1990) (NO. 89-6845)
AND Denial of Post-Conviction Relief Affirmed by
3 Drew v. U.S., 46 F.3d 823 (8th Cir.(Mo.), Feb 01, 1995) (NO. 94-2348)
Certiorari Denied by
4 Drew v. U.S., 116 S.Ct. 72, 133 L.Ed.2d 33, 64 USLW 3215, 64 USLW 3240 (U.S., Oct 02, 1995) (NO. 94-2007)

UNITED STATES of America, Appellee,
v.
Wayne WOMOCHIL, Appellant.

No. 84-2591.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 10, 1985.

Decided Dec. 9, 1985.
Rehearing and Rehearing En Banc Denied Jan. 30, 1986.

Defendant was convicted of conspiring to distribute cocaine and of possession of cocaine with intent to distribute, in the United States District Court for the District of Nebraska, Clarence Arlen Beam, J., after that same court had denied suppression motions, 579 F.Supp. 804, and defendant appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that: (1) incriminating statement attributed to declarant by another person in witness' presence was admissible under the coconspirator hearsay exception; (2) otherwise inadmissible testimony was admissible on redirect examination to correct false impression left by defendant on cross-examination; and (3) alleged prosecutorial misconduct did not require mistrial.

Affirmed.

[1] CRIMINAL LAW ⇐ 427(5)
110k427(5)
For an out-of-court statement to be admitted against defendant under the coconspirator exception the hearsay rule under Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A., Government must show by preponderance of independent evidence that conspiracy existed, that defendant and declarant were members of the conspiracy, and that statement was made during the course of and in furtherance of the conspiracy.

[2] CRIMINAL LAW ⇐ 1158(4)
110k1158(4)
District court's determination as to admissibility of coconspirator's hearsay statements will not be reversed unless it is clearly erroneous.

[3] CRIMINAL LAW ⇐ 427(5)
110k427(5)
Evidence was sufficient to support finding that defendant and declarant were members of cocaine distribution conspiracy and that declarant made incriminating statement in furtherance of that conspiracy, so that declarant's statement implicating defendant fell under the coconspirator exception to the hearsay rule under Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 422(1)
110k422(1)
Declarant's statement incriminating defendant, which fell under the coconspirator exception to the hearsay rule under Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A., was not rendered inadmissible by fact that statement was not made to witness but was attributed to declarant by another person in witness' presence.

[5] WITNESSES ⇐ 287(1)
410k287(1)
District court did not abuse its discretion in allowing Government on redirect examination of Government witness to elicit inadmissible testimony to which defense counsel had not opened the door during cross-examination, where defendant had elicited the same testimony during voir dire out of presence of jury and had left mistaken impression by later selective cross-examination before jury.

[6] CRIMINAL LAW ⇐ 706(2)
110k706(2)
Defendant charged with conspiracy to distribute cocaine was not entitled to mistrial on ground of prosecutor's improper questioning of witness as to contents of package delivered for defendant, which questions were never answered, or for prosecutor's unsuccessful proffer of inadmissible evidence.

[6] CRIMINAL LAW ⇐ 706(3)
110k706(3)
Defendant charged with conspiracy to distribute cocaine was not entitled to mistrial on ground of prosecutor's improper questioning of witness as to contents of package delivered for defendant, which questions were never answered, or for prosecutor's unsuccessful proffer of inadmissible evidence.

[7] WITNESSES ⇐ 287(1)
410k287(1)
Prosecutor was **entitled** to question federal agent on

redirect examination as to information received regarding defendant's previous dealings with narcotics, which would have otherwise been inadmissible, in order to correct false impression created by evidence elicited on cross-examination that defendant had never been arrested or charged with such offenses; reference to such testimony was likewise permissible in prosecutor's closing argument.

***1312** J. William Gallup, Omaha, Neb., and a supplemental brief filed by Alan P. Caplan, Cleveland, Ohio, for appellant.

Stephen Anderson, Asst. U.S. Atty., Omaha, Neb., for appellee.

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Wayne Womochil appeals from a final judgment entered by the district court [FN1] on a jury verdict finding him guilty of one count of conspiring to distribute cocaine in violation of 21 U.S.C. § 846, and one count of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Womochil to twelve years in prison on each count, to be served concurrently, and ordered him to pay a $5,000 fine on each count. Womochil, who had been indicted along with ten other defendants, makes several arguments on appeal, centering on the admission of certain evidence and the allegedly improper conduct of the prosecutor. Finding none of Womochil's arguments to be of merit, we affirm the district court's judgment.

FN1. The Honorable C. Arlen Beam, United States District Judge for the District of Nebraska.

The indictment against Womochil and the other defendants resulted from a three-year investigation, jointly conducted by local and state law enforcement personnel as well as the Federal Bureau of Investigation (FBI), into illegal narcotics transactions in the Omaha, Nebraska area. The investigation was intended to uncover the identity of the "king pin" suppliers of cocaine in the area; that is, those persons responsible for distributing cocaine to individual sellers. After investigators had used conventional methods such as surveillance, pen register devices, and the use of informants, confidential sources, and undercover officers, the County Attorney for Douglas County, Nebraska applied to Douglas County District Court Judge James Murphy for electronic surveillance authorization. On July 13, 1982, the date of the application, Judge Murphy authorized the wiretaps for a period of thirty days from the date of hook-up, without terminating when the described communications were first obtained. Those phones authorized by Judge Murphy to be intercepted by wiretap included defendant Ronald Bartrem's residential line, two Omaha businesses' lines, and a dental laboratory. Upon applications supported by affidavits, thirty-day extensions of the interceptions were granted on August 12, September 10, October 19, and November 17 of 1982.

In addition to these telephone interceptions, the Douglas County attorney also sought and was granted authority on July 29, 1982 to place an electronic device, or "bug," in defendant Bartrem's apartment and at the dental laboratory. The bugs were used to monitor conversations between Bartrem and co-defendant Joseph J. Bongiorno in regard to the sale of cocaine. Subsequent extensions of this authorization kept the bugging devices in use through November 28, 1982. In brief, the evidence obtained through the use of the wiretaps and bugs disclosed that Womochil originally distributed cocaine to Harry Gilbert, who in turn distributed the cocaine to Bartrem and Bongiorno. Bartrem and Bongiorno, acting as partners, then distributed the cocaine to other individuals. Later in the conspiracy Womochil bypassed Gilbert to distribute cocaine directly to Bartrem, who bought the cocaine on behalf of himself and Bongiorno.

I. Denial of Womochil's Motion to Suppress Evidence Obtained by Interception of Wire and Oral Communications

Womochil, along with several of his co-defendants and other defendants in related ***1313** cases, filed a pretrial motion to suppress the evidence obtained by use of the wiretaps and bugs. The district court denied all such motions in United States v. Van Horn, 579 F.Supp. 804 (D.Neb.1984). On appeal Womochil argues that the district court's denial of his motion to suppress was

improper for several reasons. First, Womochil contends that because the wiretaps were granted by a county judge upon application by the county attorney, the validity of the court authorization of the wiretaps should be determined by Nebraska law. Second, Womochil asserts that all of the authorization orders were invalid because the government failed to establish in the affidavits supporting its applications that normal investigative procedures had been used without success and without the prospect of success in the future. Third, Womochil argues that the authorization orders failed to comply with both state and federal statutes because they did not limit the interceptions to a period long enough to achieve the objective of the authorization. Fourth, Womochil maintains that because the Nebraska wiretap statute allows only officers of the state or a political subdivision thereof to make the interceptions, the FBI agents were improperly authorized to participate in the wiretaps. Finally, Womochil contends that the government made no attempt to minimize the interception of personal, "non-criminal" calls.

The district court thoroughly addressed and disposed of all of these arguments in its published opinion. See Van Horn, 579 F.Supp. at 809-817. We have carefully considered all of Womochil's contentions in regard to the propriety of the electronic surveillance conducted in this case, as well as the district court's exhaustive response to these contentions. We see no need to reiterate or elaborate on the district court's well-reasoned discussion. Womochil does not point to any flaws in the district court's opinion; indeed, he does not even cite to that opinion in his brief. We therefore affirm the district court's denial of Womochil's motion to suppress the evidence obtained by use of the wiretaps and bugs.

II. Admission of Alleged Hearsay Evidence

Womochil next assigns as error the district court's admission of certain statements, which he contends constituted hearsay because they were not the statements of a coconspirator, nor were they made in the course of the conspiracy or in furtherance of it. Womochil asserts that impermissible hearsay testimony was admitted on two occasions at trial. The first occurrence of the testimony to which Womochil objects was on direct examination of Gilbert Lascala, an alleged coconspirator of Bongiorno's, Bartrem's, and Womochil's. The prosecutor questioned Lascala about whether he had ever discussed with Bartrem or Bongiorno their sources of cocaine:

> Q: Did [Bongiorno] say who [Bartrem] was getting it from?
>
> A: On one occasion there he said he was getting it from--
>
> Mr. Gallup (Womochil's defense counsel): Oh, just a moment, Judge, that's hearsay.
>
> THE COURT: Overruled.
>
> Q: Did [Bongiorno] say from whom he was getting his--Ronald Bartrem was getting his cocaine?
>
> A: He said he was getting it from his brother-in-law or a cousin or an uncle or somebody like that.
>
> Mr. Gallup: I want to object again to that and move for a mistrial.

Transcript at 640-41. After a conference at the bench and an inchambers hearing the next day, the district court overruled the defendant's mistrial motion and permitted Lascala's answer to stand.

Because the evidence before this point in the trial had already established that Womochil was Bartrem's brother-in-law, Womochil alleges that this testimony was devastating to his case, despite the district court's comment to the contrary. He contends that because Lascala's testimony concerned a statement not made by Bartrem, but attributed to Bartrem by Bongiorno, the statement was inadmissible hearsay. Further, Womochil alleges that nofoundation ***1314** was laid as to when the alleged conversation between Lascala and Bongiorno took place; such foundation would have to establish that the conversation took place during the conspiracy or it would not have been admissible.

[1] We think Womochil's contentions are without merit, and that the testimony in question was admissible under Fed.R.Evid. 801(d)(2)(E) as the statement of a coconspirator of a party during the course and in furtherance of the conspiracy. For an out-of-court statement to be admitted against a defendant under the coconspirator exception of Fed.R.Evid. 801(d)(2)(E), the Government must show by a preponderance of independent evidence that a conspiracy existed, that the defendant and the declarant were members of the conspiracy, and that the statement was made during the course and in furtherance of the conspiracy. United States v. Helmel, 769 F.2d 1306, 1312 (8th Cir.1985);

United States v. Johnson, 767 F.2d 1259, 1271 (8th Cir.1985). Womochil does not contend that a conspiracy did not exist, or that Bongiorno, Bartrem, and Lascala were not coconspirators. Rather, Womochil asserts that the Government failed to show by a preponderance of independent evidence that he was a member of the conspiracy, or that the statement was made during the course and in furtherance of the conspiracy.

[2][3] The district court's determination as to the admissibility of coconspirator's statements under Fed.R.Evid. 801(d)(2)(E) will not be reversed unless it is clearly erroneous. United States v. DeLuna, 763 F.2d 897, 909 (8th Cir.1985) (quoting United States v. Singer, 732 F.2d 631, 636 (8th Cir.1984)). We are satisfied that the Government proved by a preponderance of the evidence that Womochil was a member of the conspiracy in question. Janet Meadows, a former girlfriend of Gilbert's, testified as to Womochil's frequent visits to Gilbert's house, during which Womochil and Gilbert would meet behind closed doors in Gilbert's bedroom, where Gilbert kept cocaine. Law enforcement agents testified that Womochil was observed on one occasion at the dental laboratory that served as a locus of the drug transactions, and at a meeting at or near a drugstore with other coconspirators. Womochil's own statements recorded pursuant to the wiretaps, admissible under Fed.R.Evid. 801(d)(2)(A) as admissions of a party-opponent, also constitute independent evidence of his role in the conspiracy. Further, Russell Rockwell testified that he had delivered a paper sack containing something from Womochil to Bartrem (see Section III below). Also, Officer Griffith, on cross-examination by defense counsel, testified as to his theory of Womochil's role in the conspiracy.

[4] As for the "in the course of" requirement, contrary to Womochil's assertion Lascala testified that his conversation with Bongiorno took place during the course of the conspiracy. As well, Bongiorno's statement to Lascala was made in furtherance of the conspiracy. "Statements of a coconspirator identifying a fellow coconspirator as his source of controlled substances is in furtherance of the conspiracy and therefore admissible." United States v. Anderson, 654 F.2d 1264, 1270 (8th Cir.), cert. denied, 454 U.S. 1127, 102 S.Ct. 978, 71 L.Ed.2d 115 (1981). See also United States v. Fitts, 635 F.2d 664, 666 (8th Cir.1980); United States v. Carlson, 547 F.2d 1346, 1362 (8th Cir.1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977). Finally, we disagree with Womochil's contention that because the statement as to Bartrem's source of cocaine was not made by Bartrem, but attributed to him by Bongiorno, it was inadmissible hearsay. See, e.g., Carlson, 547 F.2d at 1361-62 (court admitted, under Fed.R.Evid. 801(d)(2)(E), testimony of DEA Agent Nelson that another DEA agent told him that coconspirator Dahl stated that his source of cocaine was defendant Hofstad). In sum, we cannot say that the district court's decision to admit Lascala's testimony was improper.

The second point in the testimony which Womochil alleges involved impermissible hearsay occurred during redirect examination of Lascala by the Government:

***1315** Q: Mr. Gallup [Womochil's defense counsel] asked you on Cross Examination whether Ronald Bartrem had told you he had gotten his cocaine from Harry Gilbert; is that right?
A: Right.
Q: And what did Ronald Bartrem tell you?
THE COURT: Excuse me--
Mr. Gallup: I am going to object to that * * * *

Transcript at 702-03. Womochil claims that on cross-examination of Lascala, Womochil's defense counsel questioned him solely about statements he had made to the FBI when they came to see him in the penitentiary. No inquiry was made on cross-examination, Womochil asserts, as to Lascala's conversations with Bartrem in the penitentiary. Thus, because defense counsel had not opened the door to permit evidence of conversations between Lascala and Bartrem, Womochil contends that the court erred in admitting the prosecutor's questions in regard to such conversations.

In admitting the testimony in question, the district court determined after a hearing out of the presence of the jury that the prosecutor's question about Lascala's conversations with Bartrem was necessary to correct a false impression left by defense counsel on cross-examination. Specifically, prior to cross-examining Lascala, defense counsel voir dired him out of the presence of the jury in regard to Defense Exhibit 401, a statement made by Lascala to the FBI. During this voir dire defense counsel elicited from Lascala a statement that Bartrem had told him while they were in Leavenworth that he had gotten

cocaine from Womochil and then later from Gilbert. On cross-examination of Lascala in front of the jury, however, defense counsel repeatedly left the impression that Lascala had told the FBI that Gilbert alone had been Bartrem's cocaine source. The district court, therefore, allowed the prosecutor on redirect examination to correct this false impression by bringing out Lascala's complete statement as to Bartrem's source of cocaine.

[5] The scope of redirect examination is within the sound discretion of the district court, United States v. McDaniel, 773 F.2d 242, 246 (8th Cir.1985); United States v. Foley, 683 F.2d 273, 276-77 (8th Cir.), cert. denied, 459 U.S. 1043, 103 S.Ct. 463, 74 L.Ed.2d 613 (1982), and we will reverse the district court only upon a showing of abuse of its discretion. United States v. Taylor, 599 F.2d 832, 839 (8th Cir.1979). We find no such abuse of the district court's discretion in its decision to allow the Government to clear up the false impression created on cross-examination as to Lascala's testimony. This court has repeatedly allowed the use of otherwise inadmissible evidence on redirect examination to clarify or complete an issue opened up by defense counsel on cross-examination. See, e.g., United States v. Young, 553 F.2d 1132, 1135 (8th Cir.), cert. denied, 431 U.S. 959, 97 S.Ct. 2686, 53 L.Ed.2d 278 (1977) (and cases cited therein).

III. Alleged Prosecutorial Misconduct

We next address Womochil's argument that the district court erred in denying his many motions for mistrial based on the prosecutor's alleged misconduct. In support of his contention Womochil cites to specific incidents during the trial in which he asserts that the prosecutor employed "illegal tactics." The first such incident occurred on direct examination of Government witness Russell Rockwell. Rockwell had previously pleaded guilty to violating 21 U.S.C. § 843(b) (1984), by telephoning Womochil on November 8, 1982 and telling Womochil he had delivered cocaine to Bartrem. At trial Rockwell testified that he had delivered a package to Bartrem at Womochil's request. The questioning which Womochil finds objectionable was as follows:

> Q: Do you remember ever telling anyone that it was cocaine that was in that sack that you were taking to Ronald Bartrem?
>
> Mr. Gallup: I am going to object to that, your Honor, there is no proper and sufficient foundation and I object to that and I move for a mistrial.
>
> ....
>
> *1316 THE COURT: Yes, sustained on foundation.
>
> ....
>
> Q: Well, Mr. Rockwell, do you ever remember telling anyone that you had told Mr. Womochil on the phone that you had delivered cocaine to Ronald Bartrem?
>
> Mr. Gallup: I am going to object to that * * * *
>
> THE COURT: Overruled. He may answer if he can.
>
> A. When I pleaded * * * *
>
> Mr. Gallup: I object. That is not responsive and I move for a mistrial * * * *

Transcript at 908-09. After a conference at the bench out of the hearing of the jury the court held that insufficient foundation had been laid as to Rockwell's knowledge of what was in the package. The court sustained the objection to the question, directing the jury to disregard it, but overruled the motion for a mistrial. After this ruling by the court, the questioning continued:

> Q: At the time that you carried the sack to Ronald Bartrem, did you have an opinion at that time as to what was in the sack?

Transcript at 913. Defense counsel's objection to this question was again sustained by the court.

The second instance of alleged prosecutorial misconduct occurred after Womochil's defense counsel had used Officer Griffith's affidavits, prepared in support of an application for a wiretap order, in cross-examining the police officer. The prosecutor then offered the affidavits, Defendant's Exhibit 404, into evidence; Womochil's objection was sustained. Womochil then moved for a mistrial based on the prosecutor's "continually offering inadmissible items." The court did not grant the motion.

Womochil next asserts that the prosecutor acted improperly during redirect examination of FBI Agent Murphy. On cross-examination of Murphy the following exchange took place between Womochil's defense counsel and Murphy:

> Q: * * * And [Womochil] has never, to your knowledge, ever been arrested or accused of drug trafficking or drug violations of any type up until

this particular case, isn't that true?
A: Do you mean by official process accused of it?
Q: Yes.
A: Not that I'm aware of.

Transcript at 126-27. Shortly thereafter, on redirect, the prosecutor questioned Agent Murphy as follows:

Q: Agent Murphy, you indicated that you never learned that prior to this case that Mr. Womochil had gone through the official process of being charged on another narcotics-related matter.
A: That's correct, yes.
Q: That's not to say that you hadn't received other information with respect to Wayne Womochil and previous dealings with narcotics?
Mr. Gallup: I am going to object to that, it's incompetent, immaterial and irrelevant and goes beyond the scope of the Cross Examination.
THE COURT: Overruled.
Q: And have you received other information?
A: Oh, yes. Yes, many times.
Q: What has been the nature of that information?
Mr. Gallup: The same objection, hearsay, incompetent, immaterial and irrelevant.

Transcript at 128. The prosecutor ultimately withdrew the last question, conceding that it called for hearsay. The record does not show, however, that Womochil moved for a mistrial in connection with Murphy's testimony.

As his final examples of prosecutorial misconduct Womochil points to certain questions asked by the prosecutor of Officer Griffith on redirect examination, the answers to which were referred to in the Government's closing argument. As stated ***1317** above, on cross-examination of Griffith defense counsel used Exhibit 404, consisting of affidavits and applications for wiretap orders, to impeach him by showing he had made prior inconsistent statements in the exhibit. The Government contends that the net result of this attack on Griffith's testimony was to leave the jury with the impression that the exhibit contained the latest and best information, and that Griffith's opinions brought out on cross-examination were unreliable insofar as they contradicted the exhibit. The court permitted the prosecutor on redirect, over Womochil's objection, to ask Griffith whether various individuals who had been subjects of the narcotics investigation had been interviewed since the affidavits were written. The court subsequently overruled Womochil's motion for a mistrial based on this questioning of Griffith. Later, in his summation of the evidence, the prosecutor referred to Griffith's testimony that further investigation, including interviews with Bartrem and Cenon Ortiz, was conducted after the affidavits and wiretap applications were made. Womochil's objection and mistrial motion were overruled, although the court cautioned the jury to "decide the case upon the evidence that is before you and not what in Final Argument counsel have said the evidence might be." Womochil contends that the Government's closing argument allowed the jury to infer that Bartrem and Ortiz had implicated him in their interviews.

[6][7] At the outset we note that the district court has broad discretion in determining whether a defendant has been so prejudiced as to require a mistrial. United States v. Robinson, 774 F.2d 261 at 277 (8th Cir.1985); United States v. Panas, 738 F.2d 278, 285 (8th Cir.1984). We conclude that the instances of alleged prosecutorial misconduct cited by Womochil neither individually nor collectively rise to the requisite level of prejudice to warrant a mistrial. The question directed to Rockwell as to statements he had made concerning the contents of the package delivered was never answered. We cannot say that the mere asking of an improper question prejudiced Womochil's case. See Robinson, at 277; United States v. Givens, 712 F.2d 1298, 1301 (8th Cir.1983), cert. denied, 465 U.S. 1009, 104 S.Ct. 1005, 79 L.Ed.2d 237 (1984). Likewise, Womochil's contention that the Government's proffer of Defendant's Exhibit 404 into evidence prejudiced his case is without merit. Finally, the Government's lines of questioning of Agent Murphy and Officer Griffith on redirect examination were necessary to correct false inferences left by defense counsel after cross-examination of these witnesses. In Agent Murphy's case, defense counsel opened the door to questions about whether the agent had ever received information as to Womochil's involvement with narcotics by creating the false impression on cross-examination that Womochil had never come under suspicion with respect to drugs. As to Officer Griffith's testimony, the questioning as to investigations conducted subsequent to his writing the affidavits in support of the wiretap applications helped correct the inference left on cross-examination that those affidavits contained the most current and correct information available. As we discussed above in Section II, when defense counsel

leaves a false impression after cross-examining a witness, the court may allow the use of otherwise inadmissible evidence on redirect to clarify the issue. Young, 553 F.2d at 1135. Because the questioning of Officer Griffith was not in error, the prosecutor's reference to the officer's testimony in his summation was likewise permissible. The trial court has broad discretion in controlling the substance of closing arguments. United States v. Lewis, 759 F.2d 1316, 1350 (8th Cir.1985); United States v. Nabors, 761 F.2d 465, 470 (8th Cir.), cert. denied, --- U.S. ----, 106 S.Ct. 148, 88 L.Ed.2d 123 (1985). The district court's caution to the jury to decide the case based on the evidence and not on the final argument cured any potential error. See Llach, 739 F.2d 1322 at 1330 (8th Cir.1984); United States v. Schwartz, 655 F.2d 140, 142 (8th Cir.1981). In sum, the district court ***1318** did not abuse its discretion in denying Womochil's motions for mistrial.

IV. Conclusion

This court by previous order has denied Womochil's request for a second opportunity to present oral argument, due to the failure of his attorney, Alan P. Caplan, to appear on the date originally scheduled. In rendering this opinion we have given full consideration to the arguments presented in Womochil's brief to this court. Finding none of those arguments to be of merit, however, we affirm his conviction.

END OF DOCUMENT

INSTA-CITE

CITATION: 778 F.2d 1311

Direct History

1 U.S. v. Van Horn, 579 F.Supp. 804 (D.NE, Jan 30, 1984)
(NO. CR 83-0-54, CR 83-0-55, CR 83-0-57, CR 83-0-56)
Order Affirmed by
=> 2 **U.S. v. Womochil,** 778 F.2d 1311 (8th Cir.(Neb.), Dec 09, 1985)
(NO. 84-2591)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
23A C.J.S. Criminal Law Sec.1250 Note 79

UNITED STATES of America, Appellee,
v.
Lynn M. FINCH, Appellant.

No. 93-1560.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 14, 1993.

Decided Jan. 25, 1994.
Rehearing and Suggestion for Rehearing En Banc Denied March 3, 1994.

Defendant was convicted in the United States District Court for the District of North Dakota, Rodney S. Webb, Chief Judge, of conspiracy to distribute cocaine and possession with intent to distribute. Defendant appealed. The Court of Appeals, Morris Sheppard Arnold, Circuit Judge, held that: (1) convictions were supported by sufficient evidence; (2) prosecutor's statements in closing argument were not impermissible; (3) admission of photograph was harmless; and (4) in determining amount of controlled substance involved in offense for sentencing purposes, trial court properly considered amounts of cocaine involved in counts that did not result in conviction but were part of conspiracy.

Affirmed.

[1] CRIMINAL LAW ⇐ 878(4)
110k878(4)
Consistency of jury's verdict is not necessary.

[2] CRIMINAL LAW ⇐ 1175
110k1175
Even where verdicts are clearly inconsistent, Court of Appeals will not invade province of jury.

[3] CRIMINAL LAW ⇐ 1134(1)
110k1134(1)
Criminal defendant is afforded protection against jury irrationality or error by independent review of sufficiency of evidence, a review properly undertaken by appellate courts.

[4] CRIMINAL LAW ⇐ 1144.13(6)
110k1144.13(6)
On review of defendant's conviction for conspiracy to distribute cocaine, Court of Appeals would consider all of evidence presented at trial, not just evidence relating to the one substantive offense for which she was convicted. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[5] CONSPIRACY ⇐ 23.1
91k23.1
Proof of buyer-seller relationship without more is not sufficient to prove conspiracy.

[6] CONSPIRACY ⇐ 47(12)
91k47(12)
Conviction of conspiracy to distribute cocaine was supported by testimony of unindicted coconspirator which was not facially incredible or insubstantial, and others as to defendant's involvement in conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[7] CRIMINAL LAW ⇐ 508(9)
110k508(9)
Testimony of accomplice alone may be sufficient to convict defendant if testimony is not incredible or insubstantial on its face.

[8] DRUGS AND NARCOTICS ⇐ 123.2
138k123.2
Formerly 138k123(2)
Conviction of possession with intent to distribute was supported by testimony of unindicted coconspirator, which was not facially incredible or insubstantial. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

[9] CRIMINAL LAW ⇐ 1159.4(2)
110k1159.4(2)
It is jury's role to assess credibility of witnesses.

[10] CRIMINAL LAW ⇐ 713
110k713
Court of Appeals examines allegedly improper statements of prosecutor within context of entire trial to determine first whether remarks were in fact improper, and second whether remarks were so offensive so as to deprive defendant of fair trial.

[11] CRIMINAL LAW ⇐ 720(5)
110k720(5)
Prosecutor's statements in closing argument that witness was telling truth, that defense attorney was trying to mislead jury, and that evidence showed that defendant was guilty, were not impermissible; read in context, prosecutor was merely arguing that jury should accept state's interpretation of evidence rather than defendant's interpretation.

[11] CRIMINAL LAW ⇐ 720(7.1)
110k720(7.1)
Prosecutor's statements in closing argument that witness was telling truth, that defense attorney was trying to mislead jury, and that evidence showed that defendant was guilty, were not impermissible; read in context, prosecutor was merely arguing that jury should accept state's interpretation of evidence rather than defendant's interpretation.

[11] CRIMINAL LAW ⇐ 723(1)
110k723(1)
Prosecutor's statements in closing argument that witness was telling truth, that defense attorney was trying to mislead jury, and that evidence showed that defendant was guilty, were not impermissible; read in context, prosecutor was merely arguing that jury should accept state's interpretation of evidence rather than defendant's interpretation.

[12] WITNESSES ⇐ 285.1
410k285.1
Cross-examination of witness about particular topic does not necessarily **open door** to **redirect** examination and additional evidence relating to topic; evidence introduced must rebut something that has been elicited on cross-examination.

[13] CRIMINAL LAW ⇐ 1169.1(10)
110k1169.1(10)
Admission of photograph of two people, neither of whom was witness at trial, using cocaine at party that defendant did not attend was harmless; photograph could hardly have incriminated or prejudiced defendant.

[14] DRUGS AND NARCOTICS ⇐ 133
138k133
In determining amount of controlled substance involved in offense for sentencing purposes, where defendant was convicted of conspiracy to distribute cocaine as well as one count of distribution of cocaine, trial court properly considered amounts of cocaine involved in counts that did not result in conviction but were part of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 401(a, b), 21 U.S.C.A. §§ 841, 841(a, b); U.S.S.G. § 1B1.3(a), 18 U.S.C.A.App.

[15] DRUGS AND NARCOTICS ⇐ 133
138k133
When punishment depends on amount of controlled substance involved in offense, amount need be proven only by preponderance of evidence.

***229** Counsel who presented argument on behalf of the appellant was Phillip S. Resnick of Minneapolis, MN.

Counsel who presented argument on behalf of the appellee was Keith W. Reisenauer, Assistant U.S. Attorney, of Fargo, ND.

Before MORRIS SHEPPARD ARNOLD, Circuit Judge, HEANEY and ROSS, Senior Circuit Judges.

***230** MORRIS SHEPPARD ARNOLD, Circuit Judge.

A grand jury indicted Lynn M. Finch and five others charging them with one count of conspiracy to distribute cocaine and conspiracy to possess cocaine with intent to distribute it in violation of 21 U.S.C. § 846, and forty-five substantive counts of distribution or possession of cocaine in violation of 21 U.S.C. § 841(a)(1). Twelve of the forty-five substantive counts charged Finch with possession or distribution of cocaine, each in connection with different shipments of cocaine spaced approximately one month apart. The five other conspirators either pleaded guilty or agreed to plead guilty before Finch's trial. A jury convicted Finch of conspiracy and one substantive count, acquitted her of two substantive counts, and were undecided on the remaining nine substantive counts. The trial court [FN1] sentenced Finch to fifteen months in prison, the final six months of which are to be served in a halfway house, followed by three years of supervised release. Finch appeals the convictions and the sentence.

FN1. The Honorable Rodney S. Webb, United States District Judge for the District of North

Dakota.

I.

Finch challenges the sufficiency of the evidence with respect to both convictions. She argues that her conviction for conspiracy should be reversed because the jury convicted her of only one act of buying or selling cocaine. Since evidence of only a single purchase or sale of cocaine is not evidence of a conspiracy, she argues, the evidence did not support the conviction. She further argues that in order to have convicted her of the substantive count, the jury must have believed the government's principal witness, Brian Solum, an unindicted co-conspirator who had agreed to cooperate with the government; but, her argument continues, since the jury acquitted her of two substantive counts, and failed to agree on a verdict regarding the other counts, the jury must have also disbelieved Solum. She is, therefore, making two different but related claims, and is conflating two distinct issues. One claim is that the convictions should be reversed because they are inconsistent with both the acquittals and the failure to reach verdicts on the other counts. The second claim is that the convictions should be reversed because the evidence is insufficient to support them. These claims raise different issues and we therefore review them separately. See United States v. Powell, 469 U.S. 57, 67, 105 S.Ct. 471, 478, 83 L.Ed.2d 461 (1984); United States v. Suppenbach, 1 F.3d 679, 681 (8th Cir.1993).

A.

Finch apparently finds the jury's verdict infirm because it is inconsistent for two reasons. First, if the jury disbelieved the testimony so thoroughly that it acquitted on two counts, and did not find the testimony credible enough to agree to convict on nine counts, there could not have been sufficient evidence to convict Finch of conspiracy to distribute cocaine and one count of possession with intent to distribute cocaine. Second, if the jury acquitted or could not reach a verdict on all but one of the counts of possession with intent to distribute, there could not have been sufficient evidence to convict Finch of conspiracy to distribute cocaine. The jury's verdicts, according to Finch's argument, are therefore inconsistent, and the convictions should be vacated. Our review of the record reveals, however, that the evidence against Finch was probably strongest for the count on which she was convicted, and probably weakest for the counts of which she was acquitted.

[1][2][3] Even if the verdicts were inconsistent, moreover, we would still refuse to reverse the convictions because of the role of the jury and its verdict in our legal system. It is well established that consistency of a jury's verdicts is not necessary. Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 190-91, 76 L.Ed. 356 (1932) (Holmes, J., for a majority of 8-1); see also Powell, supra, 469 U.S. at 63, 105 S.Ct. at 476 (Rehnquist, J., for a unanimous Court) (reaffirming Dunn); Suppenbach, supra, 1 F.3d at 681. "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such ***231** matters." Dunn, supra, 284 U.S. at 394, 52 S.Ct. at 191. The jury here may have acquitted Finch of certain counts and failed to reach verdicts on other counts in order to exercise lenity or to mitigate punishment. Although such an exercise of power is impermissible, it is nevertheless not reviewable. Dunn, supra, 284 U.S. at 393, 52 S.Ct. at 190-91; Powell, supra, 469 U.S. at 65-66, 105 S.Ct. at 476-77. Juries in common-law courts have exercised this impermissible power for eight hundred years. T. Green, Verdict According to Conscience (1985). Even where verdicts are clearly inconsistent, we will not invade the province of the jury; indeed, the Supreme Court will not allow such an invasion. Powell, supra, 469 U.S. at 57, 105 S.Ct. at 471. A criminal defendant "is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence," a review properly undertaken by the appellate courts. Powell, supra, 469 U.S. at 67, 105 S.Ct. at 478. It is to that review that we now turn.

B.

[4] The government presented evidence of twenty shipments of cocaine that took place over approximately twenty months. The government alleged that twelve of these involved Finch. The evidence relevant to the conviction for conspiracy, as Finch herself points out, is all of the evidence, not just the evidence relevant to the substantive count for which she was convicted. Powell, supra, 469 U.S. at 67, 105 S.Ct. at 478; Jackson v.

Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). When we review Finch's conviction for conspiracy, therefore, we consider all of the evidence presented at trial, not just the evidence relating to the one substantive offense for which she was convicted. "We will reverse 'only if we conclude that a reasonable fact-finder must have entertained a reasonable doubt about the government's proof of one of the offense's essential elements.' " United States v. Rogers, 982 F.2d 1241, 1244 (8th Cir.1993) (quoting United States v. Ivey, 915 F.2d 380, 383 (8th Cir.1990)), cert. denied sub nom. Philipp v. United States, --- U.S. ----, 113 S.Ct. 3017, 125 L.Ed.2d 706 (1993).

[5] Finch is correct that proof of a buyer-seller relationship without more is not sufficient to prove a conspiracy. United States v. Prieskorn, 658 F.2d 631, 633 (8th Cir.1981). We have held that it is proper for a trial court to refuse to instruct the jury explicitly that proof of a buyer-seller relationship is insufficient to prove a conspiracy where the evidence did not support such an instruction because there was evidence of distribution of large amounts of cocaine over a significant period of time. United States v. Turner, 975 F.2d 490, 497 (8th Cir.1992), cert. denied sub nom. Dowdy v. United States, --- U.S. ----, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993). We have also held that a court's refusal to give such an instruction was not plain error where the circumstances of the single sale of cocaine at issue suggested that the cocaine had been purchased for resale. United States v. Hamell, 931 F.2d 466 (8th Cir.) (sale of eighty-two grams of ninety percent pure cocaine), cert. denied, --- U.S. ----, 112 S.Ct. 347, 116 L.Ed.2d 286 (1991).

[6][7] Because we consider all of the evidence presented at trial, we consider here evidence of Finch's role in the distribution of twelve shipments of cocaine. Finch testified at trial, denying any involvement in any conspiracy. Solum and others testified that Finch took part in the purchase and distribution of cocaine. The testimony of an accomplice alone may be sufficient to convict a defendant if the testimony is not incredible or insubstantial on its face. United States v. Starcevic, 956 F.2d 181, 185 (8th Cir.1992). We do not find Solum's testimony to be incredible or insubstantial, and we note, moreover, that his was not the only testimony that incriminated Finch. There was evidence to show Finch's involvement in the purchase of cocaine from Las Vegas, Nevada, and its subsequent distribution in the Fargo area. There was evidence to show that by pooling their resources the participants in North Dakota obtained cocaine more efficiently than they could have had they been acting alone, and more efficiently than Solum had done when he was purchasing smaller quantities of the drug. There was evidence that Finch knew that in addition to Solum, there were others who participated in the ***232** purchasing of cocaine from a source in Las Vegas and its subsequent distribution. There was evidence showing that the amounts involved in the shipments and distribution were greater than necessary for personal use. There was sufficient evidence, therefore, for the jury to have concluded that there was indeed a conspiracy and that Finch was one of the conspirators. We affirm the conviction for conspiracy to distribute cocaine.

[8][9] Finch's conviction for possession with intent to distribute must be affirmed for similar reasons. Solum's testimony was not facially incredible or insubstantial. It is true that the credibility of Solum and other witnesses as well as that of Finch was at issue. But it is the jury's role to assess the credibility of witnesses. The evidence was sufficient for a jury to find Finch guilty beyond a reasonable doubt.

II.

[10][11] Finch makes four other arguments in her appeal. She maintains, first, that the convictions should be reversed because the prosecutor improperly vouched for the government's evidence and attacked Finch's trial counsel during the government's closing argument. We must therefore examine the allegedly improper statements "within the context of the entire trial to determine first whether the remarks were in fact improper, and second whether the remarks were so offensive so as to deprive the defendant of a fair trial." United States v. Eldridge, 984 F.2d 943, 946 (8th Cir.1993) (citing United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). Finch is challenging the propriety of the government's statements in its closing argument that a witness was telling the truth, that the defense attorney was trying to mislead the jury, and that the evidence showed that Finch was guilty. (Finch objected at trial to only the first of these.) One witness (Solum) was

truthful, the government argued, because he did not testify that Finch had been involved in and knew about all the shipments of cocaine, but rather testified to her relatively limited involvement. The government argued that Finch's attorney was trying to mislead the jury by drawing attention to facts not relevant to and not inconsistent with Finch's involvement in the conspiracy. Finally, the government summarized the evidence by stating that the evidence showed that Finch was guilty beyond a reasonable doubt. Read in context there is nothing impermissible about the government's statements: the government was merely arguing that the jury should accept its interpretation of the evidence rather than the defendant's interpretation. We do not find such statements to be improper.

Finch next asserts that a photograph of one of her friends using cocaine was improperly admitted into evidence. The photograph had been provided to the government by Roxanne Claerbout, one of its witnesses. The first reference to the photograph at trial occurred when Finch cross-examined Claerbout at length about a photograph that she had supplied to the government in connection with this case. The government neither had introduced the photograph as evidence nor had examined Claerbout about it. On re-direct examination the government introduced the photograph as evidence over Finch's objection. Claerbout testified that the photograph had been taken at a party about six years before the trial and depicted two individuals, one of whom was snorting cocaine. Finch was not depicted in the photograph and, according to Claerbout's testimony, did not attend the party; neither of the people in the photograph testified at trial. The trial court concluded that the photograph was admissible because Finch had established its relevance by examining the witness about it.

[12] Finch's purpose in examining Claerbout about the photograph remains unclear. Questions about the photograph may have been part of Finch's impeachment of Claerbout's credibility. Indeed, Claerbout at first denied having given the government any photographs, then admitted that she had, and finally admitted that she had a "memory problem." On the other hand, however, Finch may have been attempting to lead the jury to the conclusion that the government failed to introduce the photograph because of the government's own misconduct or because ***233** it contained exculpatory evidence. We believe that the trial court's conclusion that the photograph was admissible merely because Finch had opened the door to such evidence is a misapprehension of the law, although a common one. Cross-examination of a witness about a particular topic does not necessarily open the door to re-direct examination and additional evidence relating to that topic. Hamilton v. Nix, 809 F.2d 463, 469 (8th Cir.) (en banc), cert. denied, 483 U.S. 1023, 107 S.Ct. 3270, 97 L.Ed.2d 768 (1987). The evidence introduced must rebut something that had been elicited on cross-examination. Id.

[13] Here, as in Hamilton, the evidence admitted on re-direct examination does not seem to rebut anything, except perhaps an inference of prosecutorial misconduct. It does not seem to rehabilitate the witness since it confirms what she testified to on cross-examination, namely that she gave the government a photograph that did not depict Finch. Although the evidence might have been admitted to rebut an inference of wrong-doing, the government did not make such an argument at trial and the court did not admit it for such a reason. We are convinced, however, that admitting the photograph and the related testimony was harmless because a picture of two people, neither of whom was a witness at the trial, using cocaine at a party that Finch did not attend could hardly have incriminated or prejudiced Finch.

Finch's final contention is that her sentence is improper because it was determined in part by looking at conduct that the trial court should not have considered. She argues that her sentence should be determined only by considering the amount of cocaine involved in the substantive count for which she was convicted, that the other substantive counts should not have been considered, and that she should not have been held responsible for the total amount of cocaine involved in the conspiracy because the total amount was not foreseeable.

[14][15] Finch was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Punishment under Section 846 is the same as the punishment specified for the substantive offense that was the object of the conspiracy. The substantive offense here, distribution of a controlled substance, is proscribed in Section 841(a), and the punishment specified in Section 841(b) depends on the amount

of the controlled substance involved in the offense. 21 U.S.C. § 841. When the punishment depends on the amount of the controlled substance involved in the offense, that amount need be proven only by a preponderance of the evidence. United States v. Payne, 940 F.2d 286, 292 (8th Cir.1991), cert. denied sub nom. Bogan v. United States, ---U.S. ---, 112 S.Ct. 616, 116 L.Ed.2d 638 (1992), and sub nom. Ransom v. United States, --- U.S. ----, 112 S.Ct. 1589, 118 L.Ed.2d 307 (1992). Relevant conduct includes all acts committed during the commission of the offense for which Finch was convicted as well as all reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3(a). Finch was convicted of conspiracy to distribute cocaine as well as one count of distribution of cocaine. Thus, the amounts of cocaine for which Finch can be held responsible need not have been proven beyond a reasonable doubt, and the trial court, therefore, could have considered the amounts of cocaine involved in the counts that did not result in conviction because they were part of the conspiracy.

The conspiracy in this case involved twenty shipments of cocaine over twenty months and a total amount of cocaine well in excess of two kilograms. Finch was indicted for her participation in twelve of these shipments. Eleven of the twelve involved between 112 and 168 grams of cocaine; the twelfth involved 252 grams. Finch's shares of the shipments were between seven and forty-two grams of each of the first eleven, and between twenty-eight and fifty-six grams of the twelfth. The trial court did not hold Finch responsible for the two shipments that were the subject of the counts of which she was acquitted, and held her responsible only for the lowest amount of the range established for each of the other shipments. Thus, the trial court calculated that the total amount of cocaine for which Finch was responsible was 91 grams, that is, nine shipments of seven grams and one shipment of 28 grams. This ***234** results in a base offense level of 16. U.S.S.G. § 2D1.1(c)(14). The trial court reduced the offense level to 12 because Finch was a minimal participant in the overall conspiracy. U.S.S.G. § 3B1.2. The trial court found Finch's criminal history category to be category III, having found five criminal history points. This results in a sentencing range of fifteen to twenty-one months; the trial court imposed a sentence of fifteen months. We find that the evidence adequately supported the trial court's finding that Finch was responsible for conspiring to distribute a total of ninety-one grams of cocaine, and find no error in the trial court's calculation of the sentence.

We note that the government suggests in its brief that the trial court improperly calculated the base offense level because Finch should have been held responsible not only for the amount of cocaine she actually possessed or distributed, but for the total amount of cocaine foreseeably involved in the conspiracy. The government did not, however, appeal the sentence, and we therefore decline to reach this issue.

III.

For the reasons given, we affirm Finch's conviction and sentence.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 04/10/96

INSTA-CITE

CITATION: 16 F.3d 228

Direct History

=> 1 **U.S. v. Finch,** 16 F.3d 228, 40 Fed. R. Evid. Serv. 230 (8th Cir.(N.D.), Jan 25, 1994) (NO. 93-1560), rehearing and suggestion for rehearing en banc denied (Mar 03, 1994)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 04/10/96
THE CURRENT DATABASE IS CTA

Citation | Page(P) | Database | Mode
809 F.2d 463 FOUND DOCUMENT P 1 OF 60 CTA Page
(Cite as: 809 F.2d 463)

Reed Wayne HAMILTON, Appellant,
v.
Crispus NIX, Warden, and Attorney General of the State of Iowa, Appellees.
No. 84-2089.
United States Court of Appeals,
Eighth Circuit.
Submitted May 15, 1986.
Decided Jan. 12, 1987.

Petitioner, who had been convicted in state court of first-degree murder and voluntary manslaughter, filed federal petition for writ of habeas corpus. The United States District Court for the Southern District of Iowa, Harold D. Vietor, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, 781 F.2d 619, Lay, Chief Judge, vacated and remanded. On the state's petition for rehearing en banc, the Court of Appeals, Bowman, Circuit Judge, held that: (1) identity and testimony of defendant's mother and her companion tending to inculpate defendant was admissible under independent source rule; (2) admission of marijuana defendant allegedly stole from victim was harmless error; (3) allegedly improper remarks by prosecutor during opening statement and in closing argument did not deprive petitioner of fair trial; and (4) sufficient circumstantial evidence supported finding of guilty

the police. The State concedes that the marijuana was not admissible under either the independent source, attenuation, or inevitable discovery exception.

[5][6] At trial the State sought to justify the admission of the marijuana on the ground that the defense had "opened the door" to its admission by cross-examining Maxine Hamilton about her activities in regard to the suitcase of marijuana. The trial judge admitted the marijuana as "rebuttal testimony." The State does not explain in its brief exactly what evidence or testimony it sought to rebut by introducing the marijuana. Nor are we able to discern from the trial transcript a proper reason for its admission as rebuttal evidence. Therefore, we hold that its admission into evidence was error. Compare Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925) and United States v. James, 555 F.2d 992 (D.C.Cir.1977) with Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). Our review of the entire trial transcript convinces us, however, that the error was harmless. There was strong circumstantial evidence to permit the jury to conclude beyond a reasonable doubt that Hamilton had robbed Pappas of marijuana. See Part III, infra. The marijuana itself added little if anything to the State's case. Thus, it was harmless error to admit it into evidence. See Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972).

II.

Hamilton next contends that improper remarks by the prosecutor in the opening

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 04/10/96

INSTA-CITE PAGE 5 OF 6

CITATION: 809 F.2d 463

Direct History

17 Hamilton v. Nix, 781 F.2d 619 (8th Cir.(Iowa), Dec 31, 1985) (NO. 84-2089)
Rehearing Granted by
18 Loeffler v. Carlin, 788 F.2d 494, 40 Empl. Prac. Dec. P 36,154 (8th Cir.(S.D.), Apr 08, 1986) (NO. 84-2553-EM, 84-2574-EM, 85-1301-NI, 84-2089-SI, 84-2617-SD)
AND On Rehearing
=> 19 **Hamilton v. Nix,** 809 F.2d 463 (8th Cir.(Iowa), Jan 12, 1987) (NO. 84-2089)
Certiorari Denied by
20 Hamilton v. Nix, 483 U.S. 1023, 107 S.Ct. 3270, 97 L.Ed.2d 768 (U.S.Iowa, Jun 26, 1987) (NO. 86-6523)

Related References

21 State v. Hamilton, 309 N.W.2d 471 (Iowa, Aug 26, 1981) (NO. 64359)

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CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 04/10/96
THE CURRENT DATABASE IS CTA

UNITED STATES of America, Plaintiff-Appellant,
v.
Donald Wesley TAYLOR, Defendant-Appellee.
UNITED STATES of America, Plaintiff-Appellee,
v.
Steven Wayne PRESSLER, and Donald Wesley Taylor, Defendant-Appellants.

Nos. 81-1769, 81-1770 and 81-1785.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 17, 1982.

Decided Sept. 23, 1983.

Defendants were convicted in the United States District Court for the District of Arizona, William P. Copple, J., of conspiracy to manufacture amphetamines and attempt to manufacture amphetamines. Both defendants appealed, and the Government appealed from the dismissal of a dangerous special drug offender notice it filed against one defendant. The Court of Appeals, Boochever, Circuit Judge, held that: (1) there was probable cause for the issuance of a warrant to search one defendant's home; (2) the detention of a codefendant during the execution of the warrant to search the house and vehicle could not be justified as being incident to the execution of the search; (3) the initial handcuff detention of the codefendant did not amount to an arrest without probable cause; (4) it was not necessary to grant the codefendant's motion for a severance; (5) the codefendant's confrontation rights were not violated; (6) the evidence was sufficient to sustain the conviction of the codefendant, despite his claim that he was merely an unwitting errand runner; (7) the jury was inadequately instructed on the substantial step requirement, mandating reversal of the attempt conviction; and (8) the dangerous special drug offender notice was properly dismissed.

Affirmed in part and reversed in part.

Fletcher, Circuit Judge, concurred in the result with an opinion.

[1] SEARCHES AND SEIZURES ⇐ 105.1
349k105.1
Formerly 349k105, 349k3.4
Validity of search warrant depends upon sufficiency of what is found within four corners of underlying affidavit. U.S.C.A. Const.Amend. 4.

[2] SEARCHES AND SEIZURES ⇐ 113.1
349k113.1
Formerly 349k113, 349k3.6(2)
Affidavit in support of issuance of search warrant is sufficient if it establishes probable cause, that is, if stated facts would reasonably allow magistrate to believe that evidence will be found in stated location. U.S.C.A. Const.Amend. 4.

[3] SEARCHES AND SEIZURES ⇐ 111
349k111
Formerly 349k3.6(4)
Affidavit in support of search warrant need not establish that it is "more likely than not" that evidence will be found or preclude other innocent interpretations for activities at defendant's house; affidavit is required only to enable magistrate to conclude that it would be reasonable to seek evidence at place indicated by affidavit. U.S.C.A. Const.Amend. 4.

[4] SEARCHES AND SEIZURES ⇐ 200
349k200
Formerly 349k3.9
Deference is accorded to magistrate's decision to issue search warrant. U.S.C.A. Const.Amend. 4.

[5] DRUGS AND NARCOTICS ⇐ 188(2)
138k188(2)
Formerly 138k188
Information regarding defendant's previous drug history was relevant to determination as to whether there was probable cause to justify search of defendant's home in that information was consistent with agent's and police chemist's opinions regarding suspicious activities detailed in two affidavits. U.S.C.A. Const.Amend. 4.

[6] DRUGS AND NARCOTICS ⇐ 188(8)
138k188(8)
Formerly 138k188
Defendant's claim that agent's information in affidavit in support of search warrant was stale failed where affidavit disclosed that beeper still signaled that box of precursor chemicals was at defendant's residence on day warrant was sought.

U.S.C.A. Const.Amend. 4.

[7] DRUGS AND NARCOTICS ⚿ 182.5(2)
138k182.5(2)
Formerly 138k182(6), 349k7(20)
Use of beeper tracking device in box containing chemicals ordered by suspect allegedly involved in operation of amphetamine laboratory did not violate Fourth Amendment where warrant was obtained for its installation. U.S.C.A. Const.Amend. 4.

[8] DRUGS AND NARCOTICS ⚿ 188(2)
138k188(2)
Formerly 138k188
Facts before magistrate were sufficient to establish probable cause to believe that evidence of drug-related activity would be found at defendant's residence. U.S.C.A. Const.Amend. 4.

[9] SEARCHES AND SEIZURES ⚿ 141
349k141
Formerly 349k3.8(1)
Detention of codefendant during execution of search of defendant's house could not be upheld as incident to execution of search warrant where codefendant was not detained in or adjoining the place being searched and was obviously in no position to facilitate orderly completion of search of house while lying handcuffed face down in a ditch some distance from the house. U.S.C.A. Const.Amend. 4.

[10] ARREST ⚿ 63.5(6)
35k63.5(6)
Law enforcement officers had legitimate investigatory purpose in stopping defendant who was driving truck away from his home based on founded suspicion that defendant had been manufacturing amphetamines in his home. U.S.C.A. Const.Amend. 4.

[11] ARREST ⚿ 63.5(7)
35k63.5(7)
When police officer stopped defendant and his apparent confederate to question them during investigation of whether defendant was manufacturing amphetamines in his home, officers were justified in drawing their weapons in self-protection after having been told that defendant was dangerous and that others with defendant should also be considered dangerous. U.S.C.A. Const.Amend. 4.

[12] ARREST ⚿ 63.5(7)
35k63.5(7)
Handcuffing and frisk of codefendant who was in defendant's truck which was subject of investigatory stop was justified after codefendant had disobeyed order to raise his hands and had made furtive movements inside truck where his hands could not be seen and, further, having codefendant lie down and be handcuffed during frisk did not convert it into an arrest necessitating probable cause. U.S.C.A. Const.Amend. 4.

[12] ARREST ⚿ 63.5(8)
35k63.5(8)
Handcuffing and frisk of codefendant who was in defendant's truck which was subject of investigatory stop was justified after codefendant had disobeyed order to raise his hands and had made furtive movements inside truck where his hands could not be seen and, further, having codefendant lie down and be handcuffed during frisk did not convert it into an arrest necessitating probable cause. U.S.C.A. Const.Amend. 4.

[13] ARREST ⚿ 63.5(9)
35k63.5(9)
Upon completing frisk of codefendant who had been in defendant's truck which was subject of investigatory stop, it was not necessary for officers to remove handcuffs or return codefendant to his feet immediately upon completing frisk in that restrictions eliminated possibility of assault or attempt to flee. U.S.C.A. Const.Amend. 4.

[14] ARREST ⚿ 63.4(12)
35k63.4(12)
There was probable cause to arrest codefendant who matched description of person who had picked up drug precursor chemicals ordered by another for defendant and had inquired about purchasing laboratory glassware and who claimed to be living at defendant's trailer home which was repository of chemicals and drug formulae and which was suspected site of drug laboratory. U.S.C.A. Const.Amend. 4.

[14] ARREST ⚿ 63.4(17)
35k63.4(17)
There was probable cause to arrest codefendant who matched description of person who had picked up drug precursor chemicals ordered by another for defendant and had inquired about purchasing

laboratory glassware and who claimed to be living at defendant's trailer home which was repository of chemicals and drug formulae and which was suspected site of drug laboratory. U.S.C.A. Const.Amend. 4.

[15] CRIMINAL LAW ⚿ 622.2(9)
110k622.2(9)
Formerly 110k622(2)
It was not necessary to sever trial of two defendants charged with offenses arising out of operation of, or attempt to operate, amphetamine laboratory in one defendant's home where nontestifying defendant's statement that codefendant wanted to shoot it out with the police was merely cumulative to agent's testimony that codefendant had given the same information.

[16] CRIMINAL LAW ⚿ 662.10
110k662.10
Formerly 110k662(1)
Codefendant's confrontation rights were not violated by Government's failure to recall agents who had overheard statements by codefendant concerning whether, when rearrested, he had told his girl-friend to tell defendant to "get out of there" and whether he had told agent that he lived at defendant's residence so as to rebut defendant's denial of having made those statements. U.S.C.A. Const.Amend. 6.

[17] CRIMINAL LAW ⚿ 396(1)
110k396(1)
Defense counsel opened the door to allegedly objectionable questioning involving drug enforcement administration agent's testimony that, in his experience, "innocent" third parties were not used to pick up chemicals for drug manufacturers where, on cross-examination, defense counsel had asked agent whether or not drug manufacturers used "intermediaries" or "third parties" to pick up chemicals so as to insulate themselves from detection. Fed.Rules Evid.Rule 611(a), 28 U.S.C.A.

[18] CONSPIRACY ⚿ 47(12)
91k47(12)
Evidence was sufficient to sustain convictions for conspiracy to manufacture amphetamines and attempt to manufacture amphetamines despite codefendant's claim that he was nothing more than unwitting errand runner.

[18] DRUGS AND NARCOTICS ⚿ 123.1
138k123.1
Formerly 138k123(1), 138k123
Evidence was sufficient to sustain convictions for conspiracy to manufacture amphetamines and attempt to manufacture amphetamines despite codefendant's claim that he was nothing more than unwitting errand runner.

[19] CRIMINAL LAW ⚿ 1036.4
110k1036.4
Defendants' failure to object to one of two chemical containers which was admitted in prosecution for conspiracy to manufacture amphetamines and attempt to manufacture amphetamines precluded reversal absent plain error. Fed.Rules Evid.Rule 103(a)(1), (d), 28 U.S.C.A.

[20] CRIMINAL LAW ⚿ 404.60
110k404.60
Formerly 110k404(4)
Fact that contents of two chemical containers were not tested went to weight to be given that evidence in prosecution for conspiring to manufacture amphetamines and attempt to manufacture amphetamines, not to admissibility, where adequate foundation was laid by identifying exhibits as filled containers labeled "platinum oxide" and "hydrogen" that were seized at defendant's residence. Fed.Rules Evid.Rules 103(a)(1), (d), 901, 28 U.S.C.A.

[21] CRIMINAL LAW ⚿ 720(7.1)
110k720(7.1)
Formerly 110k720(7)
Once two chemical containers that were labeled were admitted in prosecution for conspiring to manufacture amphetamines and attempt to manufacture amphetamines, it was not improper for prosecution to argue that in all likelihood contents of containers matched their labels. Fed.Rules Evid.Rules 103(a)(1), (d), 901, 28 U.S.C.A.

[22] CRIMINAL LAW ⚿ 1169.1(10)
110k1169.1(10)
Error, if any, in admitting two chemical containers that were labeled, but the contents of which were never chemically tested, was not prejudicial given extensive number of chemical exhibits introduced at trial.

[23] DRUGS AND NARCOTICS ⚿ 132
138k132

Convictions for attempt to manufacture amphetamines could not stand where jury was not instructed on substantial step requirement, but instruction merely required "some act" in effort to bring about or accomplish forbidden object. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[24] DRUGS AND NARCOTICS ⚿ 133
138k133
Under section providing that, in no case shall fact that defendant is alleged to be dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to presiding judge without consent of parties, it is "fact" of notice, not supporting details, that "shall" not be disclosed prematurely. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 409(a), 21 U.S.C.A. § 849(a).

[25] DRUGS AND NARCOTICS ⚿ 133
138k133
Notice that one defendant was dangerous special drug offender was properly dismissed where notice had been brought to attention of district judge presiding over trial, rather than to attention of district's chief judge, judge continued to preside over trial and did not notify parties of problem until notice was unsealed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 409(a), (e)(3), 21 U.S.C.A. § 849(a), (e)(3).

***704** Gary V. Scales, Asst. U.S. Atty., Phoenix, Ariz., for plaintiff-appellant.

George F. Klink, David M. Heller, McGroder, Pearlstein, Peppler & Tryon, Phoenix, Ariz., for defendant-appellee.

On Appeal from the United States District Court for the District of Arizona.

Before FLETCHER and BOOCHEVER, Circuit Judges, and KENYON, [FN*] District Judge.

FN* The Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

BOOCHEVER, Circuit Judge:

Donald Wesley Taylor and Steven Wayne Pressler were convicted of conspiracy to manufacture amphetamines and attempt to manufacture amphetamines. The Government and both defendants appeal. Taylor contends that the search of his residence was illegal because the information contained in the affidavit offered in support of the warrant failed to establish probable cause. Pressler contends that: (1) the trial court erred in denying his motion to suppress because his arrest was based on less than probable cause, (2) his trial should have been severed from Taylor's trial, (3) the district court committed reversible error by allowing certain questions during cross-examination, and (4) the evidence was insufficient to support his convictions. Both defendants contend that: (1) the trial court erred in allowing the Government to comment on the contents of two chemical bottles that were labeled but never analyzed, and (2) under the facts of this case, the jury instruction on attempt was inadequate. The Government appeals the dismissal of the "Dangerous Special Drug Offender" notice it filed against Taylor.

FACTS

The essence of the Government's case was that Taylor was operating, or attempting to make operable, an amphetamine laboratory at his home in Camp Verde, Arizona. Taylor has a ten-year history of being involved in the illegal manufacture of amphetamines. Pressler's principal role in the scheme appears to have been to pick up previously ordered chemicals at a chemical supply store.

The Government's investigation commenced when orders were placed at a Phoenix chemical supply store for chemicals used in manufacturing amphetamines. The first two orders were placed by a woman who identified herself as Carla Delwish, the maiden name of Taylor's wife. Personnel at the chemical supply store notified the Drug Enforcement Administration ("DEA") that orders had been placed for suspect chemicals. Although the first two orders were placed by Carla Delwish, a man later identified by a store employee as Pressler picked up the chemicals. The second time Pressler came to the store to pick up the chemicals, he also picked up several chemical supply catalogues and ordered additional chemicals.

In late January of 1981, based on the information

obtained from the chemical supply store, DEA agents secured a warrant authorizing them to hide a "beeper" tracking device in a box containing the chemicals ordered by Pressler. On February 2, 1981, Sharon Coley (Taylor's sister) picked up the beeper box and brought it to her home. Sometime between February 13th and 18th, the beeper box was removed from Coley's home to Taylor's home. Prior to the time the beeper box was moved, the DEA agents watching Coley's house observed Taylor transfer boxes from the house to Taylor's vehicle. Also prior to the date the beeper box was moved, Pressler visited the chemical supply store again to inquire about expensive laboratory glassware.

***705** On February 20, 1981, DEA and state agents executed search warrants at the residences of Coley and Taylor. The principal evidence found at Coley's home were receipts for the chemicals she and Pressler had picked up and a radio scanner tuned to a DEA channel.

Prior to executing the warrant for Taylor's home, the police and DEA agents borrowed a firetruck, disguised themselves as firemen and told residents that a propane truck had overturned nearby. They also had volunteer firemen man a roadblock while dressed as emergency medical technicians. The Government claims this was done as a safety precaution because of the explosive nature of the chemicals they suspected were being stored at the house, but testimony at trial indicates that this was done as a ruse to get Taylor to vacate his house.

Before execution of the search warrant, Taylor and Pressler attempted to drive away from the house, but were stopped and arrested. Taylor was arrested at gunpoint when he stepped out of his vehicle.

The parties give differing accounts of Pressler's arrest. It is clear that another officer approached the vehicle while Taylor was being arrested and told Pressler to raise his hands and step out. Pressler failed to comply until the officer repeated his order several times. The Government states in its brief that Pressler became "verbally uncooperative" when he stepped out so the agent ordered him to lie face down in a ditch and handcuffed him. The Government further states that several minutes later, a second agent approached Pressler, recognized Pressler from a description given by an employee at the chemical supply house as the person who had picked up the chemicals, and arrested him.

The record supports Pressler's contention that he did not become "verbally uncooperative", as the Government describes it, until after he was handcuffed face down in the ditch.

The agents proceeded to search Taylor's residence and seized hundreds of items, including some of the chemicals necessary to manufacture amphetamines, Taylor's handwritten formulas for producing controlled substances, and miscellaneous laboratory equipment. Agents failed to find any already-produced amphetamines or a working laboratory.

Taylor and Pressler were charged in a four count indictment with conspiring to manufacture amphetamines during two separate time periods, attempt to manufacture amphetamines (21 U.S.C. §§ 841(a)(1), 846 (1976)), and use of a firearm during the commission of a felony (18 U.S.C. § 924(c)(1) (Supp. V 1981)). After a nine-day trial, both defendants were convicted of one of the two conspiracy charges and the attempt charge and acquitted on the other two counts. Pressler was sentenced to concurrent sentences of five years on each count, of which only the first six months had to be spent in prison. Taylor received sentences of five years imprisonment on the conspiracy count, followed by five years of probation on the attempt count.

I.
Search Warrant

Taylor contends that the warrant to search his house, yard, and vehicle was based on less than probable cause because the information in the supporting affidavit was either stale or was obtained from tracking the beeper device. The argument is meritless because the information obtained from tracking the beeper was not constitutionally infirm and amply corroborated the allegedly stale information.

[1][2][3] The validity of a search warrant depends upon the sufficiency of what is found within the four corners of the underlying affidavit. United States v. Martinez, 588 F.2d 1227, 1234 (9th Cir.1978). An affidavit is sufficient if it establishes probable cause;

that is, if the stated facts would reasonably allow a magistrate to believe that the evidence will be found in the stated location. Id. Thus, contrary to Taylor's contention, the affidavit need not establish that it was "more likely than not" that evidence would be found or preclude other ***706** innocent interpretations for the activities at his house. The affidavit need only "enable the magistrate to conclude that it would be reasonable to seek the evidence in the place indicated by the affidavit." United States v. Hendershot, 614 F.2d 648, 654 (9th Cir.1980).

[4] Deference is accorded to a magistrate's decision to issue a warrant. Martinez, 558 F.2d at 1234. Three "types" of information were offered in support of the search warrant in this case. First, the agent gave detailed information regarding Taylor's involvement in manufacturing amphetamines over the previous ten years. Second, the agent's affidavit incorporated the previous affidavit made by the same agent to obtain the warrant to install and track the beeper device. The beeper affidavit described the suspicious transactions at the chemical supply store and included an expert chemist's opinion that the chemicals were "probably" being used to manufacture illegal drugs. Third, the agent detailed the information derived from tracking the beeper to Coley's and Taylor's homes.

[5][6] The information regarding Taylor's previous drug history was relevant in that it was consistent with the agent's and police chemist's opinions regarding the suspicious activities detailed in the two affidavits. Taylor's claim that the agent's information was stale overlooks the fact that the affidavit disclosed that the beeper still signalled that the box of precursor chemicals was at Taylor's residence the day the warrant was sought.

Taylor's contention that the electronic beeper violated his privacy rights in his home has been answered by United States v. Knotts, --- U.S. ----, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), and United States v. Brock, 667 F.2d 1311 (9th Cir.1982). In Knotts, the Supreme Court held that the tracking of a warrantless beeper placed in a drum of chloroform was neither a "search" nor a "seizure" within the meaning of the fourth amendment. 103 S.Ct. at 1087. There could be no expectation of privacy where the automobile transporting the drum was in plain view while on public thoroughfares or where the drum was open to observation while in the "open fields" while on private property. Id. 103 S.Ct. at 1085-86. The Court did not reach the issues of the warrantless installation of the beeper, id. 103 S.Ct. at 1084 n. *, or of the permissibility of monitoring the movement of the beeper while within the private residence. Id. 103 S.Ct. at 1087. These questions have been answered in this circuit by Brock.

[7] In Brock, this court upheld the warrantless [FN1] installation and monitoring of a beeper in a can of precursor, non-contraband chemicals. 667 F.2d at 1322. The court held that monitoring the device after it was carried into a private residence was not a "search" due to the minimal degree of intrusion. Id. at 1321-22. There can be no fourth amendment objection to the use of the beeper in the present case because a warrant for its installation was obtained. [FN2]

> FN1. We agree with Judge Adams, concurring in Brock, that it is certainly the better practice for the Government to obtain a warrant from a magistrate before installing and monitoring beeper devices. 667 F.2d at 1324-25 (Adams, J., concurring). In this case, such a warrant was obtained.
>
> FN2. The beeper was not used to monitor movement of the chemicals within the house, so that issue is not before us.

[8] The facts before the magistrate were sufficient to establish probable cause to believe that evidence of drug-related activity would be found at Taylor's residence.

II.
Motion to Suppress

Pressler argues that: (1) Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), is inapplicable because it was unnecessary to detain him during the execution of the warrant to search Taylor's house and vehicle; (2) the initial handcuffed detention constituted an arrest without probable cause, not a stop as permitted ***707** by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 22 L.Ed.2d 889 (1968); and (3) the officers lacked probable cause to arrest.

The district court denied the suppression motion. It found that the first officer's "detention" of

Pressler was justified under Michigan v. Summers and that there was probable cause for arrest by the time the second officer became involved. A clearly erroneous standard of review is applied to the historical facts found by the trial court. As to the determination of probable cause, we reach the same result under either a clearly erroneous standard or de novo review. We shall consider each of the points raised by Pressler.

A. Detention Incident to Execution of a Search Warrant

[9] The district court upheld Pressler's detention under Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), as a seizure incident to the execution of a search warrant. In Summers, the Supreme Court held that "for Fourth Amendment purposes, ... a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705, 101 S.Ct. at 2595. The Court noted that the detention constituted a "seizure" without probable cause. Id. at 696, 101 S.Ct. at 2590.

The applicability of Summers presents a close question. Initially we note that there is no merit to Pressler's attempt to distinguish Summers on the grounds that he lacked an interest in the premises subject to the warrant sufficient for standing and was not at the premises when detained. The Court clearly framed Summers in terms of "occupants", not owners, and explicitly found no constitutional significance in the fact that some of the "occupants" were seized on the sidewalk as they were leaving the house. Id. at 702 n. 16, 101 S.Ct. at 2594 n. 16.

On the other hand, however, much of the justification for the rule announced in Summers is inapplicable to Pressler's situation. In Summers, the "occupants" were kept in or brought back into the house being searched and kept there throughout the search or at least until the police discovered sufficient evidence to justify arresting them. The Court discerned two governmental purposes justifying the detention: (1) "preventing flight in the event that incriminating evidence is found", id. at 702, 101 S.Ct. at 2594, and (2) facilitating "the orderly completion of the search" by the presence of the occupants of the premises, id. at 703, 101 S.Ct. at 2594. The second purpose is based on the notion that the "self-interest [of the detained individuals] may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the [search]." Id.

It is clear from the first officer's testimony at the suppression hearing that neither of these purposes motivated his detention of Pressler. Nor was Pressler's detention likely to advance either governmental purpose articulated in Summers, especially the second. Unlike the individuals in Summers, Pressler was not detained in or adjoining the place being searched and was obviously in no position to facilitate the orderly completion of the search of Taylor's home while lying handcuffed face down in a ditch some distance from the house. [FN3]

> FN3. Although the Government does not argue the point, it is plausible that Pressler might have been taken to Taylor's house during the search but for the second officer formally arresting him shortly after the initial seizure. Nothing in the record, however, suggests that the officers intended to do so.

We conclude that the detention of Pressler cannot be justified on the basis of Michigan v. Summers.

B. Terry Stop

Using the ruse described above, law enforcement officers had evacuated Taylor's neighborhood. Taylor and Pressler eventually left Taylor's house in Taylor's truck, ***708** Taylor driving. When, within a short distance, Taylor spotted one of the officers, Agent Teague, Taylor stopped the truck, got out, and approached Teague to ask what was happening. Officers on the scene had been warned that prior experience with Taylor indicated that he was likely to be dangerous. Teague stopped Taylor at gunpoint, while another agent, Gamble Dick, approached the vehicle with his gun drawn and aimed at Pressler, who was seated in the passenger seat of the truck. Agent Dick ordered Pressler to raise his hands. Pressler did not comply, but made furtive movements with his hands inside the vehicle. Dick again ordered Pressler to raise his hands, and again Pressler did not comply. Finally, Pressler complied the third time the officer gave him the

order. Dick directed Pressler to lie face down in a ditch where he was handcuffed and frisked. Within a very short time, Agent Checkoway arrived on the scene. Checkoway recognized Pressler as the person who had picked up chemicals ordered by "Delwish" and had inquired at the chemical company about purchasing expensive laboratory glassware. Pressler also volunteered to the officers that he lived at Taylor's house, which was the repository of the chemicals and the site of the suspected drug laboratory. Checkoway formally arrested Pressler.

We consider each of the actions taken by the officers toward Pressler: Agent Dick's armed approach, the handcuffing, and the arrest. In our view, the initial detention and handcuffing of Pressler were justified as a Terry stop. Subsequently, when Agent Checkoway formally arrested Pressler he had probable cause to do so.

[10][11] The law enforcement officers had a legitimate investigatory purpose in stopping Taylor, founded suspicion that he was manufacturing amphetamines, as had been detailed in the affidavit in support of the search warrant. When the officers stopped Taylor and his apparent confederate, Pressler, to question them, we believe that the officers were justified in drawing their weapons in self-protection. The Supreme Court has recognized "that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). [FN4] The purpose of a Terry stop is "to allow the officer to pursue his investigation without fear of violence". Adams, 407 U.S. at 146, 92 S.Ct. at 1923. Earlier on the day in question, Agent Dick and the other officers on the scene had attended a briefing where they had been told that Taylor was dangerous and were warned that others with Taylor should also be considered dangerous.

> FN4. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Terry v. Ohio, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 22 L.Ed.2d 889 (1967).

Pressler argues that United States v. Strickler, 490 F.2d 378 (9th Cir.1974), mandates a different result. In Strickler, the police were watching a house where they expected cocaine to be delivered. The police observed a car drive past the house twice, the unknown occupants of the car looking in the direction of the house the first time. Later at some distance from the house police cars surrounded the car and one of the officers pointed a gun at the occupants of the car and ordered them to raise their hands. The court stated that it could not equate the armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the brief investigatory stop authorized by Terry and Adams. 490 F.2d at 380. On the facts of the case, though, it is clear that the drawing of weapons would not have been permissible for other grounds: the police ***709** had no legitimate fear for their safety and only tenuous reasons to believe that the occupants of the car were involved in the drug transaction. In the present case, the law enforcement agents had strong evidence of drug activity and valid reason to fear for their safety.

[12] The handcuffing and frisk of Pressler for weapons was similarly justified. Twice Pressler had disobeyed an order to raise his hands, and he made furtive movements inside the truck where his hands could not be seen. At this point Agent Dick found it wise to frisk Pressler for weapons. Because there were two suspects and only two or three officers on the scene, Agent Dick deemed it prudent to have Pressler lie down and be handcuffed during the frisk. We have previously held that the use of handcuffs, if reasonably necessary, while substantially aggravating the intrusiveness of an investigatory stop, do not necessarily convert a Terry stop into an arrest necessitating probable cause. United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir.1982). See United States v. Thompson, 597 F.2d 187, 190 (9th Cir.1979). Likewise, requiring the suspect to lie down while a frisk is performed, if reasonably necessary, does not transform a Terry stop into an arrest.

[13] After frisking Pressler, the officers required him to remain in this prone, handcuffed position for three to five minutes before he was formally placed under arrest by Agent Checkoway. During this time, Pressler was "extremely verbally abusive" and "quite rowdy". It was not necessary for the officers to remove Pressler's handcuffs or to return Pressler to his feet immediately upon completing the frisk. The restrictions eliminated the possibility of an assault or attempt to flee, particularly if an arrest became imminent, as indeed it did. See Bautista, 684 F.2d at 1290.

C. The Arrest

[14] When Agent Checkoway arrived on the scene, he consulted with other officers, recognized Pressler, and formally placed Pressler under arrest. Checkoway recognized Pressler as matching the description of a person who had picked up drug precursor chemicals ordered by "Delwish", and had inquired about purchasing laboratory glassware. The description included height, weight, age, hair color and length, and beard type. The courier was also described as wearing a Harley-Davidson belt buckle. Pressler fit the description in all respects. In addition, Checkoway knew of Pressler's claim of also living at Taylor's trailer home, which was the repository of the chemicals and drug formulae and the suspected site of the drug laboratory. In all, we conclude that Agent Checkoway possessed probable cause to arrest Pressler.

We therefore affirm the district court denial of the motion to suppress.

III.
Severance

[15] Pressler contends that the trial court committed reversible error in refusing to sever his trial from Taylor's. The issue concerns testimony given by a DEA agent regarding statements allegedly made by Taylor and Pressler while the agent was driving the two defendants to the police station to be booked. According to agent Parra, Taylor said that he had considered shooting it out with the law enforcement agents but had decided against it because he felt that he had not done anything wrong. He convinced Pressler to come out peacefully and they unloaded their guns. Agent Parra stated further that Pressler had said that he favored shooting it out with the law enforcement officers but that he had agreed with Taylor and decided against it. Pressler also allegedly said that he did not trust law enforcement officers and that it had been his experience that they could not be trusted. At trial, Pressler testified that he never made the statement to agent Parra about preferring to shoot it out, but was unable to question Taylor about the conversation with agent Parra because Taylor chose not to testify, as was his right.

***710** The general rule is that defendants jointly charged are jointly tried. See United States v. Gay, 567 F.2d 916, 919 (9th Cir.), cert. denied, 435 U.S. 999, 98 S.Ct. 1655, 56 L.Ed.2d 90 (1978). This rule is applicable in conspiracy cases. United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir.), cert. denied, 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d 71 (1980). Fed.R.Crim.P. 14 provides, however, that the trial court may grant a severance when it appears that a defendant would suffer significant prejudice from a joint trial.

Pressler argues that his trial should have been severed from Taylor's, citing Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). Bruton is inapplicable here because Taylor's statement that Pressler wanted to shoot it out with the police was merely cumulative to Agent Parra's testimony that Pressler had given the same information. Pressler cross-examined Agent Parra about the conversation. Pressler took the stand and denied that the conversation took place. We therefore affirm the denial of severance.

IV.
Improper Questioning at Trial

[16] Pressler contends that the trial court committed reversible error in not sustaining his objections to certain questions asked by the Government at trial. First, the prosecutor asked Pressler whether, when re-arrested on May 7, 1981, in the presence of DEA agents he had told his girlfriend to tell Taylor to "get out of there". The prosecutor also asked Pressler if he had told a DEA agent that he lived at the Taylor residence. Pressler denied making these statements, and the Government did not offer testimony from the agents in question to support the questions. Pressler relies

on County of Maricopa v. Maberry, 555 F.2d 207 (9th Cir.1977). He contends that his confrontation rights were violated by the Government's failure to recall the agents who overheard the statements so as to rebut Pressler's denial of having made them. We disagree. The statements made in this case were not nearly so inflammatory as those in Maberry. See United States v. Jones, 592 F.2d 1038, 1044 n. 9 (9th Cir.), cert. denied, 441 U.S. 951, 99 S.Ct. 2179, 60 L.Ed.2d 1056 (1979) (pointing out that Maberry was a case in which the complained of questioning was highly "prejudicial", clearly "improper", and "unethical").

[17] The second line of allegedly objectionable questioning involved DEA Agent Henderson's testimony. On cross-examination, defense counsel asked the DEA agent whether or not drug manufacturers use "intermediaries" or "third parties" to pick up chemicals so as to insulate themselves from detection. On re-direct, the prosecuting attorney asked the witness whether, in his experience, these third parties are always, sometimes, or never involved in the illegal manufacturing operation. The witness answered that, in his experience, "innocent" third parties were not used to pick up chemicals. We find that defense counsel "opened the door" to this line of questioning, see United States v. Millican, 424 F.2d 1038, 1039-40 (5th Cir.1970), and that the trial court did not abuse its discretion in permitting the question. Fed.R.Evid. 611(a).

V.
Sufficiency of the Evidence

[18] Pressler next contends that there was insufficient evidence to support a conviction on either count. In addressing this contention, the reviewing court determines whether the evidence, viewed in the light most favorable to the Government, would permit any rational trier-of-fact to conclude that the defendant was guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir.1969).

Pressler argues that the evidence, even when viewed under the appropriate standard, failed to show that he was something more than an unwitting errand runner. He contends that the Government did no more ***711** than pile inference upon inference to persuade the jury that he was a major actor, rather than an "unsuspecting pawn", in Taylor's scheme.

The difficulty with Pressler's argument is that the reviewing court must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. See United States v. Ramos, 558 F.2d 545, 546 (9th Cir.1977). There was sufficient evidence to support the verdicts against Pressler. There was testimony, inter alia, that Pressler picked up the suspect chemicals ordered by Taylor's wife; that he later secured a catalogue of chemicals and inquired about purchasing expensive laboratory glassware (he failed to claim any legitimate use for the glassware at trial); that he periodically resided at Taylor's house, where extensive precursor chemical supplies and laboratory equipment were found; and that he made the incriminating statement about wanting to shoot it out with police.

VI.
Admission of and Reference to Unanalyzed Chemical Exhibits

Taylor, joined by Pressler (by incorporation), contends the trial court abused its discretion in admitting and allowing the Government to refer to two chemical containers that were labeled, but the contents of which were never chemically tested. Defendants contend that there was inadequate foundation to admit the exhibits.

[19][20][21][22] The contention is meritless. First, the defendants' failure to object to one of the two exhibits precludes reversal absent plain error. Fed.R.Evid. 103(a)(1), (d). Second, the Government laid an adequate foundation by identifying the exhibits as filled containers labeled "platinum oxide" and "hydrogen" that were seized at Taylor's residence. See Fed.R.Evid. 901. The fact that the exhibits were never analyzed goes to their weight as evidence, not their admissibility. See United States v. Brewer, 630 F.2d 795, 801-02 (10th Cir.1980). Third, once the exhibits were admitted it was not improper for the prosecution to argue that in all likelihood the contents matched the label. Finally, given the extensive number of chemical exhibits introduced at trial, it seems unlikely that the admission of these two exhibits,

even if improper, was prejudicial error. We therefore find no reversible error.

VII.
The Convictions of Attempt

[23] The defendants were convicted of both attempt and conspiracy under 21 U.S.C. § 846. They contend that the trial court did not adequately instruct the jury on attempt. In United States v. Snell, 627 F.2d 186, 187 (9th Cir.1980) (per curiam), cert. denied, 450 U.S. 957, 101 S.Ct. 1416, 67 L.Ed.2d 382 (1981), this court stated that a conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent. In the case before us, the district court instructed the jury on attempt that:

> To "attempt" an offense means willfully to do some act in an effort to bring about or accomplish something the law forbids to be done.
>
> An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

This instruction was taken verbatim from 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 14.21, at 437 (3d ed. 1977). [FN5]

> FN5. In United States v. Conway, 507 F.2d 1047, 1052 (5th Cir.1975), the Fifth Circuit held that the first paragraph of the instruction, standing alone, instructed the jury accurately on the applicable law. The contention made in Conway was that the instruction "gave an inadequate definition of the word 'attempt' ", defendant citing no authority. The contention was apparently not made that the instruction failed to require a substantial step. Moreover, in Conway the defendant had failed to object and so the court reviewed for plain error. In the present case, a timely objection was made, accompanied by a suggested alternative instruction.

***712** The instruction given nowhere discussed the substantial step requirement. The instruction merely required "some act" in an effort to bring about or accomplish a forbidden object. "Some act" could include an act of mere preparation, which does not constitute a substantial step. E.g., United States v. Manley, 632 F.2d 978, 987 (2d Cir.1980), cert. denied, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981). Counsel objected to the instruction and submitted a requested instruction distinguishing between mere preparation and an overt act likely to result in the commission of the offense. We therefore hold that on the facts of this case the jury instruction was inadequate, and reverse each of the defendants' convictions of attempt. [FN6]

> FN6. We are also disturbed by an ambiguity in the statute that the defendants were convicted of violating. A single section of title 21 makes "attempt or conspiracy" to violate the Drug Abuse Prevention and Control Act a crime. 21 U.S.C. § 846. The statute seems to create only a single offense, denominated "attempt or conspiracy". The facts of this case indicate only a single course of action. We acknowledge that, under some circumstances, Congress may have intended separate punishment for attempt and conspiracy under section 846. Conceivably, a conspiracy to manufacture followed by a later, separate attempt to manufacture could constitute separately punishable offenses. For example, if two people agreed to manufacture amphetamines and ordered a chemical to further that purpose, the requirements of conspiracy would be met. If a year later one of them built a laboratory, assembled all necessary ingredients and started the manufacturing process but was apprehended before completing it, punishment might be permissible for the conspiracy and the attempt. But here, in contrast, there is but a single course of criminal conduct. Normally this case would be suitable for application of the doctrine of lenity whereby a "Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Whalen v. United States, 445 U.S. 684, 695 n. 10, 100 S.Ct. 1432, 1440 n. 10, 63 L.Ed.2d 715 (1980) (quoting Ladner v. United States, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958)). See also Busic v. United States, 446 U.S. 398, 406-07, 100 S.Ct. 1747, 1752-53, 64 L.Ed.2d 381 (1980) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); United States v. Bass, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971). It is unnecessary for us to resolve this issue, however, in view of our reversal of the convictions for attempt.

VIII.
Special Drug Offender Notice

Prior to trial, the Government filed a notice with the district court clerk pursuant to 21 U.S.C. § 849(a) (1976) that Taylor was a dangerous special drug offender as defined by section 849(e)(3) (1976). Two days into the nine-day trial, the clerk's office inadvertently brought the notice to the attention of the judge presiding over Taylor's trial rather than to the attention of the district's chief judge. The trial judge continued to preside over the trial, and did not notify the parties of the problem until the notice was unsealed when the guilty verdicts were returned. At that point, the trial judge recused himself, and reassigned all further proceedings to another judge. The second judge dismissed the notice, finding that 21 U.S.C. § 849(a) imposes strict liability on the Government to insure that the trial judge does not learn of the notice prematurely. Section 849(a) provides, in relevant part:

> In no case shall the fact that the defendant is alleged to be a dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties.

The Government concedes that section 849(a) was violated, but contends the error was harmless because: (1) the judge learned only that a notice had been filed, not its contents, (2) the disclosure did not affect the trial judge's impartiality, and (3) the violation was attributable to the clerk's office, not the Government. None of these is relevant.

[24] As noted by the second district judge, section 849(a) unambiguously provides ***713** that it is the "fact" of the notice, not the supporting details, that "shall" not be disclosed prematurely. See United States v. Bailey, 537 F.2d 845, 849 (5th Cir.1976), cert. denied, 429 U.S. 1051, 97 S.Ct. 764, 50 L.Ed.2d 767 (1977).

[25] The Government's contention that the disclosure did not affect the trial judge is pure speculation. As the district court in United States v. Tramunti, 377 F.Supp. 6, 10 (S.D.N.Y.1974), modified on other grounds, 513 F.2d 1087 (2d Cir.1975), noted in rejecting the same argument:

> [w]hether or not I believe that I was at all consciously or subconsciously influenced by having seen the notice before the verdict, I do not feel free to ignore the clear provisions of Section 849. The potential penalties to which Section 849 subjects a defendant are very grave indeed, and in seeking to have them imposed the government must precisely follow all of the procedural safeguards which the section requires.

Finally, while the Government was not directly responsible for the violation, it was certainly better situated than Taylor to have prevented its occurrence. Moreover, the Government offers no cogent reason why the defendant should bear the effects of the mistake regardless of whose fault the mistake was.

The dismissal of the special drug offender notice is affirmed.

CONCLUSION

Each defendant's conviction of conspiracy is AFFIRMED. Each defendant's conviction of attempt is REVERSED. The dismissal of the special drug offender notice as to Taylor is AFFIRMED.

FLETCHER, Circuit Judge, concurring:

I concur in the result, and I join all of the majority opinion except Part VII. I write separately on the effect of conviction of both attempt and conspiracy under 21 U.S.C. § 846. Although I agree that the sentences imposed for attempt must be vacated, I rest my conclusion on a different reason.

21 U.S.C. § 846 (1976) provides that

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The statute thus prescribes punishment for one who "attempts or conspires" to commit any offense defined in the subchapter. Based on a given course of conduct, a defendant may be convicted of the section 846 offense if a jury unanimously agrees that the Government has proven the elements of either attempt or conspiracy. But a defendant may not be

punished for both attempt and conspiracy based on a single course of conduct merely because the elements of both offenses are present.

To be sure, there will be situations where multiple punishments under section 846 will be proper. Such instances will arise when a defendant "attempts or conspires" to violate the drug laws on two completely separate occasions. For example, a defendant who engages in a conspiracy to manufacture and sell amphetamines that ends, and who later separately attempts by himself to manufacture and sell the substance, could be separately punished for two distinct violations of section 846.

The instant case does not present such a situation. The defendants acted in concert for the purpose of setting up an amphetamine laboratory in Taylor's home. Based on this conduct, they were found guilty of conspiracy. The statute does not authorize additional punishment for "attempt" based on the same conduct. I would vacate the attempt sentences without reference to the jury instruction given.

END OF DOCUMENT

INSTA-CITE

CITATION: 716 F.2d 701

Direct History

=> 1 **U.S. v. Taylor,** 716 F.2d 701, 14 Fed. R. Evid. Serv. 218 (9th Cir.(Ariz.), Sep 23, 1983) (NO. 81-1769, 81-1770, 81-1785)

Negative Indirect History

Declined to Follow by
2 U.S. v. Savaiano, 843 F.2d 1280, 25 Fed. R. Evid. Serv. 725 (10th Cir.(Kan.), Mar 30, 1988) (NO. 86-2530, 86-2507) (Additional History)
Declined to Extend by
3 U.S. v. Contreras, 950 F.2d 232 (5th Cir.(Tex.), Dec 23, 1991) (NO. 91-2021) (Additional History)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
22A C.J.S. Criminal Law Sec.572 Note 34
79 C.J.S. Searches and Seizures Sec.151 Note 67

UNITED STATES of America, Plaintiff-Appellee,
v.
Martin TUCHOW and Louis Farina, Defendants-Appellants.

Nos. 84-1350, 84-1364.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 30, 1984.

Decided July 19, 1985.

Defendants were convicted before the United States District Court for the Northern District of Illinois, John F. Grady, J., of violations of the Hobbs Act, and they appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) district court did not err when it allowed receipt of "other acts" evidence; (2) testimony of victims was properly admitted under state of mind exception to hearsay rule; (3) while district court erred in not giving limiting instruction regarding statements made by coconspirator prior to time defendant joined extortion conspiracy, error was harmless; (4) evidence was sufficient to support convictions for conspiracy to extort money in connection with application for building permit; (5) evidence was sufficient to sustain convictions for attempted extortion; (6) evidence was sufficient to sustain defendant's conviction for attempting to extort $25,000 from partnership which applied for building permit; (7) instruction with respect to issue of representation evidence was not improper; and (8) case would be remanded to allow defendants their right to allocution at sentencing hearing.

Affirmed and remanded.

[1] CRIMINAL LAW ⚿ 369.2(1)
110k369.2(1)
"Other acts" evidence is admissible only if: evidence is directed toward establishing a matter in issue other than defendant's propensity to commit crime charged; evidence shows that other act is similar enough and close enough in time to be relevant to matter at issue; evidence is clear and convincing; and probative value of evidence is not substantially outweighed by danger of unfair prejudice. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⚿ 371(1)
110k371(1)
Tape recorded conversation between defendant and his barber, wherein defendant, a city alderman, allegedly offered to bribe a municipal court judge to dismiss a speeding ticket, was admissible in extortion prosecution under Federal Evidence Rule 404(b) pertaining to receipt of "other acts" evidence, as it was directed toward establishing defendant's intent in accepting money for his efforts in obtaining building permit, it was similar enough and close enough in time to be relevant, evidence was clear and convincing as conversations between barber and defendant were recorded on tape, and any prejudice from admission of evidence was outweighed by its probative value. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
Any determination balancing prejudice against evidence's relevance is reversible only if district court abused its discretion. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[4] EXTORTION AND THREATS ⚿ 5
165k5
In a Hobbs Act prosecution for extortion, government is required to prove criminal intent on part of accused. 18 U.S.C.A. § 1951.

[5] CRIMINAL LAW ⚿ 371(1)
110k371(1)
Evidence of tape recorded conversations between defendant and contractor concerning an agreement that defendant, a deputy city commissioner, would arrange a job in city government for contractor's nephew for $2,500 and would fix a drunk driving citation for contractor's uncle for $1,000 was admissible in prosecution of defendant for extorting money from contractor in connection with building permit application, under Federal Evidence Rule 404(b) pertaining to "other acts" evidence, considering that evidence was relevant in establishing defendant's intent to engage in conspiracy with alderman in order to obtain illegal building permit, evidence was similar enough to obtaining of illegal building permit to be relevant, and evidence of the other acts was clear and

convincing. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] CRIMINAL LAW ⇐ 622.1(2)
110k622.1(2)
A motion for severance of defendants is committed to discretion of the district court and its decision will only be reversed upon a strong showing of prejudice to moving defendant. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

[6] CRIMINAL LAW ⇐ 1166(6)
110k1166(6)
A motion for severance of defendants is committed to discretion of the district court and its decision will only be reversed upon a strong showing of prejudice to moving defendant. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

[7] CRIMINAL LAW ⇐ 622.2(8)
110k622.2(8)
District court did not abuse its discretion in denying severance motion based on allowance of "other acts" evidence as to codefendant, considering clear language contained in court's limiting instructions that evidence as to codefendant's "other acts" was to be considered against codefendant only. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

[8] EXTORTION AND THREATS ⇐ 5
165k5
In a Hobbs Act prosecution for extortion under color of official right, government must establish not only victim's state of mind at time of alleged extortion but also intent of defendant. 18 U.S.C.A. § 1951.

[9] CRIMINAL LAW ⇐ 419(2.20)
110k419(2.20)
Formerly 110k419(1)
In prosecution of city alderman for extortion in connection with scheme to obtain illegal building permit, testimony of victims that they believed they were being extorted was admissible under state of mind exception to hearsay rule, notwithstanding claim of defendant that testimony was untrustworthy because it was contractor who conveyed information to victims as to progress made in obtaining building permit, since taped conversations revealing details of extortion scheme demonstrated that information concerning payments made to alderman was accurately conveyed to victims. 18 U.S.C.A. § 1951; Fed.Rules Evid.Rule 803(3), 28 U.S.C.A.

[10] CRIMINAL LAW ⇐ 1172.2
110k1172.2
Limiting instruction given to jury in extortion prosecution prior to its consideration of state of mind evidence in form of testimony of victims did not prejudice defendant's case, considering that although he objected to introduction of the evidence he never registered any objection to language used by court in limiting instruction, and that instruction did not direct a verdict against defendant but properly instructed jury that victims' state of mind could provide some evidence as to whether defendant, a city alderman, intended that payments to obtain building permit represent his attorney fees, rather than a bribe. 18 U.S.C.A. § 1951; Fed.Rules Evid.Rule 803(3), 28 U.S.C.A.

[11] CRIMINAL LAW ⇐ 673(1)
110k673(1)
Although statements made by conspirator to government informant prior to time defendant joined building permit extortion conspiracy were admissible to establish nature and objective of conspiracy, district court erred in not giving limiting instruction stating that while such statements could be used as evidence of nature and objective of conspiracy, they could not be used as independent evidence establishing defendant's participation in conspiracy; however, error was harmless since independent evidence establishing that defendant joined conspiracy was overwhelming. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[11] CRIMINAL LAW ⇐ 1173.2(9)
110k1173.2(9)
Although statements made by conspirator to government informant prior to time defendant joined building permit extortion conspiracy were admissible to establish nature and objective of conspiracy, district court erred in not giving limiting instruction stating that while such statements could be used as evidence of nature and objective of conspiracy, they could not be used as independent evidence establishing defendant's participation in conspiracy; however, error was harmless since independent evidence establishing that defendant joined conspiracy was overwhelming. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[12] CONSPIRACY ⇐ 23.1

91k23.1
Formerly 91k23, 91k24
In order to establish a conspiracy, government must prove there was an agreement between two or more persons to commit an unlawful act, that defendant was a party to the agreement, and that an overt act was committed in furtherance of the agreement by one of the coconspirators.

[12] CONSPIRACY ⇐ 27
91k27
In order to establish a conspiracy, government must prove there was an agreement between two or more persons to commit an unlawful act, that defendant was a party to the agreement, and that an overt act was committed in furtherance of the agreement by one of the coconspirators.

[13] CONSPIRACY ⇐ 47(3.1)
91k47(3.1)
Formerly 91k47(3)
Evidence in prosecution of city alderman and deputy city commissioner for conspiracy to extort money under the Hobbs Act, in connection with scheme to obtain illegal building permit, including taped conversations between government informant and alderman as well as between informant and city commissioner, was sufficient to refute alderman's claim that $50,000 payment represented his attorney fees for his help in obtaining a simple building permit, and thus to sustain convictions. 18 U.S.C.A. § 1951.

[14] EXTORTION AND THREATS ⇐ 4
165k4
Required interstate commerce nexus needed to establish federal jurisdiction in an extortion case under the Hobbs Act is de minimis. 18 U.S.C.A. § 1951.

[15] EXTORTION AND THREATS ⇐ 6
165k6
As long as an extortion payment is made to an official because of his position, an act of "extortion" as defined in section of the Hobbs Act [18 U.S.C.A. § 1951(b)(2)] is committed.

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

[16] EXTORTION AND THREATS ⇐ 15
165k15
Evidence in prosecution of city alderman and deputy city commissioner under the Hobbs Act, for extortion in connection with application for building permit, including fact that alderman attempted to block construction project which cost approximately $1.5 million and was built with over $400,000 in materials from outside of Illinois, was sufficient to support jury's conclusion that actions of officials had a potential direct effect on interstate commerce, and thus to sustain convictions for attempted extortion. 18 U.S.C.A. § 1951(b)(2).

[17] EXTORTION AND THREATS ⇐ 15
165k15
Evidence in Hobbs Act prosecution of city alderman for attempting to extort $25,000 from partnership in exchange for building permit, including testimony of partner that alderman demanded $25,000 for permit and that after partners agreed to pay amount, permit was finally issued to general contractor, was sufficient to sustain conviction, notwithstanding alderman's claim that $25,000 payment was a legal fee for his work in representing partnership on related real estate and tax matters. 18 U.S.C.A. § 1951.

[18] CRIMINAL LAW ⇐ 1166.22(3)
110k1166.22(3)
Judge's statement to defense counsel in presence of jury in which judge admonished counsel not to continue to object to witness' testimony, as court considered there was a standing objection and that testimony would be unduly interrupted, did not rise to level of prejudicial error, where, after hearing counsel's explanation that counsel had misunderstood that judge considered his objections to be continuing throughout testimony, judge apologized to defense counsel for misunderstanding and later explained to jury that counsel was not being intentionally disruptive and that they should disregard court's remark.

[19] CRIMINAL LAW ⇐ 1166.22(3)
110k1166.22(3)
Although district court's comment to defense counsel in front of jury that he would have to "screen defense counsel's questions if I cannot trust you to ask proper questions" may have been a harsh admonishment, it did not prejudice defendant's case, considering that it was a single isolated comment in a three-week long trial in which proof of guilt was substantial.

[20] CRIMINAL LAW ⚿ 1172.2
110k1172.2
With regard to instruction that evidence of good reputation should "not constitute an excuse to acquit" defendant, if the jury, after weighing all evidence including evidence of good character, is convinced beyond a reasonable doubt that defendant is guilty of crime charged in the indictment, fact that "excuse to acquit" language is used does not constitute reversible error as long as phrase "including the evidence of good character" is included in the instruction.

[21] CRIMINAL LAW ⚿ 1181.5(8)
110k1181.5(8)
Where defendants were denied right of allocution at sentencing hearings, case would be remanded back to district court to allow them opportunity to make a statement on their own behalf before sentence was imposed. Fed.Rules Cr.Proc.Rule 32(a)(1)(C), 18 U.S.C.A.

***858** Allan A. Ackerman, Ackerman & Egan, Chicago, Ill., for plaintiff-appellee.

William Bryson, Asst. U.S. Atty., Chicago, Ill., for defendants-appellants.

Before CUDAHY and COFFEY, Circuit Judges, and GRANT, Senior District Judge. [FN*]

FN* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

COFFEY, Circuit Judge.

The defendants Tuchow and Farina appeal a jury verdict finding them guilty of violating the Hobbs Act, 18 U.S.C. § 1951. [FN1] We affirm their convictions, but remand this case to allow the defendants' their right to allocution at the sentencing hearing.

FN1. § 1951. Interference with commerce by threats or violence "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. "(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

I.

The majority of the evidence introduced at trial was gathered through the use of taped conversations between Jack Walsh, the government's key witness, and the defendants Tuchow and Farina. On appeal, the defendants dispute the inferences to be drawn from the statements recorded on tape.

Shortly after Jack Walsh purchased a home remodeling company named J.C. Construction in 1979, the FBI approached Walsh and informed him that they had evidence of his participation in a bank fraud. Because of this evidence, Walsh agreed to cooperate with the FBI which was conducting several other fraud investigations in Chicago in late 1979. To aid in these investigations, the FBI placed listening and recording devices throughout Walsh's office and in his telephone. In early 1980, Walsh learned of the Kenton Court condominium rehabilitation project ***859** from a friend in the construction business and immediately contacted Kaplan, a partner in the project to express his interest in the rehabilitation venture. The other individuals who comprised the Kenton Court partnership were Messrs. Radek and Golding, both of whom testified at trial. After examining the project's blueprints, Walsh concluded that the project did not meet the City of Chicago building code requirements as the building did not have enough fire exits (although he apparently did not inform the Kenton partners of his observations). [FN2] Walsh then contacted the FBI and told them

that he needed a building permit for a job which, in his opinion, did not meet the Chicago building code requirements and that he would contact a friend, the defendant Farina, to get the permit "fixed."

FN2. After his initial meeting with Tuchow, Walsh entered into a contract with the Kenton partners on June 9, 1980 to act as the general contractor for the condominium rehabilitation project.

On May 20, 1980, Walsh called Farina and arranged to meet with him at a Chicago restaurant on the following day, May 21, 1980. When he met Farina on May 21, Walsh told him that he needed his help "in getting a building permit through" since the building had "some violations in it." Walsh testified that Farina promised to help for a $2,000 fee and warned Walsh that "now this may cost you a little more you know, whatever the situation takes." Farina, who at the time was the Deputy Commissioner of Sanitation for the City of Chicago, then suggested that he would have to bring the ward committeeman for the area, the defendant Tuchow, into the deal. Later during this May 21 conversation, Farina made several incriminating statements referring to the expected payoffs, including "for God's sake, don't tell people what you give me" and "I'll take it from here. Cause I wanna drop the money first." On June 3, Walsh again met with Farina and gave him $2,000, which was supplied to Walsh by the FBI; and at that time Farina warned Walsh not to show the money or it would "kill us all." Farina then telephoned Tuchow's office and told Tuchow that he had a client with a building permit problem for Tuchow and told him that "since it's in your ward, I think you should handle it." [FN3] When Walsh again met with Farina on June 4, at Farina's office in city hall, Farina explained to Walsh that he had spoken with several of his contacts who had indicated that Tuchow was not powerful enough to obtain the building permit. Farina suggested that Walsh wait until Farina was elected alderman in the fall, however, Walsh declined and asked to see Tuchow, to which Farina responded "if you want to take that chance, we'll take it." Farina and Walsh then walked to Tuchow's office. On the way Farina asked Walsh for another $1,000 for Tuchow and he also informed Walsh that it could cost "at least $10,000" to obtain the building permit.

FN3. Farina further explained to Walsh "he'll take it from there. He'll take it from there, and that's it .... We got the right connection. Now if he can't do it, nobody can do it." Farina also told Walsh not to use his name with anyone because of the FBI investigations taking place in Chicago at that time.

Farina and Walsh arrived in Tuchow's office, where Tuchow explained that his price for the building permit "won't be exorbitant, but it will be substantial." Tuchow also informed Walsh that others would have to be involved. After the meeting, Farina told Walsh that it would cost more than the $10,000 he had previously quoted and that he needed another $1,000 to get Tuchow "going on finding out whoever he has to find out to fix the permit."

On June 11, after receiving money from the FBI, Walsh gave Farina $1,000 to be passed on to Tuchow. During this meeting, Farina again cautioned Walsh not to mention any names since two other aldermen had recently been convicted for fixing a building permit. Farina told Walsh that Tuchow's fee for help in obtaining the permit would be approximately $1,000 per condominium unit or $47,000.

***860** In the meantime, the Kenton Court partnership had applied for a Federal Housing and Urban Development loan guarantee commitment of $1.5 million to help finance the project. The application for the guarantee needed to be submitted by June 27, 1980. Thus, Radek, one of the partners in the project, met with Walsh during the week of June 11th to express his concern about the time it was taking to obtain the building permit. Walsh reassured Radek that he would obtain the permit since he had earlier paid money to Farina and Tuchow; Radek responded that he did not believe any payments were necessary since the project was legitimate. On June 25, Tuchow called Walsh and told him that it looked as if the permit would go through. Walsh explained to Tuchow the emergency facing the Kenton Court partners concerning the HUD deadline and Tuchow responded that he would supply Walsh with a letter the next day authorizing Walsh to begin demolition work. During the conversation, Walsh told Tuchow that Farina had quoted a price of $47,000 for Tuchow's assistance; Tuchow responded by asking whether he (Walsh) had given Farina the $1,000 payment and Walsh answered in the affirmative.

Later that day Walsh spoke with Golding, one of the Kenton Court partners, and explained that he had made payoffs to various officials for the project and that more money was expected. On June 26, Walsh went to City Hall to pick up the letter authorizing the demolition work. Tuchow and Walsh began to discuss the fee to be paid and Tuchow stated that "well, Louis shouldn't be setting prices .... I don't think I discussed that with him"; he then stated "I think Louie [Farina] misunderstood me. I told him a job like this here, to get you cleared in everything to go ahead. Got to be worth at least fifty up front." Tuchow then inquired, "when can some of this come in" to which Walsh replied, "when you want it." Walsh then agreed to pay Tuchow the following week after Tuchow returned from vacation. Walsh, Tuchow, and Noonan, an employee in the City's building department, then arranged for a demolition authorization letter to be issued the next day.

It was at this time that the FBI caught wind that Walsh was involved in another bank fraud scheme and directed him to withdraw from the Kenton Court project. As a result, Walsh informed Farina and Tuchow that he could not go forward with the deal because the Kenton partners were not willing to pay Tuchow's fee and refused to repay Walsh the money he had already paid out. Tuchow responded "that's okay, we'll just stop the job." Tuchow also informed Walsh that he did not want to deal with the partnership because "I don't even know them." Tuchow then explained to Walsh that he had put him in a bad spot since he (Tuchow) had already promised "the guy over there" (supposedly referring to Noonan) "a lot more than a couple of grand." Walsh apologetically offered that "if it takes 5 ... if it takes 10 uh, I'll do that and I don't wanna, I don't wanna embarrass myself." Tuchow accepted the $10,000 offer, "if you can get me 10 ... I'll just have to spread that around." In another conversation that same day, Walsh asked Tuchow what would happen if the Kenton partnership attempted to obtain a permit on its own and Tuchow responded "It's up to them ... if they want to go out, they won't get it though."

Over the next several weeks, Walsh began to make periodic payments on the $10,000 promise. On July 24 Walsh made a $2,000 payment to Tuchow and on July 30 he made a $1,000 payment. On October 21, Walsh made another $1,000 payment to Tuchow. During this meeting Walsh asserted that he had paid Tuchow $4,000, $3,000 directly and $1,000 through Farina. Tuchow expressed his frustration to Walsh about Farina's greed explaining that Farina had only given Tuchow $500 of the $1,000 payment intended for Tuchow, while he (Tuchow) had fairly split the proceeds of an earlier payment with Farina.

Sometime in mid-July, 1980, after Walsh informed the Kenton Court partners that he was withdrawing as the general contractor ***861** from the project, one of the partners, Radek, went to City Hall in an attempt to obtain the building permit. There he met Noonan, an employee in the City Building Department, who refused to issue a permit to Radek. Noonan told Radek that the permit had been paid for and was in Walsh's name. When Radek offered to pay the $250.00 permit fee, Noonan told Radek that he could only obtain the permit if Walsh agreed to the transfer. Noonan, testifying at trial, stated that he had been instructed by Tuchow not to authorize any transfer of the building permit at that time. Golding, called by the government as a hostile witness, testified that at a Kenton Court partnership meeting they agreed to contact Tuchow to see what could be done concerning obtaining the building permit. [FN4] During Golding's meeting with Tuchow, Tuchow demanded $50,000, but the partnership refused to pay this amount. Golding and Tuchow subsequently settled on a $25,000 payment which was to be characterized as a legal fee. Golding, in his testimony to the Grand Jury which was later admitted at trial, told Tuchow that he felt as if he was being extorted to which Tuchow replied that he needed the money "to take care of some people." In the fall of 1980, the Kenton partnership retained another general contractor to begin work on the project. After the general contractor told Golding that the plans were inadequate, Golding responded by telling the contractor not to worry about it since he had "people downtown that would take care of it." [FN5] Late in the fall of 1980, after the partnership had agreed to pay Tuchow $25,000, the building permit was issued by the building department.

FN4. Golding testified that the idea to contact Tuchow came from one of his son's friends who is an attorney in Chicago and had ties to Tuchow.

FN5. The trial court judge allowed in this evidence

since it was offered not to prove the truth of the matter asserted but rather to prove the fact that the statements were made by Golding in order to establish his state of mind. The jury was instructed that it was to consider the testimony in that light.

[1] Based upon this evidence the Grand Jury returned a seven-count indictment. In Count I, Tuchow was indicted for conspiring to extort money from the Kenton Court partnership and from Jack Walsh. Tuchow was also indicted for separate acts of attempting to extort money from the Kenton Court partnership (Count VII) and from Jack Walsh (Counts IV, V, and VI). Farina was also indicted for conspiring with Tuchow to extort money (Count I) and two separate acts of extortion of money (Counts II, III). The jury returned a verdict of guilty on all seven counts. Tuchow was sentenced to concurrent terms of eight years while Farina was sentenced to concurrent terms of four years on each of the counts contained within the indictment.

During the trial, over the defendants' objections, the district court judge allowed certain "other acts" evidence under Fed.R. of Evid.Rule 404(b). On appeal, both defendants claim that the "other acts" evidence was improperly admitted. Further, Tuchow alleges that the district court erred in admitting hearsay evidence of taped conversation between Farina and Walsh prior to Walsh being introduced to Tuchow. The defendants' other grounds for reversal include claims that there was insufficient evidence to support the charges of conspiracy and attempted extortion and further that the evidence was insufficient to establish a nexus between interstate commerce and the extortion payments made by Walsh (Counts IV, V, VI).

II.

A. "Other Acts" Evidence.

Both Farina and Tuchow complain that the district court erred when it allowed receipt of "other acts" evidence under Fed.R.Evid. Rule 404(b). [FN6] Specifically, Tuchow ***862** argues that the court erred when it received in evidence a tape recorded conversation between Tuchow and his barber, a Mr. Herzog, wherein Tuchow allegedly offered to bribe a municipal court judge to dismiss a speeding ticket. Farina also argues that the court erred in admitting a taped conversation between himself and Walsh wherein Farina agreed to find a government job for Walsh's nephew for $2,500 and fix a drunken driving ticket for Walsh's uncle for $1,000.

FN6. Rule 404(b) states: "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident."

"According to Rule 404(b), evidence of other acts cannot be introduced to establish the defendant's bad character or to show his propensity to commit the act in question simply because he committed a similar act in the past."
United States v. Chaimson, 760 F.2d 798 (7th Cir.1985). Rather, this "other acts" evidence is admissible only if:
"(1) The evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue ..., (3) the evidence is clear and convincing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."
Id. at 804, quoting United States v. Shackleford, 738 F.2d 776, 779 (7th Cir.1984); see also United States v. Stump, 735 F.2d 273, 275 (7th Cir.), cert. denied, --- U.S. ----, 105 S.Ct. 203, 83 L.Ed.2d 134 (1984); United States v. Kane, 726 F.2d 344, 348 (7th Cir.1984).

[2] Herzog testified that he contacted Tuchow after receiving a speeding ticket in late 1980. In one of the conversations, Tuchow told Herzog that he had discovered the name of the presiding judge on the case and offered to "give him a little, you know, something." In a later conversation, he told Herzog that he had talked to the judge and instructed Herzog to tell the court clerk that "Mr. Tuchow is your lawyer and he's going to try to get out here [to the court]." Tuchow also stated that "the judge got your name, so he will take care of it." Herzog testified that Tuchow did not represent him as an attorney during his traffic court appearance and that he could not remember the outcome of the case.

Rule 404(b) states that other acts evidence may "be admissible for other purposes, such as proof of motive, opportunity, [or] intent ...." At trial, Tuchow did not deny the fact that he discussed and received money for his efforts in obtaining the building permit. Rather, he characterized these discussions with Walsh and Golding during opening argument and throughout the trial as legitimate exchanges concerning his attorney fees for representing their interests in obtaining the building permit. Intent became an issue once Tuchow characterized his discussions as a legitimate exchange concerning his attorney fees. See United States v. Price, 617 F.2d 455, 459 (7th Cir.1979) (issue of intent raised during opening argument **opens** the **door** to Rule **404(b)** evidence). Since Tuchow's defense at trial related directly to the issue of his intent, the discussion between Herzog and Tuchow where Tuchow contemplated bribing a trial court judge in order to fix a traffic ticket was relevant in assessing Tuchow's characterization of his discussions with Walsh and the members of the Kenton partnership. Thus, the first factor in assessing the admissibility of evidence under Rule 404(b) is satisfied.

This "other act" evidence is also "similar enough and close enough in time to be relevant ...." The conversations with Herzog occurred in late 1980, during the period the application for the building permit was pending. Tuchow contends that the conversations concerned what could be characterized as a bribery attempt and since he was prosecuted for extortion and not bribery his conversations with Herzog were too dissimilar for purposes of comparison. We disagree. Tuchow's defense rested on his assertion that his relationship between Walsh and the Kenton partnership was only one of attorney and client. The government sought to prove that Tuchow ***863** did not regard this relationship as anything approximating an attorney-client relationship. In this regard, evidence of his conversation with Herzog concerning bribing a municipal court judge to fix Herzog's traffic ticket was relevant as Tuchow had proposed to take care of the problem not by legitimately representing Herzog at his trial but by contacting the judge and "giving the judge a little something," which Herzog believed to mean money. The similarity between this conduct and Tuchow's discussions with Walsh and Golding over his "fee" for helping them obtain a building permit is that Tuchow did not undertake to represent these parties as an attorney, but sought to improperly influence particular governmental decisions, whether it be handling a traffic ticket or obtaining a building permit, through the use of money. Both the "other act" evidence and offense charged in this case focused on the conduct of Tuchow. Both acts concerned discussions of distributing money in order to influence an office holder's actions. "The degree of similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent .... The prior acts need not be duplicates of the one for which the defendant is now being tried." See United States v. Radseck, 718 F.2d 233, 236-37 (7th Cir.1983) citing United States v. O'Brien, 618 F.2d 1234, 1238 (7th Cir.), cert. denied, 449 U.S. 858, 101 S.Ct. 157, 66 L.Ed.2d 73 (1980). [FN7]

FN7. Tuchow compares this case to United States v. Dothard, 666 F.2d 498 (11th Cir.1982), which held, in part, that admission of other acts evidence constituted reversible error. Dothard involved a defendant who allegedly falsely filed a United States Army Reserve Enlistment Form; however, the defendant in that case denied filling out the form and denied any knowledge of the false answer by the person who did in fact fill out the form. Thus, that case is readily distinguishable since the defendant Dothard denied the act of filling out the form itself. In this case, Tuchow does not deny the discussions concerning the money to be paid for his help in obtaining the building permit. Rather, it is the characterization of those discussions, which directly impacts upon Tuchow's intent and, thus, his guilt or innocence. See also, Shackleford, 738 F.2d at 782.

The third factor to be considered under Rule 404(b) is whether evidence of the other acts was clear and convincing. In this case, the conversations between Herzog and Tuchow were recorded on tape and Herzog testified that he logically assumed Tuchow's reference to "giving the judge a little something" meant money. Tuchow argues that since Herzog was in fact fined by the trial court for his speeding offense, albeit minimally, there is no evidence that a bribe took place. However, the government offered this evidence not to establish the fact that the defendant had completed an act of bribery, but to demonstrate that Tuchow believed, as he told Herzog, that he was capable of fixing the case. The fact that Tuchow's statements were

recorded on tape provided direct evidence of the other act evidence and, thus, the clear and convincing standard was met in this case. See United States v. Dolliole, 597 F.2d 102, 107 (7th Cir.1979) (direct evidence of defendant's participation in other acts satisfies the clear and convincing standard); see also, United States v. Hyman, 741 F.2d 906, 913 (7th Cir.1984).

[3] Finally, if all the other factors are satisfied, the judge must also be convinced that any prejudice from admission of this evidence is outweighed by its probative value. This determination, involving a Fed.R.Evid. Rule 403 determination balancing the prejudice against the evidence's relevance, is reversible only if the district court abused its discretion. See, e.g., United States v. Falco, 727 F.2d 659, 665 (7th Cir.1984); United States v. Weidman, 572 F.2d 1199, 1201-02 (7th Cir.1978), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978). In this case the district court conducted a separate hearing, weighed all of the evidence and, after admitting the evidence, specifically instructed the jury as to the limitations on its use. In our review of the record, we find no abuse of discretion. [FN8] Thus, we hold that Herzog's testimony ***864** and the taped conversations between Herzog and Tuchow were properly received in evidence under Rule 404(b).

> FN8. Tuchow also argues that the district court judge failed to make an explicit finding under Rule 403 and thus the fourth factor under the Rule 404(b) analysis is lacking. However, as this court stated in United States v. Hyman, 741 F.2d 906 (7th Cir.1984), the "trial court's evidentiary rulings are 'within its sound discretion and must be accorded great deference ....' Further, we have refused repeatedly to require a mechanical recitation of Rule 403's formula, on the record, as a prerequisite to admitting evidence under Rule 404(b)." Id. at 913 (citations omitted). When the correct reasons for the ruling are apparent on the record, we will not presume the wrong ones. See United States v. Price, 617 F.2d 455, 460 (7th Cir.1979).

Farina claims that the trial judge erred when he allowed in evidence of tape recorded conversations between Farina and Walsh concerning an agreement that Farina would arrange a job in city government for Walsh's nephew for $2,500 and would fix a drunk driving citation for Walsh's uncle for $1,000. These conversations were recorded on tape and took place in late 1980 and early 1981.

[4] Farina's intent, just as Tuchow's, also was an issue at trial. In a Hobbs Act prosecution, "the government is required to prove criminal intent on the part of the accused." United States v. Price, 617 F.2d 455, 460 (7th Cir.1979). At trial, Farina did not dispute the fact that discussions took place concerning the exchange of money; rather, he disputed the meaning to be attached thereto. One of Farina's defenses was that he was not engaged in any conspiracy with Tuchow; rather, as suggested in his counsel's opening argument, Farina was merely "conning" Walsh out of some money. Id. at 459 (issue of intent raised during opening argument **opens** the **door** to Rule **404(b)** evidence during government's case-in-chief); Shackleford, 738 F.2d at 781 (evidence of other acts may be admissible during government's case-in-chief where defendant raises issue of intent). [FN9] The evidence that Farina obtained a job for Walsh's nephew for $2,500 and fixed a drunk driving ticket for another $1,000 was relevant in establishing that Farina did not intend to "con" Walsh. This evidence indicated, similar to obtaining the job for Walsh's nephew and fixing the drunk driving ticket, that Farina intended to follow through on his promise to help Walsh obtain the building permit. Thus, the "other acts" evidence was relevant in establishing his intent to engage in a conspiracy with Tuchow in order to obtain the illegal permit.

> FN9. During trial, the defense counsel cross-examined Walsh attempting to demonstrate that Farina did not intend to engage in a conspiracy with Tuchow as he (Farina) believed he was simply introducing Walsh to Tuchow in order for the two to establish an attorney-client relationship. During closing argument, Farina's counsel argued that Farina did not act with an unlawful intent since Farina believed that he was introducing Walsh to Tuchow so that Walsh could obtain legitimate legal services from Tuchow. This line of defense was developed after introduction of the other acts evidence.

[5][6][7] Moreover, it is uncontested that the evidence of Farina's other acts was clear and convincing since the tape recordings provided direct evidence that Farina obtained a job for Walsh's nephew and fixed the traffic ticket. This type of

conduct of bribing government officials is indistinguishable from obtaining an illegal building permit from government officials. Finally, the district court did not abuse its discretion in admitting the "other acts" evidence. The court properly instructed the jury regarding the parameters within which this evidence could be considered, concluding with: "it is very important that you understand the very limited purpose of this evidence; first consider it only as to the defendant Farina; secondly, consider it only on the question of what Farina's knowledge and intent were in the case that is on trial here ...." Although Farina argues that the time occupied at trial concerning the "other acts" evidence (45 pages of transcript) was much greater than the time spent proving his direct involvement in the crimes charged in the indictment (30 pages of transcript), the point where so much other act evidence was introduced as to prejudice his defense was not reached in this case. Thus, the district court did not ***865** err in admitting evidence of Farina's previous bribes under Rule 404(b). [FN10]

FN10. Tuchow argues that because the district court allowed in "other acts" evidence as to Farina, the district court should have granted Tuchow's motion for severance of his trial. However, a motion for severance under Fed.R.Crim.P. Rule 14 is committed to the discretion of the district court and its decision will only be reversed upon a "strong showing of prejudice" to the moving defendant. United States v. Dalzotto, 603 F.2d 642, 646 (7th Cir.1979). The defendants must show that their joinder deprived them of a fair trial. United States v. Percival, et al., 756 F.2d 600, 610 (7th Cir.1985). After a review of the record, we hold that the court did not abuse its discretion in denying the severance motion given the clear language contained in the court's limiting instructions that the evidence as to Farina's other acts was to be considered against Farina only. See id.

B. State of Mind Testimony.

Tuchow was also indicted for and convicted of attempting to extort $25,000 from the Kenton Court partnership (Count VII). At trial, the government introduced the testimony of Golding and Radek, two partners in the partnership, under the state of mind exception to the hearsay rule, Fed.R.Evid. Rule 803(3). [FN11] The jury was also instructed that the testimony of Radek and Golding was offered to establish their state of mind at the time of the extortion attempt during the summer of 1980 and not to prove any of the matters asserted therein.

FN11. Federal Rule of Evidence 803(3) provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: "(3) Then existing mental, emotional, or physical condition.--Statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, claim, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of the declarant's will."

One of the conversations that Tuchow found particularly objectionable occurred on June 19, 1980 between Walsh and Radek. Walsh testified that during this conversation he informed Radek that he had paid money to Tuchow and Farina to obtain the permits. Radek responded that he did not believe that the partnership had to pay bribe money since the deal was legitimate. Tuchow also objected to Radek's testimony that Walsh had told him that he (Walsh) had paid $2,000 to Farina and $1,000 to Tuchow; Radek further testified that since he believed the deal was legitimate there was no need for the partnership to make payments to city officials. Radek also testified that he went to the building commissioner's office to obtain the permit but that Mr. Noonan, an employee in the city's building department, denied him the permit explaining that a fee had been paid for the permit and he would need a document from Walsh assigning the permit to him. Radek offered to pay the $250.00 fee for the permit, but Noonan refused to accept the offer. Radek returned to his office and discussed the deal with one of his partners, a Mr. Kaplan, while expressing his belief that the building permit was being blocked because certain promised payments had not been made. The defendants objected to this testimony as inadmissible hearsay. Finally, Tuchow objected to introduction of a taped conversation between Walsh and Golding on June 25, 1980, discussing Walsh's progress in obtaining the building permit. During this conversation, Walsh told Golding that he had to "drop a little here and drop a little there," to which Golding responded

"oh I know that" and "you don't get nothing done in Chicago without that." Walsh also explained to Golding that he had to pay $2,000 to Farina and $1,000 to Tuchow and Golding responded "oh, yeah. Everybody is on our side." [FN12]

FN12. The text of the conversation is as follows: WALSH: "You know how the situations work down at City Hall, so I wound up uh I hadda drop a uh two grand to Louie and then a thousand to Marty and then uh, you know, to get the show on the road. So I'm drop, you know, and then uh he came back with another figure. I said look, you do what you have to do and get this baby goin so we get some uh work done there. Now the Alderman is definitely interested in seeing that thing improved. GOLDING: "Oh, yeah. Everybody is on our side. WALSH: "So what happened is that Marty, Marty is the committeeman there. GOLDING: "Humm. WALSH: "So how can you beat it? GOLDING: "Yeah. WALSH: "You know he's my guy. GOLDING: "Marty Tuchow? WALSH: "Tuchow, yeah."

***866** [8] In a Hobbs Act prosecution under 18 U.S.C. § 1951, the government must establish not only the victim's state of mind at the time of the alleged extortion but also the intent of the defendant.

"In a Hobbs Act prosecution for extortion under color of official right, the government must prove that the victim paid money to the defendant because of the defendant's official position. Evidence of the victim's state of mind is thus an essential element of the government's case. See United States v. Braasch, 505 F.2d 139, 151 (7th Cir.1974), cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975). In addition the government must prove criminal intent on the part of the accused. See United States v. Adcock, 558 F.2d 397, 402 (8th Cir.), cert. denied, 434 U.S. 921, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977)."

Price, 617 F.2d at 459. Radek's and Golding's testimony that they believed they were being extorted established the victim's state of mind and thus one of the elements of the offense. [FN13]

FN13. Further, the testimony of Radek and Golding was relevant evidence as to Tuchow's intent. Certainly, if Radek and Golding testified that they believed the requested payments were for legitimate lawyer fees, Tuchow's claim of innocence would seem to be reasonable. Conversely, if they believed payments were being made because the defendants were city officials and that more payments were being demanded this would provide relevant evidence as to whether Tuchow viewed his demand for payment as an extortion attempt or as legitimate lawyer fees.

[9][10] Tuchow, however, specifically complains that since it was Walsh who conveyed the information to Radek and Golding as to the progress made in obtaining the building permit, it was not he, but Walsh who induced their states of mind and thus this testimony should not have been allowed as it was untrustworthy. Admittedly, if Walsh had been Tuchow's agent or had Tuchow spoken directly to Golding and Radek, then their testimony would have been admissible under Fed.R.Evid. Rule 801(d)(2)(A) as an admission of a party opponent. [FN14] However, Golding's and Radek's testimony definitely reflected their state of mind at the time of the alleged extortion attempts during the summer of 1980 and thus was admissible under Fed.R.Evid. Rule 803(3). Tuchow's complaint that the information which induced their state of mind was relayed to Golding and Radek by Walsh rather than Tuchow is of no consequence since the essential information--that Tuchow had requested payments be made in order to get the permit and that more payments would be required--was correctly conveyed by Walsh to Radek and Golding as evidenced in the taped conversations between Tuchow and Walsh and Farina and Walsh. [FN15] The indicia of reliability, ***867** which is not present in many hearsay situations, is certainly provided in the taped conversations revealing the details of the extortion scheme. Because the record indicates that the information concerning the payments made to Tuchow and Farina was accurately conveyed to them, it is clear that their "state of mind" was induced by accurate information. Contrary to Tuchow's assertion that such evidence effectively directs the verdict against him, this evidence establishes only one of the elements of the crime--the victim's state of mind. The defendant can still defend his case by demonstrating he did not have the requisite intent. Accordingly, we hold that the district court did not abuse its discretion in allowing this state of mind evidence to be introduced at trial. [FN16]

FN14. Tuchow cites United States v. Summers, 598

F.2d 450 (5th Cir.1979) to support his position that Golding's and Radek's testimony should have been excluded. In Summers, testimony detailing conversations between an FBI informant and one of the victims of the defendant's extortion scheme was admitted at trial. The Fifth Circuit held that the district court erred in admitting this evidence, but found the error to be harmless given the abundance of properly admitted evidence establishing guilt. Our case is distinguishable from Summers on two grounds. First, the Summers decision noted that the evidence of the conversations was offered to prove the truth of the matter asserted therein and thus should have been excluded as hearsay. In this case, as the jury was instructed by the district court, the evidence was not offered to prove the truth of what was asserted by Radek's and Golding's statements, but rather to prove the victims' state of mind. Further, Summers did not analyze whether the evidence would have been admissible under the hearsay exception for state of mind evidence, Fed.R.Evid. Rule 803(3). In this case, the evidence was clearly admitted to demonstrate the state of mind of the victims, Golding and Radek, two partners in the Kenton Court Partnership.

FN15. As detailed in the fact section of this opinion, the taped conversations between Tuchow and Walsh demonstrate that Tuchow demanded that an additional $47,000 be paid by Walsh and the partnership. Further, Tuchow asked Walsh whether he had paid the $1,000 to Farina intended for Tuchow. This information was correctly conveyed by Walsh to the Kenton partners. In fact, the only misinformation conveyed by Walsh to Radek was the fact that he made payments to Tuchow and Farina totalling $5,000, when in fact he had spent only $3,000 at the time.

FN16. Tuchow also complains of the limiting instruction given to the jury prior to its consideration of the state of mind evidence. The contested portion of the instruction is as follows: "Now, one of the questions you are going to have to decide ... is were these legal fees ... or were they extortion payments that were being requested? "Now, what they were depends in large part upon the intent of these defendants ... [t]hat is really the principal question that you are going to have to decide.... "One of the things that is relevant to that question is what was the state of mind of these developers. What was the effect of what was said on their minds? "Now you have heard tapes and you are going to hear some more tapes now that have a bearing on that latter question: What was going on in the mind of Mr. Golding when this $25,000 was being discussed ...? "Now that doesn't mean that this is necessarily the same way Tuchow regarded it, or Farina regarded it. It doesn't mean that at all. He might have had a misunderstanding. That would be, of course, for you to decide, but it is, nonetheless, relevant for you to know or hear evidence of what it was these people were saying at the time." The judge completed the instruction by cautioning the jury that certain of the taperecorded statements were not offered to prove the truth of the matter asserted but only to indicate the state of mind of the declarant. Tuchow's argument that this instruction somehow prejudiced his case is meritless for two reasons. First, although he objected to the introduction of the evidence he never registered any objection to the language used by the court in the limiting instruction. Second, contrary to Tuchow's suggestion, this instruction did not direct a verdict against Tuchow; rather, the jury was properly instructed that the developer's state of mind may provide some evidence as to whether Tuchow intended the demanded payments to truly represent his attorney fees. See supra, note 15. Thus, this instruction did not unfairly prejudice Tuchow's defense in any respect.

C. Hearsay Conversations.

[11] Tuchow contends that the district court erred when it admitted evidence of taped conversations between Farina and Walsh that occurred prior to the establishment of the conspiracy between himself and Farina. Specifically, Tuchow complains that Farina introduced Walsh to Tuchow on June 4, 1980, and the referred to cited conversations (May 21 and June 3) took place prior to the time Tuchow became a part of the conspiracy through his contacts with Farina. Tuchow argues that the evidence constitutes hearsay when used against him and that the coconspirator exception to the hearsay rule does not apply because he was not a member of the conspiracy at the time of conversations between Walsh and Farina; thus, the district court should have at least given a limiting instruction explaining to the jury that these statements could not be considered as evidence of Tuchow's involvement because he had not as of that date joined the conspiracy. The statements that Tuchow specifically

complains of occurred during the taped conversations of May 21 and June 3, 1980 between Farina and Walsh. During the meeting on May 21, Farina told Walsh that it would cost Walsh $2,000 to bring someone in to handle obtaining the permit. Farina also instructed Walsh not to mention the terms of their deal to anyone, "for God's sake, don't tell people what you give me." Farina then advised Walsh that he would "take it from there. Cause I wanna drop the money first." Finally, on June 3, emploring "Don't ever show it, don't ever, please," Farina told Walsh that the $2,000 ***868** payment should be kept out of Walsh's business records. The government argues that these conversations were not offered to prove the truth of the matter asserted (see Fed.R.Evid. Rule 801(c)), and thus do not constitute hearsay. Accordingly, the government contends that these statements were admissible against Tuchow. Anderson v. United States, 417 U.S. 211, 219-20, 94 S.Ct. 2253, 2260-61, 41 L.Ed.2d 20 (1974). [FN17]

FN17. In making its ruling on the admissibility of the co-conspirator statements, the court stated at the end of the trial: "I think there are very few so-called co-conspirator exception statements in this case. Offhand I can't think of any, but there probably are some. Most of the material to which objection was made as hearsay was not in my view hearsay because it wasn't offered for the truth of what was asserted; but if there were any statements which were offered for the truth of the assertions contained therein, then I find that by the greater weight of the evidence, those statements were made by one or the other of the alleged co-conspirators in furtherance of the conspiracy and during the course of the conspiracy and, therefore, they are admissible against each of the defendants." (Tr. 1133).

In this case, Tuchow does not analyze whether the testimony he challenged was being offered to assert the truth of the matter therein or whether it was offered simply as proof of some other matter. Specifically, the statements the defendants complain of relating to Farina's instructions to Walsh not to tell anyone of the pending deal and not to reflect on his records any of the payments made to Farina, including Farina's request for a $2,000 payment, were offered by the government for the sole purpose of explaining the nature and scope of the secretive and conspiratorial scheme to obtain the building permit and to establish the conspiracy itself. [FN18] See United States v. Magnus, 743 F.2d 517, 522 (7th Cir.1984). In Magnus, our court held that statements made by the coconspirator prior to the time he joined the conspiracy were admissible as non-hearsay evidence since the statements were not offered to prove the truth of the statements offered, but rather to set forth the illegality, nature and scope of the anticipated conspiratorial scheme. See also, United States v. Bobo, 586 F.2d 355, 372 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1546, 59 L.Ed.2d 795 (1979).

FN18. Indeed, as stated in United States v. Gibson, 675 F.2d 825, 834 (6th Cir.1982), the proffered "statement was not hearsay under Federal Rule of Evidence 801(c): it was not offered to show that the substance of [the declarant's] utterance was either true or false. Indeed a suggestion or an order is not subject to verification at all because such utterances do not assert facts." In this case, since Farina's instructions to Walsh were not offered to prove the truth of the matters asserted therein, they did not assert facts subject to verification. Thus, these statements were not hearsay.

Further, in United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir.1978), this court held that if a conspiracy is established by a preponderance of the evidence, statements made by one co-conspirator during the course and in furtherance of the conspiracy may be admissible against another co-conspirator. Id. at 1134. In United States v. Coe, 718 F.2d 830 (7th Cir.1983), we explained that our ruling in Santiago did not change the law in this circuit that where the defendant later became a member of the conspiracy statements made by a co-conspirator during the course and in furtherance of the conspiracy were admissible against the defendant to demonstrate the nature and objectives of the conspiracy which he subsequently joined. Id. at 839; [FN19] see also Magnus, 743 F.2d at 521; United States v. Harris, 729 F.2d 441, 448 (7th Cir.1984).

FN19. In Coe, the defendant Coe and a government informant had extensive discussions as to a possible drug deal. It was not until an April 15, 1982 telephone conversation that Coe told the informant that he (Coe) had obtained a buyer. The court held that evidence of the conversations between the

> informant and Coe prior to April 15 could not be admitted under the co-conspirator rule, Fed.R.Evid. 801(d)(2)(E), against the defendants who later joined the conspiracy since this was insufficient evidence to establish a "joint venture" or conspiracy between Coe and the informant prior to this date. See Coe, 718 F.2d at 840.

In this case, the taped conversations clearly establishes that on May 20 Walsh ***869** called Farina to arrange a meeting to discuss obtaining a building permit and that on May 21 Farina and Walsh met and entered into an agreement to obtain the illegal building permit. During the first portion of the May 21 conversation, Walsh told Farina that he needed help in "getting a building permit through" since the building had "some violations in it." Farina agreed to help if Walsh paid him $2,000. He also told Walsh that it would probably "cost you a little more ...." As required by our Coe decision, the necessary conspiracy or "joint venture" (for evidentiary purposes) between Farina and Walsh, the government informant, was established by a preponderance of the evidence at this point. Coe, 718 F.2d at 835, 840; United States v. Gil, 604 F.2d 546, 549 (7th Cir.1979). Thus, the subsequent statements made on May 21 and June 3 by Farina revealing the secretive and illegal nature of the conspiracy to obtain the building permit were admissible. Coe, 718 F.2d 839. However, we request that in the future district courts give a limiting instruction stating that while such statements may be used as evidence revealing the nature and objective of the conspiracy, such statements should not be used as independent evidence establishing the defendant's participation in the conspiracy. The fact such an instruction was not given in this case, however, was harmless error since the independent evidence establishing that Tuchow joined the conspiracy was overwhelming. See the discussion in Section III-A of this opinion.

III.

A. Sufficiency of the Evidence--Conspiracy.

[12] Tuchow and Farina both contend that there was insufficient evidence to support their conviction for conspiracy to extort money under the Hobbs Act, 18 U.S.C. § 1951. Tuchow argues that the evidence failed to establish proof of an agreement between Farina and himself and that based upon the evidence presented, it was reasonable to infer that he was acting only as an attorney representing his client in obtaining a building permit. Farina also argues that he merely introduced Walsh to Tuchow as an attorney who could represent Walsh in obtaining the building permit. The indictment in this case charged that "Martin Tuchow and Louis Farina, defendants herein, and divers [sic] other persons known and unknown to the Grand Jury, did knowingly, willfully and unlawfully ... conspire ... to commit extortion ...." In order to establish a conspiracy, the government must prove that there was an agreement between two or more persons to commit an unlawful act, that the defendant was a party to the agreement, and that an overt act was committed in furtherance of the agreement by one of the coconspirators. See, e.g., United States v. Roman, 728 F.2d 846, 859 (7th Cir.), cert. denied, --- U.S. ----, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984); United States v. Mayo, 721 F.2d 1084, 1088 (7th Cir.1983).

[13] Tuchow's defense at trial was that he was simply charging a fee for his professional services in helping Walsh and the Kenton partnership obtain a building permit. However, sufficient evidence was introduced to rebut this defense and establish, beyond a reasonable doubt, that an illegal conspiracy existed between Tuchow and Farina. During a June 3, 1980 phone conversation between Farina and Tuchow, Farina explained that he had a "client" with a building permit problem and that "since it's in your [Tuchow's] ward, I think you should handle it and advise." Farina then told Walsh, "he'll take it from there, and that's it .... We got the right connection." The next day, Farina introduced Walsh to Tuchow in Tuchow's office. Tuchow told Walsh that his fee "won't be exorbitant, but it will be substantial," and that additional fees would be necessary in order to obtain the building permit, "if I'm gonna take this over, there might be somebody else involved, you know .... We're grown men." Prior to this June 4 meeting, Farina informed Walsh that he would need $1,000 to pay to Tuchow and after the meeting Farina told Walsh that the fee for the permit would be considerably higher ***870** than the $10,000 previously quoted to Walsh. On June 11, Walsh gave Farina $1,000 to pass along to Tuchow. Farina also told Walsh that the cost to obtain the building permit would be approximately $47,000. During a later taped conversation on June 25,

Tuchow asked Walsh whether he had given Farina the $1,000 and Walsh indicated that he had done so. The following day when Walsh went to City Hall to obtain the demolition authorization letter, Tuchow affirmed that his fee would be approximately $50,000 and that while the usual practice was to "pay up front" Tuchow would accept the payment at a later date since Walsh was Farina's friend. Finally, during a taped conversation in October of 1981, Tuchow told Walsh that Farina had given him only $500.00 of the initial $1,000 payment made in early June and that he (Tuchow) had given Farina $500.00 from one of the payments that Walsh had made in July.

Given the volume of evidence in the form of taped conversations between Walsh and Tuchow as well as between Walsh and Farina, the jury was justified in rejecting Tuchow's specious claim that the $50,000 payment represented his attorney fees for his help in obtaining a simple building permit. When viewed in the light most favorable to the government, there is more than sufficient evidence in this case to support both Tuchow's and Farina's convictions for conspiracy. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

B. Interstate Commerce.

Tuchow next asserts that there was insufficient evidence introduced at trial to support his convictions under Counts IV, V, and VI charging him with attempted extortion [FN20] since Walsh was no longer involved in the Kenton Court project when he made payments to Tuchow and thus there could be no effect on interstate commerce. The Hobbs Act, 18 U.S.C. § 1951(a), provides that anyone who "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce" violates the terms of the Act. The three counts contained in the indictment charged that on July 24, 30, and October 21, 1980, Tuchow did "attempt to affect commerce ... by extortion as defined in Title 18 United States Code section 1951(b)(2), in that ... Tuchow did ... unlawfully obtain [$1,000] from Jack Walsh and J.C. Construction Co. ... said consent being induced by the wrongful use of fear of economic harm and under color of official right." [FN21]

FN20. The indictment apparently charged attempted extortion since Walsh used FBI supplied money to pay off Tuchow. See United States v. Rindone, 631 F.2d 491, 493 (7th Cir.1980).

FN21. Walsh paid Tuchow $1,000 on July 30 and October 21, 1980 and paid Tuchow $2,000 on July 24, 1980.

Walsh testified that besides performing construction work, J.C. Construction Company also did window and window frame replacements, and that the window materials were ordered from firms outside of the state of Illinois. However, the construction portion of the business, except for the Kenton Court project, had not landed a construction or remodeling contract during 1980, although Walsh testified that he continued to bid on projects until late 1980 when the company went out of business. When Walsh withdrew as the general contractor for the Kenton Court project, he was replaced by another general contractor who ordered a significant amount of supplies from outside of Illinois.

[14] Tuchow concedes that the required interstate commerce nexus needed to establish federal jurisdiction in this case is de minimis. See United States v. Mattson, 671 F.2d 1020, 1024 (7th Cir.1982) (holding that the Hobbs Act proscribes not only illegal acts that have an actual effect on interstate commerce, but also "threatened or potential effects which never materialized because extortionate demands are met"); see also United States v. Glynn, 627 F.2d 39, 41 (7th Cir.1980); United States v. Price, 617 F.2d 455, 457 (7th Cir.1979). Nevertheless, Tuchow contends ***871** that no actual effect on interstate commerce was demonstrated in this case since Walsh's J.C. Construction Company was not viable as it had obtained only one construction contract, the Kenton Court project, during the time in which Walsh owned the company. [FN22] Tuchow further contends that any potential effect on interstate commerce was negated when the FBI directed Walsh to withdraw in early July from the Kenton Court project, prior to the time the actual extortion payments were made. [FN23]

FN22. Walsh purchased J.C. Construction Co. sometime in 1980.

FN23. Tuchow relies on United States v. Elder, 569 F.2d 1020 (7th Cir.1978), where our court held that the required interstate commerce nexus was not

established where the indictment charged a continuing extortion and the company allegedly extorted had earlier ceased to purchase any materials outside of Illinois and had decided to dissolve during the time of the alleged extortion. For the reasons explained in this section of the opinion, the Elder decision is inapposite in this case.

Tuchow's interpretation of the indictment in this case is much too narrow since he limits his argument to the fact that Walsh and J.C. Construction Company's trade in interstate commerce was not affected by his actions. Counts IV, V, and VI of the indictment in this case charged that Tuchow attempted to "affect interstate commerce" when he extorted money from Walsh. [FN24] The indictment does not charge that Walsh and J.C. Construction Company's trade in interstate commerce was affected. Rather, all counts contained in the indictment allege that Tuchow (and Farina) had attempted by their actions to affect commerce, one of the requisite elements of the offense.

FN24. The evidence presented at trial and the instruction given to the jury concerning the required nexus between the extortion payments and the effect on interstate commerce are consistent with the theory that by blocking the building permit, Tuchow affected interstate commerce. The interstate commerce instruction given at trial for all counts charged in the indictment is as follows: "You may find that the interstate commerce element of the charge is satisfied if you find beyond a reasonable doubt: "That some of the materials which were to be used in the rehabilitation of the Kenton Court project originated or would have originated outside the state of Illinois. "In order to satisfy this element of the offense, the government need not prove that the defendant knew or intended that his actions would or could affect commerce. It is only necessary that the natural consequences of the defendant's acts would have been to probably or potentially affect commerce in any minimal way or degree. This instruction embodies the "direct" effect theory (versus the indirect or "depletion-of-assets" theory) in explaining the required interstate commerce nexus. See United States v. Mattson, 671 F.2d 1020, 1023 n. 1 (7th Cir.1982). The defendant neither objected to nor proposed any other instruction detailing the required effect on interstate commerce.

[15][16] The evidence in this case, when viewed in the light most favorable to the government, demonstrates that during the fall of 1980, when Walsh continued making extortion payments to Tuchow, Tuchow attempted to block the Kenton Court partnership's efforts to obtain a building permit. It was established at trial that the project, which was undertaken by another general contractor in the fall of 1980 shortly after Walsh withdrew, cost approximately $1.5 million and was built with over $400,000 of materials from outside of Illinois. In July, 1980, after Walsh indicated to Tuchow that he was withdrawing from the rehabilitation project, Tuchow expressed his dissatisfaction and told Walsh that he owed him money because of various commitments Tuchow had already made to other city employees. Walsh then agreed to pay Tuchow $10,000 of the original $50,000 negotiated payment. [FN25] During this conversation, Walsh informed Tuchow that the partnership was not willing to pay Tuchow's demanded fee, nor were they willing to reimburse Walsh for the money already spent. When Walsh asked Tuchow what would happen if the partnership attempted to obtain ***872** the building permit, Tuchow responded, "it's up to them .... They won't get it through." Further, Noonan testified that sometime during July and October Tuchow instructed him not to authorize any transfer of the building permit. [FN26] Tuchow apparently believed that by holding up the permit during this time he was helping Walsh regain the money that Walsh had paid to Tuchow. Further, Tuchow had earlier expressed reluctance to deal with the Kenton Court partnership since he did not know the partners involved and he preferred to deal with Walsh. The logical inference from this evidence is that by blocking the permit during the fall of 1980 Tuchow was attempting to force the partnership not only to reimburse Walsh for the money Walsh already had spent, but also to force the partners to keep Walsh as their general contractor. [FN27] Certainly, the jury might very well have reasoned that Tuchow's order to block the partnership's efforts to obtain the permit during the period when Walsh was making these payments to Tuchow had a potential direct effect of interfering with the project and interstate commerce. Mattson, 671 F.2d at 1024; Rindone, 631 F.2d at 493. [FN28]

FN25. Under the Hobbs Act, as long as the payment is made to an official because of his position, an act of extortion, as defined in 18 U.S.C. § 1951(b)(2), is committed. See, e.g., United States v. Schmidt, 760 F.2d 828, 830 (7th Cir.1985); United States v. Rindone, 631 F.2d 491, 495 (7th Cir.1980).

FN26. During the conversation in which Tuchow and Walsh agreed on the $10,000 payment, Tuchow told Walsh that Walsh's withdrawing from the project had put him (Tuchow) in a "bad spot" because "I got Pat Noonan to go ahead and do that for me [issue the permit] on a promise...."

FN27. The transcript of the taped conversation between Walsh and Tuchow which occurred on October 1, 1980, reveals: TUCHOW: "See, here's where we stand with that right now. The permit's in your name. What's your company? WALSH: "J.C. Construction. TUCHOW: "J.C. Construction. And the permit is in your name. If you wanna give them your permit you can assign it to them. WALSH: "That's what I thought. TUCHOW: "Now, if they wanna go with somebody else they've got to start from scratch. They cannot get your permit. I already went up there to make sure. WALSH: "Okay, okay. TUCHOW: "I wanna put you in a position where at least let'em come to you. WALSH: "Yeah. Okay, that's what I thought too. TUCHOW: "That's exactly."

FN28. In his brief, Farina adopts by incorporation Tuchow's argument that his conviction under Counts II and III must be reversed as interstate commerce was not affected by his actions. Although not clearly set forth in his brief, we reject his apparent challenge to the sufficiency of the evidence on these counts. His indictment charges that he affected commerce when he extorted money from Walsh on June 3 and 11. At this time Walsh was clearly acting on behalf of the Kenton Court partnership which was about to invest considerable sums of money in the rehabilitation project. As indicated, the project did eventually use over $400,000 of materials from outside the State of Illinois. Thus, Farina's actions did have a potential effect on interstate commerce.

C. Kenton Court Partnership.

[17] Count VII of the indictment charged that Tuchow attempted to extort $25,000 from Golding and the Kenton Court partnership. Tuchow again argues that his relationship with Golding was one of an attorney and client and thus there was insufficient evidence to support the jury's verdict under Count VII.

In the late summer of 1980, Golding met with Tuchow in an attempt to obtain the building permit. During their initial meeting Tuchow originally demanded $50,000; however, Tuchow agreed to accept a $25,000 payment instead. Tuchow points to the fact that Golding, who testified as a hostile witness for the government, considered the requested $25,000 payment as a legal fee for Tuchow's work in representing the partnership in related real estate and tax matters. However, this testimony was contradicted by Golding's earlier Grand Jury testimony wherein Golding testified that he never hired Tuchow as his attorney; that he believed he was being extorted by Tuchow's request for $25,000; and that be believed the partnership would not have obtained the permit but for Tuchow's help. Further, Golding testified that Tuchow told him that he needed the $25,000 to "take care of some people." After the partners agreed to pay this amount, the building permit was finally issued to their new general contractor late in the fall ***873** of 1980. Viewing the evidence presented in the light most favorable to the government, sufficient evidence was introduced to affirm Tuchow's conviction on this extortion count.

IV.

Tuchow next argues that he was deprived of a fair trial because of the court's unprovoked hostility and bias toward his defense counsel. He also claims that the jury was improperly instructed with respect to the issue of reputation evidence and that he was denied his right of allocution as required by Fed.R.Crim.P. 32(a)(1).

The defendant argues that the court expressed such hostility toward his attorney at trial that his defense was unduly prejudiced. The first incident occurred when Tuchow's attorney objected to Art Radek's testimony concerning what Walsh had told Radek during an earlier meeting. The court instructed the jury that this evidence was not being offered to prove the truth of the matter asserted in Walsh's

statements made to Radek, but was instead offered to prove the fact that the statements had been made. The court explained to Tuchow's attorney that "I understand your objection is continuing." Tuchow's attorney then made a series of objections during Radek's testimony regarding other conversations that Radek had with Walsh, Noonan, and Kaplan. The court instructed counsel that its same ruling applied to these conversations. After another objection, the court and Tuchow's attorney engaged in the following exchange:

MR. CROWLEY: "Your Honor, I don't know if it is necessary for me to repeat the objection as to each one of these separate conversations.
THE COURT: "No, it isn't.
MR. CROWLEY: "All right.
THE COURT: "And this is almost entirely nonhearsay anyway, and to the extent it might have some material that requires an instruction to the jury, I have given that instruction.
MR. MURTAUGH: "Just so the record is clear, Mr. Farina joins in the objection.
THE COURT: "Yes, all right. Now, the point of handling these things in advance is to avoid interrupting the flow of the testimony. Now, let's not interrupt the flow of the testimony unnecessarily to raise objections that I have already indicated are standing objections.
The record is clear, proceed.
MR. CROWLEY: "Your Honor, so that the record is clear, I have a standing objection--
THE COURT: "The record is clear. Proceed, Mr. Schweitzer.
MR. CROWLEY: "All right, thank you.
BY MR. SCHWEITZER:
"Q: Sir. when did you speak--
THE COURT: "The record was clear before we ever entered into this courtroom, and you know it. "Proceed."

The second incident occurred during the cross-examination of Herzog, a witness who testified as to Tuchow's "other acts" during the time of the alleged extortion. During this cross-examination, Tuchow's counsel began to ask Herzog whether he knew if Tuchow was married, had any children, and if he was aware that Tuchow had gone to law school late in life. At this point, the trial court judge interrupted (apparently the government's attorney was already on his feet ready to object) and informed Tuchow's attorney that he was not going to allow this line of questioning since it was not within the scope of direct examination. When Tuchow's counsel attempted to explain what he was trying to accomplish, the judge then requested a sidebar "to see what the next question is going to be." Tuchow's attorney told the court that "I am going to go to a different area, your Honor." And the court responded "I'm going to have to screen the questions if I cannot trust you to ask proper questions. Come on over." At the sidebar Tuchow's counsel argued that since the government attorney had asked Golding if he knew whether Tuchow was a lawyer and a ward committeeman he was also entitled to ask ***874** Golding questions about Tuchow's status. The district court told Tuchow's counsel that his questions had nothing to do with what was asked during direct examination and that if he did ask such questions he would "sit" on the attorney "good and hard ... in the presence of the jury ...."

[18] After reviewing the record, we conclude that the judge's statements made in the presence of the jury fail to rise to a level of prejudicial error. As to the first incident, after the initial encounter between the judge and defense counsel, concerning counsel's continuing objection, the defense counsel explained to the district court that he had misunderstood that the district court considered his objections to be continuing throughout Radek's testimony. After hearing this explanation the district court apologized to defense counsel for the misunderstanding and then later explained to the jury that "I am satisfied that Mr. Crowley ... was not being intentionally disruptive. I apologized to him at that time for the remark I made, and I now request that you too disregard that remark." The judge's original remarks did not appear to be harsh and his subsequent apology to defense counsel and explanation to the jury certainly eliminated any possible prejudice.

[19] As to the second occurrence, it appears that defense counsel was attempting to introduce evidence of Tuchow's background through Herzog, as Tuchow elected not to testify in this case. The defense counsel breached the boundary of permissible cross-examination since these questions were well beyond the scope of direct examination. A trial court must necessarily be granted wide latitude in determining the proper scope of cross-examination, see, e.g., United States ex rel. Blackwell v. Franzen, 688 F.2d 496, 500 (7th

Cir.1982), and in this case the district court determined that the defense counsel's cross-examination exceeded the permissible boundary. While the district court's comment in front of the jury that he would have to "screen defense counsel's questions if I cannot trust you to ask proper questions" appears, in isolation, to be a harsh admonishment, our review of the record reveals that this single comment taken in the context of the entire three-week long trial, in which the proof of guilt was substantial, failed to prejudice the defendant's case. See United States v. Sennett, 505 F.2d 774, 779 (7th Cir.1974); cf. United States v. Blakey, 607 F.2d 779, 788 (7th Cir.1979). [FN29]

> FN29. Tuchow further alleges that the district court's treatment of the defense counsel's objections during trial, as compared to that of the government's, indicated an unfavorable slant toward the government's case. However, after reviewing the record, and specifically those areas of concern to the defendant, we find his argument to be without merit.

[20] Tuchow also claims that the jury was improperly instructed with respect to the issue of reputation evidence. During trial Tuchow had several witnesses testify as to his good character. The contested jury instruction read in part:

> "The circumstances may be such that evidence of good character may alone create a reasonable doubt of defendant's guilt, or although without it the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant, if the jury, after weighing all the evidence including the evidence of good character is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment."

Tuchow relies on United States v. Leigh, 513 F.2d 784 (5th Cir.1975), where the Fifth Circuit ruled that similar language as that italicized above was improper and constituted reversible error. However, in United States v. Picketts, 655 F.2d 837, 842 (7th Cir.1981), we distinguished the Leigh case and held that the same instruction as given in this case was proper. See also United States v. Hyman, 741 F.2d 906, 910-11 (7th Cir.1984) citing Picketts with approval. While we would ask that district courts use the Seventh Circuit Pattern Instruction which does not employ the "excuse to acquit" language, the fact that such language ***875** is used in the instruction does not constitute reversible error as long as the phrase "including the evidence of good character" is included in the instruction. Picketts, 655 F.2d at 842; see also Fed.Crim. Jury Instructions of the Seventh Circuit, § 3.15 (1980).

[21] Finally, we hold that since both the government and the defendants agree that Tuchow and Farina were denied the right of allocution under Fed.R.Crim.P. 32(a)(1)(C) at the sentencing hearings, this case must be remanded back to the district court to allow the defendants the opportunity to make a statement on their own behalf before the sentence is imposed.

V.

We affirm the defendants' convictions on all counts and remand this case back to the district court to allow the defendants an opportunity to exercise their right of allocution.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 04/10/96

INSTA-CITE

CITATION: 768 F.2d 855
=> 1 **U.S. v. Tuchow,** 768 F.2d 855, 18 Fed. R. Evid. Serv. 699
(7th Cir.(Ill.), Jul 19, 1985) (NO. 84-1350, 84-1364)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
22A C.J.S. Criminal Law Sec.570 Note 8

ERIC JASO - LEGAL Redacted
- Rule 408 - Settlement Negotiation

ATTORNEY WORK PRODUCT

RULE 408 - settlement negot.

Original Copy

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. LR-CR-95-173
	)	
JAMES B. McDOUGAL,	)	
JIM GUY TUCKER, and	)	
SUSAN H. McDOUGAL	)	

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ADMISSION OF TESTIMONY OF DANNY R. PITTS AND MARSHALL GRANT REGARDING STATEMENTS OF JOHN HALEY AND LETTERS WRITTEN ON BEHALF OF TUCKER BY HALEY

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Memorandum of Law in support of the admission of testimony by witnesses Danny R. Pitts and Marshall Grant -- representatives of the Resolution Trust Corporation -- as well as certain letters received by Pitts and Grant. Defendant Jim Guy Tucker, through the oral and written communications of his personal attorney, John H. Haley, made admissions to Pitts and Grant in discussions regarding Tucker's outstanding $260,000 personal loan from Madison Guaranty Savings and Loan Association ("MGSL").

Pitts and Grant should be permitted to testify as to these statements, and the relevant documents should be admitted into evidence. Tucker specifically authorized his attorney, Haley, to communicate with Pitts and Grant regarding this debt and attempt to resolve any RTC claims against Tucker. As Tucker's authorized agent and attorney, Haley's written and oral statements to Pitts

and Grant constitute admissions of a party-opponent -- Tucker -- and are not hearsay.

BACKGROUND

Pitts and Grant were employees of Financial Conservators, Inc. ("FCI") of Tulsa, Oklahoma. FCI contracted with the Resolution Trust Corporation ("RTC") to attempt to recover unpaid commercial loans made by financial institutions held in receivership by the RTC, including Madison Guaranty Savings and Loan Association ("MGSL"). Among the outstanding debts FCI assigned Grant and Pitts to collect was a personal loan for $260,000 extended by MGSL to Tucker. In January 1992, Pitts contacted Tucker personally with regard to this debt. (Exh. 1) Over the next year, Haley communicated with Grant and Pitts on Tucker's behalf both orally and through written correspondence concerning Tucker's liability. (Exhs. 2 & 3) Tucker settled with the RTC in March 1993.

ARGUMENT

A. Haley's statements to Grant and Pitts constitute admissions of a party-opponent

As Tucker's attorney, specifically representing and speaking for Tucker, Haley's statements to representatives and agents of the RTC, in the course of Tucker's negotiations with the RTC, are not hearsay and are admissible as admissions of a party-opponent. Federal Rule of Evidence 801(d)(2) states that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a person authorized by the party to

make a statement concerning the subject, or a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Plainly, Haley was Tucker's agent, authorized to make statements to the RTC on Tucker's behalf regarding Tucker's indebtedness to the RTC. See Letter, John H. Haley to Marshall K. Grant (Nov. 25, 1992) (Exhibit 3) ("Jim Guy Tucker has asked me to explore the possibilities of a settlement with you.").

Statements made by an attorney employed by a party-opponent in the course of representing his client in a particular matter therefore do not constitute hearsay, as attorneys are authorized to make statements and are considered agents of the party-opponent. See, e.g., Michael H. Graham, Federal Practice and Procedure § 6723 (1992) ("An attorney may, of course, act as an ordinary agent and as such make evidentiary admissions admissible against his principal, Rule 801(d)(2)(C) and (D)") (note omitted, collecting cases); McCormick on Evidence § 259 at 163-64 (4th ed. 1992) ("These admissions occur, for example, in letters or oral conversations made in the course of efforts for the collection or resistance of claims, or settlement negotiations, or the management of any other business in behalf of the client.") (note omitted, collecting cases).

The Eighth Circuit recognizes that statements of attorneys speaking on behalf of their clients do not constitute hearsay. United States v. Ojala, 544 F.2d 940, 946 (8th Cir. 1976) ("the statements were made in an unequivocal manner by one who was

acting as appellant's attorney at the time, and . . . they referred to a matter within the scope of the attorney's authority"); United States v. Scott, 804 F.2d 104, 108 (8th Cir. 1986) (following Ojala). As the cases collected in the treatises cited above illustrate, the federal courts consistently follow the same rule. See also, e.g., United States v. Brandon, 50 F.3d 464, 468-69 (7th Cir. 1995) (defendant's attorney's written response to subpoena admissible as admission of party-opponent under Fed. R. Evid. 801(d)(2)(D); statement did not implicate assistance of counsel, self-incrimination or privilege issues); United States v. Martin, 773 F.2d 579, 583-84 (4th Cir. 1985) (defendant's attorney's statements to IRS auditor admissible; attorney "was authorized to make statements concerning [defendant's] taxes in the scope of his representation").

CONCLUSION

For the foregoing reasons, the United States submits that the testimony of Marshall Grant and Danny R. Pitts regarding statements of John Haley, Defendant Jim Guy Tucker's attorney, made in the course of Haley's representation of Tucker concerning Tucker's debts to the RTC, should be admitted into evidence. Similarly, the Court should admit the letters written by Haley to representatives of the RTC in the course of that representation.

March 28, 1996
Little Rock, Arkansas

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I, Eric H. Jaso, do hereby certify that on March 29, 1996, I caused a true and correct copy of the foregoing to be served by hand delivery on the following:

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CERTIFICATE OF SERVICE

I, Eric H. Jaso, do hereby certify that on April 1, 1996, I caused a true and correct copy of the foregoing to be served by hand delivery on the following:

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_____
Eric H. Jaso
Associate Counsel

From: Rod Rosenstein
To: EJASO
Date: 3/31/96 3:36pm
Subject: Rule 408 Issue

Communication with FCI began when they contacted Tucker personally by telephone in 1/92. Communication continued by phone, in person, and by letters until the debt was settled in 3/93.

The admissions we want to introduce by Tucker and Haley were in the course of these discussions, the goal of which was to settle the outstanding obligation. They include admissions that (1) the loan was tied to other financing; (2) Tucker did not want to buy the property; and (3) Tucker agreed to buy the property at an inflated price in order to obtain other financing.

Tucker may claim that Fed. R. Evidence 408 prohibits admission of "conduct or statements made in compromise negotiations." It would be very useful for us to have a case that stands for the proposition that although such statements are inadmissible in civil suits over the amount or legitimacy of the debt, they are admissible in collateral litigation in which the issue is not the legitimacy of the debt but the motivation for creating it. The Rule is not intended to immunize a defendant from criminal liability for statements that he makes in the course of settlement negotiations. The commentary to the Rule provides little help, however.

We are using this evidence to prove that (1) Tucker agreed to take out the loan only because it was tied to other financing within the scope of the conspiracy; (2) he did not ever intend to repay the loan personally; and (3) he knew the property was overvalued when he bought it.

Madison bought the 34 acres in 10/85 for $18,800. Tucker bought the property less than one month later for $125,000. As 2/3 owner of CSW Corporation Tucker bought the CSW utility in 2/86 for $1.2 million with 100% financing; $150,000 from CMS and $1.05 million from MGSL. By 7/86, CSW was insolvent and unable to make payments on its loans. Ultimately, the CSW loan balance was cut in half in 10/87. Tucker set up Southloop Construction Corp. as a subsidiary of CSW in 6/87 and then "sold" the 34 acre property to Southloop in 10/87. He obtained an additional $100,000 cash by arranging for Southloop to mortgage the property to CMS, which therefore had some $360,000 in debt against it.

When it came time to pay what was owed on the original $260,000 loan and he believed the scrutiny was over, Mr. Tucker gave an explanation of this loan that was completely inconsistent with the representations he previously had made to the MGSL Board, to his own law partners, to FHLBB examiners, and to auditors. His admissions reveal the true nature of the conspiracy. They also are inconsistent with the representations of Mr. Tucker in this courtroom, where he said that he was in good financial condition and didn't need to borrow money from Madison:

1. Mr. Sutton told jury in his opening statement that Mr. Tucker had willingly repaid his loans and that there was no fraud involved. We will prove that Mr. Sutton was mistaken. Mr. Tucker did not willingly repay the $260,000 loan, and he admitted that there was fraud involved.

2. Mr. Brown stated in his cross -examination of Mr. Denton that Mr. Tucker was in good financial condition in the fall of 1985. That also is untrue. Mr. Tucker admitted that he agreed to purchase property for an inflated price in return for financing that he needed from MGSL.

This is strong probative evidence of Mr. Tucker's intent in his own words and the words of his authorized agent. The jury deserves to hear the truth and F.R.E. 408 does not exclude such highly probative evidence.

CC: RAJLES, PR

Citation Rank(R) Page(P) Database Mode
710 F.2d 439 R 1 OF 2 P 1 OF 57 CTA8 Page
114 L.R.R.M. (BNA) 2257, 97 Lab.Cas. P 10,247, 13 Fed. R. Evid. Serv. 1163
(Cite as: 710 F.2d 439)

UNITED STATES of America, Appellee,
v.
Harry J. WILFORD, Appellant.
UNITED STATES of America, Appellee,
v.
Everett G. DAGUE, Appellant.
UNITED STATES of America, Appellee,
v.
Herman J. CASTEN, Appellant.
UNITED STATES of America, Appellee,
v.
Herman B. BOEDING, Appellant.
Nos. 82-1185 to 82-1188.
United States Court of Appeals,
Eighth Circuit.
Submitted Nov. 11, 1982.
Decided June 22, 1983.
Rehearing and Rehearing En Banc
Denied Aug. 1, 1983.

FN20. Cf. United States v. Beechum, 582 F.2d 898 (5th Cir.1978), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979):
The standard for the admissibility of extrinsic offense evidence is that of [Fed.R.Evid.] 104(b): "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist."
582 F.2d at 913.

[14] In light of our discussion regarding the similarity of the prior acts to the acts in issue here, we find the other acts to be sufficiently "similar in kind and reasonably ***450** close in time to the charge at trial" to be admissible. See United States v. Two Eagle, 633 F.2d 93, 96 (8th Cir.1980). We find no error in the trial court's admission of evidence of prior acts.

VI. Local 238's Settlement Agreement with the NLRB.

[14] Before criminal charges were filed by the Department of Justice, the NLRB began an investigation into the activities of Local 238 at the D & A construction site. The investigation ended when the NLRB and Local 238 entered into a formal settlement stipulation, whereby Local 238 agreed to cease its disputed activities at the D & A site, and refund the fees paid by certain non-

union drivers. Local 238 expressly noted in the stipulation that it was not admitting that it had violated the National Labor Relations Act.

At trial the government offered into evidence two exhibits containing the settlement agreement, and the testimony of an NLRB attorney concerning the circumstances surrounding the agreement. The trial court admitted the evidence over the defendants' objections.

The defendants argue on appeal that evidence of the settlement stipulation was irrelevant and immaterial, since the defendants were not parties to the agreement, and therefore should not have been admitted. Defendants also contend that evidence of the settlement stipulation was inadmissible under Fed.R.Evid. 408. [FN21] The government counters that the defendants, on cross-examination of drivers who had received the refunds, placed in issue the circumstances surrounding the refunds, and therefore the government was entitled to introduce evidence of the settlement stipulation to explain fully the circumstances in which Local 238 made the refunds. [FN22]

FN21. That rule provides:
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or

invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.
Fed.R.Evid. 408.

FN22. The government also argues on appeal that the defendants did not object on the ground that admission of the evidence would violate **rule 408**, and therefore the issue is not preserved for appeal. See Fed.R.Evid. 103(a)(1). Because we find that the evidence was admissible even assuming the defendants properly objected, we need not reach this issue.

To determine whether the trial court properly admitted evidence of the settlement stipulation, we must decide first, whether the evidence was relevant to an issue in the lawsuit, and second, whether **rule 408** prohibited admission of the evidence.

During the trial, on direct examination, the government asked driver J.W. Coon

whether the money he used to pay Local 238's fee came from his own pocket or whether he was reimbursed for it. Coon responded that he was not "reimbursed" until some time later, when Local 238 mailed him a check refunding the fee he had paid at the D & A site.

The prosecutor asked another driver, Charles Boyd, whether he had received anything from Local 238 after he had paid the fee and had left the D & A site. Boyd responded that he was uncertain whether he had received a newsletter or anything similar, but Local 238 had sent him a refund of the fees he had paid. The prosecutor followed this response with a question as to whether Boyd had ever received anything else from Local 238, and whether he wanted to be a member of Local 238. On cross-examination, defense counsel asked Boyd whether he had sent the refund to the trucking company that had paid the fee. Boyd responded that when he received the ***451** refund he was no longer associated with the trucking company that paid the fee, so he kept the refund.

On the direct examination of Charles Higgs, another driver, the prosecutor asked him if he knew why he received a refund from the union, and if he knew from whom he had received the refund. Higgs answered "no" to both questions. On cross-examination, defense counsel showed Higgs a copy of the refund check, whereupon Higgs stated that he received the refund from the defendant Wilford, and from Local 238.

Subsequent to this testimony, the prosecutor sought to introduce evidence of

the settlement stipulation "to explain the situation involving those [refunds], why the [refunds] were made, who they went to, the amount, and generally [to] explain to the jury under what circumstances [these refunds were] made to these truck drivers...."

Because the defense counsel placed the refunds in issue, the government was entitled to explain to the jury the circumstances surrounding the refunds. The prosecutor's questions on direct examination to drivers Coon and Boyd were not intended to examine whether and why the drivers had received refunds; the prosecutor inquired of Coon whether he had been reimbursed for the fee he had paid, and inquired of Boyd whether he had received any materials or benefits from Local 238, and whether he wanted to be a member of Local 238. When defense counsel on cross-examination inquired of the drivers whether they had kept the refunds themselves, and elicited a response from Higgs that the refund had come from Local 238 and the defendant Wilford, he placed in issue the matter of under what circumstances the refunds were made. As a result, the government was entitled to show that the refunds in fact stemmed from an agreement by Local 238 with the NLRB. Thus, we conclude the evidence of the settlement stipulation was relevant to an issue in the lawsuit.

We also find that **rule 408** does not bar admission of the evidence. That rule provides that evidence of compromise or offers to compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The rule

expressly states that it "does not require exclusion when the evidence is offered for another purpose...." Fed.R.Evid. 408. In this case evidence of the settlement stipulation was offered to explain the circumstances surrounding the refunds, not to show that Local 238 violated the National Labor Relations Act. The defendants were further protected from any inference of guilt by the provision in the stipulation which stated that Local 238 did not admit to any violation by entering into the stipulation.

We therefore conclude that the trial court properly admitted evidence of the settlement stipulation.

VII. Denial of the Defendants' Request for Surrebuttal.

The defendants argue that a witness presented by the government during its rebuttal brought forward new facts not raised earlier, and that the defendants were entitled to present evidence on surrebuttal to counter the witness' testimony and to impeach his credibility. The trial court sustained the government's objection to surrebuttal by the defendants.

The witness, an investigator for the NLRB, testified as to his observation of events taking place at the Pittsburgh-Des Moines Steel Co. site (discussed in section V supra). The government's stated purpose in offering the investigator's testimony was to show the similarity of the Pittsburgh-Des Moines incident to the incident for which the defendants were being tried. The defendants argue that they were entitled to present evidence in surrebuttal

INSTA-CITE

CITATION: 710 F.2d 439

Direct History

=> 1 **U.S. v. Wilford,** 710 F.2d 439, 114 L.R.R.M. (BNA) 2257, 97 Lab.Cas. P 10,247, 13 Fed. R. Evid. Serv. 1163 (8th Cir.(Iowa), Jun 22, 1983) (NO. 82-1185, 82-1186, 82-1187, 82-1188)

Certiorari Denied by

2 Wilford v. U.S., 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166, 115 L.R.R.M. (BNA) 2248, 99 Lab.Cas. P 10,659 (U.S.Iowa, Jan 09, 1984) (NO. 83-496)

Negative Indirect History

Abrogation Recognized by

3 U.S. v. Gonzalez-Lira, 936 F.2d 184, 33 Fed. R. Evid. Serv. 1505 (5th Cir.(Tex.), Jul 09, 1991) (NO. 90-2609)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References

22 C.J.S. Criminal Law Sec.274 Note 34

Citation | Page(P) | Database | Mode
718 F.2d 269 FOUND DOCUMENT P 1 OF 38 CTA Page
114 L.R.R.M. (BNA) 2745, 98 Lab.Cas. P 10,489, 14 Fed. R. Evid. Serv. 961
(Cite as: 718 F.2d 269)

VULCAN HART CORPORATION (ST. LOUIS DIVISION), Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent.
No. 82-1719.
United States Court of Appeals,
Eighth Circuit.
Submitted April 12, 1983.
Decided Oct. 4, 1983.

A petition was filed seeking review of an order of the National Labor Relations Board finding that an employer committed numerous unfair labor practices in connection with strike. The Court of Appeals, Bright, Circuit Judge, held that: (1) the employer was not denied a fair hearing on the unfair labor practice charges; (2) the sending of a letter was not an unfair labor practice where the letter did not necessarily operate as a discharge letter; (3) the denial of seniority to returning strikers was an unfair labor practice; (4) the employer's withdrawal of recognition converted an economic strike to an unfair labor practice strike; (5) the record supported the finding that the employer attempted to coerce an employee into restricting his participation in organizational activities; and (6) although

after November 1, because the subject matter on the picket signs remained the same, and the strikers affirmed that they would not return until the Union and V-H agreed on a contract.

[12] Whatever goals the strikers hoped to accomplish by striking, V-H's withdrawal of recognition clearly prolonged the strike, because it put an end to contract negotiations. To our knowledge, this strike has never been formally settled, and that failure is directly attributable to V-H's premature withdrawal of recognition. Substantial evidence therefore supports the Board's finding of conversion to an unfair labor practice strike on November 1.

D. Lindhorst.

V-H disputes the Board's finding that it violated sections 8(a)(1) and (3) by making Lindhorst's reinstatement conditional on his resignation from union office. V-H contends that the violation is not supported by substantial evidence, but even if it were, V-H argues, the backpay award was inappropriate, because the complaint charged a violation of section 8(a)(1) only. [FN6]

FN6. In fact, at the hearing, the general counsel specifically denied that the Board sought backpay for Lindhorst on section 8(a)(3) grounds. We address the Board's failure to seek relief under section 8(a)(3) in our discussion of the appropriate remedy, Section E, infra.

[13] With respect to the Board's findings of fact, this issue turns entirely on credibility determinations. The Board specifically ***277** credited Lindhorst's version of the reinstatement offer, and we find no ground for overturning the Board's credibility determinations in this case. The question has arisen also whether evidence relating to the reinstatement discussions should have been admitted at all, since one might characterize the discussions as compromise negotiations within the scope of Fed.R.Evid. 408. [FN7] But Rule 408 excludes evidence of settlement offers only if such evidence is offered to prove liability for or invalidity of the claim under negotiation. To the extent that the evidence is offered for another purpose, and to the extent that either party makes an independent admission of fact, the evidence is admissible.

FN7. Under 29 U.S.C. s 160(b), the NLRB must conduct its hearings in accordance with the Federal Rules of Evidence, "so far as [is] practicable." But though the federal rules carry great weight, they do not absolutely bind on the NLRB. See, e.g., NLRB v. Maywood Do-Nut Co., Inc., 659 F.2d 108, 110 (9th Cir.1981) (per curiam).

[14] In this case, the demand that Lindhorst resign his union office arose in the context of negotiations to settle his discharge grievance. The

discharge claim is not at issue in this proceeding. Accordingly any statements V-H made in the course of the negotiations are not excludable under Rule 408. With the admission of those statements, the record clearly supports the finding that V-H attempted to coerce Lindhorst into restricting his participation in organizational activities, in violation of section 8(a)(1).

E. Remedy.

V-H contends that the remedy the NLRB imposed is punitive, not remedial, and therefore should not be enforced. V-H argues that Lindhorst is not entitled to backpay from October 3, and that none of those still on strike should receive either backpay or reinstatement. We think the remedy was overbroad with respect to Lindhorst, but not with respect to the other strikers.

[15][16] The NLRB's general counsel charged V-H on Lindhorst's account under section 8(a)(1) only, and specifically denied at the hearing that it sought backpay for Lindhorst from the time of the October 3 resignation demand. See n. 6 supra. The NLRB erred in awarding backpay and reinstatement from October 3, because the strike had not been abandoned at that point, and did not become an unfair labor practice strike until November 1. From November 1, however, all strikers including Lindhorst are entitled to reinstatement and backpay. V-H argues that the strikers who never abandoned the strike are not entitled to reinstatement or backpay. We disagree. V-H itself guaranteed that the strike would never be resolved when it withdrew its recognition of the Union. It

cannot now escape responsibility for its unfair labor practices by arguing that the strikers did not settle, since V-H's refusal to negotiate is itself part of the reason they still remain on strike.

III. Conclusion.

We enforce the Board's order in part and deny enforcement in part, in accordance with this opinion.

END OF DOCUMENT

INSTA-CITE

CITATION: 718 F.2d 269

Direct History

1 Vulcan-Hart Corp., 262 NLRB 167, 262 NLRB No. 17, 1982 WL 24582, 110 L.R.R.M. (BNA) 1302, 111 L.R.R.M. (BNA) 1022 (N.L.R.B., Jun 14, 1982) (NO. 14-CA-13129)
Decision Supplemented by
2 Vulcan-Hart Corporation, 263 NLRB 477, 263 NLRB No. 64, 1982 WL 23869, 111 L.R.R.M. (BNA) 1022 (N.L.R.B., Aug 17, 1982) (NO. 14-CA-13129)
Enforcement Granted in Part, Denied in Part by
=> 3 **Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B.,** 718 F.2d 269, 114 L.R.R.M. (BNA) 2745, 98 Lab.Cas. P 10,489, 14 Fed. R. Evid. Serv. 961 (8th Cir., Oct 04, 1983) (NO. 82-1719)

4 Vulcan-Hart Corp., 262 NLRB 167, 262 NLRB No. 17, 1982 WL 24582, 110 L.R.R.M. (BNA) 1302, 111 L.R.R.M. (BNA) 1022 (N.L.R.B., Jun 14, 1982) (NO. 14-CA-13129)
Enforcement Granted in Part, Denied in Part by
=> 5 **Vulcan Hart Corp. (St. Louis Div.) v. N.L.R.B.,** 718 F.2d 269, 114 L.R.R.M. (BNA) 2745, 98 Lab.Cas. P 10,489, 14 Fed. R. Evid. Serv. 961 (8th Cir., Oct 04, 1983) (NO. 82-1719)

Negative Indirect History

Declined to Follow by
6 N.L.R.B. v. Champ Corp., 913 F.2d 639, 59 USLW 2212, 116 Lab.Cas. P 10,268 (9th Cir., Aug 29, 1990) (NO. 89-70160) (Additional History)
7 Lo Bosco v. Kure Engineering Ltd., 891 F.Supp. 1035, 42 Fed. R. Evid. Serv. 637 (D.N.J., Jul 11, 1995) (NO. CIV. A. 93-2451) (Additional History)

Citation | Rank(R) | Page(P) | Database | Mode
768 F.2d 230 | R 3 OF 8 | P 1 OF 27 | CTA8 | Page
18 Fed. R. Evid. Serv. 1247
(Cite as: 768 F.2d 230)

James T. CRUES, Appellant,
v.
KFC CORPORATION, Appellee.
No. 84-2317.
United States Court of Appeals,
Eighth Circuit.
Submitted April 12, 1985.
Decided July 16, 1985.

Action was filed for fraudulent misrepresentation in connection with purchase of restaurant franchise. On posttrial motions, the United States District Court for the Eastern District of Missouri, William N. Hungate, J., 546 F.Supp. 217, held, inter alia, that franchise had failed to submit evidence of legal malice sufficient to support punitive damages claim, that evidence of lost profits was not speculative, and that franchisee was liable for unpaid royalties. Both parties appealed. Following remand by the Court of Appeals, 729 F.2d 1145, the District Court, William S. Bahn, Magistrate Judge, entered judgment on jury verdict in favor of franchisor, and franchisee appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) instruction that jury could find that, even if franchisee had reasonably relied

compromise under Fed.R.Evid. 408.

[6] [7] [8] The admission of this evidence is grounds for reversal only if the district court abused its discretion. There is abundant support for the court's decision. First, the evidence introduced by KFC was cumulative; Crues had proved the offer during his case-in-chief. Second, the initial offer was made more than three years before the lawsuit was filed. Rule 408 applies only to an offer to compromise a "claim," and it is not clear that Crues had a claim against KFC in August 1977. To the contrary, his actions at that time showed his intent to proceed with the fish franchise. That the same offer was made after litigation commenced is not a reason to exclude proof of the offer in its initial context. Third, Crues cites no federal cases holding that **Rule 408** applies to **admissions** of compromise against the offeree. The rule is concerned with excluding proof of compromise to show liability of the offeror. C. McCormick, McCormick on ***234** Evidence s 264, at 712 (E. Cleary 3d ed. 1984). KFC submitted the offer to show that Crues was unreasonable in relying on the initial representation in continuing the fish operation. This use of evidence violates neither the spirit nor the letter of Rule 408. See Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 277 (8th Cir.1983).

IV.

[9] Finally, we deal with the issue of costs. On September 7, 1984, KFC filed a bill of costs for $7,628.74 with the district court. On September 9,

INSTA-CITE

CITATION: 768 F.2d 230

Direct History

1 Crues v. KFC Corp., 546 F.Supp. 217 (E.D.Mo., Aug 03, 1982)
(NO. 81-0082C (4))
Affirmed in Part, Remanded in Part by
2 Crues v. KFC Corp., 729 F.2d 1145 (8th Cir.(Mo.), Mar 13, 1984)
(NO. 82-2050, 82-2085)
Appeal After Remand
=> 3 **Crues v. KFC Corp.,** 768 F.2d 230, 18 Fed. R. Evid. Serv. 1247
(8th Cir.(Mo.), Jul 16, 1985) (NO. 84-2317)

Negative Indirect History

Disagreed With by
4 Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175,
17 Fed.R.Serv.3d 1283 (9th Cir.(Cal.), Sep 13, 1990)
(NO. 89-56008) (Additional History)
Declined to Follow by
5 Griffith v. Mt. Carmel Medical Center, 157 F.R.D. 499
(D.Kan., Aug 26, 1994) (NO. CIV. A. 92-1141-MLB)
(Additional History)
6 Brook, Weiner, Sered, Kreger & Weinberg v. Coreq, Inc., 1995 WL 144554
(N.D.Ill., Mar 30, 1995) (NO. 91 C 7955) (Additional History)

Ella FREIDUS, Appellant,
v.
FIRST NATIONAL BANK OF COUNCIL BLUFFS, a National Banking Corporation, Appellee.

No. 90-5182.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 11, 1990.

Decided March 8, 1991.

Contract vendee brought breach of contract suit against vendor for unreasonably withholding its consent to resale of property. The United States District Court for the District of South Dakota, Donald J. Porter, Chief Judge, entered judgment on jury verdict in favor of contract vendor, and vendee appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) letters exchanged during settlement negotiations were admissible to rebut testimony that vendor never gave reasons for conditions it imposed on its consent to proposed resale, and (2) refusal to admit testimony of certified public accountant, who would have testified as to adverse tax consequences of vendor's proposals for obtaining its consent, was not error.

Affirmed.

[1] EVIDENCE ⇐ 213(4)
157k213(4)
Rule precluding documents manifesting attempts to settle litigation did not bar admission of letters exchanged during settlement negotiations in contract vendee's breach of contract suit against contract vendor to rebut testimony that vendor never gave reasons for conditions it had imposed on its consent to vendee's proposed resale of property; without letters, vendor would not have been able to rebut claim that it unduly delayed in giving its consent, which ultimately prevented completion of resale. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[1] WITNESSES ⇐ 406
410k406
Rule precluding documents manifesting attempts to settle litigation did not bar admission of letters exchanged during settlement negotiations in contract vendee's breach of contract suit against contract vendor to rebut testimony that vendor never gave reasons for conditions it had imposed on its consent to vendee's proposed resale of property; without letters, vendor would not have been able to rebut claim that it unduly delayed in giving its consent, which ultimately prevented completion of resale. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[2] EVIDENCE ⇐ 146
157k146
Testimony of certified public accountant was properly excluded in contract vendee's suit against contract vendor for breach of contract for unreasonably withholding consent to resale to another, as potentially confusing or misleading to jury; certified public accountant would have explained potentially adverse tax consequences of vendor's proposals for securing its consent, which had tenuous relevance at best to issues in suit. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

***793** William J. Srstka, Pierre, S.D., for appellant.

***794** Donald E. Covey, Winner, S.D., for appellee.

Before WOLLMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FRIEDMAN, [FN*] Senior Circuit Judge.

FN* The HONORABLE DANIEL M. FRIEDMAN, United States Senior Circuit Judge for the Federal Circuit, sitting by designation.

WOLLMAN, Circuit Judge.

Ella Freidus appeals from the district court's [FN1] judgment entered upon a jury verdict in favor of the First National Bank of Council Bluffs, Iowa, in Freidus' diversity suit for breach of contract. We affirm.

FN1. The Honorable Donald J. Porter, Chief Judge, United States District Court for the District of South Dakota.

I.

In 1987, Freidus, a resident of New York, purchased farm land in South Dakota from the bank on a contract for deed. In the summer of 1988, the bank commenced foreclosure because Freidus' annual payment was late. The parties settled the foreclosure action in March 1989. The settlement stipulation increased the interest rate on the contract from 7% to 8.5% and deleted the 60-day grace period on missed payments. Freidus collected a portion of the settlement money paid to the bank from a one-year lease of the land with an option to purchase held by Danielski Farming and Harvesting.

Upon reinstatement of the contract, Freidus requested consent from the bank to sell the land to Danielski as required by paragraph 16 of the contract for deed, which provides in part:

> Assignment. [Freidus] shall not assign this Contract or any interest therein, or any interest of the property purchased hereunder unless [the bank] first consents to such assignment in writing, which consent shall not be unreasonably withheld.

The bank responded to Freidus' request with terms for the sale in an April 20, 1989, letter that proposed that:

> (1) The bank would receive Danielski's down payment in the year of sale, approximately $400,000, and would credit that against the balance due on the contract.
>
> (2) The remaining balance on Freidus' contract would be reamortized to provide for a market rate of interest, not less than 10.5%, and the bank would receive all Danielski's payments until Freidus discharged its obligation to the bank in full.
>
> (3) Freidus would pay the bank a 1% processing fee and reimburse the bank for costs and attorney's fees.

Freidus perceived this proposal as an unreasonable refusal to consent to the sale of the land to Danielski and sued the bank for breach of contract. On May 9, 1989, the bank sent another letter indicating the bank's final position on consent to the sale would allow the interest rate to remain at 8.5% and require half of the down payment in the year of sale.

In August 1989, the parties attempted to settle the litigation through a series of letters. The proposed settlement was conditioned upon completing the sale to Danielski. In December 1989, Danielski refused to close the transaction because of delay and changes to the contract. The case went to trial in March 1990. The jury found that the bank had not withheld consent to the sale unreasonably, and the district court entered judgment for the bank.

II.

Freidus argues that several evidentiary rulings by the district court constituted an abuse of discretion. We give substantial deference to the district court's rulings on the admissibility of evidence, and we will not find error in the absence of a clear showing of abuse of discretion. Harris v. Mallinckrodt, Inc., 886 F.2d 170, 171 (8th Cir.1989).

[1] Freidus first challenges the district court's admission into evidence of two letters, Exhibits 19 and 20, exchanged during settlement negotiations between the parties in August 1989. Under Federal Rule of *795 Evidence 408, documents manifesting an attempt to settle litigation are not **admissible** to prove liability for or invalidity of a claim or its amount. **Rule 408** does not, however, exclude "evidence offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Fed.R.Evid. 408.

The bank offered Exhibits 19 and 20 to rebut the testimony of Jacob Freidus, Ella's husband and agent. Jacob Freidus testified that the bank never gave any reason for its conditions on consent to the sale, "even up to this date," meaning to the date of trial. Exhibit 19, a letter from the bank's attorney to Freidus' attorney, explained the financial information the bank required before accepting Danielski as the assignee of Freidus' interest in the land. Exhibit 20, a letter from Freidus' attorney to the bank's attorney, outlined Freidus' understanding of alternative ways to bring Danielski to close the sale and requested concessions from the bank on the interest rate and other terms. The district court reasoned that the letters "negativ[ed] a contention of undue delay" by Freidus, and therefore **admitted** the letters under **Rule 408.**

We conclude that the district court did not abuse its discretion in **admitting** the challenged exhibits. The jury could well find that the letters, when read together, constituted a plausible explanation for the bank's unwillingness to immediately accede to Freidus' requested consent to assignment of her

interest in the contract. Without question, the letters served to rebut Jacob Freidus' testimony that "even up to this date" the bank had failed to give any reasons for the conditions it had imposed on giving its consent, testimony that left unrebutted would have been devastating to the bank's position that it had not unduly delayed giving its consent. Accordingly, the challenged evidence was properly **admissible** under **Rule 408.**

[2] Freidus next argues that the district court should have **admitted** the testimony of a certified public accountant explaining the potentially adverse tax consequences of the bank's April and May proposals. We agree with the district court that the relevance of such evidence was tenuous at best. Federal Rule of Evidence 403 permits a district court to exclude otherwise admissible evidence if its probative value is substantially outweighed by the danger that the evidence might confuse the issues or mislead the jury. We recognize the wide discretion placed in, and the deference that must be given to, a trial judge in making a ruling under Rule 403, Hicks v. Mickelson, 835 F.2d 721, 726 (8th Cir.1987), and accordingly will not disturb the district court's ruling here.

Finally, Freidus contends that the district court abused its discretion in revising jury instruction 13A and in answering a question from the jury as it did. We disagree with Freidus' contention that the instruction misdirected the jury. In fact, instruction as given is not materially different from Freidus' proposed instruction. Freidus' challenge to the district court's answer to the jury's question is without merit.

The district court's judgment is affirmed.

END OF DOCUMENT

UNITED STATES of America, Plaintiff-Appellee,
v.
Jack R. PREWITT and Joseph V. Smillie, Defendants-Appellants.

Nos. 93-3153, 93-3796.

United States Court of Appeals, Seventh Circuit.

Argued June 9, 1994.

Decided Aug. 29, 1994.

Defendants were convicted in the United States District Court for the Southern District of Indiana, Sarah Evans Barker, Chief Judge, of mail fraud as either principals or aiders and abettors, and they appealed. The Court of Appeals, Shabaz, District Judge, sitting by designation, held that: (1) trial court did not abuse its discretion when it admitted statements defendant made during compromise negotiations with Securities Division of the Indiana Secretary of State's Office, and (2) defendant's prior mail fraud convictions were admissible.

Affirmed.

[1] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
District court's decisions admitting or excluding evidence will be reviewed for abuse of discretion, giving district court great deference.

[2] CRIMINAL LAW ⇐ 408
110k408
In prosecution of defendant for mail fraud, district court did not abuse its discretion when it admitted statements defendant made during compromise negotiations with Securities Division of the Indiana Secretary of State's Office; rule that evidence of statements made in compromise negotiations is not admissible was not applicable to criminal case and rule governing inadmissibility of pleas, plea discussions and related statements in criminal cases was not applicable. Fed.Rules Evid.Rule 408, 28 U.S.C.A.; Fed.Rules Cr.Proc.Rule 11(e)(6), 18 U.S.C.A.

[3] CRIMINAL LAW ⇐ 408
110k408
Rule providing that evidence of furnishing or accepting valuable consideration in compromising claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of claim or its amount and that evidence of statements made in compromise negotiations is likewise not admissible should not be applied to criminal cases; clear reading of rule suggests that it applies only to civil proceedings, specifically language concerning validity and amount of claim, nothing in rule specifically prohibits receipt of evidence in criminal proceedings concerning statements made at conference to settle claims of private parties, and public interest in prosecution of crime is greater than public interest in settlement of civil disputes. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 369.2(1)
110k369.2(1)
Evidence of prior crimes, wrongs or acts is only admissible if it is a matter in issue other than defendant's propensity to commit the offense charged, it is similar enough and close enough in time to be relevant to the matter in issue, it is clear and convincing, and its probative value is not substantially outweighed by the danger of unfair prejudice. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 370
110k370
Defendant's prior mail fraud convictions were admissible in his current prosecution for mail fraud because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 371(1)
110k371(1)
Defendant's prior mail fraud convictions were admissible in his current prosecution for mail fraud because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 372(14)
110k372(14)
Defendant's prior mail fraud convictions were

admissible in his current prosecution for mail fraud because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] CRIMINAL LAW ⇐ 622.2(3)
110k622.2(3)
Defendant claiming that district court erred in denying his motion for severance must show that district court actually prejudiced him by depriving him of a fair joint trial.

[7] CRIMINAL LAW ⇐ 622.2(3)
110k622.2(3)
To show actual prejudice as result of joint trial of defendant and codefendant, defendant must show that one of the following was present: conflicting and irreconcilable defenses; a massive and complex amount of evidence that makes it almost impossible for jury to separate evidence as to each defendant; codefendant's statement that incriminates defendant; and gross disparity of evidence between defendants.

[8] CRIMINAL LAW ⇐ 622.2(8)
110k622.2(8)
Trial court did not abuse its discretion in denying defendant's motion for severance of his trial from that of codefendant; jury could easily separate evidence as it applied to each defendant, including codefendant's prior convictions, and were so instructed by trial court.

[9] CRIMINAL LAW ⇐ 1139
110k1139
District court's ruling on motion to dismiss indictment is a ruling on a question of law and is subject to de novo review.

[10] CRIMINAL LAW ⇐ 273.1(2)
110k273.1(2)
Plea agreement providing that defendant would not be charged in Northern District of Indiana was not binding on United States Attorney's Office for the Southern District of Indiana and thus, trial court's denial of defendant's motion to dismiss indictment brought by Southern District of Indiana was not an error of law.

[10] CRIMINAL LAW ⇐ 1134(3)
110k1134(3)
Plea agreement providing that defendant would not be charged in Northern District of Indiana was not binding on United States Attorney's Office for the Southern District of Indiana and thus, trial court's denial of defendant's motion to dismiss indictment brought by Southern District of Indiana was not an error of law.

***437** Christina McKee, Asst. U.S. Atty. (argued), Indianapolis, IN, for the U.S.

Lesa L. Johnson, Indianapolis, IN (argued), for Jack R. Prewitt.

Kevin McShane (argued), McShane & Gordon, Indianapolis, IN, for Joseph V. Smillie.

Before MANION and KANNE, Circuit Judges, and SHABAZ, District Judge. [FN*]

FN* The Honorable John C. Shabaz, of the Western District of Wisconsin, is sitting by designation.

SHABAZ, District Judge.

PROCEDURAL HISTORY

On October 28, 1992 defendants Joseph V. Smillie, Jack R. Prewitt and Donald F. Leuck were indicted by a federal grand jury in the United States District Court for the Southern District of Indiana on five counts of mail fraud as either principals or aiders and abettors pursuant to 18 U.S.C. §§ 1342 and 2. The case was assigned to the Honorable Sarah Evans Barker, United States District Judge.

The motion of defendant Jack R. Prewitt to dismiss the indictment against him was denied by the district court on March 16, 1993. The motion of defendant Joseph V. Smillie to sever his trial was denied on January 21, 1993, renewed on March 19, 1993, and once again denied on March 22, 1993.

Trial commenced March 22, 1993, and the jury returned a verdict of guilty on all counts on March 26, 1993. On August 11, 1993 Prewitt filed a motion to vacate convictions and/or motion to dismiss indictment which was denied by the district court on August 26, 1993. Defendants Smillie and Prewitt appeal their convictions.

***438** FACTS

Defendant Jack R. Prewitt was indicted on June 6, 1988 in the United States District Court for the Northern District of Indiana on charges of mail fraud and filing a false tax return in Case No. S CR 88-37. On March 8, 1990, he was indicted in said district on mail fraud charges in Case No. S CR 90-11. On May 2, 1990 he pled guilty to two counts of mail fraud and one count of filing a false tax return pursuant to a plea agreement which contained the following language:

> The United States Attorney's Office for the Northern District of Indiana agrees that no further charges will be brought against me in the Northern District of Indiana arising out of my dealings in Mid-Continent, the Riley Agency or Chubb Insurance Group or any other affiliated companies.

On September 11, 1990 Thomas O. Plouff, Assistant United States Attorney for the Northern District of Indiana, advised defendant's attorney Patrick A. Tuite that the United States Attorney's Office for the Southern District of Indiana was investigating alleged criminal conduct by defendant Prewitt that victimized individuals in both the Northern and Southern Districts of Indiana. Plouff stated that his office would abide by the plea agreement and not prosecute defendant Prewitt in the Northern District of Indiana for any of this activity. Postal Inspector Thomas Burnham was employed in Indianapolis, Indiana, and investigated defendant Prewitt's activities in both the Northern and Southern Districts of Indiana.

On October 22, 1990 defendant Prewitt was convicted in the United States District Court for the Northern District of Indiana for two counts of mail fraud and one count of filing a false tax return pursuant to his aforesaid guilty plea. He was sentenced to concurrent prison terms of three years on the mail fraud counts and a sentence of three years probation on the tax count.

In 1987 defendant Jack V. Smillie founded Sterling American Financial Group, Inc. (Sterling), a corporation intended to oversee a group of businesses related to the insurance industry. Between December 1989 and April 1990 defendant Smillie, defendant Prewitt and Donald F. Leuck made a series of sales presentations to prospective investors in Sterling.

The Securities Division of the Indiana Secretary of State's Office began an investigation of Sterling in March 1990. The Division issued a cease and desist order against the defendants and Sterling on April 2, 1990. After receiving this order Sterling ceased doing business and commenced settlement and compromise efforts with the Securities Division. Defendant Smillie was interviewed by investigators from the Division on May 15, 1990 and July 2, 1990.

According to the October 28, 1992 indictment defendant Smillie withdrew approximately $281,000 of the $282,000 which Sterling had received from investors between December 1989 until May 1990. The majority of these funds were used for the personal benefit of defendants Smillie, Prewitt and Leuck.

At trial investors testified concerning their interactions with Sterling. Postal Inspector Burnham offered a number of financial records into evidence. Robert Lott, an Investigator for the Indiana Securities Division, testified concerning statements made to him by defendant Smillie on May 15, 1990 and July 2, 1990. At the first interview defendant Smillie stated that only operating expenses had been paid from the Sterling bank account. During the July 2, 1990 interview defendant Smillie acknowledged that a number of Sterling checks represented payments for his own use and benefit for a total of approximately $32,000.

Both defendants testified at trial. The district court admitted certified copies of the judgment and commitment orders of defendant Prewitt's prior mail fraud convictions with a limiting instruction that they should be considered only against defendant Prewitt and only on the question of his intent, plan, knowledge or absence of mistake or accident.

William Stalnaker, the President of Prime Financial Partners in Phoenix, Arizona, testified for the defense. He confirmed that he had discussions with Sterling about a business relationship designed to market 419 ***439** trusts. The district court did not allow Stalnaker to testify to that commission which would have been earned had binding contracts for the purchase of the trust been entered into. The court concluded such testimony would be too speculative.

MEMORANDUM

[1] Defendants Smillie and Prewitt and appeal their convictions challenging evidentiary decisions made by the district court. The district court's decisions admitting or excluding evidence will be reviewed for abuse of discretion giving the district court great deference. United States v. Wilson, 973 F.2d 577, 580 (7th Cir.1992).

[2] Defendant Smillie principally contends that the district court abused its discretion in admitting his statements made during compromise negotiations with the Securities Division in violation of Rule 408, Federal Rules of Evidence. The district court admitted statements made on May 15 and July 2, 1990 by defendant Smillie to investigators for said division.

> Rule 408 provides in pertinent part as follows:
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

[3] The clear reading of this rule suggests that it should apply only to civil proceedings, specifically the language concerning validity and amount of a claim. Rule 11(e)(6) of the Federal Rules of Criminal Procedure is of no help to this defendant. It applies to the inadmissibility of pleas, plea discussions, and related statements in criminal cases.

Nothing in Rule 408 specifically prohibits the receipt of evidence in criminal proceedings concerning the admissions and statements made at a conference to settle claims of private parties. United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir.1984). The public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes. Id. Rule 408 should not be applied to criminal cases. United States v. Baker, 926 F.2d 179 (2d Cir.1991). The trial court did not abuse its discretion when admitting defendant Smillie's statements made to Investigator Lott on May 15 and July 2, 1990.

Defendant Prewitt claims that the district court abused its discretion in excluding certain testimony by witness Stalnaker. Defendant Prewitt asked Stalnaker what commission would have been earned had binding contracts been entered into for the purchase of the trust. The district court did not allow this testimony because it would be speculative. This was not an abuse of discretion.

Defendant Prewitt claims that his prior mail fraud convictions in the Northern District of Indiana should not have been admitted. Rule 404(b), Federal Rules of Evidence provides as follows:

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident ...

[4] Evidence of prior crimes, wrongs or acts is only admissible if:

> (1) [I]t is a matter in issue other than the defendant's propensity to commit the offense charged; (2) it is similar enough and close enough in time to be relevant to the matter in issue; (3) it is clear and convincing; and (4) its probative value is not substantially outweighed by the danger of unfair prejudice.

United States v. Lennartz, 948 F.2d 363, 366 (7th Cir.1991); United States v. Shackleford, 738 F.2d 776, 779 (7th Cir.1984).

Pursuant to proffer and balancing the district court admitted defendant Prewitt's two prior convictions of mail fraud to prove intent, ***440** knowledge and plan. The jury was provided a limiting instruction upon its admission.

[5] The prior convictions were admissible because their probative value concerning intent, knowledge and plan was not outweighed by any possible prejudice to defendant Prewitt. United States v. Torres, 977 F.2d 321, 328 (7th Cir.1992). The trial court did not abuse its discretion in admitting defendant Prewitt's prior convictions.

[6] Defendant Smillie further argues that the district court erred in denying his renewed motion for severance. He must show that the district court

actually prejudiced him by depriving him of a fair joint trial. United States v. Hamilton, 19 F.3d 350 (7th Cir.1994).

[7][8] Defendant Smillie argued for severance because the evidence of Prewitt's two prior federal convictions for mail fraud was so prejudicial as to deprive him of a fair trial. To show actual prejudice defendant must show that one of the following was present:

> (1) conflicting and irreconcilable defenses; (2) a massive and complex amount of evidence that makes it almost impossible for the jury to separate evidence as to each defendant; (3) a codefendant's statement that incriminates the defendant; and (4) a gross disparity of evidence between the defendants.

United States v. Clark, 989 F.2d 1490, 1499 (7th Cir.1993). Defendant has not shown any of these circumstances to be present. The jury could easily separate the evidence as it applied to each defendant including defendant Prewitt's prior convictions and were so instructed by the district court. The trial court did not abuse its discretion in denying defendant Smillie's motion for severance.

[9] Defendant Prewitt principally argues that the district court erred in denying his motion to dismiss the indictment. The district court's ruling on a motion to dismiss the indictment is a ruling on a question of law and is subject to de novo review. United States v. Furlett, 974 F.2d 839, 841 (7th Cir.1992).

Defendant Prewitt argues that his plea agreement in the Northern District of Indiana precluded the charges from being brought against him in this case.

On its face the plea agreement is unambiguous. It bound only the United States Attorney's Office for the Northern District of Indiana from bringing charges in the Northern District of Indiana arising from defendant Prewitt's dealings with Mid Continent, the Riley Agency or Chubb Insurance Group or any other affiliated companies.

Defendant Prewitt argues that any other affiliated companies includes Sterling. Whether or not any other affiliated companies includes Sterling is not material to whether the plea agreement precluded the Southern District of Indiana from charging defendant Prewitt. The agreement precluded only prosecution in the Northern District of Indiana.

The September 11, 1990 letter written by Thomas O. Plouff prior to sentencing of Prewitt in the Northern District of Indiana clarifies the extent of the plea agreement. It advises defendant's counsel of the pending investigation in the Southern District of Indiana, his intent to abide by the plea agreement and not to prosecute defendant for any of the alleged criminal activity in the Northern District of Indiana. Prior to sentencing defendant Prewitt knew there was a strong possibility of future prosecution in the Southern District of Indiana and that the plea agreement only precluded Northern District of Indiana prosecutions.

Defendant Prewitt emphasizes that Postal inspector Thomas Burnham investigated both cases and that some of the activity for which he was indicted in the Southern District of Indiana occurred in the Northern District of Indiana. The record indicates, however, that three investors resided in the Southern District of Indiana and the charges in the Southern District arose from an investigation distinct from the Northern District of Indiana investigation. The plea agreement provided that defendant Prewitt would not be charged in the Northern District of Indiana for any of his dealings with Mid-Continent, the Riley Agency or Chubb Insurance Group or any other affiliated companies. ***441** The government complied with this agreement.

[10] The agreement did not preclude state charges or charges in other federal district courts. The agreement was not binding on the United States Attorney's Office for the Southern District of Indiana. See United States v. Ingram, 979 F.2d 1179, 1185 (7th Cir.1992), cert. denied, --- U.S. ---, 113 S.Ct. 1616, 123 L.Ed.2d 176 (1993). The denial of defendant's motion to dismiss the indictment was not an error of law.

Defendant Prewitt contends that the trial court erred by denying his August 11, 1993 motion to vacate the convictions and dismiss the indictment because the conduct used to enhance his offense level was utilized in both the Northern District of Indiana and here in violation of United States v. McCormick, 992 F.2d 437 (2d Cir.1993). The Northern District of Indiana conviction was not a sentencing guidelines case. The district court properly denied Prewitt's motion to vacate the

convictions and dismiss the indictment because defendant did not suffer any double jeopardy violations. He was convicted and sentenced for separate crimes.

CONCLUSION

The district court did not abuse its discretion or err as a matter of law. Accordingly, the convictions of defendants Smillie and Prewitt are

AFFIRMED.

INSTA-CITE

CITATION: 34 F.3d 436
=> 1 **U.S. v. Prewitt,** 34 F.3d 436, 41 Fed. R. Evid. Serv. 205 (7th Cir.(Ind.), Aug 29, 1994) (NO. 93-3153, 93-3796)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
23 C.J.S. Criminal Law Sec.889 Note 22 (Pocket Part)

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(Cite as: 869 F.Supp. 1315)

Rob KOLSON, et al., Plaintiffs,
v.
Rajan V. VEMBU, et al., Defendants.
No. 93 C 5360.
United States District Court,
N.D. Illinois,
Eastern Division.
Nov. 28, 1994.
Decision Supplementing Opinion
Nov. 30, 1994.

Lenders brought suit against corporate guarantor of underlying indebtedness and guarantor's principal for their alleged breach of guaranty agreements and fraud in connection with loans. Plaintiffs also sought to hold corporate principal personally liable by piercing corporate veil. On party's cross-motions for summary judgment, the District Court, Shadur, J., Senior District Judge, held that: (1) parol evidence was not admissible to contradict express terms of continuing, absolute and unconditional guaranty; (2) corporate veil would be pierced in order to hold principal personally liable on guaranty; but (3) material questions of fact as to whether lenders justifiably relied on information contained in private placement memorandum, without taking steps to

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(Cite as: 869 F.Supp. 1315, *1331)

interest of completeness this Court has determined that genuine issues of material fact exist as to the precise time at which Kolson and Weinsteins discovered or should have discovered that they had been wronged. Hence the Vembu-Robex motion for summary judgment on the basis of the Illinois statute of limitations for fraud actions would have had to be denied in all events.

***1332** SUPPLEMENT TO MEMORANDUM OPINION AND ORDER [FN1]

FN1. Except for its recapitulation of the shorthand references to the parties litigant, this supplement will not repeat--but will utilize--defined terms in the Opinion.

This Court's November 28, 1994 memorandum opinion and order (the "Opinion") (1) determined that Rajan Vembu ("Vembu") and Robex USA, Ltd. ("Robex") were jointly and severally liable to Rob Kolson ("Kolson") and Eric and Irwin Weinstein (collectively "Weinsteins") in the principal sum of $150,000 plus interest and (2) directed the parties to submit interest calculations by November 29, to permit the entry of a final judgment on November 30. [FN2] Each side's counsel has timely provided such calculations, and this supplement to the Opinion reflects the resolution of their competing positions.

FN2. That timetable was not at all as hurried as the dates in the text

would suggest. On November 23 this Court's chambers had advised counsel for each side of the decision that this Court had reached as to liability (at that time the lengthy Opinion was in the typing process) and also told counsel of their need to submit the interest calculations. Because of the intervention of the Thanksgiving holiday it was November 28 before the Opinion became available for signing and distribution.

Because the five promissory notes at issue have always been available to both sides (and they formed part of the record on the cross-motions for summary judgment), it is hardly surprising that the parties have not quarreled as to the notes' respective principal amounts and dates of issue, their collective extended date of maturity (December 15, 1989) and their prematurity (10% per annum) and postmaturity (13% per annum) interest rates. Instead, the litigants' interest calculations differ by more than $75,000 solely as a consequence of their dispute as to whether the notes bear only simple interest or interest compounded annually.

Neither side had even mentioned that facet of the interest calculation in their briefing of the summary judgment motions (indeed, the Kolson-Weinsteins GR 12(M) statement did not even include an assertion as to the amount that they claimed to be due (including interest), although their Mem. 23 did spell out the principal and interest figures on a basis that was derived via the compound

interest route). Accordingly it was this Court that addressed the subject for the first time (Opinion 1331 n. 31), by correctly stating the Illinois rule that simple interest would apply in the absence of an agreement for compounding. [FN3]

FN3. Each note's provision that speaks of an interest rate simply in "per annum" terms is intrinsically ambiguous, for that could reflect either an old-style simple interest calculation or the more modern recognition that the true cost represented by the loss of the use of money requires compounding. What Opinion 36 n. 31 referred to as the Illinois rule is like most default rules in the law--it reflects what the law will presume in the absence of an express agreement between the parties.

Now counsel for Kolson and Weinsteins bring forward two documents that they say evidence just such an agreement:

1. On September 10, 1991 Kolson wrote a letter to Sylvester Whey, stating that he was writing at Vembu's request asking for a schedule of proposed debt reduction. After setting out the principal amounts and dates of the five notes, Kolson said in part:

The principal amount totals $150,000. The notes accrue interest at a rate of 10% compounded annually until December 15, 1989, and at a rate of 13%

thereafter.

Immediately after that Kolson stated the amount of his calculations "which you are welcome to check"--and those calculations plainly reflected a fully compounded figure.

2. Another letter, this one addressed to Kolson and Weinsteins on November 11, 1992, was written by Sylvester Whey's Madison, Wisconsin lawyer Larry Libman of the Axley Brynelson law firm (with copies of the letter shown as having been sent to both Vembu and Sylvester Whey). That letter reflected and enclosed a proposed agreement between Sylvester Whey on the one hand and Kolson and Weinsteins on the other, which acknowledged the existing default in payment of the five notes and set out a proposed arrangement for the future liquidation of that obligation by payment of a percentage of Sylvester Whey's future cash flow. Among the recitals to that agreement was a statement of the then outstanding balance ***1333** that clearly reflected far more than a simple interest calculation--indeed, the figure was obviously the product of compounding:

WHEREAS, as of October 31, 1992, the total outstanding balance, including principal and accrued interest, which is owed to the Lenders by SWPI on the Loan is $290,000.00 (the "Loan Balance")....

Counsel for Vembu and Robex counter that the documents on which Kolson and Weinsteins seek to rely cannot represent any agreement between the parties with

regard to interest (Mem. 2). They point out that Kolson's letter is purely unilateral and that the document that had been enclosed with the letter from Sylvester Whey's lawyer was a "proposed settlement agreement [that] is not signed by any party involved in this litigation and must not be considered in determining whether the interest calculation be simple interest or compounded annually" (id. 2-3).

There is no dispute as to the authenticity of the two documents--where the parties part company is rather as to legal effect of those documents. As for the first document, Vembu and Robex are entirely correct: It sets out only Kolson-Weinsteins' understanding and intention (Kolson was also acting as the agent for Weinsteins in writing the letter), so it could not by itself constitute the necessary agreement. But as for the second document, Vembu and Robex are just as clearly wrong: It plainly satisfies the need for a showing of Sylvester Whey's agreement that the notes called for compound interest.

Fed.R.Evid. ("Rule") 408 is the well-known embodiment, plus an extension, of the common law rule that sought to encourage the settlement of disputes by rendering settlement offers as such inadmissible to show liability for, or the amount of, a claim. Where the second sentence in the following quotation from Rule 408 goes beyond the common law rule is in also excluding from admissibility statements that are made during negotiations for compromise: [FN4]

FN4. See 2 Jack Weinstein & Margaret Berger, Weinstein's Evidence P 408 [03], at 408-24 (1994).

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Where the Vembu-Robex argument goes astray in its implicit invocation of Rule 408 (although their current memorandum cites no authority in support of their position, they obviously seek to rely on the rule of law that excludes evidence of the types described in the Rule) is that in this instance neither the validity nor the amount of the claim was in dispute (thus the proposed agreement's "WHEREAS" recital that immediately preceded the one quoted earlier in this supplement said "for various reasons, [Sylvester Whey] has been unable to pay the Loan as required under the Loan Documents and is technically in default under the Loan Documents"). Instead the parties' then-active settlement negotiations dealt only with the time and mechanism for payment of the undisputed claim. In that respect the last two sentences in the following

quotation from 2 Weinstein & Berger P 408[01], at 408-12 to 408-13 (footnotes omitted) might well have been written for this very case (see also the cases cited there):

The Advisory Committee Note also states that "the **effort** ... to **induce** a **creditor** to **settle** an **admittedly** due amount for a lesser sum" would not further the underlying policy of the rule and is therefore not protected. Yet a careful distinction must be made between a frank disclosure during the course of negotiations--such as "All right, I was negligent. Let's talk about damages" (inadmissible)--and the less frequent situation where both the validity of the claim and the amount of damages are admitted--"Of course, I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it" (admissible). Likewise, an admission of liability made during negotiations concerning the time of payment and involving neither the ***1334** validity nor amount of the claim is not within the rule's exclusionary protection.

Hence the earlier-quoted "WHEREAS" recital as to the total outstanding balance, including accrued interest, amounting to $290,000 comes squarely within the category of statements that are defined as nonhearsay and are rendered admissible by Rule 801(d)(2)(D):

The statement is offered against a party and is ... (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or

employment, made during the existence of the relationship....

Attorney Libman was unquestionably Sylvester Whey's agent, and his statements were equally unquestionably made in the scope and during the existence of the agency relationship. [FN5] And the key statement here, the amount of accrued interest, was not made in the course of an offer of settlement but was rather a recital of an acknowledged fact--and so it represents a classic example of an admission (what at common law used to be termed the "admission against interest" exception to the hearsay rule, but has now been expanded by the Rule 801(d)(2) definition of nonhearsay). This Court is then entitled to consider that admission, which binds Vembu and Robex (see n. 5).

FN5. Robex as guarantor of Sylvester Whey's obligations is subject to liability that is coterminous with Sylvester Whey's. And Vembu's derivative obligation, either through piercing Robex' corporate veil or as that corporation's alter ego, is of course exactly the same. Hence the earlier-quoted argument by the Vembu-Robex lawyer that the 1992 document was not signed by either Vembu or Robex is entirely empty: They stand in the shoes of Sylvester Whey, and that corporation was and is bound by its lawyer's admission. Thus Vembu and Robex are equally bound.

In summary, Kolson and Weinsteins have demonstrated the necessary agreement of

the parties for the compounding of interest. Because Vembu and Robex have not contested the accuracy of the Kolson-Weinsteins calculations if their legal theory is correct, this Court orders that judgment be entered in favor of Kolson and Weinsteins and against Vembu and Robex jointly and severally in the sum of $150,000 in principal plus $221,437.04 in interest, for a total judgment amount of $371,437.04.

END OF DOCUMENT

INSTA-CITE

CITATION: 869 F.Supp. 1315

Direct History

=> 1 **Kolson v. Vembu,** 869 F.Supp. 1315 (N.D.Ill., Nov 28, 1994)
(NO. 93 C 5360), opinion supplemented (Nov 30, 1994)

Related References

2 Kolson v. Vembu, 1993 WL 348574 (N.D.Ill., Sep 08, 1993)
(NO. 93 C 5360)

3 Kolson v. Vembu, 1993 WL 515472 (N.D.Ill., Nov 24, 1993)
(NO. 93 C 5360)

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598 F.2d 984 | R 19 OF 37 | P 1 OF 33 | ALLFEDS | Page
4 Fed. R. Evid. Serv. 567
(Cite as: 598 F.2d 984)

UNITED STATES of America, Plaintiff-Appellee,
v.
Donald E. MEADOWS, Defendant-Appellant.
No. 78-5572.
United States Court of Appeals,
Fifth Circuit.
July 13, 1979.

Defendant was convicted before the United States District Court for the Northern District of Georgia, Richard C. Freeman, J., of obtaining by fraud funds which were the subject of a grant pursuant to the Comprehensive Employment and Training Act, and he appealed. The Court of Appeals, Tuttle, Circuit Judge, held that trial court committed reversible error in submitting jury instruction which, applying law to the facts, stated merely that "fraud may result from statements of half-truths or the concealment of material facts," without more, since trial court thereby understated principal of law by failing to remind jury of the intent required to convict.

Reversed and remanded.

Godbold, Circuit Judge, concurred in part and dissented in part and filed opinion.

Control when he continued to claim the extra paychecks at City Hall for several months, and that the City relied on this misrepresentation by continuing to issue the duplicate checks. It would not be unreasonable for the jury to assume that if Meadows had left the checks unclaimed, the city would have realized the error and stopped issuing the checks. Alternatively, the jury could have found that, by failing to inform the proper city officials that he was no longer working at the Bureau of Pollution Control and was receiving paychecks from Black World, Meadows concealed a material fact; thus ensuring that the city would continue to issue the paychecks and that he would continue to benefit from the city's initial mistake. Although it is clear that Meadows made no false inducements to obtain the extra paychecks initially, his conduct in continuing to pick them up with knowledge of the obvious error came sufficiently within the broad sweep of 18 U.S.C. s 655 to go to the jury.

IV. **RULE 408** OFFER TO COMPROMISE.

[3] Meadows contends that the trial court committed reversible error by **admitting** certain statements he made to a government official when he was confronted ***989** with the fact of the overpayments, on the grounds that the statements were part of compromise negotiations and should have been excluded on the basis of Rule 408, Federal Rules of Evidence.[FN3] We disagree.

FN3. Rule 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

These statements occurred in an interview between Meadows and a program analyst for the Labor Department named Goldsmith. Goldsmith had received a memorandum from Meadows' CETA supervisor with Black World, which indicated that Meadows had complained because he had not received his full bonus check. Goldsmith reviewed the records and found that while Meadows' Black World bonus check was deficient, Meadows had received a full bonus check from the Bureau of Pollution Control, and moreover, had been carried simultaneously on two departments' payrolls for several months. Based on these discoveries,

Goldsmith decided to hold Meadows' checks and when Meadows came to Goldsmith's office, he was confronted with the problem. When testifying for the government on direct examination, Goldsmith stated that Meadows' immediate response was an admission that he knew after the first check that there was some sort of administrative error causing the duplicate checks to be issued, but declared that "if you were stupid enough or somebody else makes the mistake, I felt that I could benefit from it." On cross-examination, the defense counsel brought out that Meadows subsequently agreed to a repayment schedule.

Although the government contends that Rule 11(b), Federal Rules of Criminal Procedure, rather than **Rule 408,** Federal Rules of Evidence, governs the issue since this is a criminal case, we assume the applicability of **Rule 408** to govern the **admission** of related civil settlement negotiations in a criminal trial. F.R.Evid. 1101(b), See Ecklund v. United States, 159 F.2d 81 (6th Cir. 1947). We do not, however, find any violation of the rule. We do not feel that Meadows' remark to Goldsmith that he knew the checks were issued by mistake was in any sense an offer to compromise a claim. The conversation occurred during an informal investigation of the situation; thus, there was no claim to compromise at the time the two first met. The prosecution merely made use of a direct admission with respect to Meadows' intent, which is, of course, probative evidence of his state of mind. Although the testimony concerning the repayment schedule might otherwise have been barred by rule 408 as a settlement

offer, this testimony was solicited by the defense counsel on cross-examination. We reject the appellant's contention that it was "forced" to introduce this testimony of the repayment schedule; it appears to us to be a calculated, tactical defense decision.

V. SUPPLEMENTAL CHARGE.

As we stated earlier, the jury requested additional instructions on the definition of fraud during the course of its deliberations. In response, the court merely repeated the small portion of its original charge describing the law of fraud and its application to these facts. The supplemental instructions contained no reference to the burden or quantum of proof, presumption of innocence, or any other matter necessarily favorable to the defendant. The defense counsel objected and requested some additional balancing instruction, but the trial court refused. The jury returned its verdict of guilty within fifteen minutes. Since the case will have to be retried, it may be helpful to comment on the procedure followed.

***990** It is well-established that in giving additional instructions to a jury; particularly in response to inquiries from the jury, a court must be especially careful not to give an unbalanced charge. Although the failure to give any presumption of innocence instruction does not mandate reversal in all criminal appeals, Kentucky v. Whorton, --- U.S. ----, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979), the particular significance of a supplemental charge when a

INSTA-CITE

CITATION: 598 F.2d 984
=> 1 **U. S. v. Meadows,** 598 F.2d 984, 4 Fed. R. Evid. Serv. 567 (5th Cir.(Ga.), Jul 13, 1979) (NO. 78-5572)

UNITED STATES of America, Appellee,
v.
Albert BAKER and Paul Mazzilli, Defendants,
Paul Mazzilli, Defendant-Appellant.

No. 500, Docket 89-1320.

United States Court of Appeals,
Second Circuit.

Argued Feb. 12, 1991.

Decided Feb. 13, 1991.

Defendant was convicted of offenses arising out of his possession of stolen electronic equipment following a trial in the United States District Court for the Eastern District of New York, and he appealed. The Court of Appeals, 848 F.2d 384, reversed on grounds of improper cross-examination by the trial judge. On remand, the defendant was convicted in the District Court, Joseph M. McLaughlin, J., of one count of possessing stolen goods and one count of receiving stolen goods, and he appealed. The Court of Appeals held that: (1) evidentiary rule dealing with compromise evidence applied only to civil litigation and did not bar evidence of defendant's prearrest attempt to make a "deal" involving possible criminal charges; (2) evidence was sufficient to support finding that defendant knew that merchandise was stolen; and (3) Government was properly allowed to present rebuttal evidence that invoices produced by defendant for stolen items could be purchased by the general public and were not documents from a real company.

Affirmed in part, vacated in part and remanded.

[1] CRIMINAL LAW ⇐ 408
110k408
Evidentiary rule precluding admission of attempts to compromise a claim applied only to civil litigation and did not bar evidence of a defendant's prearrest attempt to make a "deal" involving possible criminal charges. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[2] RECEIVING STOLEN GOODS ⇐ 8(4)
324k8(4)
Evidence that defendant could identify only as "Joey" the person from whom he purchased stolen electronic equipment on extremely favorable terms, that defendant was unaware of any invoice for the goods until an invoice was produced sometime after the agents discovered the stolen goods in his father's basement, and the fact that he tried to arrange a "deal" with the FBI when confronted by government investigators, was more than sufficient to allow the jury to conclude beyond reasonable doubt that defendant knew that merchandise was stolen.

[3] CRIMINAL LAW ⇐ 683(2)
110k683(2)
Permitting Government to present evidence in rebuttal that invoices of the type defendant produced for stolen goods could be purchased by the general public and were not documents from a real company bore directly on the issues raised by invoice introduced by defendant charged with possession of stolen goods and thus was a proper exercise of trial court's discretion.

***179** Roger Bennet Adler, New York City, for defendant-appellant.

Jack Wenik, Asst. U.S. Atty. (Andrew J. Maloney, U.S. Atty., E.D.N.Y., Emily Berger, Asst. U.S. Atty., of counsel), Brooklyn, N.Y., for appellee.

Before VAN GRAAFEILAND, WINTER and WALKER, Circuit Judges.

PER CURIAM:

Paul Mazzilli appeals from a judgment entered after a jury trial in the Eastern ***180** District convicting him of one count of possessing stolen goods, in violation of 18 U.S.C. § 659, and one count of receiving stolen goods, in violation of 18 U.S.C. § 2315. This trial was his second on the present indictment, his previous conviction having been reversed on grounds of improper cross-examination by the first trial judge. United States v. Mazzilli, 848 F.2d 384 (2d Cir.1988). On this appeal, he asserts multiple grounds for reversal, all but one of which are meritless. The government concedes that his conviction on both counts is multiplicitous. We therefore vacate the Section 2315 conviction and remand for resentencing on the Section 659 conviction alone.

In November 1986, two truck trailers full of portable stereos, televisions, telephones, and electronic toys destined for North Carolina were stolen from a trucking yard in East Brunswick, New Jersey. Acting on information received from Albert Baker, the FBI began to investigate Mazzilli, a New York City firefighter and operator of a small video rental store in Brooklyn, in connection with the missing electronic equipment.

Special Agents Andrew Conlin and Coleen Nichols visited the home of Mazzilli's father in Brooklyn, where they encountered Mazzilli himself. Upon questioning, Mazzilli led the agents to the basement of the house, which was filled with boxes of the stolen electronic equipment. As the agents seized custody of the goods, Mazzilli asked Nichols whether she knew an FBI agent named George Hanna. After Nichols answered affirmatively, Mazzilli explained that he had heard that "Hanna has made deals for other people in the past" and "has a reputation in the neighborhood for making deals." Mazzilli proposed to Nichols that she "speak with George to see if ... maybe we can get together and make some sort of deal for myself."

[1] Mazzilli contends that the district court erred in admitting Nichols's testimony about what Mazzilli said to her. He claims that Fed.R.Evid. 408 precludes admission of his statements to Nichols. We disagree.

> Rule 408 states:
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

We believe it fairly evident that the Rule applies only to civil litigation. The reference to "a claim which was disputed as to either validity or amount" does not easily embrace an attempt to bargain over criminal charges. Negotiations over immunity from criminal charges or a plea bargain do not in ordinary parlance constitute discussions of a "claim" over which there is a dispute as to "validity" or "amount." Moreover, Fed.R.Crim.P. 11(e)(6) explicitly addresses the exclusion of plea bargain negotiations and limits the statements excluded to those made to an "attorney" for the government. The very existence of Rule 11(e)(6) strongly supports the conclusion that Rule 408 applies only to civil matters. We therefore hold that Rule 408 did not preclude testimony as to Mazzilli's statements to Nichols.

[2] We may quickly dispose of Mazzilli's other arguments. The evidence that Mazzilli could identify only as "Joey" the person from whom he purchased the stolen electronic equipment on extremely favorable terms, that he was unaware of any invoice for those goods until a "Global Imports" invoice was produced sometime after ***181** the agents discovered the stolen goods in his father's basement, and that he tried to arrange a "deal" with the FBI when confronted by the government investigators, was more than sufficient to allow the jury to conclude beyond a reasonable doubt that Mazzilli knew that the merchandise was stolen. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

[3] Permitting the government to present evidence in rebuttal that "Global Imports" invoices could be purchased by the general public and were not documents from a real company was within the discretion of the trial judge, see United States v. Casamento, 887 F.2d 1141, 1172 (2d Cir.1989), cert. denied, --- U.S. ----, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990), because the rebuttal bore directly on the issues raised by the invoice introduced by Mazzilli. See United States v. Neary, 733 F.2d 210, 220 (2d Cir.1984). None of Mazzilli's claims of prosecutorial misconduct could have affected the outcome of the case. Finally, not only was a conscious avoidance charge proper, but, given Mazzilli's claimed ignorance that the goods were stolen in the face of such highly suspicious circumstances, this was a paradigmatic case in which to give such an instruction. See United States v. Mang Sun Wong, 884 F.2d 1537, 1541-43 (2d

Cir.1989), cert. denied, --- U.S. ----, 110 S.Ct. 1140, 107 L.Ed.2d 1045 (1990).

The government concedes, however, that Mazzilli's convictions for possession of stolen goods and receiving stolen goods are multiplicitous and should be merged. See United States v. DiGeronimo, 598 F.2d 746, 749-51 (2d Cir.), cert. denied, 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117 (1979). We thus affirm the conviction for possession under Section 659, vacate the conviction for receipt under Section 2315, and remand the case for resentencing on the Section 659 conviction alone. See United States v. Sappe, 898 F.2d 878, 882 (2d Cir.1990).

END OF DOCUMENT

INSTA-CITE

CITATION: 926 F.2d 179

Direct History

1 U.S. v. Mazzilli, 848 F.2d 384, 25 Fed. R. Evid. Serv. 1328
(2nd Cir.(N.Y.), Jun 06, 1988) (NO. 744, 87-1438)
Appeal After Remand

=> 2 **U.S. v. Baker,** 926 F.2d 179, 32 Fed. R. Evid. Serv. 414
(2nd Cir.(N.Y.), Feb 13, 1991) (NO. 500, 89-1320)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
23 C.J.S. Criminal Law Sec.889 Note 22 (Pocket Part)
76 C.J.S. Receiving Stolen Goods Sec.29 Note 41

UNITED STATES of America, Plaintiff,
v.
Charles MCCORKLE and Katherine McCorkle, Defendants.

No. 93 C 6528.

United States District Court, N.D. Illinois, Eastern Division.

July 7, 1994.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

***1** The United States ("the government") sues Charles McCorkle ("Charles") and his wife, Katherine McCorkle ("Katherine"), (collectively "the McCorkles") to collect Charles' alleged outstanding income tax liabilities for the years 1966, 1967 and 1968. Both the McCorkles and the government move in limine to exclude certain evidence at trial.

The McCorkles move in limine to bar evidence concerning (1) Charles' 1975 misdemeanor conviction for failure to file income tax returns; (2) rescission of the 1986 settlement agreement between Charles and the government for mutual mistake of fact; (3) the civil action captioned United States of America v. Charles McCorkle, et al., 84 C 4674 (N.D.Ill.); (4) the testimony of Robert Kern; (5) the testimony of any government agent or employee regarding Charles' alleged assignment of income to Katherine; and (6) Katherine's income and lifestyle from 1986 to date. The government moves in limine to bar the McCorkles from offering any evidence or making any arguments with respect to the knowledge, opinions, or conclusions of Internal Revenue Service ("IRS") personnel.

DISCUSSION

Motions in limine are generally disfavored. This court excludes evidence on a motion in limine only if the evidence is clearly not admissible for any purpose. See Hawthorne Partners v. AT & T Technologies, Inc., 831 F.Supp. 1398, 1400 (N.D.Ill.1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. Id. at 1401. Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. See United States v. Connelly, 874 F.2d 412, 416 (7th Cir.1989). Both the McCorkles' and the government's motions in limine fail to meet this rigorous standard and must be denied.

First, the McCorkles seek to exclude any mention of Charles' 1975 criminal conviction for failure to file federal income taxes. Although Charles' conviction would be admissible since it involved dishonesty or false statements, see Fed.R.Evid. 609(a)(2), mention of the conviction is barred by Fed.R.Evid. 609(b) because the conviction is more than ten years old. However, Charles transferred his 80 percent stock interest in McCorkle Reporters to Katherine in 1975, the same year as his criminal conviction. Thus, the criminal conviction may be admissible under Fed.R.Evid. 404(b), which allows evidence of other crimes, because it may be probative of Charles' motive or plan to transfer his assets to Katherine in order to reduce his liability to the government.

Second, the McCorkles seek to prevent the government from advancing the legal theory that the settlement agreement is void due to mutual mistake. The McCorkles contend that the government's mutual mistake theory is new, and they profess uncertainty regarding the factual basis for this legal theory. However, the McCorkles were on notice that mutual mistake is a ground for rescinding the settlement agreement. Under 26 U.S.C. § 7122, both parties are bound by a compromise agreement except upon a showing of "(1) falsification or concealment of assets by the taxpayer, or (2) mutual mistake of a material fact sufficient to cause a contract to be reformed or set aside." 26 C.F.R. § 301.7122-1(c) (1993). Thus, the government may attempt to prove at trial that Charles' failure to disclose his 1975 transfer of his 80 percent stock interest in McCorkle Reporters to Katherine in his Form 433 constituted a fraudulent concealment. Alternatively, the government may seek to rescind the settlement based on mutual mistake, arguing that since Charles inadvertently omitted the transfer from his Form 433 and the government had no knowledge

of the transfer, the settlement agreement is based on an inaccurate portrait of Charles' ability to pay and must be rescinded.

***2** Third, the McCorkles seek to exclude all documents relating to the government's 1984 case against the McCorkles that resulted in the 1986 settlement agreement, United States of America v. Charles McCorkle, et al., 84 C 4674 (N.D.Ill). The McCorkles do not submit these documents--trial briefs, the final pretrial order, correspondence containing settlement negotiations, etc.--with their motion in limine, so the court is unable to determine the admissibility of specific documents. It is premature to exclude all these documents since some or all of them may shed light on the parties' intent when they entered the 1986 settlement agreement.

The McCorkles' reliance on Fed.R. Evid 408 to exclude these documents is misplaced. Rule 408 precludes evidence of settlement discussions in a particular case from being mentioned at the trial of that case (with certain exceptions). However, **Rule 408** does not bar settlement information in one case from **admissibility** in another case. Here, the settlement discussions that resulted in the 1986 settlement agreement may be relevant to determining whether that agreement must be rescinded.

Fourth, the McCorkles seek to exclude the testimony of Robert Kern ("Kern"), the government lawyer in the 1984 case. The McCorkles contend the government did not disclose that it would call Kern as a witness before listing him as a trial witness, despite interrogatories propounded on the government that should have elicited this information. The McCorkles argue that Kern must be barred from testifying at trial because they have not had an opportunity to depose him. The government counters that the McCorkles did not propound interrogatories seeking the identities of government witnesses; instead, the government contends that the McCorkles themselves identified Kern as an individual with information relevant to this case. The government also avers that it offered to make arrangements for a telephone deposition of Kern, but the McCorkles responded that a deposition was unnecessary because all the information that could be ascertained from Kern was available in other government documents. Thus, the McCorkles' questionable assertion of unfair surprise at Kern's inclusion in the government's witness list does not appear to create undue prejudice.

Fifth and sixth, the McCorkles seek to exclude information relating to Katherine's income and lifestyle from both government agents and employees and other sources. However, one of the main issues in this case is whether Charles improperly assigned his income to Katherine after the 1986 settlement agreement. Information about Charles' work responsibilities and remuneration is relevant to whether Charles' salary was commensurate with his job. Similarly, information about Katherine's work responsibilities and remuneration is relevant to whether Katherine's salary was commensurate with her job. The government seeks to show that Charles earned too little and Katherine earned too much; information about Katherine's income and lifestyle is relevant to these inquiries.

***3** The government's motion in limine also fails. The government appears primarily concerned with excluding the notes from the IRS investigation conducted by Harold Taggert ("Taggert") in connection with the settlement agreement and Charles' Form 433. Taggert's notes summarize his investigation as follows:

> T/P [taxpayer] has transferred nearly everything to his wife.
>
> ... the four corps [corporations] were transferred between 1975 & 1977. Accurate Reporting now belongs to Sherman Katz and Nadine Gorski is the sole officer; Chicago Reporting Co. is 100% owned by Katherine McCorkle as is McCorkle Court Reporters and Official Records, Inc. These are basically service corps. It would be difficult to challenge the transfer in return for a small amount of money....

McCorkles' Resp. at 2. The government advances two arguments in its attempt to preclude Taggert's notes and other unspecified government documents and testimony. First, the government contends that the McCorkles may not offer evidence or argument that the government is estopped from denying the actions or knowledge of IRS employees, including Taggert. Second, the government invokes the deliberative process privilege.

First, it is correct that parties cannot usually raise estoppel arguments against the government. See Heckler v. Community Health Serv., 467 U.S. 51, 60-61 (1984). The government contends that since

Taggert was not authorized to compromise Charles' tax liabilities, Taggert's knowledge that Charles had transferred assets to Katherine is irrelevant. Government's Mot. at 2. The government contends that allowing Taggert's testimony would amount to an attempt to improperly estop the government based on the actions of one government employee. Id. However, admitting evidence regarding the government's knowledge about Charles' financial situation at the time it entered into the settlement agreement is not equivalent to granting a government employee the power to bind the government to a legal position.

The government may not disavow the actions of its employees entirely. Knowledge possessed by a government agent with a duty to disclose is imputed to the government. Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1096 (7th Cir.1992), citing In re "Agent Orange" Product Liability Litigation, 597 F.Supp. 740, 796 (E.D.N.Y.1984), aff'd, 818 F.2d 145 (2d Cir.1987). Thus, the challenged evidence may show what Taggert or another government agent--and therefore the government itself--knew about Charles' 1975 transfer of his 80 percent interest in McCorkle Reporters to Katherine at the time of the settlement agreement. The McCorkles may attempt to use this evidence to rebut the government's mutual mistake theory.

Second, the deliberative process privilege protects communications that are part of the decision-making process of a government agency, i.e., communications made prior to and during an agency determination. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993) (citations omitted). However, what the government knew is not equivalent to its deliberations. Evidence regarding the government's knowledge of Charles' transfer of his 80 percent interest in McCorkle Reporters to Katherine or other information about Charles' financial situation is not protected from disclosure by the deliberative process privilege.

CONCLUSION

***4** The parties' motions in limine are denied.

END OF DOCUMENT

INSTA-CITE

CITATION: 1994 WL 329679

Direct History

=> 1 **U.S. v. McCorkle,** 1994 WL 329679 (N.D.Ill., Jul 07, 1994) (NO. 93 C 6528)

Related References

2 U.S. v. McCorkle, 1994 WL 186756, 73 A.F.T.R.2d 94-2243, 94-1 USTC P 50,258 (N.D.Ill., May 11, 1994) (NO. 93 C 6528)

3 U.S. v. McCorkle, 1994 WL 317702, 74 A.F.T.R.2d 94-5323, 94-2 USTC P 50,450 (N.D.Ill., Jun 23, 1994) (NO. 93 C 6528)

UNITED STATES of America, Plaintiff-Appellee,
v.
Thomas E. HAUERT, Defendant-Appellant.

No. 93-3171.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 7, 1994.

Decided Nov. 14, 1994.

Defendant was convicted in the United States District Court for the Northern District of Illinois, William T. Hart, J., of tax evasion and failure to file tax returns, and he appealed. The Court of Appeals, Wellford, Circuit Judge, held that: (1) evidence of defendant's conduct during prior income tax audit was admissible to show that he knew what the law was and his legal duty thereunder; (2) lay opinion testimony regarding defendant's beliefs about propriety of his filing returns and paying taxes was excludable; (3) jury was adequately instructed on good-faith defense; and (4) charged misconduct by prosecutor was not reversible error.

Affirmed.

[1] CRIMINAL LAW ⇐ 370
110k370
Evidence of taxpayer's conduct during previous income tax audit, relating to his claim of tax exempt status, was admissible in subsequent criminal prosecution for tax evasion and for failure to file tax returns to show that taxpayer knew what the law was and knew his legal duty thereunder, to overcome his good-faith misunderstanding of the law defense, and was not excludable as conduct or statements made in compromise negotiations, having been offered for purpose other than to establish liability. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[1] CRIMINAL LAW ⇐ 408
110k408
Evidence of taxpayer's conduct during previous income tax audit, relating to his claim of tax exempt status, was admissible in subsequent criminal prosecution for tax evasion and for failure to file tax returns to show that taxpayer knew what the law was and knew his legal duty thereunder, to overcome his good-faith misunderstanding of the law defense, and was not excludable as conduct or statements made in compromise negotiations, having been offered for purpose other than to establish liability. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 449.2
110k449.2
Taxpayer's knowledge of federal law requirements was not proper subject for lay witness opinion testimony in criminal tax prosecution in which defendant raised good-faith misunderstanding of the law defense. Fed.Rules Evid.Rules 701, 704(a), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 449.2
110k449.2
Defendant's beliefs about propriety of his filing federal tax returns and paying federal taxes, which were closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, were not proper subject for lay witness opinion testimony in criminal tax prosecution, in which defendant raised good-faith misunderstanding of the law defense, in absence of careful ground work and special circumstances, as such testimony would not be helpful to clear understanding of issues by jury. Fed.Rules Evid.Rules 701, 704(a), 28 U.S.C.A.

[4] INTERNAL REVENUE ⇐ 5317
220k5317
Jury charge that did not use term "subjective standard," but did not include any reference to objectively reasonable standard or to measure of conduct of reasonable taxpayer, adequately instructed jury on good-faith misunderstanding of the law defense in criminal prosecution for tax evasion and failure to file tax returns, where jury was additionally instructed on government's burden of proof and on standard of willfulness. 26 U.S.C.A. §§ 7201, 7203.

[5] CRIMINAL LAW ⇐ 778(6)
110k778(6)
District court's instruction that no person could intentionally avoid knowledge by closing his or her eyes to information or facts which would otherwise have been obvious did not improperly shift burden of proof to defendant in criminal prosecution for tax evasion and failure to file tax returns. 26 U.S.C.A.

§§ 7201, 7203.

[6] CRIMINAL LAW ⇐ 713
110k713
Prosecutor's statement during closing argument in criminal tax prosecution that taxpayer was subject to the tax laws, just like the rest of us, was not improper, in light of defendant's claimed defense that in good faith he did not believe that federal tax laws were applicable to him and that he did not willfully violate these laws with respect to criminal charges made against him.

[7] CRIMINAL LAW ⇐ 1171.1(6)
110k1171.1(6)
Any error by prosecutor during closing argument in criminal tax prosecution in reminding jury that if they were not convinced that taxpayer was acting in good faith, taxpayer would be vindicated in his contentions and he would be getting a free ride, was not prejudicial in context of entire trial.

[8] CRIMINAL LAW ⇐ 1171.8(1)
110k1171.8(1)
Prosecutor's mere asking of question during cross-examination of defendant regarding whether defendant's friend, who tutored defendant and persuaded him to reach his position on nontaxability of his wages and not filing income tax returns, was convicted of income tax evasion was not basis for reversing defendant's convictions for tax evasion and for failure to file tax returns, where defendant's prompt objection to question was sustained.

[9] CRIMINAL LAW ⇐ 1171.3
110k1171.3
Prosecutor's misstatement during closing argument in criminal tax prosecution that defendant, raising good-faith misunderstanding of the law defense, had to convince jury of his good-faith belief was not reversible error, in light of district court's clear instructions that burden of proof remained with government.

***198** Barry Rand Elden, Robert Michels (argued), Asst. U.S. Attys., Crim. Receiving, Appellate Div., Chicago, IL, for plaintiff-appellee.

Raymond D. Pijon, Chicago, IL (argued), for defendant-appellant.

Before POSNER, Chief Judge, and EASTERBROOK and WELLFORD, [FN*] Circuit Judges.

FN* The Honorable Harry W. Wellford, United States Circuit Judge for the Sixth Circuit, sitting by designation.

WELLFORD, Circuit Judge.

After conviction by a jury in the district court for tax evasion (violation of 26 U.S.C. ***199** § 7201) and for failure to file tax returns for the calendar years 1988 through 1991 (violation of 26 U.S.C. § 7203), defendant, Thomas E. Hauert, has appealed his convictions and sentences to this court. Conceding that he had failed to file federal income tax returns since 1986, Hauert first maintains that the district court erred "in allowing the government to introduce evidence of defendant's compromise and settlement negotiations in a 1984 civil tax case." Next, he asserts error by the trial judge in "denying defendant an opportunity to present lay opinion testimony ... relevant to the issue of good faith." Hauert also challenges certain jury instructions given by the district court applicable to his claimed "good faith" defense. He avers, moreover, prosecutorial misconduct denying him a fair trial, and, finally, that the government erroneously shifted the burden of proof from the prosecution. We discuss these grounds of Hauert's appeal seriatim.

I. BACKGROUND

Hauert worked regularly for the Caterpillar Company for many years including the years in question, and received payment for his earnings that mandated filing a federal income tax return for each of the years in contention, unless "excused" from criminal liability for his failure to file by reason of his so-called "good faith misunderstanding of the law" defense. This court is aware at the outset that we decided in 1989, after argument in 1988, that an "objectively reasonable standard" was to be applied in this type of criminal tax liability situation involving charges of tax evasion and failure to file federal income tax returns. United States v. Cheek, 882 F.2d 1263, 1265 (7th Cir.1989), cert. granted, 493 U.S. 1068, 110 S.Ct. 1108, 107 L.Ed.2d 1016 (1990), vacated, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991) (eliminating "objectively reasonable standard"). The tax years 1980 through 1986 were involved in the Cheek case.

[FN1]

> FN1. Since the government concedes that Cheek principles, as enunciated by the Supreme Court in 1991, do not retroactively apply to all the tax years at issue in this indictment, we are not called upon to decide any possible retroactivity problem. We must apply Cheek, then, to all the issues involved in this case by reason of Hauert's "good faith misunderstanding of the law" defense.

II. EVIDENCE OF PRIOR TAX SETTLEMENT

[1] Hauert objected to the testimony and evidence involving his claimed tax exempt status asserted on W-4 withholding tax forms for his salary during 1980 and 1981. (Hauert maintains in his brief that he also claimed exempt status for the years 1988 through 1991.)

Hauert was audited by the Internal Revenue Service ("IRS") because of certain partnership income purportedly attributable to him in 1980 or 1981. During the course of the IRS' audit for those years, Hauert asserted in a letter that "I have abandoned my constitutional challenge for those years." Hauert claims that allowing the government to introduce this and other evidence of his dealings with IRS agents indicating an abandonment of any constitutional challenge to the taxability of his Caterpillar earnings was prejudicial error. There was also evidence admitted at trial, over defendant's objection, of his signing settlement documents in 1984 foregoing a contention that his wages or salary were not taxable.

Hauert does not contest that evidence of his prior compliance with the laws he later claimed to misunderstand in earlier tax years is not admissible. This evidence is relevant to his actual subjective intent and his understanding of his income tax obligations to file and to pay tax on earnings from employment. Defendant argues that the evidence of his conduct during the income tax audit during 1984 is "irrelevant," "cumulative," and "contrary to policy concerning settlement."

Defendant's reliance on United States v. Robertson, 582 F.2d 1356 (5th Cir.1978), in support of the above contention, is misplaced. Robertson, not a tax case, involved a drug charge and admissions made by a defendant to DEA agents in a parking lot. The Robertson court discussed FED.R.CRIM.P. 11(e)(6) and FED.R.EVID. 410 with regard to admissibility of statements " 'in connection with, and relevant to' an offer to plead guilty." 582 ***200** F.2d at 1364 (emphasis added). Among other things, in overruling defendant's contentions in that case, the en banc court observed that "[c]ourts have been very reluctant to allow an accused to withdraw a guilty plea merely on allegations of a misunderstanding resulting from an accused's purely subjective beliefs." Id. at 1367.

Nor do we believe that FED.R.EVID. 408 is of assistance to defendant in respect to this assertion of error. Among other things, while generally proscribing admissibility of "conduct or statements made in compromise negotiations," this rule adds that it "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations," and also "when the evidence is offered for another purpose." See FED.R.EVID. 408. In adopting this language, the Conference Committee Report explained that "evidence of facts disclosed during compromise negotiations is not inadmissible." See H.R.CONF.REP. No. 1597, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7099.

The purpose of the evidence in question was to show Hauert's knowledge and intent regarding his obligation to report and pay taxes on his Caterpillar (and other) earnings. As stated in Cheek, "in deciding whether to credit [defendant's] good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that [defendant] was aware of his duty to file a return and to treat wages as income." Cheek, 498 U.S. at 202, 111 S.Ct. at 611. The evidence involving the earlier years may not have been admissible to show Hauert's civil tax liability in those earlier years or to his claims or the government's claims in the context of civil tax liability. This evidence was admissible under Rule 408 for "another purpose" in this case. See United States v. Birkenstock, 823 F.2d 1026, 1028 (7th Cir.1987).

As stated in a case cited by defendant, "Federal Rule of Evidence 408 permits evidence of settlement agreements for purposes other than proving liability." United States v. Hays, 872 F.2d 582, 588-89 (5th Cir.1989). [FN2] The evidence in

question was admitted to show whether Hauert knew "what the law is" and his "legal duty" thereunder. See Cheek, 498 U.S. at 202, 203 n. 8, 111 S.Ct. at 611 n. 8. We find that the district court was acting within its sound discretion by admitting the evidence at issue. See also United States v. Farmer, 924 F.2d 647 (7th Cir.1991); Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc., 687 F.2d 182 (7th Cir.1982).

FN2. Hays, also not a tax case, held that district courts have wide discretion in determining relevancy under Rule 401. Hays, 872 F.2d at 587. Hays also indicated that evidence that defendant was engaged in conspiratorial conduct could not be admitted under Rule 408 by introducing evidence of prior settlement agreements between defendant and others alleged to be co-conspirators. Id. at 589. Hays is otherwise distinguishable from the instant case, in our view.

We are not persuaded by Hauert's contentions in this regard.

III. LAY OPINION TESTIMONY

[2][3] Hauert recognizes "the special limitations imposed upon opinion evidence by expert witnesses under Rule [FED.R.EVID.] 704(b)," and thus does not appeal the district court's decision to preclude a proffered psychiatric opinion that he was "credible, sincere and manifests a good faith belief" with respect to IRC obligations. He argues, however, that it was prejudicial error under FED.R.EVID. 701 and 704(a) to prevent such testimony from lay witnesses who were fellow employees and long-time friends. In particular, Hauert sought to present these witnesses to attest to his sincerity about his income tax beliefs. He relies upon the following language of FED.R.EVID. 701:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

See FED.R.EVID. 701.

Hauert also relies upon that portion of FED.R.EVID. 704(a), which permits opinion evidence embracing an ultimate issue. The district court ruled that the lay opinion evidence sought to be introduced was substantially ***201** the same as the proffered expert evidence, which was barred under FED.R.EVID. 704(b). The district court barred such lay opinion testimony dealing with defendant's subjective sincerity, motivation, knowledge, or state of mind. The district court did not prevent the lay witnesses from testifying about the context of their association and contact with Hauert, but foreclosed their opinions about his sincerity and "good faith" belief. The government maintains that issue should be governed by Rule 701, rather than Rule 704, although it, of course, agrees with the result reached by the district court. Rule 701 deals generally with "opinion testimony by lay witnesses." Although a lay witness may, in appropriate circumstances, give an opinion on an "ultimate issue," we agree that the basic inquiry with respect to the district court's evidentiary rulings on lay witness testimony is governed by FED.R.EVID. 701.

In offering the testimony of these witnesses, defendant's lawyer described them as "credibility witnesses," and then there was discussion about FED.R.EVID. 608, regarding opinion about defendant's reputation, and limiting their testimony to opinion of Hauert's character and reputation as to truthfulness. Defendant's attorney objected to being limited so as not to ask these witnesses about Hauert's "sincerity." Defendant's attorney added that these witnesses had "numerous conversations and interactions" with Hauert "on the issue of taxation, and have formulated opinions as to whether he is sincere and believes his statements." The district court ruled, however, without specific reference to Rule 701, that these witnesses would not, under the circumstances, be permitted to give opinions about defendant's "mental state or condition constituting any element of the crime charged ... a totally subjective matter." The district court summarized its ruling by concluding that lay witness opinion testimony on Hauert's "state of mind" or the sincerity of his "good faith" defense "is not appropriate."

Defendant's counsel made no further specific proffer as to the content of the proposed testimony nor did he offer any witness outside the presence of the jury to make a record of it. These five witnesses did testify to Hauert's reputation for truthfulness, his employment, and his active church involvement. Witness Holman testified that Hauert was a "sincere

and honest person." Witness Dobsczyle added that Hauert was "one of the most truthful, honest people that I have ever met." Witness Acosta, a close friend, supplemented the opinion of truthfulness to state: "I don't think you could find anybody that would say a bad thing about him." [FN3]

> FN3. Acosta also was permitted to testify, outside the jury's presence, that he had accompanied Hauert to an IRS office and that Hauert pursued many income tax questions that were not answered, but the district court reserved a ruling on the admissibility of this testimony. Hauert's counsel made no further motion to introduce this testimony before the jury.

On the issue of lay opinion testimony concerning Hauert's knowledge of tax law requirements, we agree with the opinion in United States v. Rea, 958 F.2d 1206, 1216 (2d Cir.1992), that opinion testimony on a party's knowledge of the law "in most instances ... will not meet the requirements of Rule 701." If offered, then, to show Hauert's knowledge, or lack thereof, about filing returns and reporting wages and other receipts as income, we believe the district court did not abuse its discretion in denying lay testimony to this effect.

The opinion testimony introduced by defendant that Hauert was "honest, sincere," and a good person generally did come into evidence. That evidence bore upon his "good faith" defense. Whether the evidence would be, as required by Rule 701, "helpful to a clear understanding" of Hauert's testimony and position is essentially a matter of sound judgment and within the discretion of the district court. "[U]ltimately, the question of whether a lay opinion falls into the category of 'meaningless assertion' or whether that opinion actually will help the jury decide an issue in the case is a judgment call for the district court." United States v. Allen, 10 F.3d 405, 415 (7th Cir.1993).

We consider here a ruling on admissibility of lay witness opinion, testimony about a defendant's state of mind, his intent or belief with particular reference to Rule 701(b)-- ***202** whether the evidence would be "helpful to a clear understanding" of the issues by a jury. United States v. Guzzino, 810 F.2d 687, 699 (7th Cir.), cert. denied, 481 U.S. 1030, 107 S.Ct. 1957, 95 L.Ed.2d 529 (1987). While the district court's analysis was not as clear as we would have liked, we find no abuse of discretion, no clear error, in the preclusion of this lay opinion evidence under the circumstances of this case. We believe that by the nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances not present here. [FN4] In this case, such testimony was not helpful to the jury.

> FN4. Even if such lay witness opinion evidence were deemed helpful and relevant by the district judge, he may still consider, under FED.R.EVID. 403, whether such evidence should be excluded as "substantially outweighed by the danger of unfair prejudice ... or [the] needless presentation of cumulative evidence." See FED.R.EVID. 403.

IV. JURY INSTRUCTIONS

[4] Citing Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), defendant objects to the district court's instruction on the government's burden to prove that he acted "willfully" with respect to his charged violations of the income tax laws. [FN5] Hauert argued the Cheek case rationale to the jury, maintaining that his knowledge and belief are based upon subjective standards ("this calls for you [the jury] to enter into the mind and mental processes of this man"). The district court's instructions did not use the word, "subjective standard," as to Hauert's claim of good faith belief, but used the following language:

> FN5. In his closing argument, Hauert's counsel stated that the government had to prove beyond a reasonable doubt that "Mr. Hauert has willfully and with the intention to disobey the law done certain things."

If the defendant, in good faith, believed that tax laws did not require that he file individual tax returns for a particular year, then any failure to file any income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if the defendant in good faith believed that under the law he did not have any income tax obligation for a particular year,

> then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not.

Cheek referred to the holding of United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), that "defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief." Cheek, 498 U.S. at 200, 111 S.Ct. at 610. Cheek also referred to United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (per curiam), that the statutory language "required a finding of bad purpose or motive." Cheek, 498 U.S. at 200, 201, 111 S.Ct. at 609, 610. Cheek concluded that "the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.' " Id. at 201, 111 S.Ct. at 610. Cheek, in our opinion, does not mandate the use of the word "subjective" or words "subjective standard" as argued by defendant. It does require the elimination of the words, "objectively reasonable," id., as applied to a willful violation of a known legal duty.

The district court did eliminate any reference in its instructions to an objectively reasonable standard or to the measure of the conduct of a reasonable taxpayer. We believe the instructions given, taken as a whole, conform to the Supreme Court's requirements in Cheek:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding ***203** and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

Id. at 202, 111 S.Ct. at 611.

The jury was adequately instructed about defendant's good faith belief defense, a belief "that tax laws did not require that he file individual tax returns for a particular year." The district court also instructed the jury that if the government failed to prove beyond a reasonable doubt that he had no such good faith belief, his failure to file a return or pay income taxes for a particular year was not a "willful" violation of his duty. The district court instructed the jury that the government was required to prove a "willful" violation, one that was "voluntary and intentional."

We are not prepared to adopt the reasoning of United States v. Pabisz, 936 F.2d 80, 83 (2d Cir.1991), that the district court, in dealing with the good faith defense, must either instruct the jury to consider "whether [defendant] subjectively believed that he did not need to file income tax returns or pay taxes," or "that defendant's beliefs need not be objectively reasonable." Pabisz may be distinguishable, however, because the prosecutor urged the jury to consider whether defendant "had to know objectively if whether [sic] he had to file," [FN6] and that was not done in this case. Id. (emphasis added).

> FN6. In Pabisz, the prosecutor also argued that defendant's beliefs were "totally unreasonable." Pabisz, 936 F.2d at 83. United States v. Powell, 936 F.2d 1056 (9th Cir.1991), also cited by defendant, is distinguishable because the district court there instructed the jury that to succeed in their good faith defense, defendants had to have an "objectively reasonable belief." Id. at 1061. (Powell was subsequently amended and superseded at 955 F.2d 1206 in light of Cheek).

[5] Nor do we find the district court's instructions on the definition of a known duty to be in error as contended by defendant. Finally, we find no error in the court's instruction that "[n]o person can intentionally avoid knowledge by closing his or her eyes to information or facts which would otherwise have been obvious." See, e.g., United States v. Ramsey, 785 F.2d 184, 190 (7th Cir.), cert. denied, 476 U.S. 1186, 106 S.Ct. 2924, 91 L.Ed.2d 552 (1986). [FN7] We do not agree with defendant that this instruction shifted the burden of proof to the defendant. United States v. White, 794 F.2d 367, 371 (8th Cir.1986).

> FN7. The facts of this case " 'support the inference that the defendant was aware of a high probability of the existence of the fact in question [tax liability] and purposely contrived to avoid learning all of the facts.' " United States v. de Francisco-Lopez, 939 F.2d 1405, 1409 (10th Cir.1991) (quoting United States v. Alvarado, 838 F.2d 311, 314 (9th Cir.1987), cert. denied, 487 U.S. 1222, 108 S.Ct.

2880, 101 L.Ed.2d 915 (1988)).

We have examined the district court's instructions in their totality. We are not persuaded by defendant's contentions that these instructions dealing with good faith, willfulness and knowledge were "equivocal, conflicting and inaccurate." We, therefore, reject the assignment of error that we must reverse because of prejudicial error in the jury instructions.

V. PROSECUTORIAL MISCONDUCT

A. Argument

[6] Defendant recites a litany of actions by the prosecutor in this case, including principally, a "personal appeal to the jury" and "emphasis on each citizen's duty to pay income taxes." We have reviewed the record carefully and find no reversible error in this respect. In particular, we note no error in arguing that Hauert is "subject to the tax laws ... just like the rest of us." The issue raised by defendant was not the constitutionality or the validity of the tax laws; rather, he claimed that in "good faith" he did not believe that these laws were applicable to him, and that he did not "willfully violate these laws with respect to the criminal charges made against him."

[7] Hauert also complains that the prosecutor reminded the jury that if they were not convinced that Hauert was acting in good faith, Hauert would be "vindicated" in his contentions and would be getting "a free ride." The fact is that Hauert essentially was claiming that he should not be treated like others because of his own peculiar "good faith" convictions about not being under a ***204** duty to file tax returns and pay taxes in the fashion most taxpayers do.

If the prosecutor overstated the theme of the effect of vindication in some respects and urged that Hauert not go "home free," we are not convinced that such error, if any, was prejudicial in the context of the entire trial. We are satisfied, in short, that the prosecutor's conduct did not deprive Hauert of a fair trial, although we do not condone the prosecutor's impugning of defendant's patriotism. Defendant concedes that improper argument "rarely rise [s] to the level of reversible error," and we think it has not risen to that level here. As in Moylan v. Meadow Club, Inc., 979 F.2d 1246, 1251 (7th Cir.1992), "[w]e do not believe that counsel's characterizations in this case, even if untoward, were sufficiently egregious to require reversal of the verdict."

B. Gabe Thompson Episode

[8] Defendant admitted during his testimony that his friend and co-employee, Gabe Thompson, tutored him and persuaded him to reach his position on non-taxability of his wages and in not filing income tax returns. He claims it was reversible error for the prosecutor to ask him if he knew whether Thompson was convicted of income tax evasion. Defendant's prompt objection was sustained. We, again, find no reversible error in this respect. Indeed, we express no opinion as to whether such evidence may have been admissible under the circumstances of this case. The believability of Thompson, a close friend, associate and advisor, may well have been an appropriate subject of cross-examination. The district court precluded any answer and perhaps should have advised the jury that whether Thompson was convicted of tax evasion had no direct bearing on the guilt or innocence of defendant Hauert. The mere asking of this question is not, however, a basis for reversing Hauert's conviction.

C. Other Prosecutorial Conduct

[9] Hauert claims that the government attempted to shift the burden of proof in this case. The district court, however, gave the following clear instruction about the burden of proof:

> The indictment in this case is a formal method of accusing the defendant of a crime and placing him on trial. It is not evidence against the defendant and does not create any inference of guilt.
>
> The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any

evidence.

The district court further charged the jury that the government had to prove that defendant's actions were willful. The prosecutor made a misstatement of the law in argument indicating that Hauert had to convince the jury that he had a good faith belief, but added immediately: "If you think he has a good faith belief, then you are right, he is home free." Defendant's objection to this misstatement was promptly sustained by the trial court. The prosecution told the jury that they might consider whether Hauert's claim of good faith was "reasonable," [FN8] and reiterated the erroneous statement that defendant had to convince the jury of his good faith belief. Although this was an incorrect ***205** argument, the district court's instructions made it clear that the burden of proof remained with the government throughout. We find no reversible error by reason of the prosecutor's misstatement.

> FN8. See United States v. Cheek, 3 F.3d 1057, 1063 (7th Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 1055, 127 L.Ed.2d 376 (1994). Cheek was convicted again by the jury after remand of his case by the Supreme Court. After the Supreme Court's 1991 decision in Cheek, one commentator observed: [T]he high Court's affirmance of the subjective standard will no doubt embolden at least some factions of the tax protestor movement into continuing their struggle ... [F]uture defendants [will] continue to attempt to circumvent the tax laws, and then defend their actions on the basis of beliefs subjectively held in good faith. Anthony Michael Sabino, Revising the Willfulness Standard for Federal Tax Crimes: The Road from Bishop to Cheek, 11 REV.LITIG. 1, 42 (1991).

For the reasons indicated, we AFFIRM the jury verdict and the judgment of the district court. The writer must add that Justice Blackmun's dissent in Cheek evidences considerable prescience: "This Court's opinion, today, I fear, will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity." Cheek, 498 U.S. at 210, 111 S.Ct. at 615.

END OF DOCUMENT

INSTA-CITE

CITATION: 40 F.3d 197

Direct History

=> 1 **U.S. v. Hauert,** 40 F.3d 197, 74 A.F.T.R.2d 94-7004, 95-1 USTC P 50,045, 41 Fed. R. Evid. Serv. 654 (7th Cir.(Ill.), Nov 14, 1994) (NO. 93-3171)
Certiorari Denied by
2 Hauert v. U.S., 115 S.Ct. 1822, 131 L.Ed.2d 744, 63 USLW 3784, 63 USLW 3786 (U.S., May 01, 1995) (NO. 94-1392)

Related References

3 U.S. v. Hauert, 1995 WL 611839 (N.D.Ill., Oct 17, 1995) (NO. 93 CR 285, 95 C 5458)

Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
Kenneth W. Graham, Jr.

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5314. ---- OTHER

The listing of permissible uses of compromise evidence in Rule 408 is illustrative, not exhaustive. [FN1] Any use of such evidence that is beyond the scope of the rule is permissible even if not mentioned; for this reason it has been suggested that the last sentence is superfluous. [FN2] In determining the admissibility of evidence offered for some other purpose, courts will have to consider the language that delineates the scope of the rule [FN3] as well as the policy that supports it. [FN4] Reliance on common law precedents is risky because to some extent the Advisory Committee sought to change the pre-existing law. [FN5] Even where there was no explicit change in the common law rule, the shift in the underlying rationale may cast doubt on the vitality of the precedents. Often the old cases rely on a mixture of relevance and hearsay analysis that yields results quite different from those one might expect under a privilege analysis. For example, if the offer of compromise was used to show the effect of the offer on some third person or to prove a state of mind of the offeror other than consciousness of liability, [FN6] the evidence was admissible. [FN7] But since the use of the evidence for this purpose might tend to deter the making of offers of compromise, a pure privilege rationale would suggest that the evidence ought to be excluded.

A good illustration of the difficulty of reconciling prior authority with the language of Rule 408 is the use of compromise evidence to show agency, ownership, or control. [FN8] For example, suppose the issue is whether the driver of the car that struck the plaintiff was an employee of the defendant corporation and evidence is offered that the corporation tried to settle the plaintiff's claim for damage arising out of the accident. [FN9] The evidence was admissible at common law, perhaps because courts felt that the evidence was less ambiguous when offered for this purpose than as evidence of consciousness of fault, [FN10] perhaps because the implied assertion of agency was seen as an independent fact, [FN11] or perhaps as a result of a flawed analogy to the subsequent repairs and other crimes rules. [FN12] But whatever the ground, some writers have assumed that the same result would follow under Rule 408. [FN13] This is difficult to justify. It would seem that in proving agency, the plaintiff is attempting to prove the validity of his claim of respondeat superior. [FN14] It can be argued that the identity of the offeror is a prerequisite to compromise negotiations and not a part of them so that the rule is not applicable, [FN15] but the argument is weak both in terms of the language of the rule and its policy. [FN16]

Fortunately, it is not always this difficult to reconcile the common law cases with the language of Rule 408. Perhaps the largest group of precedents involves the use of compromise evidence where compromise is the basis for the claim rather than circumstantial evidence of the validity of the claim. [FN17] For example, if suit is brought for breach of the settlement contract, Rule 408 does not prevent the plaintiff from proving the agreement. [FN18] By parity of reasoning, the same result should follow when the defense to the original claim is predicated on a compromise; [FN19] e.g., when the defendant pleads the compromise as a release, [FN20] accord and satisfaction, [FN21] or novation. [FN22] Although it can be argued that this use of the compromise involves proof of the "invalidity of the claim", it does so not by using the compromise as circumstantial evidence of the opponent's belief in the invalidity of the claim but as proof of an act whose legal effect is to extinguish his right to recover. [FN23] Similarly, compromises with third persons can be proved when their legal effect is to release

the defendant from liability or to reduce the amount of damages he must pay. [FN24]

Rule 408 is also inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; [FN25] e.g., libel, assault, breach of contract, unfair labor practice, and the like. [FN26] Hence, if an insurer is sued for having breached its obligations under an indemnity policy by failing to make a reasonable settlement within policy limits, [FN27] Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations. [FN28] Similarly, if an attorney sues to recover the value of his services in settling the case, he can show the nature of the negotiations. [FN29] And if a party's rights to costs are affected by his opponent's refusal to compromise this can be proven. [FN30] Finally, if the compromise agreement is itself illegal [FN31]--for example, where an antitrust claim is settled by making the plaintiff a member of the conspiracy--evidence of this is admissible under Rule 408.

Another category of permissible use involves cases in which the compromise activities result in a waiver of or an estoppel to assert some procedural or substantive right. [FN32] Here the evidence is offered not to prove the state of mind of the offeror but to explain conduct of the recipient of the offer. [FN33] So, for example, if the failure to demand the retraction of a libellous statement, or to mitigate damages, or to exhaust contract remedies is excused by compromise activities, they may be shown. [FN34] The use of compromise evidence to show the revival of a debt barred by the statute of frauds or statute of limitations may also fall under this category. [FN35]

The issue which has generated the most disagreement is whether compromise evidence may be used as a form of prior inconsistent statement to impeach a witness who testifies in a contrary fashion. [FN36] At common law, statements of fact made in compromise negotiations were admissible as evidence of liability. [FN37] So there was little reason to consider their use as prior inconsistent statements. [FN38] The same ambiguity that made an offer of compromise inadmissible to show consciousness of liability would also tend to defeat its use for impeachment. [FN39] Hence, statements that the common law did not admit compromise evidence for impeachment purposes cannot be taken at face value. [FN40]

The issue is of considerably greater significance now that Rule 408 makes evidence of statements made in the course of compromise negotiations inadmissible to prove the validity or invalidity of the claim. [FN41] A federal judge has argued that such statements are admissible to impeach, apparently on the theory that the use of the statement for impeachment purposes does not involve proof of liability or invalidity "substantively." [FN42] This analysis is not very convincing unless one takes the view that the rule does not forbid the use of compromise evidence to prove an evidentiary fact that tends to prove liability. [FN43] Moreover, it seems to rest on analogy to the hearsay rule and its distinction between "substantive" evidence and "impeachment," which is not wholly apt in the present context. [FN44]

Professors Louisell and Mueller take the same position: "Rule 408 does not bar statements in settlement talks when offered to impeach at trial." [FN45] Although it is possible that this is a reference to impeachment by showing of bias, [FN46] the context suggests otherwise. [FN47] They base their conclusion on a paragraph in the Advisory Committee's objection to the House version of Rule 408: [FN48] A further point raised by [government agencies] is that the result of extending the compromise principle to include statements of fact would be encouragement of the making of misrepresentations during the course of settlement negotiations by eliminating responsibility therefore. Of course that is not the case. Reference to the language of the rule discloses that its protection applies only when the evidence is offered for the purpose of establishing liability for or invalidity of a claim. This looks more like a calculated effort to obscure the issue than an endorsement of use of negotiation statements for impeachment purposes. [FN49] The argument to which this paragraph is a response is equally opaque but is subject to the interpretation that the "responsibility" alluded to is **criminal** liability for the false statement, [FN50] a use for which the compromise evidence would be admissible on the grounds stated by the Advisory Committee. [FN51]

Professors Redden and Saltzburg take the contrary position, stating that except where the person being impeached is not a party to the action, courts should "decide against admitting statements made during settlement negotiations as impeachment evidence." [FN52] Their position is based on the policy of the rule: "Opening the

door to impeachment evidence on a regular basis may well result in more restricted negotiations." [FN53] But this argument ignores an equally important policy: "the end that truth may be ascertained." [FN54] A party who is impeached at trial by an inconsistent statement made during settlement negotiations, in the absence of some mistake, must have been lying at one time or the other. It is difficult to see why the law would care to encourage falsehood in either venue. [FN55] The purpose of Rule 408 is to foster "complete candor" between the parties, [FN56] not to protect false representations. [FN57]

Since the language of the rule cuts one way, policy another, and the legislative intent is unclear, courts will have to decide the question as best they can. [FN58] In this situation, it would seem that the injunction in Rule 102 to interpret the rules so as to foster the values of "fairness" and "truth" [FN59] should lead courts to conclude that prior inconsistent statements in the course of settlement negotiations should be admitted to impeach a party who testifies. [FN60] If so, then only the fact the statement was made should be admitted, not that it was made during settlement negotiations. The latter fact would still be barred by Rule 408 since it is unnecessary for the purpose for which the evidence is admitted. [FN61]

A related question concerns the admissibility of compromise evidence offered to show "spoliation" of a civil case. [FN62] The explicit provision in Rule 408 only applies to attempts to obstruct "a **criminal** investigation or prosecution." [FN63] Suppose, however, that the defendant should reach a compromise with one plaintiff that requires him to conceal or destroy evidence that would assist the other plaintiff to prove his case. [FN64] Though it is difficult to justify as a matter of policy, the fact that Rule 408 has a provision that limits the use of such evidence to cases where a **criminal** prosecution is the target might lead to the conclusion that the drafters intended to exclude the evidence in the example posed. [FN65] However, a better interpretation would be that an agreement to spoliate the case against another does not involve a "valuable consideration" [FN66] because of its illegality and is therefore beyond the protection of the rule for that reason. [FN67]

In addition to those cases in which compromise evidence is admissible because it is beyond the scope of Rule 408, there are also cases in which other rules permit it to be used. For example, it may come in as a preliminary fact for the admissibility of other evidence under Rule 104(a) [FN68] or to explain a statement taken out of context under Rule 106. [FN69] In addition, it is possible that the Erie doctrine may make the evidence admissible in some cases in which state law supplies the rule of decision. [FN70]

FN1. Not exhaustive Advisory Committee's Note, Rule 408.

FN2. Superfluous See N.Y. Trial Lawyers, Recommendation and Study of the Proposed Federal Rules of Evidence, 1970, p. 25, reprinted in 2 P.L.I., Federal Civil Practice 4th, 1972, p. 287 (suggesting deletion of the last sentence "since the first sentence of the rule clearly sets forth the limited purpose for which such evidence is inadmissible.").

FN3. Scope See ss 5303-5309.

FN4. Policy See s 5302.

FN5. Change pre-existing law The major changes were the expansion of the common law rule to cover completed compromises and statements made during negotiations. Ibid.

FN6. Other state of mind 2 Chamberlayne, The Modern Law of Evidence, 1911, s 1450.

FN7. Admissible The admissibility to show the state of mind of another follows from the hearsay notion that statements offered to show the effect on the hearer are not offered for the truth of the matter asserted. When offered to show some state of mind other than consciousness of liability, the evidence usually did not have the ambiguity that was the ground for exclusion under the relevance rationale.

FN8. Agency or control See Lloyd v. Thomas, C.A.7th, 1952, 195 F.2d 486, 491; Fidelity & Cas. Co. v. Southwest Bell Telephone Co., C.A.8th, 1944, 140 F.2d 724, 727; cf. National Battery Co. v. Levy, C.A.8th, 1942, 126 F.2d

33, 36-37.

FN9. Example See also the dog-bite hypothetical case used in s 5307, text at note 66.

FN10. Less ambiguous Though it does not seem plausible today, courts may have thought, in the heyday of rugged individualism, that a person was more likely to make an offer of compromise even though he did not believe his actions were blameworthy than he would be to pay damages for the acts of another when there was reason to doubt his responsibility for those acts.

FN11. Independent fact See s 5307.

FN12. Flawed analogy The other crimes rule and the subsequent repair rule bar evidence only as proof of conduct in the first case and negligence in the second; hence, evidence to prove the identity of the actor is admissible under those rules. See s 5286; vol. 22, s 5246.

FN13. Same result under 408 2 Louisell & Mueller, Federal Evidence, 1978, p. 299; 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-26.

FN14. Prove validity See s 5308.

FN15. Not part of compromise See s 5304.

FN16. Policy It seems difficult to argue that one would be deterred from making an offer of compromise by admissibility to prove direct liability but not when used to show vicarious liability.

FN17. Basis for claim Compare Model Code of Evidence, Rule 309(4) and U.R.E. 52(b), quoted s 5301 nn. 28, 29.

FN18. Breach of settlement See s 5308.

FN19. Defense on compromise See generally 2 Chamberlayne, The Modern Law of Evidence, 1911, s 1442.

FN20. Release Reporter's Note, Prop.Vt.R.Ev. 408.

FN21. Accord and satisfaction Cal.Evid.Code s 1152 does not bar evidence of a compromise offered as proof of an accord and satisfaction. Moving Picture Machine Operators Union Local No. 162 v. Glasgow Theatres, Inc., 1970, 86 Cal.Rptr. 33, 37, 6 Cal.App.3d 395 (dictum).

FN22. Novation The Wisconsin drafters added "accord and satisfaction, novation, or release" to the last sentence of Rule 408. See Wis.Stats.Ann. s 904.08, quoted in s 5031 n. 33.

FN23. Legal effect Under the hearsay analysis used at common law, the opponent's admission is offered not for the truth of the matter asserted but as legally operative conduct. See discussion under Rule 801.

FN24. Third persons Reporter's Note, Prop.Vt.R.Ev. 408: "Note that the rule is not intended to change Quesnel v. Raleigh * * * which held that any amount paid by a joint tortfeasor could be shown in mitigation of damages, nor to alter the more general proposition that unqualified release of one joint tortfeasor releases the others. These doctrines do not involve circumstantial use of the settlement which the rule seeks to prevent * * *."

FN25. Wrong in settlement This is because Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim. See s 5308.

FN26. Unfair labor practice This list is suggested by a former member of the Advisory Committee, 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-28.

FN27. Failure to settle Ehrhardt, Florida Evidence, 1977, p. 92.

FN28. Wrongful acts not shielded Perhaps the most dramatic illustration of this is Fletcher v. Western Nat. Life Ins. Co., 1970, 89 Cal.Rptr. 78, 10 Cal.App.3d 376, where the court held that Cal.Evid.Code s 1152 did not exclude evidence of intentional infliction of emotional harm brought about when an insurer "embarked upon a concerted course of conduct to induce plaintiff to surrender his insurance policy or enter into a disadvantageous 'settlement' of a nonexistent dispute by means of false and threatening letters and the employment of economic pressure based upon his disabled and, therefore impecunious, condition (the very thing insured against) * * *."

FN29. Attorney's fees McCormick, Evidence, Cleary ed. 1972, s 274, p. 664.

FN30. Costs Rule 408 does not apply to a determination by the trial court as to whether to allow pre-judgment interest because of the defendant's refusal to settle. Iberian Tankers v. Gates Constr. Corp., D.C.N.Y.1975, 388 F.Supp. 1190, 1192. See also 2 Chamberlayne, The Modern Law of Evidence, 1911, p. 1836.

FN31. Illegal compromise Overseas Motors, Inc. v. Import Motors Ltd., Inc., D.C.Mich.1974, 375 F.Supp. 499 (dictum).

FN32. Waiver or estoppel If the conduct of the opponent in compromise is such as to constitute a waiver or estoppel with respect to some procedural right, it is probably also sufficient to estop him from asserting Rule 408 to bar proof of the conduct. See generally vol. 21, s 5039.

FN33. Explain conduct 2 Chamberlayne, The Modern Law of Evidence, 1911, p. 1836.

FN34. Mitigation or exhaustion Warner Constr. Corp. v. City of Los Angeles, 1970, 466 P.2d 996, 1104 n. 12, 2 Cal.3d 285, 297 n. 12, 85 Cal.Rptr. 444, 452 n. 12 (dictum; applying Cal.Evid.Code s 1152).

FN35. Revival of debt 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-28; cf. Model Code of Evidence, Rule 309(4) and U.R.E. 52(b), quoted in s 5031 nn. 28, 29, both of which treat this use as an exception to the rule. For a criticism of the Model Code's treatment of this issue, see Likert, Precautionary Measures and Compromises, 1945 Wis.L.Rev. 399, 401.

FN36. Inconsistent statement Distinguish the use of the compromise to impeach by showing a bias in the witness toward the offeror, admissible because it is offered to show the effect of the compromise on the state of mind of the witness, not as evidence of consciousness of liability by the offeror. See s 5311. Distinguish also the use of the fact that the party had made an inconsistent claim, admissible because Rule 408 covers offers of compromise, not claims. See s 5304.

FN37. Statements of fact See ss 5302, 5307.

FN38. Little reason A statement in a settlement offer that certain bonds were owned by the defendant should have been admitted to impeach his testimony at trial that his son was the owner. U.S. v. Tuschman, C.A.6th, 1969, 405 F.2d 688.

FN39. Defeat use 2 Chamberlayne, The Modern Law of Evidence, 1911, p. 1827.

FN40. Did not admit Compare Wigmore's ambiguous treatment of the question. 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1062, n. 1.

FN41. Now inadmissible See ss 5307, 5308.

FN42. "Substantively" See Redden & Saltzburg, Federal Rules of Evidence Manual, 2d ed. 1977, p. 179.

FN43. Evidentiary fact If the witness testifies to facts that are relevant to the validity or invalidity of the claim, evidence that impairs his credibility would also seem to bear on the same ultimate issue. One can escape this reading only by arguing that Rule 408 excludes statements only when offered as direct proof of the ultimate issue, not as circumstantial evidence in a line of proof that leads to validity or invalidity. For reasons stated in s 5308, this does not appear to be a proper interpretation of the rule.

FN44. Not wholly apt The purpose of the hearsay rule is to prevent the testimonial use of extrajudicial statements; the policy of that rule is satisfied when the use of the statement does not require any inference as to the truth of the matter asserted. In the context of prior inconsistent statements, this distinction is cast, in terms of "substantive use" and use for "impeachment" because in that context the use for impeachment does not require the testimonial use of the statement. But this distinction makes no sense even with other uses of hearsay statements for impeachment; for example, one could not prove that a witness was biased by a hearsay statement; i.e., one could not prove that a witness was biased by a hearsay statement of some third person to that effect. Rule 408, however, does not exclude statements made during settlement negotiations because of the fear that they will be used testimonially but because it is thought that admitting the statement will tend to discourage "freedom of communication" that is necessary for successful compromises. See Advisory Committee's Note, Rule 408. There is no reason to suppose that a party will be any less deterred from making the statement if it is only used for purposes of impeachment.

FN45. "Rule 408 does not bar" 2 Louisell & Mueller, Federal Evidence, 1978, p. 277.

FN46. Impeachment by bias A footnote appended to the quoted statement refers the reader to their discussion of impeachment by bias. Id. at n. 29.

FN47. Context The quoted statement purports to be a paraphrase of the Advisory Committee's argument referred to in the text; that argument is clearly not aimed at impeachment for bias, whatever it may mean.

FN48. Objection to House version Senate Hearings, p. 59.

FN49. Obscure "Responsibility" is surely an unusual way to characterize the susceptibility of a witness to impeachment by prior inconsistent statements. One suspects that the drafter of this paragraph felt that the government had clumsily attempted to raise a difficult question that the Advisory Committee did not want to or could not answer and therefore seized upon the inartfulness of his opponent as a device for evading the issue.

FN50. **Criminal** liability "I am aware of no **criminal** penalties for factual misrepresentations made during negotiations to settle a controversy between two private parties. On the other hand there is a strong public policy, implemented by various **criminal** sanctions, of discouraging false statements to federal Government agencies. * * * I do not suggest that enactment of Rule 408 would encourage direct violations of these **criminal** statutes. But the public policy they express would certainly be undermined by assuring taxpayers that, unless **criminal** intent can be shown, they have no responsibility for the accuracy of any factual representations they may make in the course of settlement negotiations with the Internal Revenue Service." 2 House Hearings, p. 302 (letter from General Counsel of the Treasury).

FN51. Admissible See s 5308.

FN52. "Decide against" Redden & Saltzburg, Federal Rules of Evidence Manual, 2d ed. 1977, p. 172.

FN53. "Restricted negotiations" Ibid.

FN54. "Truth ascertained" See Rule 102.

FN55. Either venue Since most falsehoods in negotiations would probably favor the party making them, it is doubtful that the opponent would ever care to use them to impeach an honest statement at trial. Hence, most cases in which the issue is likely to arise will be cases in which the party attempts to mislead his opponent with a spurious candor in negotiations or honestly admits a weakness during negotiations and attempts to cover it with a lie at trial.

FN56. "Complete candor" Comment, Cal.Evid.Code s 1152. This section was the model for the provision in Rule 408 barring evidentiary use of negotiation statements.

FN57. False representations It might be claimed that the argument in the text fails to distinguish between the party who takes the stand on his own to testify contrary to his statement in negotiations and one who is called by the opponent for the express purpose of using the statement to impeach him if he does not testify in accordance with it. But the notion that the law ought to distinguish between a person who lies to carry his own burden of proof and one who testifies falsely so as to deny his opponent the right to prove his case seems to be based upon a supposedly outmoded theory of the nature of trials. Cf. discussion of "discoverable evidence" in s 5310.

FN58. Courts decide It would certainly seem to be an anomalous result if Rule 408 is interpreted to admit evidence of a compromise to show a possible reason for a witness to falsify under the rubric of "bias," despite the fact that this may unfairly prejudice the party's case, see s 5311, while a statement made in negotiations offered to show that the witness did lie is excluded, despite the lack of any unfairness to the party.

FN59. "Fairness" and "truth" See vol. 21, ss 5023, 5026.

FN60. Admitted to impeach Of course, if the party objecting to the statement was not a party to the compromise, he has no standing to object. See s 5315.

FN61. Unnecessary There would be no need to adhere to this distinction if the existence of compromise negotiations had already been disclosed to the jury for some other purpose permitted by Rule 408.

FN62. "Spoliation" See generally vol. 22, s 5178.

FN63. "**Criminal** investigation" See s 5313.

FN64. Conceal or destroy Rule 408 would not prevent the plaintiff from showing that the evidence was destroyed, but this will do him little good if he cannot show that it was done at the defendant's behest.

FN65. Intended to exclude Unless, of course, the agreement involved testimony the other plaintiff was to give; presumably the agreement would then be admissible to show "bias or prejudice." See s 5311.

FN66. "Valuable consideration" See s 5305.

FN67. That reason Alternatively, it can be argued that the evidence is admissible because it proves the invalidity of the defense not by an inference from the defendant's desire to settle the related case but as an inference from his desire to spoliate the present case.

FN68. Preliminary fact See vol. 21, s 5055.

FN69. Out of context See vol. 21, s 5078.

FN70. Erie doctrine See s 5315.

FPP s 5314 (R 408)

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Federal Practice and Procedure
Federal Rules of Evidence
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1995 Supplement

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5314. PERMISSIBLE USES--OTHER

FN1. Not exhaustive To explain absence of settling party: Kennon v. Slipstreamer, Inc., C.A.5th, 1986, 794 F.2d 1067, 1070; Belton v. Fibreboard Corp., C.A.5th, 1984, 724 F.2d 500, 505 (offered by settling plaintiff); Peterson v. Little-Giant Glencoe Portable Elevator Corp., Minn.1985, 366 N.W.2d 111 (midtrial settlement). To show knowledge: Johnson v. Hugo's Skateway, C.A.4th, 1992, 974 F.2d 1408, 1413 (of racial hostility); Breuer Electric Mfg. v. Toronado Systems of American, C.A.7th, 1982, 687 F.2d 182, 185 (awareness of issues); U.S. v. Gilbert, C.A.2d, 1981, 668 F.2d 94, 97 (of securities laws). Rule 408 does not bar use of settlement negotiations to prove the workings of the settling defendant's scheme. Broadcort Capital Corp. v. Summa Medical Corp., C.A.10th, 1992, 972 F.2d 1183, 1194 n. 16. District court did not err in admitting evidence of indemnity agreement to show that two parties were not adverse to each other. Brocklesby v. U.S., C.A.9th, 1985, 767 F.2d 1288, 1293. One court has held that evidence of a prior compromise is excluded under Rule 408 without any attention to the purpose for which the evidence was sought to be admissible. Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., D.C.N.Y.1980, 486 F.Supp. 414, 423. Ariz.R.Ev. 408 did not prevent the use of settlement between buyer and seller to determine whether it constituted a default by one party or a mutual recission where this fact was relevant to amount of commission due broker who had arranged the deal that was subject of dispute. Campbell v. Mahany, App.1980, 620 P.2d 711, 127 Ariz. 332. Evidence of defendant's prior settlement with class of which plaintiff was a member is not inadmissible under Cal.Evid.Code s 1154 when offered to prove that punitive and deterrent effects of exemplary damages had already been satisfied. Lemer v. Boise Cascade, Inc., 1980, 165 Cal.Rptr. 555, 107 Cal.App.3d 1. Evidence of compromise is admissible to show that employer's failure to pay was intentional and not inadvertent. Miller v. Component Homes, Inc., Iowa 1984, 356 N.W.2d 213, 216. Evidence of settlement offer of $85,000 is admissible to show why plaintiff thought that $10,000 repair to plane was inadequate. Dodson Aviation v. Rollins, 1991, 807 P.2d 1319, 1324, 15 Kan.App.2d 314. A similar statement appears in the Comment to Prop.N.Y.Evid.Code s 408. Personal injury plaintiff's settlement of prior injury claims was relevant to show preexisting injury but was properly excluded as likely to confuse the jury in case where prior injury had been conceded. Callihan v. Burlington Northern, Inc., 1982, 654 P.2d 972, 976, 201 Mont. 350. Shimola v. Cleveland, 1992, 625 N.E.2d 626, 630, 89 Ohio App.3d 505 (settlement of earlier suit on same issue admissible to show background of current dispute). Testimony that a client authorized his attorney to try to settle is not inadmissible under Rule 408 when offered to prove the client was aware of the claim. Cannell v. Rhodes, 1986, 509 N.E.2d 963, 967, 31 Ohio.App.3d 183. Gilman v. Towmotor Corp., 1992, 621 A.2d 1260, 1264, 160 Vt. 116 (admissible where it would be unfair and prejudicial to exclude).

But see Court assumes that list in last sentence of Rule 408 is exclusive and does not allow evidence of settlement of state court action against a third person to offset prejudice caused by admission into evidence of the pleading in that action. Vincent v. Louis Marx & Co., Inc., C.A.1st, 1989, 874 F.2d 36, 42.

FN2. Superfluous Since the third sentence of Rule 408 was either superfluous or redundant, its omission from a

revision of the rule did not change its meaning. Harriman v. Maddocks, Me.1986, 518 A.2d 1027, 1031.

FN4. Policy Policy of Rule 408 precludes use of letters in settlement negotiations to satisfy the statute of frauds. Trebor Sportswear Co., Inc. v. The Limited Stores, Inc., C.A.2d, 1989, 865 F.2d 506, 510. Social policy of antitrust laws made it clear that Rule 408 was not intended to exclude proof of nolo contendere pleas to antitrust violation offered to show that defendant would engage in anticompetitive behavior if permitted to acquire the plaintiff. Crouse-Hinds Co. v. Internorth, Inc., D.C.N.Y.1980, 518 F.Supp. 413. Letters offering settlement and copy of movie "Poltergeist" delivered with plaintiff's demand letter were properly admitted where objections were inadequate to alert trial court that Rule 408 was being invoked. Haney v. Purcell Co., Inc., Tex.App.1990, 796 S.W.2d 782, 789.

FN6. Other state of mind Evidence of settlement of prior police brutality by city was admissible under Rule 408 to show that city was aware of practice to support "condoned custom" theory of liability. Spell v. McDaniel, C.A.4th, 1987, 824 F.2d 1380, 1400. Court assumes that Rule 408 would not bar use of document prepared for compromise negotiations to prove that party had notice of alleged defects in building. Ramada Development Co. v. Rauch, C.A.5th, 1981, 644 F.2d 1097, 1107.

FN7. Admissible In civil rights action against city for the shooting death of plaintiff's son, evidence of settlement negotiations between city and mother of another person beaten by the same officer were admissible to show knowledge of the officer's dangerous propensities. Gagliardi v. Flint, C.A.3d, 1977, 564 F.2d 112, 116. Evidence of settlement offer was admissible to prove mental state of employer in a suit for discrimination. Bulaich v. A.T. & T. Information Systems, 1989, 778 P.2d 1031, 1037, 113 Wn.2d 254.

FN8. Agency or control Statements in settlement negotiations by the defendant's insurance agent were not admissible under Rule 408 to show that plaintiff was an employee of defendant. Sortino v. Miller, 1983, 335 N.W.2d 284, 214 Neb. 592.

FN12. Flawed analogy Court assumes that since other crimes rule would not bar use of defendant's disregard of property rights of others to show intent in instant outrage, evidence of settlement of claims for such wrongs evidence is also admissible under Rule 408. Bradbury v. Phillips Petroleum Co., C.A.10th, 1987, 815 F.2d 1356, 1364. This overlooks the fact that the only way proof of settlement of other claims proves defendant's contempt for the law is through an assumption that the claims settled were valid, exactly the inference prohibited by Rule 408. Rule 404(b) on the other hand does not prohibit proof of bad acts offered to prove intent rather than conduct.

FN17. Basis for claim This seems to have been overlooked in Duse v. International Business Machines, D.C.Conn.1990, 748 F.Supp. 956, 962 (Rule 408 bars plaintiff's suit for interference with his attempt to settle dispute with third party). One court seems to have used Rule 408 to prevent one party from proving statements they claimed were a repudiation of the contract. Conroy v. Book Automation, Inc., Minn.App.1987, 398 N.W.2d 657, 660.

FN18. Breach of settlement Rule 408 would not bar evidence of settlement offered to prove breach of settlement agreement. Cates v. Morgan Portable Bldg. Corp., C.A.7th, 1985, 780 F.2d 683, 691.

FN19. Defense on compromise B & B Investment Club v. Kleinart's, Inc., D.C.Pa.1979, 472 F.Supp. 787 (to defeat corporate officer indemnity claim by showing not successful "on the merits").

FN21. Accord and satisfaction Welched accord and satisfaction was admissible in suit on original contract. Tag Resources v. Petroleum Well Services, Tex.App.1990, 791 S.W.2d 600, 606.

FN22. Novation West's Ann.Cal.Evid.Code s 1152 does not bar evidence of settlement of another lawsuit when offered as evidence of an account stated. Truestone, Inc. v. Simi West Industrial Park II, 1984, 209 Cal.Rptr. 757, 764, 163 Cal.App.3d 715.

FN24. Third persons Evidence of insurer's settlement with insured would not be barred by Rule 408 when offered to show that payment was voluntary and thus not a proper element of damages in subrogation claim against tortfeasor.

Weir v. Federal Insurance Co., C.A.10th, 1987, 811 F.2d 1387, 1395. Rule 408 does not bar evidence of compromise of claim with third person to show costs that had been incurred by partners. Jensen v. Westberg, App.1988, 772 P.2d 228, 236, 115 Idaho 1021.

But see Wardell v. McMillan, Wyo.1992, 844 P.2d 1052, 1065 (admissibility not required by comparative negligence law).

FN25. Wrong in settlement Rule 408 does not bar the use of an affidavit submitted in settlement negotiations to impose Rule 11 sanctions. Eisenberg v. University of New Mexico, C.A.10th, 1991, 936 F.2d 1131, 1134. Evidence of settlement negotiations was properly admitted under Rule 408 on the issue of whether party acting on behalf of defendant had interfered with efforts of plaintiff to mitigate damages. Urico v. Parnell Oil Co., C.A.1st, 1983, 708 F.2d 852, 855. Rule 408 does not exclude evidence of settlement negotiations in proceeding under Civil Rule 23(e) to obtain judicial approval of class action settlement. In re General Motors Corporation Engine Interchange Litigation, C.A.7th, 1979, 594 F.2d 1106, 1124 n. 20. In action for malicious prosecution, evidence of insurer's statements in settlement negotiations were admissible to show that it filed an action in name of its insured that it knew to be meritless as a method of strongarming plaintiff into a settlement. Bradshaw v. State Farm Auto Ins., 1988, 758 P.2d 1313, 1322, 157 Ariz. 411. Trial judge properly ruled that letter sent to insurance company by lawyer was not admissible as proof of an attempt to inflate client's damages. Petersen v. State Farm Auto Ins. Co., La.App.1989, 543 So.2d 109, 115. Rule 408 permits use of statements in negotiation to show that release was signed as a result of fraud. Harriman v. Maddocks, Me.1986, 518 A.2d 1027, 1031. For a case in which the court used Rule 408 to prevent the plaintiff from proving what it claimed was the repudiation of the contract by the defendant, see Conroy v. Book Automation, Inc., Minn.App.1987, 398 N.W.2d 657, 660. Rule 408 did not bar use of evidence of settlement negotiations to prove that parties were fraudulently induced to enter agreement. Gorman v. Soble, 1982, 328 N.W.2d 119, 120 Mich.App. 831. Rule 408 does not bar proving representations made during settlement negotiations when these are the basis of claims of fraud being sued on. Portland Savings & Loan Association v. Bernstein, Tex.App.1985, 716 S.W.2d 532, 537. For an illustration of the sort of heavy-handed tactics that ought not to be shielded by Rule 408, see Goodman, All The Justice I Could Afford, 1983, p. 58 (employer opposed fired employee's claim for unemployment compensation benefits as tactic to coerce agreement on settlement of age discrimination action).

FN27. Failure to settle White v. Western Title Ins. Co., 1985, 221 Cal.Rptr. 509, 518, 40 Cal.3d 870, 710 P.2d 309; Pattison v. Valley Forge Ins. Co., La.App.1992, 599 So.2d 873, 877 (but excludible under Rule 403); Gelinas v. Metropolitan Property & Liability Ins. Co., 1988, 551 A.2d 962, 968, 131 N.H. 154; U.S. Fire Ins. Co. v. Millard, Tex.App.1993, 847 S.W.2d 668, 672. Offers to settle entire case were not admissible to refute bad faith claim with respect to only one element. Martin v. Principal Casualty Ins. Co., Colo.App.1991, 835 P.2d 505, 511. After a thorough review of the conflicting cases from other jurisdictions, court holds that a defendant cannot introduce evidence of its own offer to settle to mitigate a claim for punitive damages. Ettus v. Orkin Exterminating Co., Inc., 1983, 665 P.2d 730, 233 Kan. 555. Settlement negotiations are admissible in defense of claim for attorney's fees for failure to make a timely tender under an uninsured motorists policy. Benoit v. State Farm Auto Ins. Co., La.App.1992, 602 So.2d 53, 55. Rule 408 does not bar proof of settlement offers and discussions in a suit for wrongful failure to settle by insurer. Gelinas v. Metropolitan Property & Liability Ins. Co., 1988, 551 A.2d 962, 968, 131 N.H. 154.

FN28. Wrongful acts not shielded Rule 408 does not shield wrongful acts during settlement negotiations; a party can prove that he or she was induced to sign by fraudulent misrepresentations. Harriman v. Maddocks, Me. 1986, 518 A.2d 1027, 1031.

FN34. Mitigation or exhaustion Evidence of settlement negotiations was admissible to prove the plaintiff's failure to mitigate damages. Bhandari v. First National Bank of Commerce, C.A.5th, 1987, 808 F.2d 1082, 1103. Evidence of settlement negotiations was admissible to show that defendant's insurer had interfered with efforts of plaintiff to mitigate damages. Urico v. Parnell Oil Co., C.A.1st, 1983, 708 F.2d 852, 855. Rule 408 does not bar introduction of employer's offer to take back employee to prove failure to mitigate damages for wrongful discharge. Thomas v. Resort Health Related Facility, D.C.N.Y.1982, 539 F.Supp. 630. Rule 408 does not bar admission of offer to return converted property to show mitigation of damages. McKenzie v. Tom Gibson Ford, Inc., 1988, 749 S.W.2d 653, 657, 295 Ark. 326. Evidence of insurance company settlement offer was not admissible to show that plaintiff could have

had money to repair truck and thus mitigate consequential damages. Waseca Sand & Gravel, Inc. v. Olson, Minn.App.1985, 379 N.W.2d 592, 594.

FN36. Inconsistent statement Where plaintiff claimed that another baseless libel suit had been settled, evidence that the suit had in fact been abandoned when the defendant agreed to publish a letter-to-the-editor it would have published anyway was admissible to impeach. American Family Life Assur. Co. v. Teasdale, C.A.8th, 1984, 733 F.2d 559, 568. After canvassing competing views, court holds that statements made in settlement negotiations may be admitted to impeach testimony given at trial. Davidson v. Beco Corp., App.1986, 733 P.2d 781, 786, 112 Idaho 560. Evidence of negotiations with insurance carrier could be admitted under Minn.R.Ev. 408 as impeachment of trial testimony concerning the loss. In re Commodore Hotel Fire and Explosion, Minn.1982, 324 N.W.2d 245. Defense offer to get "get" for $25,000 was admissible to show that refusal to obtain divorce was based on monetary rather than religious considerations. Burns v. Burns, 1987, 538 A.2d 438, 440, 223 N.J.Super. 219. A.B.A. Litigation Sec., Emerging Problems Under The Federal Rules of Evidence, 1983, p. 78.

FN52. "Decide against" After one-sided review of the literature, court concludes that letter in which defendant claimed that its mandatory retirement program was legal could not be used to impeach testimony of executives at trial that there was no such program. E.E.O.C. v. Gear Petroleum, Inc., C.A.10th, 1991, 948 F.2d 1542, 1545. "The clear import of the Conference Report as well as the general understanding among lawyers is that such conduct or statements may not be admitted for impeachment purposes." M. Graham, Handbook of Federal Evidence, 1981, pp. 255-256 (emphasis in original). This is the position taken in Tenn.R.Ev. 408, discussed in s 5301, note 33, this SUPPLEMENTnt. For a somewhat evasive embrace of this position, see Waltz & Huston, The Rules of Evidence in Settlement, 1981, 5 Litigation 11, 16 (courts should "almost never" admit compromise evidence to impeach).

FN56. "Complete candor" Cal.Evid.Code s 1155 justified exclusion of evidence of statement made by defendant's agent during settlement negotiations that would have impeached direct testimony of another agent. C & K Engineering Contractors v. Amber Steel Company, Inc., 1978, 151 Cal.Rptr. 323, 23 Cal.3d 1, 587 P.2d 1136.

FN58. Courts decide Court assumes that evidence of settlement from others was admissible to impeach the plaintiff's testimony that he could not afford needed surgical procedure. Williams v. Chevron U.S.A., Inc., C.A.5th, 1989, 875 F.2d 501, 504. F.R.Ev. 408 codifies a trend in the caselaw that permits evidence of settlement to be used to impeach. County of Hennepin v. AFG Industries, Inc., C.A.8th, 1984, 726 F.2d 149, 153. Court opines that First Circuit would not allow use of compromise statements for impeachment. Derderian v. Polaroid Corp., D.C.Mass.1988, 121 F.R.D. 9, 12 n. 1. Evidence that lawyer referred to purported will as a "shopping list" during settlement negotiations was admissible to impeach his testimony that he had never made such a reference. Matter of Estate of O'Donnell, 1991, 803 S.W.2d 530, 531, 304 Ark. 460. Almost all courts have held that statements made in compromise negotiations can be used for impeachment. Davidson v. Beco Corp., 1987, 753 P.2d 1253, 1255, 114 Idaho 107 (collecting cases). Rule 408 does not bar use of compromise evidence when offered to impeach. El Paso Electric Co. v. Real Estate Mart, Inc., App.1982, 651 P.2d 105, 109, 98 N.M. 570. Opinion, though vague, suggests that court is not sure if evidence of compromise ought to be admitted to impeach. Hursh Agency, Inc. v. Wigwam Homes, Inc., Wyo.1983, 664 P.2d 27, 36. It has been suggested that the rule should be amended to preclude the use of evidence for impeachment purposes. Kirkpatrick, Reforming Evidence Law in Oregon, 1980, 59 Ore.L.Rev. 43, 67.

FN60. Admitted to impeach Settlement documents were admissible to impeach by specific contradiction testimony that the bank never gave reasons for its actions regarding foreclosure. Freidus v. First National Bank of Council Bluffs, C.A.8th, 1991, 928 F.2d 793, 795. Where husband testified he was not aware of award of spousal maintenance until he was ordered to pay it, evidence of settlement agreement providing for award was admissible to impeach. DeForest v. DeForest, App.1985, 694 P.2d 1241, 1247, 143 Ariz. 627. The Rule 102 rationale is adopted in Davidson v. Beco Corp., 1987, 753 P.2d 1253, 114 Idaho 107 and Missouri Pacific Ry. Co. v. Arkansas Sheriff's Boys' Ranch, 1983, 655 S.W.2d 389, 280 Ark. 53. A prior inconsistent statement made during settlement negotiations should be admitted only if it strongly suggests that the witness has lied or if prejudice is likely to be slight. Davidson v. Beco Corp., App.1986, 733 P.2d 781, 787, 112 Idaho 560. Where plaintiff testified at trial that he never got any closer than 40 feet to escaped hamburgers-on-the-hoof, admission in demand letter that he came within ten feet of the steer was admissible to impeach him. Davidson v. Prince, Utah App.1991, 813 P.2d 1225, 1233 n. 9. This position is approved

in Blakely, Article IV: Relevancy and Its Limits, 1983, 20 Hous.L.Rev. 151, 242.

FN64. Conceal or destroy Court assumes that Mary Carter agreement would be admissible under Rule 408 in Soria v. Sierra Pacific Airlines, Inc., 1986, 726 P.2d 706, 717, 111 Idaho 594. There is an exception to rule excluding evidence of settlement for "Mary Carter" agreements; i.e., agreements where party to the settlement continues in case as a pretended adversary while in fact having an interest in the putative adversary's victory. Turner v. Monsanto Co., Tex.App.1986, 717 S.W.2d 378, 380 (but finding agreement at issue did not qualify). Rule 408 does not bar revealing to jury that directed verdict on plaintiff's claim against one defendant was pursuant to a settlement in which that defendant had an interest in the plaintiff's recovery from remaining defendant. Sampson v. Karpinski, 1986, 515 A.2d 1066, 1069, 147 Vt. 315.

FN67. That reason Trial court properly admitted statement of cab company official on arriving on the scene of accident involving cab that he would give the other driver money "to forget about the incident." Frias v. Valle, 1985, 698 P.2d 875, 877, 101 Nev. 219 (apparently assuming Rule 408 did not apply).

FN68. Preliminary fact In determining trustworthiness of hearsay, the court can consider that party compromised a claim in reliance thereon despite Rule 408 as that rule does not apply to preliminary fact determinations under Rule 104. In re Japanese Electronic Products Antitrust Litigation, C.A.3d, 1983, 723 F.2d 238, 275, decision reversed on other grounds 1986, 106 S.Ct. 1348, 475 U.S. 574, 89 L.Ed.2d 538.

FPP s 5314 (R 408)

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DATE AND TIME PRINTING ENDED:	03/31/96	06:29:40 pm (Central)
OFFLINE TRANSMISSION TIME:		00:04:17
NUMBER OF REQUESTS IN GROUP:	14	
NUMBER OF LINES CHARGED:	3609	

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Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
Kenneth W. Graham, Jr.

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5313. ---- OBSTRUCTION OF JUSTICE

The last permissible use suggested by the Advisory Committee is "proving an effort to obstruct a **criminal** investigation or prosecution." [FN1] The scope and rationale of this provision is uncertain, in part because of the ambiguity in the common law rule. As codified by Wigmore, that rule was: In a **criminal** case, the accused's offer to pay value to a complaining witness for avoiding prosecution, being contrary to public policy, is receivable as evidence of an admission. [FN2] In his treatise, Wigmore speaks of this conduct as being admissible against an accused because it would be an "unlawful act" to "settle" the prosecution. [FN3] McCormick, however, attempted to distinguish between legitimate plea bargaining and attempts to "buy off" the prosecution. [FN4] The Advisory Committee Note seems to have followed McCormick's analysis: "An effort to 'buy off' the prosecution or a prosecuting witness in a **criminal** case is not within the policy of the rule of exclusion." [FN5]

However, this reliance on McCormick still leaves it unclear (a) exactly what sort of conduct is being proscribed, and (b) what evidentiary uses of that conduct are permissible. To illustrate, suppose a case in which the plaintiff has accused the defendant of violating the antitrust laws, both in testimony before a grand jury and in a civil suit filed against him. Which of the following acts is an attempt to "buy off" the prosecution?: (1) The defendant offers the plaintiff one million dollars to settle the civil action; (2) The defendant offers the prosecution a guilty plea, and a promise to make restitution of one million dollars to the victim in return for a favorable sentencing recommendation; (3) The defendant offers the plaintiff one million dollars to (a) leave the country, or (b) change his testimony, or (c) attempt to convince the prosecutor to drop **criminal** charges, or (d) write a favorable letter to the sentencing judge. There are countless other variations and the case may be made even more difficult by supposing, as sometimes occurs, that the government has both a civil claim for damages resulting from the **criminal** conduct and a duty to prosecute for the crime. However, the foregoing examples should suffice to portray the range of conduct that may be arguably claimed to be an attempt to "buy off" the prosecution.

Assuming that the conduct is that proscribed by the rule, in which of the following instances is it admissible?: (1) The evidence is offered against the defendant in a **criminal** prosecution for obstruction of justice; (2) The evidence is offered against the defendant in the **criminal** antitrust trial; (3) The evidence is offered against the defendant in the civil antitrust trial. Notice that the answer to the first question becomes much simpler if the evidence is admissible only in a **criminal** prosecution in which the conduct in question is the basis for the charges. In such cases the admissibility of the evidence would be determined by the same law that determines the criminality of the conduct.

Since the answer to the second question may simplify matters with respect to the first, let us begin with it. It is possible to read the last clause of Rule 408 as applying only to the case in which the claimed "compromise activities" are the basis of **criminal** charges against the party. [FN6] The evidence would be admissible in such a case because it is not being offered to prove the validity or invalidity of the claim being compromised; [FN7] in other words, the trier of fact is not being asked to treat the offer as an implied admission with respect to the underlying claim. [FN8] Although it simplifies the rule and some commentators seem to have accepted it, [FN9]

this reading is difficult to reconcile with either Wigmore or McCormick's version of the common law rule or with policy.

In his proposed codification of the common law rule, Wigmore phrased it as making the attempt to compromise "receivable as evidence of an admission." [FN10] This language is not apt as a description of the use of the evidence to prove the charged crime in a prosecution for obstruction of justice; for such purposes the evidence would not be hearsay and there would be no reason to describe it as an "admission." [FN11] Moreover, the cases cited as authority for the rule in his treatise appear to be cases in which the evidence was admitted in a prosecution for the underlying charge, not obstruction of justice cases. [FN12] McCormick's discussion of the rule makes it clear that he views it as making the attempt to obstruct the prosecution admissible as spoliation evidence in a prosecution for the underlying offense. [FN13] Accordingly, some of the commentators have read Rule 408 as also permitting this. [FN14]

But if these writers are correct in their interpretation, then the rationale for admitting evidence of obstruction must be different than would be the case if it were only admissible in a prosecution for obstruction; evidence that the defendant attempted to "buy off" the victim in the case on trial is clearly being offered to prove the validity or invalidity of the claim. [FN15] The reason for admitting the evidence, at least under the privilege analysis of the rule, must be that it is not the policy of the rule to encourage such conduct; [FN16] or in other words, that the attempt to buy off a **criminal** prosecution is not a legitimate "compromise" and is not within the meaning of that term as used in the rule. [FN17] However, if this is the justification for admitting obstruction evidence, there does not seem to be any reason to limit such use to **criminal** prosecutions. [FN18] If the evidence would be admissible as proof of spoliation in the **criminal** case, surely it should also be admitted to prove the spoliator's lack of belief in his contentions in a civil case that involves the same event.

This brings us back, then, to our first question: the meaning of "an effort to obstruct a **criminal** investigation or prosecution." Here the common law cases must be used with some caution. [FN19] Some of them go back to the days in which there were no public officers charged with ferreting out crime and deciding which cases should be prosecuted; [FN20] since the enforcement of the **criminal** law was so dependent on the initiative of the victim or other concerned citizens, it is not surprising to find courts asserting the impropriety of attempts to "settle" a **criminal** case and railing about "compounding" of crimes. [FN21] Even in more recent times courts have been reluctant to acknowledge the legitimacy of "plea bargaining" by public officials. [FN22] Obviously the meaning of "obstruct" should be based on contemporary institutions and values, not the needs of another day.

Given the importance of negotiated dispositions in the administration of both civil and **criminal** justice, it seems obvious that a bona fide effort to settle either a civil or a **criminal** case is not "an effort to obstruct a **criminal** investigation or prosecution." Rule 410 makes it clear that the policy of the Evidence Rules is to protect, not to inhibit plea bargaining. [FN23] While the Wisconsin drafters have suggested that their version of Rule 408 would make admissible any effort to settle a **criminal** prosecution other than with the court or the prosecuting attorney, [FN24] this seems unrealistic. [FN25] The attitude of the victim is often controlling in the disposition of **criminal** cases, particularly for minor crimes. [FN26] So long as the discussions with the victim are within the limits of propriety, [FN27] there seems to be little reason to treat them as efforts to obstruct justice.

Similarly, if the act of the defendant gives rise to both civil and **criminal** liability, a legitimate attempt to compromise the civil claim should be protected under Rule 408. [FN28] While even a legitimate settlement of the civil claim can have some influence on the way in which the victim testifies in the **criminal** case, the fact that this can be shown under the provision of Rule 408 making compromise evidence admissible to prove bias or prejudice [FN29] of the witness should discourage efforts to make over-generous settlements of related civil litigation in an effort to soften-up the witness. Of course, if an express or implied provision of the offer of compromise requires some interference with the **criminal** case, [FN30] evidence of this would be admissible in either the civil or the **criminal** case.

Courts should have little difficulty in most cases in differentiating between genuine compromises that are protected by the rule and those acts that are designed to obstruct a **criminal** prosecution. [FN31] Any offer or

agreement that involves the bribery of police or prosecutorial officers, that requires the party to testify in a particular fashion or to assert a privilege in the **criminal** trial, that calls for the destruction or concealment or fabrication of evidence of guilt or innocence, or that requires the intimidation or harassment of witnesses is not protected by Rule 408. [FN32] Similarly, any statement in compromise negotiations that suggests such an agreement or that reveals that an obstruction of justice has taken place is also admissible. [FN33]

FN1. "Obstruct prosecution" Although the Uniform Rules had no reference to this use, it has been asserted that such evidence would be admissible under U.R.E. 52. Falknor, Extrinsic Policies Affecting Admissibility, 1956, 10 Rutgers L.Rev. 574, 594.

FN2. "Contrary to public policy" Wigmore, Code of Evidence, 3d ed. 1942, s 1001 (emphasis in original).

FN3. "Unlawful act" "In a **criminal** prosecution, the accused's offer to pay money or otherwise to 'settle' the prosecution will be received against him, because that mode of stopping or obstructing the prosecution would be an unlawful act, and good policy could not encourage that mode of dealing with a **criminal** charge; * * *" 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 46 (emphasis in original).

FN4. "Buy off" McCormick, Evidence, 1954, s 251, pp. 542-543.

FN5. "Not within policy" Advisory Committee's Note, Rule 408.

FN6. Basis of charges One simply reads "proving an effort to obstruct a **criminal** investigation or prosecution" as meaning only when those facts are the ultimate issues in a case.

FN7. Validity or invalidity In addition, it can be argued that the illegality of the proposed consideration means that it is not a "valuable consideration" under the rule. See s 5305.

FN8. Underlying claim See s 5308.

FN9. Commentators accept Waltz, The New Federal Rules of Evidence, 2d ed. 1975, p. 35; Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 17-18. It is also possible to read these writers as saying that the attempt to buy off the victim is admissible in the **criminal** action but not in the related civil action.

FN10. "An admission" See text at note 1 above.

FN11. Not hearsay While the attempt to buy off the case would constitute a "statement" by the defendant, that statement is not being used testimonially but as proof of the ultimate facts of the case; i.e., it is not offered to prove the truth of the matter asserted. See discussion under Rule 801.

FN12. Not obstruction cases 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 46 n. 13.

FN13. Spoliation After stating that the common law compromise rule did not exclude evidence of attempts to "buy off" a **criminal** prosecution, McCormick continues: "Indeed, we have seen that it is classed as an implied admission and received in evidence as such." The footnote to this sentence is a cross-reference to his discussion of the doctrine of spoliation. McCormick, Evidence, Cleary ed. 1972, s 274, p. 665. For discussion of spoliation evidence, see vol. 22, s 5178.

FN14. Rule 408 permits 2 Louisell & Mueller, Federal Evidence, 1978, p. 297. It is also possible to read the writers cited in note 9 above, as reaching the same conclusion.

FN15. Validity being proved Since the civil plaintiff has no authority to compromise the **criminal** claim, efforts to settle that claim with him would not be within the rule for that reason. See s 5303. If the compromise can be

characterized as an attempt to settle the civil claim, that claim is, of course, a different claim than the **criminal** claim. However, in order to be relevant in the **criminal** case, the civil compromise must be used first to infer the offeror's belief in the validity of the civil claim. See s 5308.

FN16. Not within the policy Cf. Advisory Committee's Note, Rule 408, quoted in the text at note 5 above.

FN17. Not "compromise" See s 5306.

FN18. Limit to **criminal** cases As seems to be argued by the writers cited in note 9 above.

FN19. Caution Cf. Slough, Relevancy Unraveled, 1957, 5 U.Kan.L.Rev. 675, 721, stating the common law rule this way: "For reasons quite apparent, in a **criminal** prosecution, offers to pay money or settle with the prosecution are generally received against the offeror."

FN20. No professional enforcement Friedman, A History of American Law, 1973, pp. 252-253.

FN21. "Compounding" See, e.g., State v. Soper, 1839, 16 Me. 293, 295; State v. Givens, 1911, 70 S.E. 162, 87 S.C. 525.

FN22. "Plea bargaining" See generally, Rosett & Cressey, Justice By Consent, 1976, pp. 53-58.

FN23. Protect plea bargaining See Advisory Committee's Note, Rule 410.

FN24. Court or prosecuting attorney Judicial Council Committee's Note, Wis.Stats.Ann. s 904.08 ("offers other than to the court or to the prosecuting attorney * * * to settle a **criminal** prosecution remain admissible;").

FN25. Unrealistic Very often in minor disputes in which the police are called, the officers will attempt to bring the parties to some private resolution rather than arrest or cite someone; if this is unsuccessful, then the **criminal** sanction is invoked. It seems ironic that under the Wisconsin interpretation, an attorney would be viewed as acting illegitimately for engaging in conduct that is quite common and thought unexceptionable when done by a rookie policeman.

FN26. Attitude of victim One of the authors once had the unhappy duty of prosecuting a **criminal** case that arose from the attempt of the defendant to operate a dog kennel as a nonconforming use in a rural area where his neighbors had prevailed upon the local authorities to alter the zoning laws after the kennel operation began. The judge who would have tried the case was elected by the voters of the affected area while the district attorney had a wider constituency that included a number of newspapers in neighboring communities that had been critical of the efforts of local officials to oust the kennel. Needless to say, the prosecutors in that case would have been only too happy to have had the defendant negotiate a settlement with the "victims"--even if it meant buying them off.

FN27. Limits of propriety In at least one area known to the authors, the practice of defense counsel dealing directly with the victim is so common that it is the subject of well-understood ground rules covering such matters as when and from whom consent to talk with the victim should be obtained, who may be present, and in what cases such negotiations are permissible.

FN28. Protected under Rule 408 2 Louisell & Mueller, Federal Evidence, 1978, p. 296; 2 Weinstein & Berger, Weinstein's Evidence, 1975, pp. 408-14.

FN29. Bias or prejudice See s 5311.

FN30. Interference required McCormick, Evidence, Cleary ed. 1972, s 274, p. 666 (compromise rule applies to efforts to settle civil liability "if no agreement to stifle the **criminal** prosecution is involved").

FN31. Little difficulty The tough cases are those in which the agreement requires the person to do something that he could legitimately do, but might not do if he had not agreed to do so; e.g., write a truthful letter urging leniency in sentencing or assert a privilege not to testify. It would seem that where the question is not one of direct prohibition of these practices but rather of their admissibility as evidence, courts can afford to be excessively scrupulous. Compare, for example, the question of payments to witnesses in excess of the statutory witness fee, which are admissible in evidence even if not forbidden. If the party's motivations are pure, he could not be much prejudiced by the introduction of such evidence.

FN32. Not protected See McCormick, Evidence, Cleary ed. 1972, s 273. Of course, by the terms of Rule 408, the practice must be aimed at obstruction of the **criminal** case, not of some related civil trial. While a party might attempt to interfere with a civil case by an act of spoliation, it would seldom be the case that he would enter into an agreement with his opponent to suppress evidence. See also s 5314.

FN33. Negotiation statements Since this use of the evidence is based on the policy of not protecting acts of spoliation, it would seem that the rule should not apply to statements proposing or admitting such acts.

FPP s 5313 (R 408)

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Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
Kenneth W. Graham, Jr.

1995 Supplement

Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5313. PERMISSIBLE USES--OBSTRUCTION OF JUSTICE

FN4. "Buy off" Agreement by which one principal of corporate defendant agreed not to financially support defense or to voluntarily testify and to assign any benefits he might receive from corporate counterclaim to defendants was not an attempt to buy off a witness. Quad/Graphics, Inc. v. Fass, C.A.7th, 1985, 724 F.2d 1230, 1235.

FN14. Rule 408 permits In mail fraud prosecution, evidence that the defendant told the victim she would return the stolen dolls to her if victim would drop the fraud charges was not inadmissible under Rule 408 since it was an effort to obstruct a criminal charge, not a bona fide settlement of civil case. U.S. v. Peed, C.A.4th, 1983, 714 F.2d 7.

FN31. Little difficulty Where there was no civil suit pending and the defendant offered to return loot in exchange for dropping of charges by victim, this was akin to effort to obstruct justice and not a settlement protected by Rule 408. U.S. v. Peed, C.A.4th, 1983, 714 F.2d 7, 9.

FPP s 5313 (R 408)

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compare - breadth of conspiracy.

UNITED STATES of America, Plaintiff-Appellee,
v.
James L. HAYS and Weldon J. Hays, Defendants-Appellants.

No. 88-1366.

United States Court of Appeals,
Fifth Circuit.

April 25, 1989.

Defendants were convicted of conspiracy, misapplication of funds and making false entries in the records of federally insured savings and loan association by the United States District Court for the Northern District of Texas, Jerry Buchmeyer, J., by jury verdict. Defendants appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) admission of evidence involving events leading up to inception of savings and loan association, which had been granted provisional charter, impermissibly affected substantial rights of defendants; (2) error in admitting evidence pertaining to unidentified coconspirator named in indictment was not harmless; and (3) erroneous admission of evidence regarding settlement agreement entered into between defendants and federally insured savings and loan association was not harmless.

Reversed.

[1] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
District court's determination on either logical or legal relevancy of evidence will not be disturbed absent substantial abuse of discretion. Fed.Rules Evid.Rules 401, 403, 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 369.1
110k369.1
Evidence, which consisted of testimony of 11 witnesses, which required almost 200 pages of the record on appeal, and which involved defendant's allegedly improper activities during time defendant was attempting to secure sufficient deposits to ensure continued operation of provisionally chartered savings and loan association, was not admissible, in prosecution for conspiracy, misapplication of funds and making false entries in the records of federally insured savings and loan association; indictment charges involved different savings and loan association. Fed.Rules Evid.Rules 401, 403, 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[3] CRIMINAL LAW ⇐ 1169.11
110k1169.11
Error in admitting evidence, which concerned one defendant's allegedly improper activities during time he was attempting to secure sufficient deposits to ensure continued operation of provisionally chartered savings and loan association, impermissibly affected substantial rights of defendants, in prosecution for conspiracy, misapplication of funds and making false entries in records of different federally insured savings and loan association; record indicated that the Government's motive in introducing the evidence was to attack the character of the defendants and that evidence was cumulative, unduly prejudicial and inflammatory. Fed.Rules Evid.Rules 401, 403, 404(b), 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[4] CRIMINAL LAW ⇐ 1169.7
110k1169.7
Error in admitting mostly irrelevant evidence, which concerned activities of unidentified coconspirator named in indictment and which was in the form of several hundred pages of exhibits accessible to jury during deliberations, was not harmless, given voluminous quantity of the exhibits and nature of their content, in prosecution for conspiracy, misapplication of funds and making false entries in records of federally insured savings and loan association; evidence served merely to assassinate character of unnamed coconspirator and, in so doing, indirectly assassinate character of defendants, and reviewing court was unable to say that jury would have found defendants guilty even in the absence of the evidence. Fed.Rules Evid.Rules 401, 403, 404(b), 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[5] CRIMINAL LAW ⇐ 408
110k408
Evidence regarding settlement agreement entered into between defendants and federally insured savings and loan association was not admissible in prosecution for conspiracy, misapplication of funds and making false entries in records of federally

insured savings and loan association; the Government did not contend that evidence was offered for permissible purpose of proving liability, negativing contention of undue delay, or establishing obstruction of criminal investigation, but rather, the Government claimed that evidence of the agreement assisted jury in its understanding of breadth of the conspiracy. Fed.Rules Evid.Rule 408, 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

[6] CRIMINAL LAW ⊜ 1169.12
110k1169.12
Error in admitting evidence regarding settlement agreement entered into between defendants and federally insured savings and loan association was not harmless, in prosecution for conspiracy, misapplication of funds and making false entries in records of federally insured savings and loan association; it did not tax reviewing court's imagination to envision juror who retired to deliberate with notion that if defendants had done nothing wrong, they would not have paid the money back. Fed.Rules Evid.Rule 408, 28 U.S.C.A.; 18 U.S.C.A. §§ 371, 657, 1006.

***583** Michael S. Fawer, Herbert V. Larson, Jr., New Orleans, La., for defendants-appellants.

Delonia A. Watson, Terence J. Hart, Joseph Revesz, Asst. U.S. Attys., Marvin Collins, U.S. Atty., Dallas, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Defendants-appellants James L. Hays and Weldon J. Hays appeal their convictions for conspiracy, misapplication of funds and making false entries in the records of a federally insured savings and loan association. Concluding that the district court's admission of unnecessarily cumulative, prejudicial and irrelevant evidence impermissibly affected substantial rights of the defendants, we are constrained to reverse.

I. FACTS AND PROCEDURAL HISTORY

In 1982, an appellant-defendant in this case, James Hays, became the president of Lancaster First Federal Savings and Loan Association (hereinafter Lancaster) in Lancaster, Texas. Prior to assuming that position, James Hays, a former Texas Savings and Loan bank examiner, had been Lancaster's vice-president and a member of its board. James Hay's son, Weldon Hays, also a former Texas Savings and Loan bank examiner and the other appellant-defendant in this case, likewise was involved in the savings and loan business as an employee at Lancaster and also as president of the Colony Savings and Loan (hereinafter Colony). This appeal arises from the criminal convictions of James and Weldon Hays for improper activities regarding certain loans and deposits involving the Lancaster's funds. What follows is a brief description of the loans and deposits which are relevant to the issues presented by this appeal.

A. The Loans

1. "Hubbard I"

In early 1982, Francis Allen Clark (hereinafter Clark), a real estate developer, met Paul Jensen (hereinafter Jensen), the president of Mountain West Mortgage Company (hereinafter Mountain West), a mortgage brokerage company. Mountain West did not actually fund mortgages, but rather was in the business of putting together ***584** borrowers and lenders. As a result of Clark's acquaintance with Jensen, Clark tendered to Mountain West a proposal to purchase and develop a 22 1/2 acre tract of land near Lake Ray Hubbard near Dallas. Responding favorably to Clark's proposal, Jensen, through Mountain West, arranged the necessary financing for the venture from Lancaster. Accordingly, Lancaster loaned Clark $1.5 million and the land was purchased on July 22, 1982. In attendance at the closing were Jensen, Clark and James Hays. It was at that time that James Hays first met Clark. Thereafter, Mountain West and Clark formed Lake Ray Hubbard, Ltd., LL, a limited partnership, to pursue development of the Lake Ray Hubbard property.

2. "Hubbard II"

In August 1982, Lancaster made another loan, this time for construction on the 22 1/2 acre Lake Ray Hubbard tract which was previously purchased and

described above. The proceeds of the Hubbard II loan, also in the amount of $1.5 million, went to another newly formed limited partnership, Lake Ray Hubbard Ltd. I. Lake Ray Hubbard Ltd. I was to provide the necessary construction on the Lake Ray Hubbard property. The partnership distribution of Lake Ray Hubbard Ltd. I was as follows: Clark, a general partner held 45.5% interest; Mountain West, a limited partner held 45.5% interest; James Hays, a limited partner held 4% interest; [FN1] and Richard Randall, a limited partner held 5% interest.

FN1. It is interesting to note that James Hays' capital contribution to the partnership was $10.00. It is also worth noting that the partnership agreement was not signed until after the closing of the August 1982 loan.

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3. "Plano"

Later in 1982, Lancaster loaned Plano Ltd. I, another limited partnership, $3,000,000 for the purchase of a twenty-eight acre tract near Plano, Texas. Plano Ltd. I was structured as follows: Clark, a general partner held 41% interest; First Financial Mortgage Corporation, [FN2] a limited partner held 41% interest; James Hays, a limited partner held 4% interest; and Richard Randall, a limited partner held 10% interest. Allegedly, this loan was overfunded by approximately $300,000. [FN3]

FN2. First Financial Mortgage Corporation had three directors: Paul Jensen, Weldon Hays, and Van Zannis.

FN3. Two other loans made by Lancaster to two other limited partnerships, Lake Meadows, Ltd. I and Lake Meadows, Ltd. II, are not discussed here as both defendants were acquitted of any criminal conduct in connection with those loans.

4. "HLH Joint Venture Loans"

In August 1982, a partnership was formed by Weldon Hays, William O. Henry and Lawrence Moffitt as equal partners. Known as HLH Joint Venture, the partnership was created to purchase and develop land. Allegedly, Weldon Hays had been brought into the partnership by Henry and Moffitt because Weldon Hays had the ability to procure the necessary financing and appraisals through his father, James Hays, who was then president of the Lancaster. The HLH partnership agreement provided that any two of the three partners could sign documents for the partnership.

The loans made by Lancaster to the HLH Joint Venture were as follows: the first loan was for $1,000,000 and was made in August 1982; the second loan was for $840,000 and was made in December 1982; and the third loan was for $380,000 and was made in January 1983. The $1,000,000 loan was allegedly overfunded by $423,016 and the $380,000 loan by $19,782.

Weldon Hays never signed any of the loan agreements, although the other two partners did. According to the Government, the conspicuous absence of Weldon Hays' signature on the loan agreements reflected an intent to conceal his partnership interest in the HLH Joint Venture. Ultimately, the HLH Joint Venture was dissolved and Weldon Hays was paid $245,330 for his interest in the partnership.

B. The Deposits

Some time after Weldon Hays left his position as an examiner with the Texas ***585** Savings and Loan Department, he was approached by an individual by the name of Harry Hunsicker (hereinafter Hunsicker). Hunsicker, a real estate appraiser and investor, owned a shopping center in the Colony, a suburban community near Dallas. Seeking a new tenant for his shopping center, Hunsicker convinced Weldon Hays that the Colony needed its own savings and loan association which could be housed in Hunsicker's shopping center. It would be called the Colony Federal Savings and Loan.

After receiving advice from a regulatory consultant, Weldon Hays sought to acquire a provisional charter for his new savings and loan. The requisites for a provisional charter are not particularly cumbersome and are in fact, remarkably simple. First, marketing studies are required. Those studies must reflect that a new savings and loan association is not only needed in the community but that its presence would not have an adverse impact. Next, organizers must pledge $250,000 in deposits as protection against losses by initial depositors until insurance is obtained from the Federal Savings and Loan Insurance Corporation

(FSLIC). The organizers' pledges are then attached to an application for a provisional charter to the Federal Home Loan Bank (hereinafter FHLB). Upon approval by the regional FHLB, the application is forwarded to the FHLB Board in Washington where, upon final approval, a provisional charter is issued. After the issue of the provisional charter, the organizers have six months to obtain deposits in the amount of $2,000,000 from 1,000 depositors, seventy-five percent of whom must be from the institution's market area. When the above requirements are met, and the appropriate insurance premiums are paid to the FSLIC, the new savings and loan may engage in a full range of services.

The Colony met the above described initial requirements and was granted a provisional charter. Unfortunately, however, Weldon Hays and the other organizers of the Colony were unable to meet the depository requirements for an unqualified charter. A six month extension was sought and granted. Nevertheless, Colony failed to secure the necessary deposits and the provisional charter expired. It was thereafter surrendered by Weldon Hays on November 4, 1982. Significantly, some $400,000 of Lancaster's funds were deposited in Colony before its demise even though the deposits of Colony had not been, nor ever were, federally insured.

C. Wheelers, Dealers or Conspirators?

The Government charged James and Weldon Hays with illegally receiving pecuniary benefits in connection with the above described loans. Those benefits are as follows: On September 9, 1982, First Financial Mortgage Company (hereinafter First Financial) paid James and Weldon Hays each $15,000 in fees earned by First Financial on the Plano loan. Later, on October 14, 1982, First Financial paid James Hays $12,500 for loan expenses on the Hubbard II loan. Additionally, James and Weldon Hays were paid $44,400 in commissions from First Financial for the HLH Joint Venture loans. On December 30, 1982, Lancaster issued a check that was signed and approved by James Hays in the amount of $22,008 to First Financial. That check was then used to purchase another check in the amount of $22,008 which was payable to Weldon Hays. Despite receiving these benefits, James Hays, on January 11, 1983, signed a "representation letter" in which he failed to disclose his receipt of fees as well as his ownership interest in an entity to which Lancaster had loaned money.

In addition to the above mentioned benefits in connection with the loans made by Lancaster, the government charged Weldon and James Hays with receiving other improper benefits as a result of their savings and loan activities. Namely, in October 1982, $46,000 of Lancaster's funds were used to purchase two Cadillacs which were used by James and Weldon Hays. Moreover, Weldon Hays used his Cadillac before he was employed by Lancaster and the automobile was later purchased by the HLH Joint Venture from Lancaster. Finally, as mentioned previously, Weldon Hays received $245,330 for his interest in the ***586** HLH Joint Venture Partnership upon its dissolution.

On October 28, 1987, a federal grand jury returned an eleven count indictment against James Hays and Weldon Hays. Count 1 of the indictment charged James and Weldon Hays under 18 U.S.C. § 371 with conspiring to violate 18 U.S.C. §§ 657 and 1006. The remaining ten counts charged James Hays with the misapplication of funds belonging to a savings and loan institution, making false entries and the illegal receipt of loan proceeds in violation of 18 U.S.C. §§ 657 and 1006. Weldon Hays was charged with aiding and abetting in all of the above counts with the exception of Count 9.

The defendants entered pleas of not guilty to all counts. A jury trial ensued during which the Government called forty-one witnesses and offered somewhere in the neighborhood of 300 exhibits. Thereafter, the jury found James Hays guilty on all counts of the indictment except for Counts 5 and 6. Weldon Hays was convicted on all counts with which he was charged except for Counts 5 and 6. James Hays was sentenced to five years' imprisonment on both Counts 1 and 2 with the sentences to run consecutively. On each of the remaining counts, James Hays was sentenced to five years' imprisonment with the sentences to run concurrently with each other and the Count 1 sentence. James Hays was fined $60,000. Weldon Hays was sentenced in an identical manner, except that his fine was assessed at $55,000. The defendants thereafter timely appealed.

II. DISCUSSION

On appeal the appellants contend that the district court made a substantial number of evidentiary rulings that were in error. Specifically, appellants contend that the trial court improperly allowed the Government to introduce an overwhelming amount of irrelevant evidence. They also argue that even if some of the challenged evidence was relevant, that it was highly prejudicial, and as such was improperly admitted under Fed.R.Evid. 403. As a second assignment of error, the appellants maintain that the repeated references to, and extraordinary emphasis that was placed upon, their alleged violations of civil banking regulations was a violation of their constitutional rights to due process of law under the fifth amendment. Because we conclude that the appellants' first point of error has merit and warrants reversal, we do not reach appellants' second point of error.

The appellants argue the district court erred in allowing into evidence some 200 pages of testimony and numerous exhibits which had no bearing on the charges alleged in the indictment. To determine whether the evidence challenged by the appellants was, in fact, irrelevant, recourse must be had to the wording of the indictment. As the appellants correctly contend, under the indictment, the Government needed only to establish the existence of the Hubbard I loan, the Hubbard II loan, the Plano loan, the HLH Joint Venture loans, the representation letter signed by James Hays, and the existence of a conspiratorial relationship between James Hays, Weldon Hays, and Paul Jensen. The appellants urge that had the Government been limited to introducing only the evidence necessary to establish those facts, then the length of the trial would have been reduced substantially and the number of exhibits which were introduced would have been cut by almost one third. More importantly, the appellants contend that the introduction of such irrelevant and prejudicial evidence was reversible error.

As defined by the Federal Rules of Evidence, relevant evidence is that evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Evidence which meets this broad standard is known as "logically relevant" evidence. The Federal Rules of Evidence further provide that "[a]ll relevant evidence is admissible," and that "[e]vidence which is not relevant is not admissible." Fed.R.Evid. 402.

In determining whether evidence should be admitted or excluded on the basis of ***587** relevancy, however, the trial court's decision does not always turn upon a simple determination that the standard enunciated in Rule 401 is satisfied. Instead, the focus may turn to a determination of whether the proferred evidence is "legally relevant." Fed.R.Evid. 403 provides that "[relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Thus, while the trial court's discretion in admitting evidence under Rule 401 is necessarily quite broad, Rule 403 requires a balancing of interests to determine whether logically relevant evidence is also legally relevant evidence.

[1] In reviewing the district court's rulings on matters of relevancy, this Court is guided by the principle that district courts have wide discretion in determining relevancy under Rule 401. The district court's decision will not be disturbed absent a substantial abuse of discretion. United States v. Brown, 692 F.2d 345, 349 (5th Cir.1982). Similarly, the decision of the district court with regard to the admissibility of evidence under the standards set forth in Rule 403 is subject to considerable deference. In the absence of an abuse of discretion, the district court's ruling on matters involving Rule 403 will not be overruled. United States v. Kalish, 690 F.2d 1144, 1155 (5th Cir.1982), cert. denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983).

Nevertheless, our review of erroneous evidentiary rulings in criminal trials is necessarily heightened. As the Supreme Court has instructed, evidence in criminal trials must be "strictly relevant to the particular offense charged." Williams v. New York, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed.2d 1337 (1949). "The admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction, even though there was sufficient relevant evidence to sustain the verdict." United States v. Allison, 474 F.2d 286, 289 (5th Cir.1973) (citing Williams v. United States, 168 U.S. 382, 18 S.Ct. 92, 42 L.Ed. 509 (1897)). Thus, when viewing the

error alleged, we must examine the consequences of the error in light of the entirety of the proceedings. To that end, we are constrained to take into account "what effect the error had or reasonably may be taken to have had upon the jury's decision." Kotteakos v. United States, 328 U.S. 750, 764, 66 S.Ct. 1239, 1247, 90 L.Ed. 1557 (1946). While we realize that it is indeed a rare case that is reversed on the basis of erroneous evidentiary rulings under Fed.R.Evid. 401 and 403, we nevertheless emphasize that we are bound to zealously guard against emasculation of the important protections that those rules afford the defendants in criminal cases.

We turn now to the record and the challenged evidence. That evidence may be divided into three categories: 1) evidence which involves the events leading up to the inception of Colony, 2) evidence which concerns the activities of Paul Jensen, and 3) evidence regarding a settlement agreement between the Hays and Lancaster. We first address the evidence which was introduced by the Government concerning Colony.

[2] At trial, the Government presented eleven witnesses who testified at length regarding Weldon Hays' allegedly improper activities during the time he was attempting to secure sufficient deposits to ensure the continued operation of Colony. The testimony of those eleven witnesses required almost 200 pages of the record on appeal. Little, if any, of that testimony is relevant to the offenses with which either Weldon Hays or his father were charged. Instead, the evidence consists primarily of testimony regarding the unscrupulous conduct of Weldon Hays at or about the time he was attempting to get Colony chartered.

Specifically the challenged testimony accused Weldon Hays of generating fictitious lists of depositors, forging pledges, receiving a clandestine salary and engaging in other misconduct relative to the formation of Colony. We fail to see how these matters relate to the specific offenses charged in the indictment since the charged offenses occurred years later and were in connection with Lancaster. According to ***588** the indictment, James and Weldon Hays conspired to misapply Lancaster's funds, not Colony's funds. The indictment alleged conspiracy to make false entries in Lancaster's books, not Colony's books. The indictment alleged misapplication of Lancaster's funds and making false entries in Lancaster's books, not Colony's. Accordingly, the only glimmer of possible relevance of this testimony to the offenses charged is fleeting at best. Thus, we must conclude that its admission was error.

[3] A review of the record leaves us with the distinct impression that the Government's motive in introducing such evidence was to attack the character of Weldon and James Hays. As such, the admission of the evidence was also violative of Fed.R.Evid. 404(b). Likewise, a review of the record leaves us with the impression that the evidence was cumulative, unduly prejudicial and inflammatory. Had the evidence been restricted to a limited number of witnesses, or had the testimony taken a more modest number of pages of the record, the result might have been different. However, such was not the case. Under the appropriate standard of review, and on this record, we are unable to conclude that the error had no effect, or only a slight effect on the jury's decision. Kotteakos, 328 U.S. 750, 66 S.Ct. 1239. Having so concluded, we must view the error as having impermissibly affected substantial rights of the defendants. Id.

[4] Next, we focus on the evidence pertaining to Paul Jensen. Although never explicitly recognized as such by the district court, a review of the record in light of the indictment leaves the clear impression that Paul Jensen was one of the "unidentified co-conspirators" named in the indictment. Unlike the Colony evidence, the evidence concerning Paul Jensen was in the form of several hundred pages of exhibits accessible to the members of the jury during their deliberations. Among those pages could be found Paul Jensen's income tax return revealing a gross income of several million dollars, documentation of a federal investigation of several of Jensen's companies, evidence that Jensen was being investigated by a Federal Grand Jury assisted by a prosecutor in the instant case, and accounting records which showed that Jensen, through Snowball Investments, had issued a check for $272,000 to Colony. The check was purportedly to cover losses incurred by Colony, and the $272,000 was taken as a personal deduction by Jensen against his income tax obligations.

While the $272,000 matter is logically relevant to the conspiracy charges since Colony could not pay

Lancaster its deposits without that money, the evidence gleaned from the other several hundred pages was, in large part, irrelevant. The information contained in those pages served merely to assassinate the character of Paul Jensen, and in so doing, indirectly assassinate the character of James and Weldon Hays. The Hays contend that such "guilt by association" is improper. The Government on the other hand argues that the evidence was necessary in order for the jury to understand the "scope of the conspiracy" and how the appellants were able to misapply Lancaster's funds.

While we are inclined to view the evidence regarding Jensen as less improper than the evidence regarding Colony addressed above, we nevertheless are unable to conclude that the error did not impermissibly affect the jury's deliberations as contemplated by Kotteakos given the voluminous quantity of the exhibits and the nature of their content. Nor are we prepared to say that the jury would have found James and Weldon Hays guilty even in the absence of that evidence. See United States v. Lay, 644 F.2d 1087, 1091 (5th Cir.1981).

[5] Finally, the appellants complain the Government was improperly allowed to introduce evidence regarding a settlement agreement entered into between James Hays, Weldon Hays and Lancaster. Additionally, the appellants argue that the district court committed reversible error by allowing the Government to read several excerpts from civil depositions in which James and Weldon Hays state their reasons for entering into the settlement agreement. Federal Rule of Evidence 408 permits ***589** evidence of settlement agreements for purposes other than proving liability, such as demonstrating the prejudice of a witness, negativing a contention of undue delay, or establishing the obstruction of a **criminal** investigation. The Government does not contend that it offered this evidence for any of the permissible purposes contemplated by **Rule 408.** Rather, the Government urges that evidence of the settlement agreement assisted the jury in its understanding of the breadth of the conspiracy. In our view, this purpose stands at direct odds with the clear mandates of Rule 408, and therefore the admission of the evidence regarding the settlement agreement between the Hays and Lancaster was error.

[6] As the appellants correctly contend in brief, and as the framers of Rule 408 clearly contemplated, the potential impact of evidence regarding a settlement agreement with regard to a determination of liability is profound. It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back. Accordingly, we cannot say that the admission of the evidence of the Hays' settlement with Lancaster did not affect their substantial rights under the plain error standard first enunciated in Kotteakos.

III. CONCLUSION

Having concluded that much of the challenged evidence introduced by the Government during the course of the trial of the appellants was admitted erroneously, and having determined that the cumulative effect of that evidence was prejudicial and affected substantial rights of the defendants, we are constrained to reverse the convictions. Because we have so concluded, we do not reach appellants' arguments regarding the violation of their due process rights under the fifth amendment.

REVERSED.

INSTA-CITE

CITATION: 872 F.2d 582

Direct History

=> 1 **U.S. v. Hays,** 872 F.2d 582, 28 Fed. R. Evid. Serv. 300 (5th Cir.(Tex.), Apr 25, 1989) (NO. 88-1366)

Negative Indirect History

Declined to Follow by
2 Mayes v. State, 887 P.2d 1288 (Okla.Crim.App., Jun 24, 1994) (NO. F-90-776), as corrected on denial of rehearing (Aug 04, 1994) (Additional History)

Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
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Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5302. POLICY OF **RULE 408**

The common law rule on the admissibility of statements made in an effort to reach some non-litigious resolution of a controversy was based on the distinction between "express" and "implied" admissions. [FN1] The general rule, as Wigmore would have codified it, was: An offer by one party to the other, i.e. if by a plaintiff to accept compensation, and if by a defendant, to make compensation, being open to the inference that it proceeds only from a desire to end controversy and not from a concession of the correctness of the opponent's case, is not an implied admission, and is not receivable. [FN2] But, on the other hand, an "express admission, though made in course of negotiations for settlement of a claim, is receivable." [FN3]

But if courts were in agreement on the nature of the rule, there was no such consensus on its justification. The rationale for the rule has varied from time to time and place to place. The writers have recognized at least three reasons for excluding evidence of compromise: relevance, implied contract, and privilege. [FN4] This theoretical question has a significant practical impact because the underlying theory will shape the application of the rule to particular cases and will have profound consequences for the procedure to be used in administering the rule. [FN5]

Like the rule dealing with evidence of subsequent repairs, [FN6] the rule on evidence of compromise was originally approached from the direction of the hearsay rule. [FN7] The oldest justification, [FN8] what Wigmore called the "true reason", [FN9] for the rule was that such evidence was irrelevant. When the proponent offered evidence of an offer of compromise, he was seen as offering an out-of-court statement, not for the truth of the matter asserted, but to prove an implied statement that the offeror believed that his case was weak. But the courts rejected the implication, [FN10] pointing out that even a party who believed that he would win at trial might be willing to pay something to "buy peace" and avoid the expense of litigation. This justification did not apply when the admission was express rather than implied; hence "independent" admissions of fact were received in evidence. [FN11]

In England, the relevance theory was soon displaced by a contract rationale. [FN12] If the offeror prefaced the presentation of his compromise proposal with the magic words "without prejudice" [FN13] this created a unilateral implied contract that the offer and related matter was not to be used in evidence. [FN14] Although a few American cases adopted the contract theory, [FN15] most courts followed Wigmore in rejecting it. [FN16]

A third and most recent justification for the rule excluding evidence of offers of compromise argues that the rule is one of privilege, [FN17] not relevance. Under this rationale, exclusion is based on the strong public policy favoring negotiated resolution of disputes. [FN18] Since parties may be inhibited in making offers of compromise by the fear that these will be used against them if the compromise efforts fail, the law alleviates that fear and encourages the making of offers of compromise by making them privileged. [FN19] Although Wigmore rejected this reasoning, arguing that it did not serve to explain the cases and that another privilege was not needed, [FN20] McCormick argued strongly in favor of this justification, [FN21] convincing a few courts [FN22] and most of the

other writers. [FN23]

There is another justification for the rule, one that has received much less attention than the first three. This is "fairness" to the person who offers a compromise. [FN24] Litigants are often exhorted to settle and the willingness to compromise one's difference is usually considered a virtue. The person who attempts to settle a claim he believes to be well-founded is likely to feel that it is not fair that his opponent should be permitted to introduce evidence of his good deed to support an inference that he is insincere in pressing his case. [FN25] This sense of unfairness may be stronger if he believes that his opponent has lured him into making the offer. Although the argument has merit, fairness will not serve as the sole justification for the rule since courts usually bar evidence of compromise without any inquiry into the motives of the offeror, [FN26] thus protecting not only the person who attempts a good faith compromise but also parties whose motives will not bear scrutiny. [FN27]

However, none of the other three justifications for excluding evidence of compromise is without its defects. Although the relevance theory may serve to explain most of the cases, it has been criticized for the artificiality of the distinction between "express" and "implied" admissions. [FN28] It has been pointed out that often the implication that the offeror does not believe in his case is quite strong; [FN29] e.g., when he offers to pay all that his opponent demands minus his costs of suing to recover it. Moreover, an express admission of fact may sometimes be made not out of a belief in its truth but only as a device to encourage agreement. If, as the relevance theory would seem to suggest, the admissibility of the evidence of compromise should turn on the intent of the person making the offer, [FN30] it is difficult to see why that is not a preliminary fact best left to the jury to determine. [FN31]

The English contractual theory eliminated the problem of determining intent [FN32] by making admissibility turn on whether the party making the offer used the phrase "without prejudice." [FN33] If the words were used, then the courts would exclude not only the offer but also any statements of fact made in connection with it. [FN34] However, the contract theory did not explain all of the cases in which the English courts had excluded evidence of compromise negotiations. [FN35] Moreover, the talismanic use of "without prejudice" has been thought too mechanical [FN36] and unfair to an unsophisticated person attempting to compromise disputes without legal assistance. [FN37]

The privilege theory appeals to many writers because it promises better protection for statements of fact made during compromise negotiations. [FN38] It eliminates the need for the court to search for the intent of the parties [FN39] or for the parties to cast their statements in any particular form. [FN40] Finally, it justifies giving the task of determining admissibility to the judge rather than the jury. [FN41] The major difficulty with the privilege theory is that it depends upon an assumption of fact that has never been empirically demonstrated, [FN42] viz., that exclusion of the evidence is required in order to settle cases. This seems like a dubious assumption with respect to the proposed expansion of the rule to cover independent statements of fact since the common law courts seem to have settled many cases while admitting such statements in evidence. Moreover, it has never been satisfactorily explained why the policy of favoring settlement should prevail over the policy of admitting all relevant evidence. [FN43] Finally, the privilege rationale can produce unjust results [FN44] unless it is tempered by a series of exceptions that will be as difficult to administer as the relevance theory.

Because the Advisory Committee had earlier abandoned Wigmore's concept of "legal relevance" [FN45] in favor of a broad definition of relevance coupled with a discretionary power to exclude, it would have been very difficult to explain Rule 408 as an application of the doctrine of relevance. Hence, the Advisory Committee's Note embraces McCormick's rationale, [FN46] making the rule, in the words of the Reporter, a "species of privilege." [FN47] This change in the underlying rationale makes it somewhat misleading to state, as one former member of the Advisory Committee has, that the rule states "the generally accepted" law. [FN48] Adoption of the privilege rationale has a number of implications for the administration of Rule 408. First, since it is no longer a question of relevance, disputed preliminary facts are to be decided by the judge, [FN49] not the jury. Second, if the rule is truly one of privilege, it can be argued that an offer of compromise or statements made in compromise negotiations cannot be used to prove preliminary facts that support the admissibility of other evidence. [FN50] Third, the privilege rationale restricts the scope of the rule by limiting the number of people who can invoke it;

[FN51] anyone can object to irrelevant evidence, but if the party who made the offer is willing to have it introduced, the privilege rationale does not provide any basis for objections by others. [FN52] Finally, it may be argued that the privilege theory means that the offers of compromise are not discoverable because of the exception in Civil Rule 26(b)(1) for "privileged" matter. [FN53]

But the Advisory Committee did more to the common law rule than merely shift its underlying rationale. [FN54] Rule 408 expands the common law prohibition on the use of evidence of offers of compromise to encompass as well any statements or conduct made during compromise negotiations. This change was justified on the grounds that "the practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact", a limitation that had "an inevitable effect" on "freedom of communication with respect to compromise." [FN55] But the Advisory Committee offered no empirical support for these claims and, so far as is known, none exists. [FN56] Nor did the Committee trouble to explain why, under its privilege rationale, it was thought necessary for parties to make statements of fact in conducting compromise negotiations. [FN57]

The Advisory Committee also felt that it was necessary to expand the common law rule in order to eliminate "controversy over whether a given statement falls within or without the protected areas." [FN58] But it would seem that changing the size of the protected area would have little impact on the extent of controversy as to just where its borders were. [FN59] Moreover, since the Advisory Committee chose to follow the example of California [FN60] rather than the other prior codifications, all of which found no reason to change the common law rule, [FN61] there is very little by way of precedent to guide courts in determining just what statements and conduct are to be protected by Rule 408.

Therefore, in interpreting Rule 408, courts will be unable to rely on any policy of codifying the common law. [FN62] Rule 408 will require a good deal of careful interpretation because the novel phrasing of the rule, [FN63] some expansive claims for its scope, [FN64] and the uncertain meaning of the Congressional alteration [FN65] of the rule all provide ammunition for claims that the rule makes other changes in the pre-existing law on the use of evidence of compromise. [FN66] The policy of Rule 408 is best described as one of confused reform.

FN1. Common law rule 4 Wigmore, Evidence, Chadbourn rev. 1972, ss 1061, 1062.

FN2. "Not implied admission" Wigmore, Code of Evidence, 3d ed. 1942, p. 204.

FN3. "Express admission" Ibid.

FN4. Three reasons Morgan, Basic Problems of Evidence, 1961, p. 209.

FN5. Procedural consequences Falknor, Extrinsic Policies Affecting Admissibility, 1956, 10 Rutgers L.Rev. 574, 593.

FN6. Subsequent repairs See s 5282.

FN7. Hearsay rule Even today there are writers that treat the rule under the heading of "admissions by conduct." See, e.g., McCormick Evidence, Cleary ed. 1972, s 274; Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 15, 16.

FN8. Oldest justification For discussion of the earliest common law cases, see Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev. 85, 86-88.

FN9. "True reason" 4 Wigmore, Evidence, Chadbourn rev. 1972, p. 36.

FN10. Rejected implication Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 241-246.

FN11. "Independent" admissions Comment, Evidence--Admissibility of Statements of Fact Made During Negotiation

for Compromise, 1936, 34 Mich.L.Rev. 524.

FN12. Contract rationale Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev., 85, 89.

FN13. "Without prejudice" For the modern application of the doctrine, see Cross, Evidence, 3d ed. 1967, p. 247.

FN14. Implied contract Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 238, 246.

FN15. American cases Slough, Relevancy, Unraveled, 1957, 5 U.Kan.L.Rev. 675, 719. New Jersey apparently followed the English rule down to the time when the Uniform Rules were adopted in that state. See, N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 98; N.J.Sup.Ct., Committee on Revision of the Law of Evidence, Report, 1955, p. 104.

FN16. Followed Wigmore 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, pp. 35-36.

FN17. Rule of privilege Comment, Evidence--Admissibility of Statements of Fact Made During Negotiation for Compromise, 1936, 34 Mich.L.Rev. 524, 525.

FN18. Public policy Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev. 85, 94.

FN19. Encourages compromise Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 251.

FN20. Privilege not needed 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, pp. 34-35.

FN21. McCormick favored McCormick, Evidence, 1954, s 76. For reasons that do not appear, in the revised edition of his work, "McCormick" is made to say almost the direct opposite. McCormick, Evidence, Cleary ed. 1972, s 74.

FN22. Courts Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 17 n. 94.

FN23. Most writers Slough, Relevancy Unraveled, 1957, 5 U.Kan.L.Rev. 675, 719-720.

FN24. "Fairness" Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 249-250.

FN25. Insincere claim Compare the analogous argument in behalf of the rule excluding evidence of subsequent repairs. See s 5282.

FN26. Inquiry into motives The argument also runs counter to the general preference in American courts for instrumental justifications. See vol. 21, s 5023, pp. 134-135.

FN27. Bad motives However, courts sometimes attempt to avoid injustice by manipulating the definition of "compromise." See s 5306.

FN28. Criticized Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 241-246.

FN29. Implication strong McCormick, Evidence, 1954, s 76.

FN30. Intent of offeror 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 36.

FN31. Left to jury See, e.g., Phoenix Assur. Co., Ltd. v. Davis, C.C.A.5th, 1933, 67 F.2d 824, 825-826.

FN32. Determining intent Morgan, Basic Problems of Evidence, 1961, pp. 210-211.

FN33. "Without prejudice" Comment, Evidence--Admissibility of Statements of Fact Made During Negotiations for Compromise, 1936, 34 Mich.L.Rev. 524, 525.

FN34. Covers statements of fact Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 246 n. 26.

FN35. Did not explain cases Vaver, "Without Prejudice" Communications--Their Admissibility and Effect, 1974, 9 U.B.C.L.Rev. 85, 99-104.

FN36. Too mechanical 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 42 ("cabalistic phrase"). But compare those decisions that make the admissibility of statements made in compromise turn on whether or not they were made in hypothetical form. Schmertz, Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence, 1974, 33 Fed.B.J. 1, 17.

FN37. Unfair to unsophisticated Field & Murray, Maine Evidence, 1976, pp. 81-82.

FN38. Statements of fact Exclusion of express statements of fact is incompatible with the relevance theory. 4 Wigmore, Evidence, Chadbourn rev. 1972, s 1061, p. 39 n. 5. Although it is sometimes said that the privilege theory requires protection for statements of fact made during compromise negotiations, see e.g., Falknor, Extrinsic Policies Affecting Admissibility, 1956, 10 Rutgers L.Rev. 574, 593, this is true only if such statements are necessary to reach a compromise, a point usually assumed rather than demonstrated.

FN39. Intent of parties Peterfreund, Relevancy and Its Limits in the Proposed Rules of Evidence for the United States District Courts: Article IV, 1960, 25 Record of N.Y.C.B.A. 80, 92.

FN40. Particular form Cf. Comment, Cal.Evid.Code s 1152.

FN41. Not to jury For a pre-Code decision holding that the jury is to determine whether a statement of fact is an admission or part of a compromise effort, see People v. Anderson, 1965, 46 Cal.Rptr. 377, 384, 236 Cal.App.2d 683, 693.

FN42. Not empirically demonstrated Bell, Admissions Arising Out of Compromise--Are They Irrelevant?, 1953, 31 Texas L.Rev. 239, 252.

FN43. Policy of admission Courts admitting evidence of independent statements of fact often did so on grounds that the policy of admission prevailed over the justifications for exclusion. See, e.g., Gagne v. New Haven Road Constr. Co., 1934, 175 A. 818, 87 N.H. 163.

FN44. Unjust results For example, suppose that in the course of compromise negotiations, one party threatens to follow a "scorched earth" method of defense, conceding that this opponent can win but promising to prolong the litigation so as to make the victory very expensive. It is difficult to see why the law would want to encourage such threats. One method to permit the introduction of such statements is to argue that the statement was not made "in compromise" because there was no real dispute. See s 5306. But this reopens the issue of subjective intent of the party, a question that the broader rule of exclusion was supposed to foreclose.

FN45. Abandoned Wigmore See vol. 22, s 5162.

FN46. McCormick's rationale See Advisory Committee's Note, Rule 408 (citing McCormick, Evidence, 1954, ss 76, 251). As previously mentioned, McCormick's argument for the privilege rationale has been deleted in the revision of the book. The states adopting the rule have been less explicit, see Committee Commentary, No.Dak.R.Ev. 408, or have argued that the rule can be justified on both relevance and privilege grounds. See Reporter's Note, Prop.Vt.R.Ev. 408. The Model Code also favored the privilege rationale. See Comment, Model Code of Evidence, Rule 309. Although the Comment is silent, one writer has said that Uniform Rule 52 also embodies this rationale. Slough, Relevancy Unraveled, 1957, 5 U.Kan.L.Rev. 675-719.

FN47. "Species of privilege" 2 Louisell & Mueller, Federal Evidence, p. 278 n. 33.

FN48. "Generally accepted" Green, Relevancy and Its Limits, 1969 Law & Soc.Ord. 533, 553.

FN49. Decided by judge Field & Murray, Maine Evidence, 1976, p. 81

FN50. Prove preliminary facts For the contrary argument, see vol. 21, s 5053, p. 256.

FN51. Who can invoke See s 5315.

FN52. No basis for objection McCormick, Evidence, 1954, s 76.

FN53. Not discoverable Prior to the effective date of the Evidence Rules, one court relied on the Wigmorean rationale in holding that settlement negotiations were discoverable. Oliver v. Committee for the Re-election of the President, D.C.D.C., 1975, 66 F.R.D. 553, 556. One writer has asserted that the same result would follow under Rule 408, but without any supporting argument. Phillips, A Guide to the Proposed Ohio Rules of Evidence, 1978, 5 Ohio North.L.Rev. 28, 39.

FN54. Did more Most of the state codifiers have recognized that in adopting Rule 408 they were altering the pre-existing law. See, e.g., Sponsor's Note, Fla.Evid.Code s 90.408; Comment, Minn.R.Ev. 408; Committee Commentary, No.Dak.R.Ev. 408. See also, Ehrhardt, Florida Evidence, 1977, p. 91; Clarke, Montana Rules of Evidence: A General Survey, 1978, 39 Mont.L.Rev. 79, 109.

FN55. "Freedom of communication" Advisory Committee's Note, F.R.Ev. 408.

FN56. None exists Similar unsupported claims are made in behalf of the equivalent provisions in the California Evidence Code. See Comment, Cal.Evid.Code s 1152.

FN57. Necessary to make In the experience of one of the authors, the most memorable of such statements run along the lines: "Sure, we know that X is true but have fits trying to prove it." In if the case goes to trial you will such cases it would seem that the policy of avoiding a waste of valuable court time in trying undisputed issues of fact would be more important than the policy of encouraging compromise. The only persons who would be deterred from making such statements are those who are attempting to conduct a war of attrition against an impecunious adversary. There would seem to be little reason to encourage such bad faith efforts at settlement.

FN58. "Protected area" Advisory Committee's Note, F.R.Ev. 408. For similar arguments, see Judicial Council Committee's Note, Wis.Stats.Ann. s 904.08; Waltz, The New Federal Rules of Evidence, 1975, pp. 33-34.

FN59. Little impact Under the common law rule, one could make a colorable claim for exclusion only if the statement was hypothetical in form or so connected with the offer of compromise that proof of the admission would prove the offer. Rule 408 saves courts the trouble of looking at such questions, but now requires courts to decide whether or not a statement or conduct was "made in compromise negotiations", an issue that can be raised at least as frequently as the claim for exclusion under the common law rule. See s 5307.

FN60. California The California precedents are not very helpful because of the propensity of courts in that state to

disregard the Code and decide cases in accordance with pre-existing caselaw. See, e.g., Moving Picture Machine Operators Union Local No. 162 v. Glasgow Theatres, Inc., 1970, 86 Cal.Rptr. 33, 6 Cal.App.3d 395.

FN61. No reason to change The Model Code, the Uniform Rules of Evidence, and the state codes based thereon all, with the sole exception of California, left the common law rule unchanged. See s 5301. But see, N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 99 (stating that N.J.R.Ev. 52 would exclude evidence of statements made in compromise negotiations).

FN62. Policy The Advisory Committee's Note also points out that the rule is intended to change the common law rule with respect to completed compromises. See s 5303.

FN63. Novel phrasing Rule 408 does not resemble any of the prior codifications, though it borrows bits and pieces from some of them. The distinctive feature of Rule 408 is its attempt to provide an illustrative list of permissible uses of evidence of compromise, a listing that is strangely incomplete. See ss 5310-5314.

FN64. Expansive claims The most extravagant claims for the scope of the rule can be found in 2 Louisell & Mueller, Federal Evidence, 1978, pp. 271-272, 280-282.

FN65. Congressional alteration See ss 5301, 53110.

FN66. Other changes E.g., changes in the meaning of the requirement that the claim be one that is "disputed." See s 5306.

FPP s 5302 (R 408)

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Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5302. POLICY OF RULE 408

FN1. Common law rule Offers to compromise are generally inadmissible to prove liability, but they are admissible for other purposes. Petersen v. State Farm Auto Ins. Co., La.App.1989, 543 So.2d 109, 115 (collecting state cases). For a case in which state law had not dealt with what seems like a fairly obvious issue under the rule, thus illustrating the rudimentary nature of the "common law" on use of compromise evidence, see Cleere v. United Parcel Service, Inc., Okl.App.1983, 669 P.2d 785. Smith & Phelps, District of Columbia Annotations to the Proposed Federal Rules of Evidence, 1973, 32 Fed.B.J. 270, 301-303. Illinois law is considered in Note, Post-Accident Repairs and Offers of Compromise: Shaping Exclusionary Rules to Public Policy, 1979, 10 Loy.U.(Chi.) L.Rev. 487, 495.

4. Three reasons There are several reasons for excluding evidence of compromise; among these are relevance and public policy of encouraging settlements. Miller v. Component Homes, Inc., Iowa 1984, 356 N.W.2d 213. The relevance and instrumental rationales are embraced in Czuj v. Toresco Enterprises, 1989, 570 A.2d 1049, 239 N.J.Super. 123.

FN7. Hearsay rule For an opinion holding, probably erroneously, that evidence of settlement is not hearsay under the modern codes, see Wyatt by Caldwell v. Wyatt, 1987, 526 A.2d 719, 721, 217 N.J.Super. 580.

FN12. Contract rationale Coote, "Without Prejudice" Communications--Another Red Light for Practitioners, 1979 N.Z.L.J. 87.

FN17. Rule of privilege Rule 408 does not create a privilege within the meaning of state freedom of information act. Guy Gannett Publishing Co. v. University of Maine, Me.1989, 555 A.2d 470, 472.

FN18. Public policy Winchester Packaging, Inc. v. Mobil Chemical Co., C.A.7th, 1994, 14 F.3d 316, 320 (expressing some doubt about the rationale); Lytle v. Stearns, 1992, 830 P.2d 1197, 1203, 250 Kan. 783; DeTienne Associates v. Montana Rail Link, 1994, 869 P.2d 258, 262, 264 Mont. 16; Delicious Foods v. Millard Warehouse, 1993, 507 N.W.2d 631, 640, 244 Neb. 449; Haderlie v. Sondgeroth, Wyo.1993, 866 P.2d 703, 713.

FN25. Insincere claim An additional justification for excluding evidence of settlements of the fear that a juror may think that the plaintiff has already received adequate compensation so that further award from remaining defendants is unjustified. Byerly v. Madsen, 1985, 704 P.2d 1236, 1240, 41 Wn.App. 495.

FN33. "Without prejudice" Accord: Czuj v. Toresco Enterprises, 1989, 570 A.2d 1049, 239 N.J.Super. 123.

FN46. McCormick's rationale N.J.R.Ev. 52 rejects Wigmore's rationale in favor of that of McCormick. Wyatt by

Caldwell v. Wyatt, 1987, 526 A.2d 719, 722, 217 N.J.Super. 580. Rule 408 reflects a belief that offer to compromise does not necessarily reflect strength of case and a desire to encourage compromise. Fireman's Fund Insurance Co. v. BPS Co., 1985, 491 N.E.2d 365, 372, 23 Ohio App.3d 56. The Advisory Committee's Note is paraphrased in Commentary, Ore.R.Ev. 408. The Comment to Prop.N.Y.Evid.Code s 408 adds another novel basis for the rule; it suggests that liability is an opinion of law that the party is not qualified to express and is therefore irrelevant.

FN50. Stipulations In re Cluck, D.C.Tex.1993, 165 B.R. 1005, 1009 (Rule 408 not applicable to stipulation that was basis of Tax Court final judgment).

FN52. No basis for objection One court has held that the defendant has standing to object to evidence of plaintiff's settlements with third persons. Kennon v. Slipstreamer, Inc., C.A.5th, 1986, 794 F.2d 1067, 1071. The contrary position is taken over vigorous dissent in Kennon v. Slipstreamer, Inc., C.A.5th, 1986, 794 F.2d 1067, 1071.

FN54. Did more Accord: Derderian v. Polaroid Corp., D.C.Mass.1988, 121 F.R.D. 9, 11.

FN57. Necessary to make For the justice of the rule, see Stanley v. DeCesere, Me.1988, 540 A.2d 767, 770 (in suit between builder and homeowner, Rule 408 precludes builders admission of shoddy construction made during settlement talks).

FN62. Policy Brazil, Protecting The Confidentiality of Settlement Negotiations, 1988, 39 Hast.L.J. 955. For an excellent summary of Rule 408 which highlights some of the problems in its interpretation, see Waltz & Huston, The Rules of Evidence in Settlement, 1981, 5 Litigation 11. Annot., Evidence Involving Compromise or Offer of Compromise as Inadmissible Under Rule 408 of Federal Rules of Evidence, 1985, 72 ALR Fed. 592.

FPP s 5302 (R 408)

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23 Fed. Prac. & Proc. Evid. s 5301 (R 408)
(WRIGHT & MILLER TREATISE MAIN VOLUME)
(Publication page references are not available for this document.)

Federal Practice and Procedure
Federal Rules of Evidence
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Chapter 5 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

s 5301. STATUTORY HISTORY

Rule 408 apparently gave the Advisory Committee little difficulty. Unlike most of the other rules, it remained unchanged [FN1] from the time it first appeared in the Preliminary Draft [FN2] until it was finally promulgated by the Supreme Court. [FN3]

The history of the rule in Congress is a much different story. It was initially labeled "noncontroversial" [FN4] and the first subcommittee draft of the rules did not propose any changes. [FN5] But controversy erupted when several government agencies launched an attack [FN6] on the provision in the rule that required the exclusion of admissions of fact made during settlement negotiations. [FN7] The thrust of these objections was that in the administrative handling of disputes between the Government and citizens, e.g., in a tax case, it was often difficult to say just when investigation stopped and efforts to settle began. [FN8] It was feared that a taxpayer might concede a number of facts to government investigators, then claim that these admissions were made during settlement negotiations. [FN9] It was argued that at best this meant that the government would have to go after the information again, perhaps through formal discovery. [FN10] At worst, the government lawyers claimed that the rule might be read as permitting the taxpayer to deny what he had once admitted, without fear of impeachment, [FN11] and even immunizing documents that had been disclosed to government investigators during what a court later determined to be settlement negotiations rather than investigation. [FN12]

The Hungate subcommittee responded to these fears by amending Rule 408. [FN13] First, the second sentence of the rule was changed so that the quasi-privilege only applied to admissions or opinions of liability and not to statements of fact. [FN14] Second, a new sentence was added to make clear that the rule did not require exclusion of information disclosed during settlement negotiations, but only applied to the statements made at that time. [FN15] Finally, the last sentence of the rule was amended to no apparent purpose. [FN16] The full committee endorsed these changes, relying on the arguments of the government lawyers. [FN17] The House approved the amended rule without debate. [FN18]

The House amendments underwent a spirited attack in the Senate. The Advisory Committee charged that the sponsoring agencies wished to use settlement negotiations to elicit admissions from unsophisticated parties, [FN19] pointing out that in the case of the Equal Employment Opportunity Commission this was a violation of statute. [FN20] The draftsmanship of the amendments was also criticized, [FN21] one commentator going so far as to say that the House had reduced the law to "hopeless confusion." [FN22] Finally, it was argued that the House had undermined the policy of the rule--to encourage compromise--by writing back into the rule the common law provisions on the use of admissions made during negotiations. The Senate agreed with these arguments by changing Rule 408 to its present form. [FN23] The Senate version was then accepted by the House. [FN24]

The admissibility of offers of compromise was covered in only two of the 19th Century codes; [FN25] the Field Code [FN26] incorporated the American common law rule and India Evidence Act codified the English version of

the rule. [FN27] Both the Model Code [FN28] and the Uniform Rules [FN29] of Evidence were based on the common law. Most of the states adopting the Uniform Rules made no change in the provision dealing with offers of compromise, [FN30] but California provided the model for Rule 408 by expanding the Uniform Rule to include statements made in compromise negotiations. [FN31] Many of the states adopting the Evidence Rules have adopted Rule 408 verbatim, [FN32] but others have drafted their own provision [FN33] or enacted Rule 408 of the Uniform Rules of Evidence, Second. [FN34]

FN1. Unchanged In accordance with a general change in the numbering system, the rule went from Rule 4-08 in the Preliminary Draft to Rule 408 in the Revised Draft. See Prop.F.R.Ev. 408, 1971, 51 F.R.D. 315, 353.

FN2. Preliminary Draft Prop.F.R.Ev. 4-08, 1969, 46 F.R.D. 161, 237-238: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a **criminal** investigation or prosecution."

FN3. Promulgated See Prop.F.R.Ev. 408, 1973, 56 F.R.D. 183, 226-227.

FN4. "Noncontroversial" 1 House Hearings, p. 190.

FN5. First draft Committee Print, H.R. 5463, June 28, 1974, 2 House Hearings at p. 155.

FN6. Agency attack See 2 House Hearings, p. 301 (letter from General Counsel of the Treasury), p. 311 (letter from General Counsel of the Equal Employment Opportunity Commission), p. 345 (Justice Department analysis of proposed bill).

FN7. Settlement negotiations See s 5307.

FN8. Difficult to say "Carrying the example of tax litigation further, it should be noted that settlement negotiations are undertaken at different levels and are so often interwoven with the investigative process (in the Internal Revenue Service) and the discovery process (in the federal courts) that one could anticipate considerable litigation is [sic] to what statements were submitted as part of the investigative or discovery procedures." 2 House Hearings, p. 345.

FN9. Taxpayer claim "Under this rule the trial of a **criminal** tax case could deteriorate into a series of motions, hearings, and rulings by the Court upon taxpayers (defendant) objection(s) that each document, statement or admission was submitted only in furtherance of compromise negotiations. * * * On the civil side there would be the threshold problem of defining the point where compromise negotiations begin. The second sentence of Rule 408 would undoubtedly have the undesirable effect of generating controversies as to whether statements of fact were 'made in compromise negotiations' or not. I can foresee the argument by taxpayers that any statements made by them to revenue agents during the course of an audit were for the purpose of compromising the agent's proposed adjustments to their reported tax liabilities. * * * The administrative consideration of the issues raised on audit of tax returns is so often partly investigative and partly settlement oriented that any privilege accorded to statements of fact made in compromise negotiations might well be a severe handicap to the later development of facts in litigation of tax cases." 2 House Hearings, p. 301.

FN10. Go after again "Factual information obtained during conciliation attempts is normally of type which would be subject to later discovery, and admissible, in connection with litigation following an unsuccessful conciliation process. At the very least, the Proposed Rule may be detrimental to the Commission's enforcement efforts by requiring it to initiate costly, duplicative and time consuming discovery proceedings to obtain information which it already has in its possession." 2 House Hearings, p. 311.

FN11. Deny without fear "But * * * public policy * * * would certainly be undermined by assuring taxpayers that, unless **criminal** intent can be shown, they have no responsibility for the accuracy of any factual representations they may make in the course of settlement negotiations with the Internal Revenue Service." 2 House Hearings, p. 302. "* * * [T]he proposed rule would encourage frivolous and misleading, if not outright false, representations in the settlement process." 2 House Hearings, p. 345.

FN12. Immunizing "Our objection to the Rule is that it * * * could also be interpreted as meaning the exclusion of pre-existing documents submitted in connection with settlement proceedings." 2 House Hearings, p. 345. "It may reasonably be anticipated that employers and unions charged with violations will withold as much information as possible from Commission investigators and then make it available during conciliation in an attempt to immunize themselves from the presentation of such information during litigation." 2 House Hearings, p. 311.

FN13. Amending Rule 408. See 2 House Hearings, p. 367.

FN14. Second sentence The amendment was as follows (new matter shown in italics, deleted material in strikeover): "Evidence of admissions of liability or opinions given during compromise negotiations is likewise not admissible." Ibid.

FN15. New sentence "Evidence of facts disclosed during compromise negotiations, however, is not inadmissible by virtue of having been first disclosed in those negotiations." Ibid.

FN16. No apparent purpose The initial clause was amended as follows (new matter in italics, deletions in strikeover): "This rule does not require exclusion when evidence of conduct or statements made in compromise negotiations is offered for another purpose, such as * * *." Ibid.

FN17. Endorsed House Report, p. 8: "Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until 'compromise negotiations' began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form."

FN18. Approved without debate 1974, 120 Cong.Rec. 2370.

FN19. Elicit admissions "I think maybe a crude but nevertheless true statement of the objective sought to be reached by the letters from those two departments, and by the Department of Justice, is simply that they want to use statements made by somebody trying to settle a dispute with the Government to make out a case against him if his efforts to settle the dispute fail." Senate Hearings, p. 49 (testimony of Professor Cleary, Reporter for the Advisory Committee).

FN20. Violation of statute Senate Hearings, p. 59.

FN21. Draftsmanship Senate Hearings, pp. 59-60.

FN22. "Hopeless confusion" Senate Hearings, p. 269.

FN23. Agreed with arguments Senate Report, p. 10: "This rule as reported makes evidence of settlement or attempted

settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible. "Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are expected from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible. "The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form. The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements--the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary. "Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations. "For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."

FN24. Accepted by House Conference Report, p. 6: "The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. "The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result. The Conference adopts the Senate amendment."

FN25. 19th Century codes See generally, vol. 21, s 5005.

FN26. Field Code N.Y.Comm. on Practice & Pleading, Code of Civil Procedure, 1850, s 1863: "An offer of compromise is not an admission that any thing is due; but admissions of particular facts, made in negotiation for a compromise, may be proved, unless otherwise agreed at the time."

FN27. English version India Evidence Act, 1972, s 23: "In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." See also, Stephen, Digest of the Law of Evidence, 1870, pp. 27-28.

FN28. Model Code Model Code of Evidence, Rule 309: "(1) Subject to Paragraphs (3) and (4) hereof, evidence that a person has paid or furnished money or any other thing or has offered or promised to do so on account of any loss or damage of any kind sustained or claimed to have been sustained, whether or not in compromise of a claim, is inadmissible as probative of any matter tending to establish his civil liability for the loss or damage or any part of it. "(2) Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing in satisfaction of a claim is inadmissible as tending to establish the invalidity of the claim or of any part of it. "(3) Evidence that a person has partially satisfied an asserted claim of another on demand of the other without questioning the validity of the claim is admissible as tending to prove the validity of the claim. "(4) Evidence of a debtor's promise to pay all or part of his preexisting debt is admissible as tending to prove the creation of a new duty on his part, or a

revival of his preexisting duty, to pay all or part of the debt." See also, Missouri Bar, Prop.Mo.Evid.Code s 9.03: "a. Evidence that a person has offered to pay or has paid money or has offered to give or has given anything of value or has performed or agreed to perform any act in compromise of any claim or cause of action asserted or lodged against him is inadmissible either as an admission or proof of any matter tending to establish his civil liability upon such claim or cause of action, and is inadmissible generally, except 1. when the fact of such offer of compromise or compromise is relevant to a controverted issue being tried, including, by way of example but not exclusively, when a compromise agreement itself is directly in issue between the parties, and when the amount paid in compromise is relevant to the amount of damages that may be recovered, or 2. when the fact of such offer of compromise or compromise affects either the credibility of a non-party witness or the weight to be given to his testimony, in which event such evidence may be used by way of impeachment on cross-examination by the adverse party or to rehabilitate the witness on redirect examination. "b. Nothing in this section contained shall be construed to exclude fact admissions or statements against interest made as a part of, or in connection with, an offer of compromise or a compromise agreement."

FN29. Uniform Rules U.R.E. 52: "Evidence that a person has, in compromise or from humanitarian motives furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claims to have sustained loss or damage, is inadmissible to prove his liability for the loss of damage or any part of it. This rule shall not affect the admissibility of evidence (a) of partial satisfaction of an asserted claim on demand without questioning its validity, [FNa] as tending to prove the validity of the claim, or (b) of a debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty." *In the official print this word is spelled "valadity." See N.C.C.U.S.L., Handbook, 1953, p. 192. U.R.E. 53: "Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act or service in satisfaction of a claim, is inadmissible to prove the invalidity of the claim or any part of it."

FN30. U.R.E. states Kan.Stats.Ann. ss 60-452, 60-453, and Utah R.Ev. 52, 53 are identical with the Uniform Rules, note 29, above. N.J.R.Ev. 52(1) is identical with U.R.E. 52. N.J.R.Ev. 52(2) reads: "Evidence that the defendant offered to plead guilty of a lesser offense or upon terms, is inadmissible against him in that **criminal** proceeding." N.J.R.Ev. 53: "Evidence that a person has in compromise accepted, or offered or promised to accept, a sum of money or any other thing, act, or service in satisfaction of a claim, is inadmissible to prove the invalidity of the claim or any part of it, but it is admissible to prove an accord and satisfaction or other material fact."

FN31. California Cal.Evid.Code s 1152: "(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it. (b) This section does not affect the admissibility of evidence of: (1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or (2) A debtor's payment or promise to pay all or a part of his pre-existing debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty." Cal.Evid.Code s 1154: "Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it."

FN32. Adopted verbatim See Ariz.R.Ev. 408; Mich.R.Ev. 408; Minn.R.Ev. 408; Mont.R.Ev. 408; Neb.Rev.Stats. s 27-408; Prop.Ohio R.Ev. 408; So.Dak.R.Ev. 408.

FN33. Drafted own

Alaska

Alaska R.Ev. 408: "Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule

does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a **criminal** investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement."

Florida

Fla.Evid.Code s 90.408: "Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."

Nevada

Nev.Rev.Stats. s 48.105 is substantially the same as the Advisory Committee's version of Rule 408, note 1, above: "1. Evidence of: (a) Furnishing or offering or promising to furnish; or (b) Accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. "2. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a **criminal** investigation or prosecution."

New Mexico

N.Mex.R.Ev. 408 was originally identical with the Advisory Committee's version of Rule 408, note 1, above. See, 1973, 84 N.Mex. xxxix. In 1976 it was amended to conform with the Congressional version of the rule. See, 1976, 88 N.Mex. 851.

North Dakota

No.Dak.R.Ev. 408: "Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. Exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations is not required. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, disproving a contention of undue delay, or proving an effort to obstruct a **criminal** investigation or prosecution."

Oklahoma

12 Okla.Stats.Ann. s 2408 is identical with F.R.Ev. 408 except for the following changes: the last clause of the first sentence reads "liability for the claim, invalidity of the claim or the amount of the claim."; the word "likewise" is omitted from the second sentence; the word "section" rather than "rule" is used in the last two sentences; the phrase "discoverable evidence" rather than "any evidence otherwise discoverable" appears in the third sentence; the word "revealed" rather than "presented" is used in the third sentence; the word "including" replaces the phrase "such as" in the fourth sentence; and the phrase "proof of" is used instead of "proving" in the fourth sentence.

Vermont

Prop.Vt.R.Ev. 408 is identical with U.R.E.2d 408, note 34 below, but adds the third sentence from F.R.Ev. 408.

Washington

Wash.R.Ev. 408 is identical with F.R.Ev. 408, except that it uses the word "negating" rather than "negativing" in the last sentence.

Wisconsin

Wis.Stats.Ann. s 904.08 is the same as the Advisory Committee's version of Rule 408, note 1, above, except that in the list of permissible uses in the last sentence the words "proving accord and satisfaction, novation or release" are added after the word "delay", and the words "compromise or" are inserted before "obstruct."

Wyoming

Wyo.R.Ev. 408 is identical with F.R.Ev. 408, except that the third sentence has been deleted.

FN34. U.R.E.2d See Ark.R.Ev. 408, Me.R.Ev. 408. U.R.E.2d 408 is a modification of the Advisory Committee's version of Rule 408 (additions shown in italics, deletions shown in strikeover): "Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, or invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a **criminal** investigation or prosecution." 1975, 13 U.L.A., p. 216.

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Rule 408. Compromise and Offers to Compromise

s 5301. STATUTORY HISTORY

FN17. Endorsed One court has cited and quoted this report as if it referred to Rule 408 as it was finally adopted. Eisenberg v. University of New Mexico, C.A.10th, 1991, 936 F.2d 1131, 1134.

FN30. U.R.E. states New Jersey and Utah have now adopted the Federal Rules of Evidence. See notes 32 and 33, below. N.J.R.Ev. 52 has now been interpreted to exclude statements made during compromise negotiations. Czuj v. Toresco Enterprises, 1989, 570 A.2d 1049, 239 N.J.Super. 123.

FN32. Adopted verbatim The following provisions are identical with Rule 408: Colo.R.Ev. 408; Mil. R.Ev. 408; Del.R.Ev. 408; Haw.R.Ev. 408; Iowa R.Ev. 408; Ky.R.Ev. 408; Miss.R.Ev. 408; Ohio R.Ev. 408; R.I.R.Ev. 408; Utah R.Ev. 408; W.Va.R.Ev. 408.

FN33. Drafted own

Idaho Ida.R.Ev. 408 is identical with U.R.E.2d 408, note 34 in the main volume, but inserts the third sentence of F.R.Ev. 408 concerning "otherwise discoverable" evidence presented during settlement negotiations.

Indiana Ind.R.Ev. 408 is identical with F.R.Ev. 408, except that it omits the sentence on "otherwise discoverable" evidence and adds this sentence at the end: "Compromise negotiations encompass alternative dispute resolution."

Maine Effective January 31, 1985, Me.R.Ev. 408 was amended to read: "(a) Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is also not admissible on any substantive issue in dispute between the parties. "(b) Evidence of conduct or statements by any party or mediator at a court-sponsored domestic relations session is not admissible for any purpose." The words "or in mediation" in the last sentence of Me.R.Ev. 408 were added, effective February 15, 1993. It has been suggested that the failure to include the third sentence in the original (dealing with permissible uses) may have been an oversight, though one that does not affect the meaning of the rule. Harriman v. Maddocks, Me.1986, 518 A.2d 1027, 1031.

Louisiana La.Evid.Code Art. 408(A) is identical with F.R.Ev. 408, except that the clause "in a civil case" is added at the beginning, "a valuable consideration" is replaced by "anything of value", "rule" is replaced by "Article" in two places, and "discoverable" is replaced by "admissible" in the second sentence. La.Evid.Code

Art. 408(B) reads: "This Article does not require the exclusion in a criminal case of evidence of the actions or statements described in Paragraph A, above, or of a giving or offer to give anything of value by the accused in direct or indirect restitution to a victim." La.Evid.Code, Art. 413: "Any amount paid in settlement or by tender shall not be admitted into evidence unless the failure to make a settlement or tender is an issue in the case."

Massachusetts Prop.Mass.R.Ev. 408 is identical with F.R.Ev. 408, except that the third sentence is deleted and in the first sentence after the phrase "prove liability for" is amended to read: "invalidity of, or amount of the claim or any other claim."

New Hampshire N.H.R.Ev. 408: "Evidence of (1) a settlement with or the giving of a release or covenant not to sue to or, (2) furnishing or offering or promising to furnish or accepting or offering or promising to accept, a valuable consideration in compromising a disputed claim with one or more persons liable in tort for the same injury to person or property or for the same wrongful death shall not be introduced in evidence in a subsequent trial of an action against any other tortfeasor to recover damages for the injury or wrongful death. Upon the return of a verdict, the court shall inquire of the attorneys for the parties the amount of the consideration paid for any settlement, release or covenant not to sue, and shall reduce the verdict by that amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. However, this rule does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for a purpose other than the proof of liability for or invalidity of the claim or its amount, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

New Jersey N.J.R.Ev. 408: "When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, including offers of compromise, shall not be admissible to prove liability for, or invalidity of, or amount of the claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations."

New York Prop.N.Y.Evid.Code, 1991, s 408: "Evidence of (a) furnishing or offering or promising to furnish, or (b) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove civil or criminal liability for, invalidity of, or the amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not, however, require the exclusion of evidence existing before the compromise negotiations merely because it is presented in the course of compromise negotiations. This section also does not require exclusion when the evidence is offered for another purpose, such as proving the bias or prejudice of a witness, controverting a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

North Carolina N.C.R.Ev. 408 is identical with F.R.Ev. 408, except that the words "evidence of" are added before the words "statement" in the second sentence.

Oregon Ore.R.Ev. 408: "Compromise and offers to compromise. (1)(a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. "(b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible. "(2)(a) Subsection (1) of this section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. "(b) Subsection (1) of this section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." The drafters of this provision say that it is based on the federal rule but has been restructured "for the sake of clarity." Commentary, Ore.R.Ev. 408.

Puerto Rico P.R.R.Ev. 22(B): "Evidence that a person has furnished or offered or promised to furnish or that a

person has accepted or offered or promised to accept money or any other thing in compromising a claim is not admissible to prove liability for or invalidity of the claim or part of it. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for other purposes."

Tennessee Tenn.R.Ev. 408 is identical with F.R.Ev. 408, except that it deletes the phrase "or promising" from 408(1) and (2), adds the phrase "whether in the present litigation or related litigation" after the word "claim" in the first sentence and adds "which claim" before "was disputed" and after that phrase adds "or was reasonably expected to be disputed", modifies "claim" by the phrase "a civil" and adds "or a criminal charge or its punishment" at the end of the first sentence. In the third sentence "actually obtained during discovery" replaces "otherwise discoverable." At the end of the last sentence, this is added: "however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations."

Texas Tex.R.Ev. 408 is identical with F.R.Ev. 408, except that in the last sentence the phrase "or interest" is inserted after "prejudice" and the phrase "or a party" is inserted after the word "witness." Tex.R.Cr.Ev. 408 is identical with Tex.R.Ev. 408. Blakely, Article IV: Relevancy and Its Limits, 1983, 20 Hous.L.Rev. 151, 221.

Vermont Vt.R.Ev. 408 has been amended by inserting the phrase "including mediation" after the word "negotiations" in the second sentence. Vt.R.Ev. 408 alters F.R.Ev. 408 is several respects. In the first sentence, "or" is replaced with a comma in three places, "its amount" is changed to "the amount of the claim" and the phrase "or any other claim" is added at the end. In the third sentence, "discoverable" is changed to "obtainable from independent sources." The description of Prop.Vt.R.Ev. 408 that appears in the main volume is inaccurate. The third sentence was not a copy of F.R.Ev. 408 but was an amendment in the same form that appears in the version of the Vermont rule as promulgated.

FPP s 5301 (R 408)

END OF DOCUMENT

UNITED STATES of America, Appellee,
v.
Maynard John VERDOORN et al., Appellants.

Nos. 75--1644, 75--1659 and 75--1665.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 12, 1975.

Decided Jan. 13, 1976.

Defendants were convicted in the United States District Court for the Northern District of Iowa, Edward J. McManus, Chief Judge, of conspiracy and possession of an interstate shipment of beef, and they appealed. The Court of Appeals, Stephenson, Circuit Judge, held, inter alia, that the evidence was sufficient to support one defendant's conviction of both possession and conspiracy; that severance of the prosecutions was properly denied; and that an instruction given with respect to the inference which might be drawn from the possession of recently stolen property was proper.

Affirmed.

[1] CONSPIRACY ⚿ 47(11)
91k47(11)
Evidence supported defendant's conviction of conspiracy and possession of stolen interstate shipment of beef. 18 U.S.C.A. §§ 371, 659, 2314, 2315, 4208(a)(2).

[1] RECEIVING STOLEN GOODS ⚿ 8(3)
324k8(3)
Evidence supported defendant's conviction of conspiracy and possession of stolen interstate shipment of beef. 18 U.S.C.A. §§ 371, 659, 2314, 2315, 4208(a)(2).

[2] INDICTMENT AND INFORMATION ⚿ 124(1)
210k124(1)
Joinder of multiple defendants in prosecution for conspiracy and possession of stolen interstate shipment of beef was proper where indictment charged and record disclosed that all defendants had participated in same act or transaction or in same series of acts or transactions constituting offense or offenses which constituted parts of common scheme or plan. 18 U.S.C.A. §§ 371, 659, 2314, 2315, 4208(a)(2); Fed.Rules Crim.Proc. rule 8(a, b), 18 U.S.C.A.

[3] CRIMINAL LAW ⚿ 622.5
110k622.5
Formerly 110k622(5)
Failure to renew pretrial motion for separate trial either at close of Government's case or at close of all evidence ordinarily constitutes waiver of severance claim.

[4] CRIMINAL LAW ⚿ 622.2(4)
110k622.2(4)
Formerly 110k622(2)
In absence of any showing of prejudice, trial court did not abuse its discretion in denying motion for separate trial of defendants jointly charged with conspiracy and possession of stolen interstate shipment of beef. 18 U.S.C.A. §§ 371, 659, 2314; Fed.Rules Crim.Proc. rule 8(a, b), 18 U.S.C.A.

[5] CRIMINAL LAW ⚿ 620(1)
110k620(1)
Formerly 110k618
In absence of showing of real prejudice to individual defendant, persons charged in conspiracy shall be tried together.

[5] CRIMINAL LAW ⚿ 622
110k622
In absence of showing of real prejudice to individual defendant, persons charged in conspiracy shall be tried together.

[6] CRIMINAL LAW ⚿ 394.6(4)
110k394.6(4)
Record did not support contention that evidence obtained from defendant's storm cellar should have been suppressed on grounds that defendant's spouse, who gave consent for search, was not advised of her constitutional rights nor permitted to talk to her attorney prior to search.

[7] CRIMINAL LAW ⚿ 747
110k747
Inconsistencies in government agent's testimony in multiple prosecution for conspiracy and possession of stolen interstate shipment of beef presented matter for jury to weigh in crediting testimony of witness,

and was not ground for mistrial. 18 U.S.C.A. §§ 371, 659, 2314.

[7] CRIMINAL LAW ⇐ 867
110k867
Inconsistencies in government agent's testimony in multiple prosecution for conspiracy and possession of stolen interstate shipment of beef presented matter for jury to weigh in crediting testimony of witness, and was not ground for mistrial. 18 U.S.C.A. §§ 371, 659, 2314.

[8] LARCENY ⇐ 77(1)
234k77(1)
Trial court, in prosecution for conspiracy and possession of stolen interstate shipment of beef, gave correct instruction concerning inference which may be drawn from possession of property recently stolen. 18 U.S.C.A. §§ 371, 659, 2314.

[9] WITNESSES ⇐ 366
410k366
Trial court properly permitted counsel to thoroughly cross-examine alleged coconspirator with respect to his guilty plea and his expectations as to leniency, in view of coconspirator's plea and testimony in behalf of Government. 18 U.S.C.A. § 371.

[10] CRIMINAL LAW ⇐ 408
110k408
Defendants were properly prevented from introducing evidence as to plea bargaining despite their contention that such evidence would tend to show lengths to which Government went in attempting to obtain vital testimony to prosecute its case. Fed.Rules Crim.Proc. rule 11(e), (e)(6), 18 U.S.C.A.; Federal Rules of Evidence, rule 408, 28 U.S.C.A.

[11] CRIMINAL LAW ⇐ 778(5)
110k778(5)
In prosecution for conspiracy and possession of stolen interstate shipment of beef, instruction with respect to inference which may be drawn from possession of property recently stolen was not improper on ground that it did not properly apprise theory of defendant's presumption of innocence and his right not to testify or present evidence, thereby shifting burden of proof from government to defendant. 18 U.S.C.A. §§ 371, 659, 2314.

***104** Donald W. Sylvester, Sioux City, Iowa, for Maynard John and David verdoorn.

P. D. Furlong, Sioux City, Iowa, for Van Maanen.

Gary E. Wenell, U.S. Asst. Atty., Sioux City, Iowa, for appellee.

Before GIBSON, Chief Judge, and STEPHENSON and WEBSTER, Circuit Judges.

STEPHENSON, Circuit Judge.

These appeals are taken from jury convictions of three appellants who were charged in Count I with conspiracy (18 U.S.C. s 371) and in Count II with possession (18 U.S.C. s 659) arising out of the theft and possession of an interstate shipment of beef. In addition, the two Verdoorn appellants were charged in Count III with transporting a stolen semi-trailer in interstate commerce (18 U.S.C. s 2314) and in Count IV with receiving and concealing beef knowingly stolen while moving in interstate commerce (18 U.S.C. s 2315).[FN1] The district court[FN2] imposed concurrent sentences under Title 18, U.S.C. s 4208(a)(2), as follows: Albert Leon Van Maanen, three years; Maynard John Verdoorn, five ***105** years; and David Verdoorn, four years. The appeals raise numerous pretrial and trial errors which will be considered seriatim. We affirm the convictions.

FN1. A fourth defendant, Eugene Heck, was convicted on Count V, charging possession of stolen beef from the same shipment, but did not appeal. Co-conspirator LeRoy Miller pled guilty to a possession count the first day of the trial and testified in behalf of the prosecution.

FN2. The Honorable Edward J. McManus, Chief Judge, Northern District of Iowa, presiding.

In summary, the evidence favorable to the government discloses that appellants David Verdoorn and Maynard John Verdoorn (referred to in the record as John or Maynard) and co-conspirator LeRoy Miller on January 19, 1975, went to a truck terminal in the Council Bluffs, Iowa, area and stole a semi-trailer load of 232 beef quarters originating in Grand Island, Nebraska, and to be delivered to Buffalo, New York. They transported the stolen tractor and trailer loaded with

beef to the Sioux City, Iowa, area. Thereafter, a portion of the stolen beef was delivered to co-defendant Eugene Heck, who owned and operated a retail meat store; a portion was stored on a farm owned by appellant Van Maanen; and the remaining part of the load was transferred onto another trailer and stored at a truck stop parking lot in North Sioux City, South Dakota. On January 28, 1975, all three appellants and co-conspirator LeRoy Miller loaded a portion of the meat from a storm cellar on appellant Van Maanen's farm onto a truck for the purpose of transporting it to a prospective buyer. After leaving the farm with the meat, appellant Maynard Verdoorn was arrested, and about the same time appellant Van Maanen and co-conspirator Miller were also arrested. Appellant David Verdoorn was arrested a couple of days later.

Appellant Van Maanen in his testimony denied any knowledge concerning the theft of the meat or the storage of the stolen meat on his farm. Appellant David Verdoorn denied any knowledge or participation in the theft or possession of the meat in question. Appellant Maynard Verdoorn did not testify. Both Verdoorns called witnesses for the purpose of establishing alibi defenses with respect to various events described by government witnesses. In this appeal only appellant Van Maanen attacks the sufficiency of the evidence to support his conviction.

[1] Van Maanen's contention that the court erred in not sustaining his motion for judgment of acquittal because there was insufficient evidence to support his conviction on either the conspiracy or possession count merits little discussion. We, of course, in reviewing the record, must view the evidence in the light most favorable to the jury's verdict and accept as established all reasonable inferences therefrom which support the verdict. United States v. Baumgarten, 517 F.2d 1020, 1026--27 (8th Cir. 1975).

The government's evidence, direct and circumstantial, as to the existence of the conspiracy in this case was strong. 'Moreover, once the government has established the existence of a conspiracy, even slight evidence connecting a particular defendant to the conspiracy may be substantial and therefore sufficient proof of the defendant's involvement in the scheme.' United States v. Overshon, 494 F.2d 894, 896 (8th Cir. 1974). Here the testimony of co-conspirator LeRoy Miller alone was sufficient to establish appellant Van Maanen's participation in both the conspiracy and the substantive charge of knowingly having in his possession on his farm the meat which he knew had been stolen. Miller's credibility was for the jury. In addition, his testimony was corroborated by other evidence in the case.

Van Maanen urges that the trial court erred in denying his motion for severance and separate trial made prior to trial. The motion to sever, in substance, claimed that two of the defendants had prior convictions for similar offenses and this would deprive him of a fair and impartial trial; that evidence might be introduced which was inadmissible as to him; and that there was a misjoinder of defendants and offenses in the indictment.

[2] The misjoinder allegation is devoid of merit. The indictment charged and the record discloses that all of the defendants had 'participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses' which constituted ***106** 'parts of a common scheme or plan' in conformity with Fed.R.Crim.P. 8(a) and (b). Scruggs v. United States, 450 F.2d 359, 363 (8th Cir. 1971).

[3][4][5] Appellant Van Maanen did not renew his pretrial motion for a separate trial either at the close of the government's case or at the close of all the evidence. Such failure ordinarily constitutes a waiver of the severance claim. United States v. West, 517 F.2d 483, 484 (8th Cir. 1975); United States v. Porter, 441 F.2d 1204, 1212 (8th Cir. 1971). In any event, we are satisfied that the trial court did not abuse its discretion in denying the motion for a separate trial. United States v. Scott, 511 F.2d 15 (8th Cir. 1975). In the absence of a showing of real prejudice to an individual defendant, persons charged in a conspiracy shall be tried together. United States v. Hutchinson, 488 F.2d 484, 492 (8th Cir. 1973). Here there was no such showing of prejudice.

[6] Appellant Van Maanen claims the court erred in denying his motion to suppress the evidence obtained from the storm cellar for the reason that his spouse, who gave the consent for the search, was not advised of her constitutional rights nor permitted

to talk to her attorney prior to the search. The record fails to support this claim.

Special Agent Oxler testified that during the early morning hours of January 29, 1975, he conversed with Mrs. Van Maanen at the Van Maanen farm and that he informed her of her constitutional rights that 'she had a right to refuse at any time, to prevent us from going on her property.' She refused to sign a form with respect thereto without consulting her attorney but said 'she would have no objection whatsoever to us looking at the outbuildings located on their farm.' In fact, Mrs. Van Maanen herself testified, 'I said, 'Feel free to search the house, the out of doors, whatever pleases. I have nothing to hide. " She admitted furnishing the agent with a flashlight because the batteries in his flashlight were out, and she also turned the outside lights on. She recalled that 'he (the agent) said the main thing they were interested in was the cave and I told him to go ahead and look.' Her authority to consent to the search is not contested. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). The trial court properly denied the motion to suppress.

[7] All of the appellants urge that the trial court erred in denying their motion for mistrial based on alleged inconsistent statements made by Special Agent O'Kuniewicz. Appellants' complaint is that at trial the special agent identified David Verdoorn as being in the area of the Van Maanen farm, whereas in the preliminary hearing he testified he could not identify and individual in 'that area' that night. The government argues that the testimony was not actually inconsistent because the 'area' involved was not defined. The matter does not merit further discussion. Assuming there was some inconsistency in the testimony, this is a matter for the jury to weigh in crediting the testimony of the witness. The motion for mistrial is devoid of merit.

[8] Appellants David Verdoorn and Maynard Verdoorn assert trial court error in giving Instruction 15A with respect to the inference which may be drawn from possession of property recently stolen. The instruction follows the suggested instruction set out in I E. Devitt & C. Blackmar, Federal Jury Practice and Instructions s 13.11 (2d ed. 1970, Supp.1974). The instruction cautions that 'recently' is a relative term; the longer the period of time since the theft, the more doubtful becomes the inference. It reminds the jury that, in the exercise of constitutional rights, the accused need not take the stand and testify. There may be opportunities to explain possession by showing other facts and circumstances, independent of the testimony of the defendant. It cautions, 'You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.'

***107** The instruction is similar to that approved by the Supreme Court in Barnes v. United States, 412 U.S. 837, 840 n. 3, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); United States v. Neville, 516 F.2d 1302 (8th Cir. 1975); United States v. Garofalo, 496 F.2d 510 (8th Cir. 1974); United States v. Tucker, 486 F.2d 1040 (8th Cir. 1973). We are satisfied the proper instruction was given in this case.

[9][10] Appellants David Verdoorn and Maynard Verdoorn claim the trial court erred in refusing to admit evidence with respect to plea bargaining by representatives of the government with each of the defendants. It should first be noted that this contention is not made with respect to co-conspirator Miller. The trial court properly permitted counsel to thoroughly cross-examine Miller with respect to his guilty plea and his expectations as to leniency in view of his plea and testimony in behalf of the government. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974). Appellants contend they should have been permitted to show that all defendants were offered possible reduced counts and/or lighter sentences in exchange for their testimony. Appellants theorize that this evidence would challenge the credibility of the government's entire case, i.e., disclose the lengths to which the government went in attempting to obtain vital testimony to prosecute its case, and thus this evidence should have been admitted. We disagree.

Plea bargaining is sanctioned by recent amendments to the Federal Rules of Criminal Procedure. See Fed.R.Crim.P. 11(e) (effective December 1, 1975). Further, Fed.R.Crim.P. 11(e)(6) (effective August 1, 1975) provides for the general inadmissibility of offers to plea and related statements in connection therewith. Under the rationale of Fed.R.Evid. 408, which relates to the general inadmissibility of compromises and offers to

compromise, government proposals concerning pleas should be excludable.

Plea bargaining has been recognized as an essential component of the administration of justice. 'Properly administered, it is to be encouraged.' Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). If such a policy is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence.

[11] Finally, appellant Maynard Verdoorn, who exercised his right not to testify, contends that Instruction 15A, with reference to the inference which may be drawn from possession of property recently stolen, did not properly apprise the jury of his presumption of innocence and his right not to testify or present evidence and consequently shifted the burden of proof from the government to appellant. We have already discussed the propriety of this instruction. The jury was fully informed that defendant need not testify or produce any evidence. In another instruction (Instruction 4) the court gave the standard instruction on the presumption of innocence accorded a defendant and the burden resting on the government to establish guilt beyond a reasonable doubt. No further instructions were requested by appellant. Appellant's contention is without merit.

We are satisfied that each of the defendants received a fair trial, no error of law appears, and the verdicts of guilt are amply supported by the evidence.

Affirmed.

END OF DOCUMENT

INSTA-CITE

CITATION: 528 F.2d 103
=> 1 **U. S. v. Verdoorn,** 528 F.2d 103, 1 Fed. R. Evid. Serv. 1093
(8th Cir.(Iowa), Jan 13, 1976) (NO. 75-1644, 75-1659, 75-1665)

ERIC JASO LEGAL RESEARCH

-Rule 608: EXTRINSIC IMPEACHMENT EVIDENCE

ATTORNEY WORK PRODUCT

Rule 608 - Extrinsic impeachment evid.

From: Rod Rosenstein
To: LJAHN, EJASO, SBATES, JBENNETT, RJAHN
Date: 3/13/96 6:47pm
Subject: Draft Memo re Employment Records

Can we give it a little more of an advocate's tone? Judge Howard always errs in favor of allowing liberal action by the defense. If we tell him he has broad discretion to let them do something, they'll do it; so there's no point in filing anything.

E.g.: Let's give some reasons why it's a bad idea to have a mini-trial on each witness, apart from just time-consuming: distracting the jury; intimidating other witnesses who learn they will be open to attack on anything in their entire lives, etc.

From: Ray Jahn
To: EJASO, JBENNETT, LJAHN, SBATES, RROSENST
Date: 3/13/96 6:52pm
Subject: Draft Memo re Employment Records -Reply

>>>>>>>>>>>>>>>
Can we give it a little more of an advocate's tone? Judge Howard always errs in favor of allowing liberal action by the defense. If we tell him he has broad discretion to let them do something, they'll do it; so there's no point in filing anything.

E.g.: Let's give some reasons why it's a bad idea to have a mini-trial on each witness, apart from just time-consuming: distracting the jury; intimidating other witnesses who learn they will be open to attack on anything in their entire lives, etc.
<<<<<<<<<<<<<<<
hit the rules of evidence hard, that the only proper impeachment is prior convictions or some limited specific acts of misconduct but theyt may only be inquired of on cross and cannot be proven by extrinsic evicence remeber we may want to get in susans employment records. the big thing is to prevent the cross examination of hale for every fly speck on the wall. for instance steqlling the widdres money as so eloquently described by brother sutton in opening statemnt.

UNITED STATES of America, Appellee,
v.
Nancy Irene MARTZ, a/k/a Nancy Lebo, Appellant.

No. 91-3205.

United States Court of Appeals, Eighth Circuit.

Submitted Feb. 12, 1992.

Decided May 18, 1992.
Rehearing and Rehearing En Banc Denied July 8, 1992.

Defendant was convicted of distributing LSD by the United States District Court for the Northern District of Iowa, David R. Hansen, J., and she appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) defendant was bound by government witness' answer, and could not introduce extrinsic evidence of witness' plea bargaining with government in unrelated case, and (2) district court judge could calculate total weight of LSD involved in defendant's offense by extrapolating weight of lightest known unit across dosage units.

Affirmed.

Heaney, Senior Circuit Judge, dissented and filed opinion.

[1] WITNESSES ⇐ 344(1)
410k344(1)
District court has discretion to allow questioning during cross-examination on specific bad acts of witness not resulting in felony conviction, if those acts concern witness' credibility; however, district court may not use extrinsic evidence to prove that specific bad acts occurred. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 344(1)
410k344(1)
Purpose of barring extrinsic evidence of witness' prior bad acts is to avoid holding mini-trials on peripherally related or irrelevant matters. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 331.5
410k331.5
Formerly 410k3311/2
Introduction of extrinsic evidence to attack credibility, to extent it is ever permitted, is subject to discretion of trial judge. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[4] WITNESSES ⇐ 352
410k352
While documents may be admissible on cross-examination to prove material fact or bias, they are not admissible merely to show witness' general character for truthfulness or untruthfulness. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[5] WITNESSES ⇐ 330(1)
410k330(1)
Defendant was bound by government witness' answer on cross-examination denying that he had ever plea bargained with government in past, and could not, in attempt to impeach witness' credibility, introduce extrinsic evidence of prior plea bargaining in form of plea document. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[6] DRUGS AND NARCOTICS ⇐ 133
138k133
In computing total weight of LSD involved in defendant's drug distribution offenses, for purpose of computing defendant's base offense level under Federal Sentencing Guidelines, district court properly included weight of drug-laced blotter paper. U.S.S.G § 2D1.1, 18 U.S.C.A.App.

[7] DRUGS AND NARCOTICS ⇐ 133
138k133
In computing total weight of the 33,800 dosage units possessed by narcotics defendant, sentencing court did not have to apply weights listed in Typical Weight Per Unit Table, but could extrapolate weight of lightest known unit across dosage units for purpose of arriving at total weight under the Federal Sentencing Guidelines. U.S.S.G. § 2D1.1, 18 U.S.C.A.App.

***787** Lorraine K. Ingels, Cedar Rapids, Iowa, argued (Gary L. Robinson, on brief), for appellant.

Rodger E. Overholser, Cedar Rapids, Iowa, argued (Patrick J. Reinert, on brief), for appellee.

***788** Before MAGILL, Circuit Judge, HEANEY, Senior Circuit Judge, and LARSON, [FN*] Senior District Judge.

FN* THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

MAGILL, Circuit Judge.

Nancy Irene Martz appeals her conviction and sentence for distributing LSD. Martz alleges the district court [FN1] erred in refusing to allow her to admit a California court document into evidence to impeach a key government witness. Martz also contests the district court's sentence, claiming the computation of the amount of LSD involved was erroneous. We affirm.

FN1. The Honorable David R. Hansen was a United States District Judge for the Northern District of Iowa at the time judgment was entered. He was appointed to the United States Court of Appeals for the Eighth Circuit on November 18, 1991.

I.

Postal inspectors executed a search warrant on June 26, 1990, and opened a first-class letter addressed to Paul Richard Smith in Charles City, Iowa. The letter, mailed from Oakland, California, contained 500 dosage units of LSD on blotter paper. Smith was arrested and agreed to cooperate in the ongoing investigation. Smith, acting with federal authorities in Iowa, twice wrote to Martz in Oakland requesting to purchase LSD. On both occasions, Smith received the requested LSD blotter sheets in return.

Martz was arrested and charged with three counts of distributing LSD, three counts of using the United States mails to distribute LSD, and one count of conspiracy to distribute LSD. A jury convicted Martz on all counts. The district court attributed 187.9 grams of LSD to Martz for an offense level of 36. The court found that Martz was the manager of a criminal enterprise involving more than five persons and increased Martz' offense level by three to 39. The judge also denied a two-level reduction for acceptance of responsibility. This put the total offense level at 39. With a criminal history in category I, Martz had a sentencing range of 262 to 327 months. The district court sentenced her to 288 months in prison and five years of supervised release.

A. Impeachment of Smith

During Smith's testimony, Martz' attorney cross-examined Smith about the plea agreement Smith had reached with federal prosecutors. Martz also sought to introduce evidence of two prior guilty pleas Smith had entered in California and Utah. [FN2] Martz contended the documents would show Smith's knowledge of how cooperating with authorities could aid Smith in his own criminal case.

FN2. The two documents included the certified record of an unrelated 1987 criminal case from California. In that case, Smith pleaded guilty to two drug possession misdemeanors while two felony drug charges were dismissed. The other document laid out Smith's guilty plea to a Utah felony which resulted in other related charges being dropped.

The district court allowed questioning about the prior pleas to the extent they demonstrated Smith's knowledge of the benefits of plea agreements and his concomitant incentive to aid prosecutors. Smith admitted in testimony that he had been charged with drug crimes in California, but he denied that he received a reduction in charges. Smith testified outside the jury's presence that he never entered a plea agreement in California, but merely pleaded guilty to two misdemeanors. The district court sustained the government's objection to the introduction of the California plea document. The court found that since the California plea required no cooperation or testimony from Smith, it gave Smith no incentive to cooperate with prosecutors and had no bearing on Smith's potential bias or prejudice. Therefore, the California document was excluded under Rule 608(b) of the Federal Rules of Evidence, which precludes the use of extrinsic evidence to prove specific instances of conduct to attack the witness' credibility. On appeal, Martz asserts the district court erred in refusing to allow introduction of the California document to impeach Smith.

[1][2][3] ***789** Rule 608(b) gives the court discretion to allow questioning during cross-

examination on specific bad acts not resulting in the conviction for a felony if those acts concern the witness' credibility. United States v. Hastings, 577 F.2d 38, 40-41 (8th Cir.1978). The rule, however, forbids the use of extrinsic evidence to prove that the specific bad acts occurred. Fed.R.Evid. 608(b). The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters. Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir.1980) (citing 3A Wigmore on Evidence, § 979 at 826-27 (Chadbourn rev. ed. 1970)). The introduction of extrinsic evidence to attack credibility, to the extent it is ever admissible, is subject to the discretion of the trial judge. United States v. Capozzi, 883 F.2d 608, 615 (8th Cir.1989), cert. denied, 495 U.S. 918, 110 S.Ct. 1947, 109 L.Ed.2d 310 (1990).

[4][5] The district court allowed Martz to cross-examine Smith about prior guilty pleas he had made and whether he had come to realize the benefits of cutting deals with prosecutors in the past. But in conducting this questioning, Martz was required to "take his answer." Capozzi, 883 F.2d at 615; McCormick on Evidence § 42 at 92 (3d ed. 1984). While documents may be admissible on cross-examination to prove a material fact, United States v. Opager, 589 F.2d 799, 801-02 (5th Cir.1979), or bias, United States v. James, 609 F.2d 36, 46 (2d Cir.1979), cert. denied, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980), they are not admissible under Rule 608(b) merely to show a witness' general character for truthfulness or untruthfulness. United States v. Whitehead, 618 F.2d 523, 529 (4th Cir.1980); James, 609 F.2d at 46. The credibility determination pertinent to the Martz trial concerned whether Smith would lie in his testimony against Martz to receive favorable treatment from prosecutors. The issue was not whether Smith, in fact, received a reduced sentence in California for pleading guilty to two misdemeanors, or whether the charges were merely dropped by prosecutors on account of lack of evidence, crowded court dockets, or other unrelated reasons. Martz' attorney argued to the district court that "a sufficient record has been made at least to establish a question for the jury at least as to whether or not a plea bargain was entered into and whether or not the defendant received the benefit of the bargain." Tr. at 192. This argument represents exactly the type of mini-trial over a collateral matter that Rule 608(b) forbids.

Martz relies on Carter, 617 F.2d 961, for the proposition that documents admitted as evidence during cross-examination of the witness do not violate Rule 608(b). Carter 's holding was much narrower. In Carter, [FN3] the Third Circuit admitted the letter in question only after the witness admitted its authenticity. The court specifically held that extrinsic evidence could not be admitted after a witness denied a charge.

> FN3. In Carter, a prison inmate sued prison officials in a § 1983 action stemming from an alleged beating. On cross-examination of the plaintiff, defense attorneys introduced a letter written by the plaintiff they allege outlined a scheme to encourage inmates to file false brutality charges against prison officials. Carter, 617 F.2d at 964-65.

> [I]f refutation of the witness's denial were permitted through extrinsic evidence, these collateral matters would assume a prominence at trial out of proportion to their significance. In such cases, then, extrinsic evidence may not be used to refute the denial, even if this evidence might be obtained from the very witness sought to be impeached.

Carter, 617 F.2d at 970. Therefore, the district court did not abuse its discretion in refusing to admit the California plea document into evidence.

B. Sentence

Martz contests her sentence based on the district court's computation of the total weight of the LSD involved. Martz contends the district court should have compiled the total weight by using the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. Utilizing this table, Martz argues, would have resulted in an offense level of 28 rather than 36.

[6] The district court attributed 33,800 dosage units of LSD to Martz and that figure is not contested on this appeal. In ***790** computing the total weight, the district court correctly included the weight of the drug-laced blotter paper. Chapman v. United States, --- U.S. ----, 111 S.Ct. 1919, 1922, 114 L.Ed.2d 524 (1991); United States v. Bishop, 894 F.2d 981, 985 (8th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 106, 112 L.Ed.2d 77 (1990). The court, however, noted that blotters that were tested

contained varying weights, ranging from .00692 grams per dose to .0055 grams per dose. The actual weight of only 1800 of the dosage units was known. Applying the rule of lenity, the district court attributed the lightest known weight to all dosage units and arrived at a total of 185.9 grams (33,800 doses times .0055 grams). The court added to that figure two liquid grams of LSD that were not applied to blotter paper but were attributed to Martz. [FN4] The resulting total was 187.9 grams.

> FN4. The district court rejected the government's argument that blotter paper weight should be added to the two grams of liquid LSD merely because Martz' pattern was always to sell LSD on blotter paper.

[7] Martz argues that the district court should have applied the weight listed in the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. This table reveals a per-unit weight for LSD of .05 milligrams and would result in a total weight of 1.69 grams for the 33,800 doses. Adding in the two grams of liquid LSD and the 11 grams of LSD listed in the indictment would total 14.69 grams of LSD. This computation would have given Martz a base offense level of 28.

The district court's determination that extrapolating the lightest-known unit across the dosage units is a more reliable estimate than using the Typical Weight Per Unit Table was not erroneous. Application note 11 to U.S.S.G. § 2D1.1, itself, notes its inaccuracy and cautions that it should only be used when a more reliable estimate of weight is unavailable.

> If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance.... Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

The note provides further that the table does not include the weight of the carrying mechanism.

> For controlled substances marked with an asterisk [including LSD], the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

U.S.S.G. § 2D1.1 & comment. (n.11). Since all of these doses were on blotter paper, the weight of the blotter paper and the LSD obviously provides a more reliable estimate than the naked drug itself.

In Bishop, 894 F.2d at 987, we upheld the estimate of a total amount of LSD based on the district court's extrapolating the lightest known weight over the total number of dosage units, including those that were unrecovered. Martz attempts to distinguish Bishop by arguing that the sample of blotter paper tested in her case did not constitute a representative sample. Unlike Bishop, the blotter paper in this case did not come from the same source at the same time. Nevertheless, the district court found that there was adequate case-specific information to estimate the total weight by extrapolating the lightest known weight over all the doses.

Random testing of drugs may be sufficient for sentencing purposes. United States v. Johnson, 944 F.2d 396, 404-05 (8th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991). In Johnson, this court refused to adopt the requirement that a representative sample of drugs from each independent source be tested. See also United States v. Follett, 905 F.2d 195, 196-97 (8th Cir.1990) (estimate of drug weight permissible in plea agreement although no LSD blotters were ***791** recovered and weighed), cert. denied, --- U.S. ----, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991).

While there may arise situations where a sample is too small or too arbitrary to extrapolate fairly over a large number of dosage units that come from disparate sources, this is not such a case. First, all of the dosage units came from Martz. Martz' bare assertion that some of the blotter sheets may have been prepared by someone else is not enough to discredit the finding that the dosage units all were distributed by Martz, consisted of LSD-laced blotter paper, and were similar in appearance. Second, in order to reduce her offense level even one step to 34, Martz would have to show that the average weight of the dosage units weighed about half of the lightest known dosage unit (.0029 compared to .0055). See U.S.S.G. § 2D1.1(c). The evidence does not show that such a wide variance is possible since the known weights were clustered at . 0055 to .00692. Moreover, a cursory review of LSD blotter

weights from other cases reveals that .0055 rests at the bottom of the logical range. Compare United States v. Marshall, 908 F.2d 1312, 1316 (7th Cir.1990) (en banc) (per-dose weights of .0057 grams and .00964 grams), aff'd sub nom. Chapman v. United States, --- U.S. ----, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); United States v. Bishop, 704 F.Supp. 910 (N.D.Iowa 1989) (per-dose weight of .0075 grams), aff'd, 894 F.2d 981 (8th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 106, 112 L.Ed.2d 77 (1990); United States v. Andress, 943 F.2d 622 (6th Cir.1991) (per-dose weight of .0065 grams), cert. denied, --- U.S. ----, 112 S.Ct. 1192, 117 L.Ed.2d 433 (1992); United States v. Leazenby, 937 F.2d 496 (10th Cir.1991) (per-dose weight of .0060 grams); United States v. Larsen, 904 F.2d 562 (10th Cir.1990) (per-dose weight of .0061 grams), cert. denied, --- U.S. ----, 111 S.Ct. 2800, 115 L.Ed.2d 973 (1991); United States v. Elrod, 898 F.2d 60 (6th Cir.) (per-dose weight of .0055 grams), cert. denied, --- U.S. ----, 111 S.Ct. 104, 112 L.Ed.2d 74 (1990); United States v. Rose, 881 F.2d 386 (7th Cir.1989) (per-dose weight of .0154 grams); United States v. DiMeo, 753 F.Supp. 23 (D.Me.1990) (per-dose weight of .0069 grams), aff'd without opinion, 946 F.2d 880 (1st Cir.1991). Therefore, we find that the district court did not err in determining that extrapolating the lightest known weight over all the dosage units was a more reliable estimate than using the bare drug weight found in the table.

II.

We find that the district court did not abuse its discretion in refusing to admit extrinsic evidence to impugn a witness' credibility. Further, we find that the district court properly calculated Martz' sentence. The decision below, therefore, is affirmed.

HEANEY, Senior Circuit Judge, dissenting.

In my view, Nancy Martz should have been permitted to introduce into evidence two documents which established that the government informant was lying when he testified that he had not entered into plea agreements in state courts in California and Utah. With respect to drug related offenses in those states, the exhibits were not offered to prove that Smith had prior drug convictions, but rather to attack his credibility. Smith's credibility was crucial--his testimony was essential to Martz's conviction. The admission of these documents could have been accomplished quickly, and it would not have given rise to a mini-trial.

Although the Carter case well supports Martz's position, the majority distinguishes Carter on the grounds that the document in that case was admitted only after the witness admitted its authenticity. Here, however, the trial court did not ever question Smith as to the authenticity of the plea agreement. If faced with questioning about the previous plea agreements, Smith may well have backed off his previous statements, and his credibility would have been damaged.

I also believe that the majority errs in affirming the sentence. This court, over ***792** my dissent, recently held en banc that we must follow policy statements and commentary to bring about consistency in sentencing. United States v. Kelley, 956 F.2d 748, 756 (8th Cir.1992) (en banc). One would think that we would be bound by that decision where the policy statement or commentary requires a shorter sentence as well as where it requires a longer sentence.

But, apparently this is not to be the case even though the application note here is clear and precise: "If the number of doses ... but not the weight of the controlled substance is known, multiply the number of doses ... by the typical weight per dose in the table below to estimate the total weight of the controlled substance." U.S.S.G. § 2D1.1 (Application Note 11). The weight of each dose was not known; thus, the table had to be used.

Unlike the majority, I do not believe extrapolation would be proper in this case. Unlike the situation in Bishop, the blotter paper here did not come from the same source at the same time. United States v. Bishop, 894 F.2d 981, 987 (8th Cir.1990). Moreover, the amount of blotter paper weighed was a small fraction (approximately five percent) of the total amount attributed to Martz. Under these circumstances, the district court did not have enough "case-specific information" from which to make a "more reliable estimate of the total weight." U.S.S.G. § 2D1.1 (Application Note 11). Compare United States v. Shabazz, 933 F.2d 1029, 1034 (D.C.Cir.1991) (use of table in Note 11 not required where defendant conceded estimated weight

of dilaudid pills was accurate, and where estimated weight was supported by data from Physicians Desk Reference, the manufacturer, and the DEA).

The majority opinion buttresses the district court's findings by favorably comparing the district court's calculation of the average weight per dose of the dosage unit (.0055 grams) to LSD blotter weights set forth in reported cases from other circuits. See ante at 791. Although the majority's review is interesting, I do not see how findings of fact from other cases can constitute "case-specific" evidence to support the district court's findings of fact in this case.

The majority also reports that a wide variance in blotter paper weights would not be possible in this case "because the known weights were clustered at .0055 to .00692." See ante at 791. With all due respect, I think this reasoning is circular: because only three samples were taken, there is no way to know whether there was a wide variance between blotter paper weights, yet the limited sample is used as proof that there was not a wide variance in weights. Moreover, there was a wide variance between even the three samples--the heaviest sample was almost twenty-five percent heavier than the lightest sample.

While it would have taken a short time to accurately determine the weight per dose, the government did not make this effort. Thus, the court was obligated to follow the table.

END OF DOCUMENT

INSTA-CITE

CITATION: 964 F.2d 787

Direct History

=> 1 **U.S. v. Martz,** 964 F.2d 787, 35 Fed. R. Evid. Serv. 962 (8th Cir.(Iowa), May 18, 1992) (NO. 91-3205), rehearing denied (Jul 08, 1992)
Certiorari Denied by
2 Martz v. U.S., 506 U.S. 1038, 113 S.Ct. 823, 121 L.Ed.2d 694, 61 USLW 3435 (U.S.Iowa, Dec 14, 1992) (NO. 92-6315)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
28A C.J.S. Drugs and Narcotics Sec.277 Note 70

GORDON et al.
v.
UNITED STATES.

No. 182.

Supreme Court of the United States

Argued Dec. 17, 18, 1952.

Decided Feb. 2, 1953.

Defendants were convicted in the District Court for the Northern District of Illinois, Eastern Division, of unlawful possession of goods stolen while in interstate commerce and of further transporting such goods in interstate commerce, and they appealed. The Court of Appeals, 196 F.2d 886, affirmed, and certiorari was granted by the Supreme Court on limited questions concerning production and admission of documentary evidence tending to impeach the testimony of a prosecution witness. The Supreme Court, Mr. Justice Jackson, held that where defendants' accomplice, who gave implicating testimony, admitted on cross-examination that between time of his apprehension and final implicating statement to Government, he had made several statements not implicating defendants, when foundation was laid and it was shown that specific statements were in Government's possession, and no privilege was asserted, denial of defendants' motion to produce such statements for inspection was error.

Judgment reversed.

[1] WITNESSES ⚿ 319
410k319
Where the Government's case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness' credibility is subject to close scrutiny.

[2] CRIMINAL LAW ⚿ 627.6(2)
110k627.6(2)
Formerly 110k6271/2
In the absence of specific legislation, the question whether a document should be ordered to be produced for inspection is governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.

[3] CRIMINAL LAW ⚿ 627.7(3)
110k627.7(3)
Formerly 110k6271/2
Where defendants' accomplice, who gave testimony against them, admitted on cross-examination that between time of his apprehension and final implicating statement to Government, he had made statements not implicating defendants, when foundation was laid and it was shown that specific statements were in Government's possession, and no privilege was asserted by Government, denial of defendants' motion to produce such statements for inspection was error even though it might subsequently have been disclosed that matter contained in statements was not admissible in evidence.

[4] CRIMINAL LAW ⚿ 627.6(2)
110k627.6(2)
Formerly 110k6271/2
For purposes of a motion to produce documentary evidence for inspection, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule, and it is not sufficient basis for denial of motion, that trial judge might have, in exercise of his discretion, excluded the evidence without thereby committing reversible error, since the question on application for order to produce is one of admissibility under the traditional canons of evidence.

[5] WITNESSES ⚿ 405(1)
410k405(1)
The self-contradiction of a witness by prior statements may be shown only on a matter material to the substantive issues of the trial.

[6] CRIMINAL LAW ⚿ 400(1)
110k400(1)
An admission by a prosecution witness that a contradiction of his testimony is contained in a document evidencing prior statement, does not bar admission of the document itself in evidence, providing document meets all requirements of admissibility and no valid claim of privilege is raised against it.

[7] CRIMINAL LAW ⚿ 400(1)
110k400(1)

Where accomplice who gave testimony against defendant admitted, on cross-examination that certain documents, representing statements made by him contradictory of his testimony, were in possession of the Government, such admission did not preclude defendants from demanding production of, and introducing the documents in evidence but best evidence rule required that defendants be permitted to introduce the document as best illustrating to the jury its impeaching weight and significance.

[7] CRIMINAL LAW ⇦ 441
110k441
Where accomplice who gave testimony against defendant admitted, on cross-examination that certain documents, representing statements made by him contradictory of his testimony, were in possession of the Government, such admission did not preclude defendants from demanding production of, and introducing the documents in evidence but best evidence rule required that defendants be permitted to introduce the document as best illustrating to the jury its impeaching weight and significance.

[8] WITNESSES ⇦ 372(2)
410k372(2)
In prosecution for unlawful possession of goods stolen while in interstate commerce, and for further transporting goods in interstate commerce, wherein testimony of purported accomplice was given against defendants, exclusion on cross-examination of transcript of proceedings at which accomplice witness pleaded guilty, showing statement by trial judge, when discussing accomplice's expectation of recommendation for lenient sentence or for probation, that accomplice should tell all that he knew even though it might involve others, with result that defendants were thereafter involved, was error. 18 U.S.C.A. §§ 659, 2314.

[9] CRIMINAL LAW ⇦ 1169.1(4)
110k1169.1(4)
Formerly 110k1169(1)
In prosecution of defendants for unlawfully possessing property stolen while in interstate commerce, and for further transporting such goods in interstate commerce, record established that combined errors in refusing order for production of documentary evidence tending to impeach testimony of an accomplice witness, and in excluding transcript of proceedings at which accomplice entered plea of guilty, which contained admonition, made before sentencing, that he should disclose all he knew, even though it might involve others, were sufficient to constitute reversible error. 18 U.S.C.A. §§ 659, 2314; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

[9] CRIMINAL LAW ⇦ 1170.5(1)
110k1170.5(1)
Formerly 110k11701/2(1)
In prosecution of defendants for unlawfully possessing property stolen while in interstate commerce, and for further transporting such goods in interstate commerce, record established that combined errors in refusing order for production of documentary evidence tending to impeach testimony of an accomplice witness, and in excluding transcript of proceedings at which accomplice entered plea of guilty, which contained admonition, made before sentencing, that he should disclose all he knew, even though it might involve others, were sufficient to constitute reversible error. 18 U.S.C.A. §§ 659, 2314; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

[10] CRIMINAL LAW ⇦ 1153(4)
110k1153(4)
An appellate court must give a trial judge wide latitude in controlling cross-examination, and especially when same pertains to matters dealing with collateral evidence as to character, but such principle will not justify a curtailment of evidence which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

****371 *414** Messrs. George F. Callaghan and Maurice J. Walsh, Chicago, Ill., for petitioners.

Mr. John R. Wilkins, Washington, D.C., for respondent.

***415** Mr. Justice JACKSON delivered the opinion of the Court.

Petitioners Gordon and MacLeod were convicted on an indictment of four counts, two charging unlawful possession of goods stolen while in interstate commerce [FN1] and two that defendants caused this property to be further transported in

interstate commerce. [FN2] The Court of Appeals affirmed, [FN3] and we granted certiorari limited to questions concerning production and admission of documentary evidence tending to impeach the testimony of a prosecution witness. [FN4]

FN1. 18 U.S.C. (Supp. V) s 659, 18 U.S.C.A. s 659.

FN2. 18 U.S.C. (Supp. V) s 2314, 18 U.S.C.A. s 2314.

FN3. 7 Cir., 196 F.2d 886.

FN4. 344 U.S. 813, 73 S.Ct. 33.

The Government proved that film being shipped from Rochester, New York, to Chicago, Illinois, was stolen from a truck in Chicago and that part of it later had been recovered in Detroit. To implicate the two petitioners, it relied principally on one Marshall, who, in Detroit, had pleaded guilty to unlawful possession of the film. Marshall testified that he and a codefendant, Swartz, who died before trial, on several occasions had driven from Detroit to Chicago and back. On each visit they had stopped at petitioner Gordon's Chicago jewelry store. On one trip, according to Marshall, Gordon accompanied them to a garage in that city and there Gordon and a man resembling MacLeod helped to load into into Marshall's car film that was stacked in the garage. A week later, Marshall said, he and Swartz again called on Gordon, when the latter sent them to see 'Ken' at an address which he wrote on a piece of paper. At this address, MacLeod identified himself as 'Ken,' and again the three men loaded film from the garage into Marshall's car.

***416** Partial corroboration of Marshall was supplied by a Federal Bureau of Investigation agent, who had been watching the garage. He testified that on the latter occasion he saw Marshall and Swartz drive up to MacLeod's address, whereupon MacLeod removed an old truck from the garage. Later, Swartz and Marshall drove away with film cartons stacked on the back seat of Marshall's car.

Both petitioners took the stand and denied complicity in the theft and knowledge that the film was stolen. While their physical movements as recited by them were not materially different from those related by government witnesses, petitioners gave a different and innocent version of the relationship of their acts to the criminal transactions. Gordon testified that the deceased Swartz was a business acquaintance who asked on the first visit if Gordon knew of a garage where a truck could be temporarily stored. Gordon called MacLeod, who was his partner in a rooming-house venture, and told him that he would send two men over who wished to use a garage back of the rooming house. MacLeod testified that he had not known ****372** either of the men before they placed a truck in the garage and that, at their request he had helped load film from the truck into Marshall's car merely as a favor.

On cross-examination, Marshall admitted that between his apprehension and his final statement to the Government, which implicated petitioners, he had made three or four statements which did not. Petitioners requested the trial judge to order the Government to produce these earlier statements. The request was denied. Marshall also admitted that, one week before he made any statement incriminating petitioners, he had pleaded guilty to unlawful possession of the film in a federal court in Detroit. He was still unsentenced and no date for sentencing had been set, although nine months had elapsed since this plea was received. He denied that he had received ***417** any promise of immunity or threats which would influence him to testify as he did. Petitioners then sought to introduce from the transcript of the Detroit proceeding this statement made to Marshall by the federal district judge: 'Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding. * * * I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others.' This was excluded on the objection that it was immaterial.

[1] The trial judge in his charge and the Court of

Appeals in its opinion [FN5] recognized that, where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. But the question for this Court is whether rejection of petitioners' two efforts to impeach the credibility of Marshall did not withhold from the jury information necessary to a discriminating appraisal of his trustworthiness to the prejudice of petitioners' substantial rights. The two issues stand on somewhat different grounds.

FN5. 196 F.2d 886, 888.

The request by the accused to order production of Marshall's earlier statements was cast in terms of obtaining access to documentary evidence rather than an offer *418 that would require a ruling on its admissibility. But the Government apparently concedes, as we think it must, that if it would have been prejudicial error for the trial judge to exclude these statements, had the defense been able to offer them, it was error not to order their production. The relation of admissibility to production for inspection is by no means settled in the various jurisdictions, but we conclude that the Government does not concede enough. Demands for production and offers in evidence raise related issues but independent ones, and production may sometimes be required though inspection may show that the document could properly be excluded.

[2] In the absence of specific legislation, questions of this nature are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' [FN6] Apparently, earlier common law did not permit the accused to require production of such documents. [FN7] Some state jurisdictions still recognize no comprehensive right to see documents in the hands of the prosecution merely because they might aid in the preparation or presentation **373 of the defense. [FN8] We need not consider such broad doctrines in order to resolve this case, which deals with a limited and definite category of documents to which the holdings of this opinion are likewise confined.

FN6. Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369; Fed.Rules Crim.Proc. rule 26, 18 U.S.C.A.

FN7. 6 Wigmore on Evidence, s 1859g.

FN8. 2 Wharton's Criminal Evidence (11th ed.) s 785.

[3] By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main *419 issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. [FN9] Nor was this a demand for statements taken from persons or informants not offered as witnesses. [FN10] The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise.

FN9. As to the pretrial discovery stage, compare Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A., with the narrower provisions of Fed.Rules Crim.Proc. rule 16.

FN10. In Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, the notes sought to be inspected had neither been used in court, nor was there any proof that they would show prior inconsistent statements.

Despite some contrary holdings on which the courts below may have relied, we think their reasoning is outweighed by that of highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to the production of such documents. [FN11] Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.' [FN12] In the light of our reason and experience, the better rule is that upon the foundation that was laid the court should have overruled the objections which the Government advanced and ordered production of the

documents.

FN11. Asgill v. United States, 4 Cir., 60 F.2d 776; United States v. Krulewitch, 145 F.2d 76, 79, 156 A.L.R. 337; People v. Davis, 52 Mich. 569, 18 N.W. 362; State v. Bachman, 41 Nev. 197, 168 P. 733; People v. Schainuck, 286 N.Y. 161, 164, 36 N.E.2d 94; People v. Walsh, 262 N.Y. 140, 186 N.E. 422.

FN12. People v. Davis, 42 Mich. 569, 573, 18 N.W. 362, 363.

*420 [4][5] The trial court, of course, had no occasion to rule as to their admissibility, and we find it appropriate to consider that question only because the Government argues that the trial judge, in the exercise of his discretion, might have excluded these prior contradictory statements and since that would not have amounted to reversible error, it was not such to decline their production. We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. [FN13] For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude **374 a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error.

FN13. We note in passing that the rules relating to impeachment by prior self-contradiction, which provide that such contradiction may be shown only on a matter material to the substantive issues of the trial, contain within themselves a guarantee against multiplication and confusion of issues. Therefore the discretion of the trial judge in excluding otherwise admissible evidence of this type is not as wide as it is in the vague and amorphous area of cross-examination of character witnesses. See Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168.

[6][7] The Court of Appeals affirmed on the ground that Marshall's admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing *421 it meets all other requirements of admissibility and no valid claim of privilege is raised against it. [FN14] The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance. [FN15] Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. Except the testimony of this witness be believed, this conviction probably could not have been had. Yet, his first statement was that he got the film from Swartz; his first four statements did not implicate these petitioners and his fifth did so only after the judicial admonition we will later consider. The weight to be given Marshall's implication of the petitioners was decisive. Since, so far as we are now informed by the record, we think the statements should have been admitted, we cannot accept the Government's contention based on a premise that the court was free to exclude them. It was error to deny the application for their production.

FN14. 3 Wigmore on Evidence, s 1037; 3 Wharton's Criminal Evidence (11th ed.) s 1309.

FN15. The best evidence rule is usually relied upon by one opposing admission, on the ground that the evidence offered by the proponent does not meet its standards. Its merit as an assurance of the most accurate record possible commends its extension to this unique situation where it is the proponent who seeks to rely on it.

[8] The second effort to impeach Marshall was to

offer parts already quoted from the transcript of proceedings *422 in Detroit. Although Marshall admitted pleading guilty to the offense and that nine months later he was still unsentenced, he denied that he had received either promises or threats. The transcript would have shown the jury that a federal judge, who still retained power to fix his sentence, in discussing Marshall's expectation of a 'recommendation for a lenient sentence or for probation' had urged him to tell all he knew, 'even though it might involve others.' Involvement of others, whom Marshall had not theretofore mentioned, soon followed. We think the jury should have heard this warning of the judge, which was an addition to the matter brought out on cross-examination. The question for them is not what the judge intended by the admonition, nor how we, or even they, construe its meaning. We imply no criticism of it, and he expressly stated that he was holding out no promise. But the question for the jury is what effect they think these words had on the mind and conduct of a prisoner whose plea of guilty put him in large measure in the hands of the speaker. They might have regarded it as an incentive to involve others, and to supply a motive for Marshall's testimony other than a duty to recount the facts as best he could remember them. Reluctant as we are to differ with an experienced trial judge **375 on the scope of cross-examination, the importance of this witness constrains us to hold that the transcript was erroneously excluded.

[9][10] We believe, moreover, that the combination of these two errors was sufficiently prejudicial to require reversal. The Government, in its brief, argues strongly for the widest sort of discretion in the trial judge in these matters and urges that even if we find error or irregularity we disregard it as harmless [FN16] and affirm the conviction. We *423 are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168. But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgment must be reversed.

FN16. Fed.Rules Crim.Proc. rule 52 admonishes us that 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'

Reversed.

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DELAWARE
v.
William A. FENSTERER.

No. 85-214.

Nov. 4, 1985.

Defendant was convicted in state court of murder, and he appealed. The Delaware Supreme Court, 493 A.2d 959, reversed, and certiorari was sought. The Supreme Court held: (1) that admission of testimony of prosecution's expert witness who was unable to recall the basis for his opinion did not deny defendant his Sixth Amendment right to confrontation where he was able to demonstrate to the jury that the witness could not recall the theory upon which his opinion was based and was able to suggest to the jury that the witness had relied on a theory which the defense expert considered baseless, and (2) admission of testimony did not deprive defendant of due process.

Reversed and remanded.

Justice Stevens filed an opinion concurring in the judgment.

Justice Marshall dissented from summary disposition.

Justice Blackmun would grant certiorari and give plenary consideration.

[1] CRIMINAL LAW ⇐ 662.7
110k662.7
The Confrontation Clause [U.S.C.A. Const.Amend. 6] guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish.

[2] CRIMINAL LAW ⇐ 662.3
110k662.3
Admission of testimony by prosecution expert who could not remember theory on which he based his opinion did not deprive defendant of his right to confront the witnesses against him, where cross-examination of prosecution's expert demonstrated to the jury that the expert could not recall the theory upon which he based his opinion that a hair found on the alleged murder weapon had been forcibly removed from the victim and where defense was able to suggest through its own expert that the prosecution expert had relied on a theory which the defense expert considered baseless. U.S.C.A. Const.Amend. 6.

[3] CRIMINAL LAW ⇐ 662.1
110k662.1
The Confrontation Clause [U.S.C.A. Const.Amend. 6] includes no guaranty that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.

[4] CRIMINAL LAW ⇐ 662.7
110k662.7
Confrontation Clause [U.S.C.A. Const.Amend. 6] is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities in prosecution testimony through cross examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony.

[5] CONSTITUTIONAL LAW ⇐ 268(10)
92k268(10)
Fact that voir dire examination of prosecution's expert alerted both prosecution and defense to expert's lapse of memory with respect to the basis for his opinion did not obligate the prosecution to refrain from calling the witness without refreshing his recollection; prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation, as a matter of due process, to refrain from introducing the expert's testimony. U.S.C.A. Const.Amend. 5.

[5] CRIMINAL LAW ⇐ 706(1)
110k706(1)
Fact that voir dire examination of prosecution's expert alerted both prosecution and defense to expert's lapse of memory with respect to the basis for his opinion did not obligate the prosecution to refrain from calling the witness without refreshing his recollection; prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation, as a matter of due process, to refrain from introducing the expert's testimony. U.S.C.A. Const.Amend. 5.

*16 **292 PER CURIAM.

In this case, the Delaware Supreme Court reversed respondent William Fensterer's conviction on the grounds that the admission of the opinion testimony of the prosecution's expert witness, who was unable to recall the basis for his opinion, **293 denied respondent his Sixth Amendment right to confront the witnesses against him. 493 A.2d 959 (1985). We conclude that the Delaware Supreme Court misconstrued the Confrontation Clause as interpreted by the decisions of this Court.

I

Respondent was convicted of murdering his fiancee, Stephanie Ann Swift. The State's case was based on circumstantial evidence, and proceeded on the theory that respondent had strangled Swift with a cat leash. To establish that the cat leash was the murder weapon, the State sought to prove that two hairs found on the leash were similar to Swift's hair, and that one of those hairs had been forcibly removed. To prove these theories, the State relied on the testimony of Special Agent Allen Robillard of the Federal Bureau of Investigation.

At trial, Robillard testified that one of the hairs had been forcibly removed. He explained that, in his opinion, there are three methods of determining that a hair has forcibly *17 been removed: (1) if the follicular tag is present on the hair, (2) if the root is elongated and misshaped, or (3) if a sheath of skin surrounds the root. However, Robillard went on to say that " 'I have reviewed my notes, and I have no specific knowledge as to the particular way that I determined the hair was forcibly removed other than the fact that one of those hairs was forcibly removed.' " Id., at 963. On cross-examination, Agent Robillard was again unable to recall which method he had employed to determine that the hair had forcibly been removed. He also explained that what he meant by "forcibly removed" was no more than that the hair could have been removed by as little force as is entailed in " 'brushing your hand through your head or brushing your hair.' " Pet. for Cert. 7. The trial court overruled respondent's objection that the admission of Robillard's testimony precluded adequate cross-examination unless he could testify as to which of the three theories he relied upon, explaining that in its view this objection went to the weight of the evidence rather than its admissibility.

The defense offered its own expert in hair analysis, Dr. Peter DeForest, who agreed with Agent Robillard that the hairs were similar to Swift's. Doctor DeForest testified that he had observed that one of the hairs had a follicular tag. He also testified that he had spoken by telephone with Robillard, who advised him that his conclusion of forcible removal was based on the presence of the follicular tag. App. to Pet. for Cert. D-2. Doctor DeForest then proceeded to challenge the premise of Robillard's theory--that the presence of a follicular tag indicates forcible removal. According to Dr. DeForest, no adequate scientific study supported that premise, and a follicular tag could be attached to hairs that naturally fall out.

On appeal, the Delaware Supreme Court reversed respondent's conviction on the authority of the Confrontation Clause. Nothing that "[t]he primary interest secured by the Clause is the right of cross-examination," 493 A.2d, at 963, *18 the court reasoned that "[e]ffective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion." Id., at 964 (footnote omitted). Absent such an acknowledgment of the basis of his opinion, the court believed that "defense counsel's cross-examination of the Agent was nothing more than an exercise in futility." Ibid. Since the court could not rule out the possibility that Robillard could have been "completely discredited" had he committed himself as to the theory on which his conclusion was based, it held that respondent "was denied his right to effectively cross-examine a key state witness." Ibid. Accordingly, the court reversed without reaching respondent's additional claim that Robillard's testimony was inadmissible under the pertinent Delaware Rules of Evidence. We now reverse the Delaware Supreme Court's holding that Agent Robillard's inability to recall the method whereby he arrived at his opinion rendered the admission of that opinion violative of respondent's **294 rights under the Confrontation Clause.

II

This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving

restrictions imposed by law or by the trial court on the scope of cross-examination. The first category reflects the Court's longstanding recognition that the "literal right to 'confront' the witness at the time of trial ... forms the core of the values furthered by the Confrontation Clause." California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970). Cases such as Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), gave rise to Confrontation Clause issues "because hearsay evidence was admitted as substantive evidence against the defendants." Tennessee v. Street, 471 U.S. 409, 413, 105 S.Ct. 2078, 2081, 85 L.Ed.2d 425 (1985). Cf. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

***19** The second category of cases is exemplified by Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974), in which, although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." As the Court stated in Davis, supra, at 315, 94 S.Ct., at 1110, "[c]onfrontation means more than being allowed to confront the witness physically." Consequently, in Davis, as in other cases involving trial court restrictions on the scope of cross-examination, the Court has recognized that Confrontation Clause questions will arise because such restrictions may "effectively ... emasculate the right of cross-examination itself." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968).

This case falls in neither category. It is outside the first category, because the State made no attempt to introduce an out-of-court statement by Agent Robillard for any purpose, let alone as hearsay. Therefore, the restrictions the Confrontation Clause places on "the range of admissible hearsay," Roberts, supra, at 65, 100 S.Ct., at 2538, are not called into play.

[1] The second category is also inapplicable here, for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way. The Court has recognized that "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but [also] ... allowed to impeach, i.e., discredit, the witness." Davis, 415 U.S., at 316, 94 S.Ct., at 1110. But it does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes one method of discrediting him. Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory. That the defense might prefer the expert to embrace a particular theory, which it is prepared to refute with special vigor, is irrelevant. " 'The main and essential purpose of confrontation is to secure ***20** for the opponent the opportunity of cross-examination.' " Id., at 315-316, 94 S.Ct., at 1109-10 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. See Roberts, 448 U.S., at 73, n. 12, 100 S.Ct., at 2543, n. 12 (even where the only opportunity the defense has to cross-examine the declarant is at a preliminary hearing, except in "extraordinary cases" where defense counsel provided ineffective representation at the earlier proceeding, "no inquiry into 'effectiveness' is required"). This conclusion is confirmed by the fact that the assurances ****295** of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one, notwithstanding the witness' inability to recall the basis for his opinion: the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused. See id., at 63, n. 6, 100 S.Ct., at 2537-38, n. 6.

[2] We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause. In this case, defense counsel's cross-examination of Agent Robillard demonstrated to the jury that Robillard could not even recall the theory on which his opinion was based. Moreover, through its own expert witness, the defense was able to suggest to the jury that Robillard had relied on a theory which the defense expert considered baseless. The Confrontation Clause certainly requires no more

than this.

Although Green, supra, involved a witness who professed a lapse of memory on the stand, that case lends no support to respondent. In pertinent part, Green was a case in which a minor named Porter informed a police officer of a transaction in which he claimed Green supplied him with drugs. At trial, Porter professed to be unable to recall how he obtained *21 the drugs. The prosecution then introduced Porter's prior inconsistent statements as substantive evidence. Green, 399 U.S., at 152, 90 S.Ct., at 1932. This Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." Id., at 164, 90 S.Ct., at 1938. However, the Court also concluded that, in the posture of that case, it would be premature to reach the question "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause...." Id., at 168, 90 S.Ct., at 1940. In this connection, the Court noted that even some who argue that "prior statements should be admissible as substantive evidence" believe that this rule should not apply to "the case of a witness who disclaims all present knowledge of the ultimate event," because "in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished." Id., at 169, n. 18, 90 S.Ct., at 1940-41, n. 18 (citations omitted).

We need not decide today the question raised but not resolved in Green. As Green's framing of that question indicates, the issue arises only where a "prior statement," not itself subjected to cross-examination and the other safeguards of testimony at trial, is admitted as substantive evidence. Since there is no such out-of-court statement in this case, the adequacy of a later opportunity to cross-examine, as a substitute for cross-examination at the time the declaration was made, is not in question here.

[3][4] Under the Court's cases, then, Agent Robillard's inability to recall on the stand the basis for his opinion presents none of the perils from which the Confrontation Clause protects defendants in criminal proceedings. The Confrontation Clause includes no guarantee that every witness called by the *22 prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. Accordingly, we hold that the admission into evidence of Agent Robillard's opinion **296 did not offend the Confrontation Clause despite his inability to recall the basis for that opinion.

[5] The Delaware Supreme Court also appears to have believed that the prosecution breached its "serious obligation not to obstruct a criminal defendant's cross-examination of expert testimony," 493 A.2d, at 963, seemingly because the prosecution knew in advance that Agent Robillard would be unable to recall the basis for his opinion when he testified at trial. While we would agree that Robillard's testimony at the voir dire examination must be taken to have alerted both the prosecution and the defense to his lapse of memory, see App. to Brief in Opposition A-1, we do not think the prosecution was obliged to refrain from calling Robillard unless it could somehow refresh his recollection. Whether or not, under state law, Robillard's opinion should have been admitted into evidence, nothing in the Federal Constitution forbids the conclusion reached by the trial court in this case: that the expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility. See United States v. Bastanipour, 697 F.2d 170, 176-177 (CA7 1982), cert. denied, 460 U.S. 1091, 103 S.Ct. 1790, 76 L.Ed.2d 358 (1983). That being so, the prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation on it, as a matter of due process, to refrain from introducing the expert's testimony unless the basis for that testimony could definitely be ascertained. We need not decide whether the introduction of an expert opinion with no basis could ever be so lacking in reliability, and so prejudicial, as to *23 deny a defendant a fair trial. The testimony of Dr. DeForest, suggesting

the actual basis for Robillard's opinion and vigorously disputing its validity, utterly dispels any possibility of such a claim in this case.

The petition for certiorari is granted, the judgment of the Delaware Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See Maggio v. Fulford, 462 U.S. 111, 120-121, 103 S.Ct. 2261, 2265-66, 76 L.Ed.2d 794 (1983) (MARSHALL, J., dissenting); Wyrick v. Fields, 459 U.S. 42, 51-52, 103 S.Ct. 394, 397-98, 74 L.Ed.2d 214 (1982) (MARSHALL, J., dissenting).

Justice BLACKMUN would grant certiorari and give this case plenary consideration.

Justice STEVENS, concurring in the judgment.

Summary reversal of a state supreme court's application of federal constitutional strictures to its own police and prosecutors in novel cases of this kind tends to stultify the orderly development of the law. Because I believe this Court should allow state courts some latitude in the administration of their criminal law, [FN1] I voted to deny certiorari. Cf. California v. Carney, 471 U.S. 386, 395, 105 S.Ct. 2066, 2071, 85 L.Ed.2d 406 (1985) (STEVENS, J., dissenting).

> FN1. In California v. Green, 399 U.S. 149, 171, 90 S.Ct. 1930, 1941-1942, 26 L.Ed.2d 489 (1970), THE CHIEF JUSTICE wrote separately "to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice." He correctly observed that "neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States." Id., at 171-172, 90 S.Ct., at 1941-42.

On the merits, I find the issue much closer to the question reserved in California v. Green, 399 U.S. 149, 168-170, 90 S.Ct. 1930, 1940-41, 26 L.Ed.2d 489 *24 (1970), than does the Court. The question reserved in Green concerned the admissibility of an earlier out-of-court statement by the witness Porter of which Porter **297 disclaimed any present recollection at the time of trial. [FN2] The question decided by the Court today concerns the admissibility of an earlier out-of-court conclusion reached by a witness who disclaims any present recollection of the basis for that conclusion. The reasons for carefully reserving the question in Green persuade me that this case should not be decided without full argument. Nevertheless, because the Court has granted certiorari and decided to act summarily, because I am not persuaded that the Federal Constitution was violated, and because the State Supreme Court remains free to reinstate its judgment on the basis of its interpretation of state law, I reluctantly concur in the judgment.

> FN2. "Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture" (footnote omitted). Id., at 168-169, 90 S.Ct., at 1940-41. See also id., at 169, n. 18, 90 S.Ct., at 1940-41, n. 18.

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Citation Rank(R) Page(P) Database Mode
939 F.2d 416 R 6 OF 26 P 1 OF 39 ALLFEDS Page
33 Fed. R. Evid. Serv. 1017
(Cite as: 939 F.2d 416)

UNITED STATES of America, Plaintiff-Appellee,
v.
Jack Lee SCROGGINS, Defendant-Appellant.
No. 90-2580.
United States Court of Appeals,
Seventh Circuit.
Argued Feb. 28, 1991.
Decided Aug. 2, 1991.

Defendant was convicted in the United States District Court, Central District of Illinois, Richard Mills, J., of conspiracy to distribute cocaine and was sentenced to 33 months in prison. Defendant appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) trial court did not abuse its discretion in prohibiting defendant from questioning key government witness regarding possible sex change operation; (2) there was sufficient evidence that defendant was integral part of cocaine distribution conspiracy to support his conviction; (3) evidence did not establish that defendant agreed to be involved only in small-scale sales such that 140 grams of cocaine involved in final transaction before his arrest could not be considered in sentencing; but (4) record of sentencing proceedings left uncertain whether sentencing

increased to 20 because of his possession of a firearm. His criminal history category was I, resulting in a sentencing range of thirty-three to forty-one months. The court sentenced Mr. Scroggins to thirty-three months.

II
ANALYSIS

A. Challenges to Conviction

1. Pretrial motions

[1] In his brief, Mr. Scroggins touches on several alleged errors by the district court in its handling of the pretrial motions concerning NA's possible sex change operation. In essence, his position is that the district court abused its discretion by foreclosing potential avenues of impeachment of NA, a key witness against Mr. Scroggins. He acknowledges, however, that "the sexual orientation of a witness generally will not be the subject of proper impeachment." Appellant's Br. at 28 (citing United States v. Colyer, 571 F.2d 941, 946 n. 7 (5th Cir.) (homosexual orientation irrelevant to credibility), cert. denied, 439 U.S. 933, 99 S.Ct. 325, 58 L.Ed.2d 328 (1978); Fed.R.Evid. 608). Mr. Scroggins insists ***421** that he "sought to inquire of [NA] as to her sexual identity not for the purposes of impugning her moral character but rather to determine whether she was masquerading as a woman when she in fact was not." Id. at 28-29.

We find no abuse of discretion on the record before us. The district

court is authorized to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to ... protect witnesses from harassment or undue embarrassment." Fed.R.Evid. 611(a). Even if we were to acknowledge that NA's sexual identity had any potential relevance to her credibility, we would not conclude that the court erred in protecting NA from the much more obvious potential of such harassment and embarrassment. [FN1] Furthermore, Mr. Scroggins had ample opportunity to attack NA's credibility on other, more relevant, grounds. For example, on cross-examination, NA acknowledged that her recommended sentence pursuant to her plea agreement was contingent on her testifying against Mr. Scroggins--the only remaining defendant who had not pled guilty or had charges dismissed. With such obvious impeachment material available to Mr. Scroggins, the district court certainly was not obligated to permit a line of questioning that was more likely to distract the jury than to inform it of relevant evidence.

FN1. Cf. United States v. Masters, 924 F.2d 1362, 1368 (7th Cir.) (no reversible error when district court limited cross-examination concerning witness' acknowledged habit of wearing women's underwear in case in which female victim's body had been found without panties; details of the "fetish would have been spicy, but peripheral to the issues because there was no suggestion that violence was an aspect of the fetish"), cert.

denied, --- U.S. ----, 111 S.Ct. 2019, 114 L.Ed.2d 105 (1991). The cross-examination prohibited in regards to NA's sexual identity was much more peripheral than the cross-examination that this court held properly limited in Masters.

2. Sufficiency of evidence

Mr. Scroggins contends that the government failed to present sufficient evidence to sustain his conviction for conspiracy to distribute cocaine. As this court has noted many times, those who raise sufficiency of evidence challenges bear a "heavy burden." E.g., United States v. Valencia, 907 F.2d 671, 676 (7th Cir.1990). "The test is whether, after viewing the evidence in the light most favorable to the government, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " United States v. Pritchard, 745 F.2d 1112, 1122 (7th Cir.1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original)); accord United States v. Lamon, 930 F.2d 1183, 1190 (7th Cir.1991).

[2][3][4] As Mr. Scroggins acknowledges, a defendant indicted for conspiracy also may be convicted on an aiding and abetting theory. See United States v. Galiffa, 734 F.2d 306, 312 (7th Cir.1984). Because the jury was so instructed, we shall examine the evidence in terms of aiding and abetting

INSTA-CITE

CITATION: 939 F.2d 416

Direct History

=> 1 **U.S. v. Scroggins,** 939 F.2d 416, 33 Fed. R. Evid. Serv. 1017 (7th Cir.(Ill.), Aug 02, 1991) (NO. 90-2580)
Appeal After Remand
2 U.S. v. Scroggins, 980 F.2d 733 (7th Cir.(Ill.), Dec 03, 1992) (TABLE, TEXT IN WESTLAW, NO. 92-1576)

Negative Indirect History

Not Followed as Dicta
3 U.S. v. Sassi, 966 F.2d 283 (7th Cir.(Ill.), Jun 30, 1992) (NO. 92-1258) (Additional History)

UNITED STATES of America, Appellee,
v.
Evonna Victoria JOHNSON, Appellant.

No. 91-3694.

United States Court of Appeals,
Eighth Circuit.

Submitted May 12, 1992.

Decided July 10, 1992.

Defendant was convicted of possession with intent to distribute cocaine base after jury trial in the United States District Court for the District of Minnesota, Paul A. Magnuson, J. Defendant appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) disallowing cross-examination of police witness for impeachment purposes on collateral issue of internal police investigation resulting in officer's suspension was not abuse of discretion; (2) disallowing cross-examination of prosecution witnesses about investigation of defendant's estranged husband to demonstrate motive for officers to testify falsely against defendant was not abuse of discretion; and (3) exclusion of evidence of potential penalty codefendant faced by claiming it was she who had thrown crack cocaine out window and not defendant was not abuse of discretion.

Affirmed.

[1] WITNESSES ⇐ 330(3)
410k330(3)
Disallowing questioning of police witness for impeachment purposes on collateral issue of internal police investigation as result of which officer had been suspended from police department was not abuse of discretion; evidence of officer's internal suspension was totally unrelated to issues involved in trial of defendant on drug charges. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 331.5
410k331.5
Formerly 410k3311/2
Rules of evidence do not permit specific instances of witness' conduct to be proved by extrinsic evidence; to extent that such evidence is ever admissible, introduction of extrinsic evidence to attack credibility is subject to discretion of trial court. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 331.5
410k331.5
Formerly 410k3311/2
Results of investigations of internal affairs of police departments are not in all cases inadmissible for impeachment purposes; there may be situations in which evidence from such internal investigations will bear heavily on credibility of testifying police officer, and, in such situations, district court should deem itself free to allow such inquiries during cross-examination.

[4] WITNESSES ⇐ 330(3)
410k330(3)
Disallowing cross-examination of prosecution witnesses about investigation and prosecution of defendant's estranged husband to demonstrate motive for officers to testify falsely against defendant was not abuse of discretion; investigation and prosecution of husband was based upon search of residence different from that search in defendant's case, and officers' reports regarding arrest of defendant had already been filed and testimony before grand jury had already been given at time suppression order was entered in case against husband in another court.

[5] WITNESSES ⇐ 318
410k318
Excluding evidence of potential penalty codefendant faced by claiming that it was she, rather than defendant who had thrown crack cocaine out window to bolster codefendant's credibility in defendant's trial was not abuse of discretion. Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.

***765** Michael W. McNabb, Burnsville, Minn., argued, for appellant.

Margaret T. Burns, Minneapolis, Minn., argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

WOLLMAN, Circuit Judge.

Evonna V. Johnson appeals from her conviction for possession with intent to distribute ***766** cocaine base, in violation of 21 U.S.C. 841(a)(1). We affirm.

I.

On February 13, 1991, Minneapolis police officers executed a search warrant at Johnson's residence. The first officer to enter the residence testified that he saw two black females--Johnson and Demellon Horton--in the home. After the officers entered the home, Johnson was seen running into the bedroom and throwing a red pantyhose bag out of the window.

The police seized the red bag, which contained thirteen grams of cocaine base, and arrested Johnson. Following her conviction, Johnson was sentenced to 120 months' imprisonment. She now appeals from three evidentiary rulings made by the district court.

II.

"The admissibility of evidence is primarily a determination to be made by the district court ..., and [we] will not substitute its judgment unless there has been an abuse of discretion." United States v. Abodeely, 801 F.2d 1020, 1022 (8th Cir.1986) (citation omitted).

[1] Johnson first argues that the district court abused its discretion by excluding evidence that one of the government's witnesses, Officer Doran, had been suspended from the police department for three days without pay in May 1991 for having left in-service training without permission, having worked on an off-duty job during a period of in-service training, and having lied to his supervisor about when he had reported to the off-duty job. Defense counsel sought to introduce the letter of suspension, pursuant to Federal Rule of Evidence 608(b), to impeach Doran's credibility. [FN1] The district court refused to admit the letter and refused to allow defense counsel to cross-examine Doran about the substance of the letter.

FN1. Although the record does not reflect defense counsel's offer of the letter of suspension, we accept counsel's representation that he offered it under Rule 608(b).

[2] Federal Rule of Evidence 608(b) does not permit specific instances of a witness' conduct to be proved by extrinsic evidence. United States v. Martz, 964 F.2d 787, 788-89 (8th Cir.1992). "The purpose of barring extrinsic evidence is to avoid mini-trials on peripherally related or irrelevant matters." [FN2] Id. To the extent that such evidence is ever admissible, the introduction of extrinsic evidence to attack credibility is subject to the discretion of the trial court. Id. at 788-89; United States v. Capozzi, 883 F.2d 608, 615 (8th Cir.1989), cert. denied, 495 U.S. 918, 110 S.Ct. 1947, 109 L.Ed.2d 310 (1990). Given the broad discretion granted to the trial court and Rule 608(b)'s stricture against the introduction of such evidence, we conclude that the district court did not err in refusing to admit the letter of suspension.

FN2. The government states that it would have offered evidence to show that Doran was exonerated on the charges contained in the letter and that thus there would have been a "mini-trial" on this collateral issue.

Although Rule 608(b) states that specific instances of past conduct "may, however, in the discretion of the court, ... be inquired into on cross-examination," the district court did not allow defense counsel to inquire into the circumstances surrounding Doran's suspension. The district court did, however, allow the prosecution to impeach Ms. Horton, who testified that it was she who threw the cocaine base out of the window, with a pending charge of giving a false name to a police officer.

Defense counsel objected to the government's attempt to impeach Ms. Horton with the testimony that she had given a false name to the police, arguing that that evidence should be ruled inadmissible in view of the district court's earlier ruling prohibiting cross-examination regarding Doran's suspension. The district court resolved the apparent inconsistency by concluding that the two situations did not "fall in the same category." The court noted that when the police questioned Horton at Johnson's residence, she gave them a false name; when ***767** the police arrested Horton on another occasion, she gave the police a false name. The district court determined that evidence of Doran's internal suspension, in contrast, was "totally unrelated" to the issues involved in Johnson's trial.

As an additional reason for its ruling, the district court stated that "[i]nternal affairs investigations must, need to and have to reside within police departments." The court added that "a minor ... investigation report, ... should not be the public subject of cross examination of the witness at every time that he testifies [after] making an arrest."

[3] We conclude that the district court did not abuse its discretion by disallowing questioning on the collateral issue of the internal police investigation. See Martz, at 788-89. We do not concur, however, in the district court's observation that the results of the investigations of the internal affairs of police departments must in all cases be ruled inadmissible for impeachment purposes. There may indeed be situations in which evidence from such internal investigations will bear heavily on the credibility of a testifying police officer. In such situations, a district court should deem itself free to allow such inquiries during cross-examination.

[4] Johnson next argues that the district court erred by excluding evidence that would have established a motive for the police officers to testify falsely against her. Johnson sought to cross-examine prosecution witnesses about the investigation and prosecution of Johnson's estranged husband, Richard McElrath. Defense counsel sought to demonstrate that the police department's desire to insure McElrath's conviction was intense enough to provide a motive for the officers to testify falsely against Johnson for the purpose of coercing her into cooperating with them in the case against McElrath. After hearing defense counsel's offer of proof, the district court determined that this evidence was irrelevant.

Having reviewed the record, we conclude that the district court did not abuse its discretion by excluding this evidence. Among other things, the investigation and prosecution of McElrath was based upon a search of a residence different from that searched in the present case. Additionally, McElrath was already in federal custody at the time Johnson's house was searched and she was arrested. Although evidence against McElrath was later suppressed by another court, the officers' reports regarding their arrest of Johnson had already been filed and their testimony before the grand jury already given at the time the suppression order was entered. Thus, their search of Johnson's residence and their account of the circumstances of her arrest could not have been motivated by any perceived need for further evidence against McElrath.

[5] Finally, Johnson argues that the district court abused its discretion by excluding evidence of the potential penalty Ms. Horton faced by claiming that it was she who had thrown the crack out of the window. By establishing that Ms. Horton was aware that the penalty for possessing thirteen grams of crack was a sentence of not less than five years' imprisonment, Johnson sought to bolster Ms. Horton's credibility, on the assumption that no one would expose herself to that severe a penalty unless she had in fact committed the act giving rise to that penalty. The district court sustained the government's objection to this line of questioning.

Although the district court might well have decided to admit this proffered testimony, cf. Fed.R.Evid. 804(b)(3) (statement tending to subject declarant to criminal liability not excluded by hearsay rule), we conclude that it did not abuse its discretion by excluding this evidence.

We express our appreciation to appointed counsel for his zealous efforts on Johnson's behalf, both at trial and on appeal.

The judgment of conviction is affirmed.

END OF DOCUMENT

INSTA-CITE

CITATION: 968 F.2d 765

Direct History

=> 1 **U.S. v. Johnson,** 968 F.2d 765, 36 Fed. R. Evid. Serv. 47 (8th Cir.(Minn.), Jul 10, 1992) (NO. 91-3694)
Certiorari Denied by
2 Johnson v. U.S., 506 U.S. 980, 113 S.Ct. 481, 121 L.Ed.2d 386, 61 USLW 3355 (U.S.Minn., Nov 09, 1992) (NO. 92-6150)

Citation | Rank(R) | Page(P) | Database | Mode
873 F.2d 1049 | R 7 OF 26 | P 1 OF 31 | ALLFEDS | Page
28 Fed. R. Evid. Serv. 200
(Cite as: 873 F.2d 1049)

UNITED STATES of America, Plaintiff-Appellee,
v.
Ibukun O. MAYOMI, Defendant-Appellant.
No. 87-2658.
United States Court of Appeals,
Seventh Circuit.
Argued Nov. 10, 1988.
Decided May 1, 1989.

Defendant was convicted before the United States District Court for the Northern District of Illinois, Harry D. Leinenweber, J., of one count of attempted possession of heroin with intent to distribute, one count of possession of heroin with intent to distribute, and seven counts of importation of controlled substance. On his appeal, the Court of Appeals, Coffey, Circuit Judge, held that: (1) detention of defendant's mail which was received at private mail box service was justified by FBI agent's reasonable suspicion that mail contained heroin; (2) length of time letters were held prior to issuance of search warrant was reasonable; and (3) district court did not abuse its discretion in precluding cross-examination regarding identity of informant who initially contacted the FBI with information that accidentally opened envelope

defendant lacks sufficient facts to support his speculative assertion that St. John's veracity should be called into question. In any event, we agree with the statement of the Tenth Circuit that:

"the Supreme Court's decision in Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957), ... acknowledged the public's interest in protecting the identity of confidential informants in order to encourage the flow of information necessary in criminal prosecutions.... [T]he public's interest, as recognized in Roviaro, imposes procedural requirements and evidentiary burdens on a defendant who requests the disclosure of the confidential informant."

United States v. Bloomgren, 814 F.2d 580, 584 (10th Cir.1987). Because the defendant failed to comply with the procedural requirements set forth in Franks, supra, he has waived the issue on appeal. We refuse to consider his attack on the search warrant in the context of his argument that the district court abused its discretion in limiting the cross-examination of the government witnesses.

[4] We reach a similar conclusion regarding the defendant's contention that the district court erred in precluding cross-examination of Ashton on his relationship with Agent St. John in investigations prior to the present case. "[T]he decision to not allow cross-examination of a witness concerning

investigations other than those related to the case on trial falls within the discretion of the district court." Silva, 781 F.2d at 110 (citing United States v. Murphy, 768 F.2d 1518, 1536 (7th Cir.1985), cert. denied, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986)).

In this case, the district judge ruled not to allow questioning about Ashton's relationship with St. John in previous FBI investigations because defense counsel failed to establish that such questioning was either necessary or relevant to the real issues in the case: namely, whether the defendant knowingly attempted to possess, possessed and imported heroin. Both at trial and on appeal the defendant argues that this line of questioning was relevant and necessary because the absence of information on Ashton's prior relationship with the FBI made it impossible for the jury to reach an informed decision regarding Ashton's credibility. We disagree.

The Supreme Court, in Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15, 19 (1985) (per curiam), stated that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original). The record reflects that Mayomi's attorney cross-examined Ashton extensively on his encounters with ***1057** the defendant at Scanner Services, the details of how and when he accidentally cut open the first envelope found to contain brown heroin, and his

subsequent cooperation with the FBI in its investigation of the defendant.

From our review of the record we are convinced that the district court afforded the defendant ample opportunity to elicit sufficient information from Ashton concerning his involvement in this case such that the jury could make an informed decision regarding his credibility as a witness. [FN9] The question of whether Ashton had been involved in previous FBI investigations was, at best, only marginally relevant to the central issues in this case and a sojourn into this matter would have served only to confuse the jury on those issues. [FN10] As Delaware v. Van Arsdall, supra, teaches, a district court has wide latitude to impose reasonable limits on cross-examination based on concerns of this nature. Accordingly, we hold that it was not an abuse of discretion for the district court to preclude cross-examination of Ashton on this issue.

FN9. In fact, as we noted in note 3, supra, Mayomi's attorney failed to take full advantage of the opportunity he had by failing to ask Ashton whether he had cut open the first envelope at the direction of the FBI.

FN10. We note that the defendant's attempt to challenge the veracity of Ashton, as well as that of the government on a matter that should have been brought to the attention of the court in a Franks motion, see supra note

8, was nothing more than an attempt to confuse the jury on the real issues set for trial--namely, whether the defendant knowingly possessed, attempted to possess, and imported heroin. We caution trial counsel that such "fishing expeditions" are not viewed favorably by this court. Given the already overcrowded dockets of the federal judiciary, if the defendant actually had information that Ashton had been involved in previous FBI investigations, he should have made a proper offer of proof in the district court.

Even if we were to agree with the contention that the district court had abused its discretion in limiting the scope of the defendant's cross-examination of Ashton, which we do not, the Supreme Court has held that violations of the Confrontation Clause are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436, 89 L.Ed.2d at 684. In light of the overwhelming evidence against Mayomi regarding his involvement in the importation and possession of heroin, we hold that any error in limiting the defendant's cross-examination of Ashton, with respect to either the identity of the informant or Ashton's previous involvement, if any, in FBI investigations, was harmless.

IV.

The district court's refusal to suppress the contents of the envelopes

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 03/14/96

INSTA-CITE

CITATION: 873 F.2d 1049

Direct History

1 U.S. v. Mayomi, 1987 WL 16629 (N.D.Ill., Aug 31, 1987) (NO. 86 CR 535)
Judgment Affirmed by
=> 2 **U.S. v. Mayomi,** 873 F.2d 1049, 28 Fed. R. Evid. Serv. 200 (7th Cir.(Ill.), May 01, 1989) (NO. 87-2658)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
72 C.J.S. Post Office Sec.64 Note 67 (Pocket Part)

UNITED STATES, Appellee,
v.
Mushtaq MALIK, a/k/a Mushtaq Ahmed,
Defendant, Appellant.

No. 90-1549.

United States Court of Appeals,
First Circuit.

Heard Jan. 9, 1991.

Decided March 18, 1991.

Defendant was convicted in the United States District Court for the District of Massachusetts, Frank H. Freedman, Chief Judge, of conspiring to import, and importing, heroin. Defendant appealed. The Court of Appeals, Breyer, Chief Judge, held that: (1) District Court was justified in forbidding defendant to cross-examine key government witnesses about one witness' terrorist activities and affiliation with radical organizations; (2) government agent's testimony about defendant's statements about prior involvement in smuggling scheme was admissible; and (3) agent's testimony that he understood defendant to claim that he was famous heroin smuggler was admissible.

Affirmed.

[1] WITNESSES ⇐ 344(1)
410k344(1)
District court was justified in forbidding narcotics defendant to ask key government witnesses about one witness' alleged terrorist activities and affiliations with radical political groups, notwithstanding defendant's contentions that such limitation prevented him from developing defense theory--defendant merely "played along" with witness in narcotics transaction in effort to get one group's money back and further revolutionary plot to overthrow foreign government--and that line of questioning would also have helped to impeach witness; defense theory was not clearly developed at time of cross-examination or even during defendant's presentation of evidence, trial court could have determined that impeachment value of membership in radical organizations was small, and questions about membership in such organizations might introduce prejudicial, emotional issue into trial that could distract jury.

[1] WITNESSES ⇐ 344(2)
410k344(2)
District court was justified in forbidding narcotics defendant to ask key government witnesses about one witness' alleged terrorist activities and affiliations with radical political groups, notwithstanding defendant's contentions that such limitation prevented him from developing defense theory--defendant merely "played along" with witness in narcotics transaction in effort to get one group's money back and further revolutionary plot to overthrow foreign government--and that line of questioning would also have helped to impeach witness; defense theory was not clearly developed at time of cross-examination or even during defendant's presentation of evidence, trial court could have determined that impeachment value of membership in radical organizations was small, and questions about membership in such organizations might introduce prejudicial, emotional issue into trial that could distract jury.

[2] WITNESSES ⇐ 267
410k267
Trial judge has wide latitude to impose limits on cross-examination in order to avoid prejudice, confusion, and unnecessary waste of time; however, limits must be reasonable, i.e., limits must not prevent defendant from providing jury with essential information about key events and sufficient information to make discriminating appraisal of witness' motives and possible bias.

[2] WITNESSES ⇐ 363(1)
410k363(1)
Trial judge has wide latitude to impose limits on cross-examination in order to avoid prejudice, confusion, and unnecessary waste of time; however, limits must be reasonable, i.e., limits must not prevent defendant from providing jury with essential information about key events and sufficient information to make discriminating appraisal of witness' motives and possible bias.

[3] CRIMINAL LAW ⇐ 374
110k374
Government agent's testimony about story defendant had told him about his prior involvement in heroin-smuggling scheme was admissible for impeachment purposes as prior inconsistent statement inasmuch as defendant had testified that he had not previously smuggled heroin; therefore, defendant did not have

viable claim that testimony only improperly served to show defendant's bad character. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 379(2)
410k379(2)
Government agent's testimony about story defendant had told him about his prior involvement in heroin-smuggling scheme was admissible for impeachment purposes as prior inconsistent statement inasmuch as defendant had testified that he had not previously smuggled heroin; therefore, defendant did not have viable claim that testimony only improperly served to show defendant's bad character. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 369.2(1)
110k369.2(1)
Rule forbidding introduction of evidence that is relevant only because it shows bad character permits introduction of evidence that shows bad character when evidence is introduced for other, legitimate reasons. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 1038.3
110k1038.3
Trial court's failure to provide limiting instruction sua sponte in connection with witness' testimony about defendant's prior inconsistent statement was not plain error.

[6] CRIMINAL LAW ⇐ 419(2.20)
110k419(2.20)
Government agent's testimony that he believed that "black prince" who defendant claimed to be was famous heroin smuggler did not amount to hearsay about what others had told agent, and instead was admissible to throw light on agent's state of mind when defendant asserted that he was "black prince."

[7] WITNESSES ⇐ 386
410k386
Questions of narcotics defendant about conference of law enforcement officers that purportedly involved discussions of defendant's narcotics trafficking, and about defendant's bragging that he knew everything that was said at conference, were proper in that bragging was inconsistent with normal reaction of person who had never been involved in narcotics trafficking as defendant had testified and information about nature of conference was needed to explain questions.

[7] WITNESSES ⇐ 388(5)
410k388(5)
Questions of narcotics defendant about conference of law enforcement officers that purportedly involved discussions of defendant's narcotics trafficking, and about defendant's bragging that he knew everything that was said at conference, were proper in that bragging was inconsistent with normal reaction of person who had never been involved in narcotics trafficking as defendant had testified and information about nature of conference was needed to explain questions.

***18** Dana Alan Curhan, Boston, Mass., by Appointment of the Court, for defendant, appellant.

Kevin O'Regan, Asst. U.S. Atty., with whom Wayne A. Budd, U.S. Atty., was on brief, Boston, Mass., for appellee.

Before BREYER, Chief Judge, ALDRICH and TORRUELLA, Circuit Judges.

BREYER, Chief Judge.

Mushtaq Malik appeals his convictions for conspiring to import, and importing, heroin. 21 U.S.C. §§ 952(a), 963; 18 U.S.C. § 2. He makes several evidence-related claims, the most important of which concerns limitations the trial judge imposed on Malik's counsel's efforts to impeach a key witness through cross-examination about the witness's past activities involving the Palestine Liberation Organization, the Jordanian government, and the FBI. After reading the entire record, we conclude that all Malik's claims are without legal merit, and we affirm the convictions.

I.
Facts

The government's evidence consisted primarily of taped phone conversations between Malik and Malik's coconspirator Samir Houchaimi, the testimony of Samir Houchaimi, and the testimony of Drug Enforcement Administration Agent William Powers. On the basis of those tapes and ***19** that testimony, a jury might reasonably have found facts such as the following:

In late 1986 or early 1987 Malik and Samir Houchaimi met in Karachi, Pakistan, and discussed

heroin trading. In September 1987 they agreed upon a heroin smuggling scheme: Malik was to advance the necessary money and to make eight kilograms of heroin available in Cyprus; Houchaimi was to smuggle the heroin into the United States and sell it. Soon thereafter Malik telephoned his source in Northern Pakistan (named Zahir Shah), identified himself as the "Black Prince," and ordered eight kilograms of heroin. Houchaimi went to Northern Pakistan, met Shah, paid him $6000 and took the heroin (in suitcases with false sides) to Malik's house in Karachi. Malik then had it transferred to the nearby house of his associates, Kassim and Muneera Ghaffar. Muneera Ghaffar then brought seven kilograms of the heroin to Cyprus where she gave it to Houchaimi, who had come to Cyprus separately.

On January 24, 1988, Houchaimi flew to the United States with 2.2 kilograms of heroin hidden in his luggage. He smuggled the heroin through customs in New York, flew on to Chicago, returned the next day to New York, and spent the next two weeks trying to sell the heroin. Eventually, he phoned a man he had met in prison who agreed to buy the heroin and asked Houchaimi to come to Springfield, Massachusetts, to deliver it. On February 6, 1988 Houchaimi went to Springfield, where he was arrested with the 2.2 kilograms of heroin. Houchaimi then confessed all and agreed to co-operate with the government.

At the government's request Houchaimi repeatedly phoned Malik and tried to lure him into meeting with Drug Enforcement Administration Agent Powers who, pretending to be an underworld figure called "Costa," supposedly would pay for Houchaimi's heroin and offer to buy more. The highly incriminating taped phone calls reveal Malik, for example, complaining about Houchaimi's tardiness in paying for the 2.2 kilograms of heroin (Malik said Shah was pressuring him for money), speaking at length about large heroin and hashish shipments (apparently using codewords such as "jackets" to refer to the shipments), and asking Houchaimi to explain his arrest (which Houchaimi said concerned only minor immigration offenses). Malik refused to travel to the United States or to Europe, but he agreed to meet "Costa" in Rio de Janeiro.

Malik met with "Costa" (Agent Powers) and "Costa's bodyguard" (another agent) in Rio on March 29, 1988. "Costa" showed Malik $200,000 in cash. Malik told "Costa" he was the "Black Prince," he talked to "Costa" about the heroin in Cyprus, and he discussed plans for future shipments. After the meeting ended, Brazilian police arrested Malik and sent him to the United States for trial.

II.
Limitations on Cross-Examination

[1] Malik argues that the district court should not have limited his counsel's cross-examination of the government's two key witnesses (Houchaimi and Powers) by forbidding him to ask them about Houchaimi's terrorist activities and related affiliations with the Palestine Liberation Organization and other organizations. He says that the limitation prevented him from developing the theory of his defense. That theory explained his conduct and the tape recordings by arguing that he and Houchaimi were members of a group trying to overthrow the President of Pakistan, that Houchaimi had run off with $500,000 of the group's money, and that he (Malik) was simply playing along with Houchaimi, pretending to agree with his remarks about drug smuggling and bragging in front of "Costa" (following to a script supplied by Houchaimi's son), all in order to get back the group's money and to further the revolutionary plot. Malik adds that the line of questioning would also have helped impeach Houchaimi.

[2] The legal question is whether or not the trial judge exceeded his powers to limit cross-examination in order to avoid prejudice, confusion, and unnecessary waste of time. A trial judge has "wide latitude" to ***20** impose such limits. See United States v. Twomey, 806 F.2d 1136, 1139 (1st Cir.1986) ("a trial judge retains wide latitude to impose reasonable limits [on cross-examination] in order to avoid prejudice to a party or confusion of the issues") (citing Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986)). But, those limits must be reasonable, which is to say that they must not prevent the defendant from providing the jury with essential information about key events and sufficient information to make a "discriminating appraisal" of a witness's motives and possible bias. See id. at 1140 (stating that a trial judge's imposition of restrictions will be reversed "only if the jury is left

without 'sufficient information concerning formative events to make a "discriminating appraisal" of a witness's motives and bias' ") (quoting United States v. Campbell, 426 F.2d 547, 550 (2d Cir.1970)).

Our reading of the record convinces us that the district court, in this case, acted well within the scope of its lawful powers, for the following reasons. First, in context, at the point Malik's counsel tried to pursue the cross-examination in question, its relevance was not clear. After the event, and particularly in his brief in this court, counsel has argued that Malik's story amounted to a claim that he was playing along with Houchaimi and that he really did not intend to smuggle drugs. At the time of cross-examination, however, and in his offer of proof, he had not developed the theory very clearly. Indeed, he seemed to be saying either that Malik wanted to show that he had engaged in drug smuggling in order to get back the money that Houchaimi allegedly took from the revolutionary group, or perhaps that Houchaimi was lying to get revenge on Malik for reasons arising from some past association.

Counsel's offer of proof consisted of the following:

> MR. FERRARONE [Malik's counsel]: ... My defense is going to be, while my client was in prison, [Houchaimi] made many many representations to him that he would involve himself in the attempt to kill Zia ul Haq, and that is the reason why my client became involved with this man, because my client was particularly interested in that and produced a large amount of money from many people in order to see this particular thing.
>
> That is why I need to involve myself in this PLO business and I am not fishing, Your Honor. I have an actual theory of defense that I need to present and that what happened was he took the money from a lot of people and he used it on drugs, and my client, realizing that he had been involved with this person, thought that the only way he was going to receive any money back and being able to repay the sixteen people who were involved in this thing, was to do anything he could to get the money back.
>
> This is the theory in a nutshell, and if I don't get the opportunity to cross examine him on this, I will never be able to adequately present this defense.

Tr. Vol. III, p. 75. The trial court's response to this offer indicates that the court understood this story merely as a recital of events leading up to the conspiracy to import heroin, rather than a version of events under which Malik never formed an intention to conspire to import heroin. The court stated:

> Why don't you simply ask him one point blank question, as a result of previous relations with Mr. Malik did he attempt to get involved in this particular conspiracy.

Id. If this was a misimpression, counsel for Malik made no attempt to correct it; instead, after one more attempt to ask Houchaimi about a conspiracy to harm Zia ul Haq, to which an objection was sustained, he asked the following question:

> As a result of your previous relations with Mr. Malik did you attempt to get him involved in a conspiracy to bring heroin into the United States so that, if caught, you could seek revenge against him for any previous relationships you may have had with him in the past?

Tr. Vol. III, p. 76. Houchaimi answered "Sir, Your Honor, I swear to God that my relationship with Mr. Malik was pure heroin and that is it." Id. The cross-examination ***21** then went on to other, unrelated matters.

Not only did counsel for Malik not make clear during his cross-examination of Houchaimi that Malik's defense would be that he never intended to smuggle drugs, he did not make it clear later in the trial either. During Malik's presentation of evidence, counsel continued to argue that Malik's defense was that he had smuggled drugs in order to recover the stolen money. He told the jury, for example:

> So that in a nutshell is what Mr. Malik's testimony is going to be about. He is not going to argue to you, ladies and gentlemen, that at some point he didn't--at some point--at any point he never knew there was--that Mr. Colonel Houchaimi was involved in trafficking drugs. Because he did know that, and he's going to say he did know that. But he is going to tell you that he had an absolute necessity, he had absolute justification that he had to seize this opportunity, because this was going to be his one and only opportunity to get out of that country, and to attempt to at least recover some of the enormous funds that they had given to the Pakistan--that they had given to Colonel Houchaimi to effect the

job that Colonel Houchaimi had promised to do. Tr. Vol. IV, p. 74. Moreover, Malik testified as follows:

> Q. At any point while you were in prison with him, did you have a discussion with Mr. Houchaimi regarding the transportation of heroin to the United States for sale?
>
> A. Absolutely not. We don't believe in this thing. We don't believe in heroin because we don't like it. And we don't do it.
>
> Q. But sir, you will admit that you were involved in dealing with heroin in the course of this transaction; is that correct?
>
> A. It didn't leave me any choice. It was a matter of life and death. It was a matter of life and death of those political people. They were being involved because of my poor judgment. And I had no other choice except to talk to get in touch with him.

Tr. Vol. IV, pp. 118-19. Finally, counsel, in his closing statement, added:

> MR. FERRARONE: Finally I just ask you to take a look at the testimony of Mr. Malik himself. You heard him tell me to sit down. No, no, I will explain....
>
> And he addressed you frontly and he said this is why I did it. This is why I did it. I was pressed from both sides. I was pressed by Colonel--pressed by General Zia, and I was pressed by my own people. I had given Colonel Houchaimi half a million dollars to do a job, a political job. That you and I know quite well Colonel Houchaimi is undoubtedly capable of doing.

Tr. Vol. VI, p. 135. Since "motive"--at least a "recovery-of-stolen-funds motive"--is not ordinarily a defense to a drug-smuggling charge, and since counsel did not clearly explain any more direct connection, we believe the district court could reasonably have considered that the proposed line of questioning lacked significant probative value for the defense.

Second, the trial court could reasonably have thought that the added impeachment value of the "terrorist" organization membership questions was small. Malik's counsel had already elicited from Houchaimi the facts that he had often smuggled heroin into the United States; that he had previously been arrested and convicted and obtained a significantly reduced sentence in return for co-operating with the government; that the government had promised him significant leniency in return for his co-operation in the present case; and that he had used aliases and false passports. The defense had caught him lying about a phone call from Chicago to New York; and it showed him to be highly evasive about remembering extensive foreign travel all documented in his passport. As we have noted, the court permitted counsel to ask Houchaimi if he had tried to involve Malik in drug smuggling to "seek revenge" for a "previous relationship," which Houchaimi denied. The court might reasonably conclude ***22** that, say, PLO membership was not obvious proof of significantly worse character or willingness to lie.

Third, at the same time, the court might reasonably conclude that questions about membership in the PLO or other revolutionary groups would introduce a potentially prejudicial, emotional issue into the trial that could distract the jury from the evidence and facts directly related to guilt or innocence of the crime with which Malik was charged.

These three sets of considerations, taken together, lead us to conclude that the trial court's refusal to permit Malik to cross-examine on this issue did not violate Malik's constitutional right to confront witnesses, nor did it exceed the scope of a trial court's lawful trial-management powers. See Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

III.
Other Issues

[3] 1. After Malik testified, the government called back Agent Powers, who said, among other things, that Malik (during the Rio meeting) had told him the following story about his (Malik's) previous involvement in a heroin-smuggling scheme with two men named Reaz Rage and Ahmed Abass:

> ... Mr. Rage double-crossed Mr. Malik and Mr. Abass and sold the heroin without their knowledge to a foreign buyer, then told them that the heroin had been seized by the Pakistani authorities.

> However, Mr. Malik found out about this, and he and Mr. Abass decided that Mr. Rage should be killed. And Mr. Abass in fact asked Mr. Malik if he could have permission to kill Mr. Rage. As a result of that, with Mr. Malik's permission, according to Mr. Malik, Mr. Abass went to the hotel that Mr. Rage was staying and attempted to enter the room. But was not let in. He then fired, using a rifle, fired shots through the door, severely wounded Mr. Rage.
>
> When Mr. Malik found out about this and found out Mr. Rage had not died as a result of the attack, he immediately contacted an associate of his in the military, and got Mr. Rage to a military hospital so that he couldn't be interviewed by the local authorities. And when Mr. Rage recovered, he advised Mr. Rage that if he ever returned to Pakistan, he would have Mr. Abass finish the job.

Tr. Vol. VI, pp. 6-7. Malik argues that the government used this "admission" to Powers to show that he (Malik) had previously participated in a bad act, which in turn helped to show his bad character; and that Fed.R.Evid. 404(b) forbids the government's introduction of evidence for this purpose.

[4] The short conclusive answer to this claim is that Rule 404(b) forbids the introduction of evidence that is "relevant only because it shows bad character;" it permits the introduction of evidence that shows bad character when a party introduces that evidence for other, legitimate reasons. United States v. Ferrer-Cruz, 899 F.2d 135, 137 (1st Cir.1990) (citing numerous cases). Here, the government introduced the evidence for a legitimate purpose. Malik had testified that he was a kind of "freedom fighter" who had not previously smuggled heroin. He specifically testified, "We don't believe in heroin because we don't like it. And we don't do it." Tr. Vol. IV, p. 119. Malik's statement to Powers is inconsistent with his previous testimony; it amounts to a "prior inconsistent statement," admissible for impeachment purposes. See United States v. Barrett, 539 F.2d 244, 254 (1st Cir.1976) ("To be received as a prior inconsistent statement, the contradiction need not be 'in plain terms. It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the ***23** witness whom it is sought to contradict.' ") (quoting Commonwealth v. West, 312 Mass. 438, 440, 45 N.E.2d 260, 262 (1942)). Therefore, it overcomes the hurdle of Fed.R.Evid. 404(b). Moreover, the inconsistency was an important one in the context of the trial, for it showed that Malik had told Powers a story close to the polar opposite of his trial testimony; and, for that reason, we believe the trial court could reasonably conclude that the statement's "probative value" outweighed its potential "prejudicial effect." See United States v. Griffin, 818 F.2d 97, 101 (1st Cir.) (an appellate court will reverse a trial court's Rule 403 determination only in "exceptional circumstances"), cert. denied, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987).

[5] Finally, as Malik now points out, he was entitled to a limiting instruction, making clear how the jury should use the testimony. However, Malik did not ask for such an instruction. Counsel might well have concluded that, in the context of the trial, such an instruction would not prove very helpful. In any event, whether a party wishes such an instruction, or wishes to forego the instruction (thereby calling less attention to the statement) is primarily a matter for counsel to decide at trial. And, we do not find the circumstances here so special that the court's failure to provide such an instruction sua sponte amounted to "plain error." The circumstances present in the two cases cited by Malik were quite different. See United States v. DeGeratto, 876 F.2d 576, 584 (7th Cir.1989) (suggesting in dictum that even had certain evidence been admissible under Rule 404(b), the trial court's failure to give a limiting instruction would have been plain error); Dawson v. Cowan, 531 F.2d 1374, 1377 (6th Cir.1976) (finding plain error in the failure to give a limiting instruction regarding evidence of a prior conviction for attempted rape where the defendant was facing both a principal charge of attempted rape and a habitual offender charge).

[6] 2. During the Rio meeting (a tape recording of which the government played for the jury) Powers said to Malik: "Your friend says you are the Black Prince." Malik said he was. The government then asked Powers (testifying live before the jury) what he understood the "Black Prince" to be. Over objection the district court ruled that Powers "may testify what he believes it to be." And, Powers said "I believe the black prince to be a very famous heroin smuggler." Tr. Vol. III, p. 144.

Malik argues that Powers's answer is inadmissible hearsay, for it is not based on Powers's previous personal acquaintance with a famous drug smuggler named the Black Prince, but reflects only what other persons told Powers out of court about the activities of someone called the Black Prince. However, the conclusive answer to this claim is that the court did not admit the statement for its truth (i.e. that Malik was the drug smuggler called the Black Prince). Rather, the court admitted the statement in order to show what Powers understood the words "black prince" to mean, as Malik used them. In other words, the statement was admitted to throw light on Powers's state of mind when Malik asserted that he was the Black Prince. See, e.g., United States v. DeVincent, 632 F.2d 147, 151 (1st Cir.) (holding that certain out-of-court statements were not hearsay because they were admissible "for their effect on the hearer"), cert. denied, 449 U.S. 986, 101 S.Ct. 405, 66 L.Ed.2d 249 (1980); J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 801(c)(1), at 801-94 to 801-96 (1990) (utterances offered to show effect on state of mind are not hearsay).

Nor did the district court have to suppress Powers's answer under Fed.R.Evid. 403. Powers's state of mind was relevant because the jury could not fully understand the conversation at the Rio meeting without knowing that Powers wanted to apprehend a heroin smuggler believed to be calling himself the Black Prince, and therefore wanted to see whether Malik identified himself by that name. Nor could it fully appreciate Powers's subsequent statements and actions during the conversation without knowing that, once Malik had identified himself as the Black Prince, Powers believed himself to be dealing with a "very ***24** famous heroin smuggler." Of course, Malik's counsel could have cross-examined Powers at trial about his understanding of the meaning of those words. Given this legitimate use of the evidence, the court could reasonably have concluded that the probative value of the evidence outweighed any prejudicial effect. See, e.g., United States v. Simon, 842 F.2d 552, 555 (1st Cir.1988) (district courts have "considerable leeway" in conducting Rule 403 balancing).

[7] 3. Malik also objects to the district court's having permitted the following questions and answers during the government's cross-examination of Malik.

> Q. In 1982, sir, a conference of law enforcement officers was held in Wiesbaden, Germany, and the subject of that meeting was your narcotics trafficking; isn't that right?
> MR. FERRARONE: Objection, Your Honor.
> THE WITNESS: Please. Let him. Please, sit down. He's in dark, doesn't know. I want to help this gentleman. Repeat your question, sir.
> [Question repeated.]
> A. I'm not a reporter that I should know, that I had to cover that conference. I'm not in the government to cover.
> ....
> Q. Wasn't it true, sir, you bragged to a member of British Customs Service that two hours later, you knew everything that was said in that conference?
> A. I think it's baseless. You are trying to put me on the spot.

Tr. Vol. V., p. 159-60 (brackets in original). Malik says that the references to the Wiesbaden conference, tending to show that Malik is a famous heroin smuggler, were prejudicial or otherwise improper.

The short answer to Malik's claim is that no one objected to the question about Wiesbaden (as repeated); and, given Malik's own instruction to his counsel, the trial court could reasonably conclude that counsel did not intend to object. In any event, the questions were proper (assuming that the government had good reason to believe that the facts the questions assumed were true, see, e.g., United States v. Silverstein, 737 F.2d 864, 868 (10th Cir.1984)). Malik's reaction to news of the conference--bragging about his knowledge--is inconsistent with the normal reaction of a person who had never been involved in heroin smuggling, as he had previously testified. It was therefore admissible to impeach him. See p. 22, supra. The information about the nature of the conference is needed to explain the question and to show why the bragging reaction is inconsistent with his previous testimony. Whether or not the "prejudice" involved outweighs "probative value" under Fed.R.Evid. 403 is, as we have said, a matter primarily for the trial court, not this court; and, given the nature of the defense (the "freedom fighter/no previous connection with heroin" claim), we cannot overturn the district court's judgment in this respect.

For these reasons the judgment of the district

court is

Affirmed.

END OF DOCUMENT

INSTA-CITE

CITATION: 928 F.2d 17

Direct History

=> 1 **U.S. v. Malik,** 928 F.2d 17 (1st Cir.(Mass.), Mar 18, 1991)
(NO. 90-1549)

Negative Indirect History

Declined to Follow by
2 State v. Rodriguez, 136 N.H. 505, 618 A.2d 810 (N.H., Dec 23, 1992)
(NO. 91-280)

UNITED STATES of America, Plaintiff-Appellee,
v.
Victor PLESCIA, Frank Bonavolante, Camillio Grossi a/k/a Canillo Grossi a/k/a Camillo Grossi a/k/a Gam, Anthony Grossi, and Norman Demma, Defendants-Appellants.

Nos. 92-1222, 92-1223, 92-1224, 92-1225, 92-1226 and 93-3405.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 3, 1994.

Decided March 8, 1995.
Rehearing and Suggestion for Rehearing En Banc Denied April 19, 1995.

Defendants were convicted of drug conspiracy offenses by the District Court for the Northern District of Illinois, Charles R. Norgle, Sr., J., and they appealed. The Court of Appeals, Engel, Circuit Judge, sitting by designation, held that: (1) denial of defendants' request for disclosure of tapes regarding their participation in separate gambling conspiracy was not abuse of discretion; (2) conspirator was properly charged, for sentencing purposes, with entire volume of drugs involved in overall conspiracy, based on his frequent large purchases over long period of time; and (3) forfeiture of conspirator's house was not excessive fine.

Affirmed.

[1] CRIMINAL LAW ⇐ 627.6(3)
110k627.6(3)
Denial of narcotics defendants' request for disclosure of tapes relating to their participation in separate gambling conspiracy, to assist them in arguing that they were not involved in drug ring but only in separate gambling conspiracy, was not abuse of district court's discretion, where defendants did receive and offered into evidence several tapes made during drug investigation of conversations limited to gambling, disclosure of additional tapes would allegedly jeopardize ongoing gambling investigation, and other tapes would not undermine evidence regarding defendants' participation in narcotics activity and no reasonable probability existed that disclosure would have changed outcome of trial.

[2] CRIMINAL LAW ⇐ 1152(1)
110k1152(1)
Court of Appeals reviews district court's ruling on motion for disclosure of alleged Brady material, which district court makes after in camera review of material, under abuse-of-discretion standard.

[3] CRIMINAL LAW ⇐ 627.10(1)
110k627.10(1)
When criminal defendant seeks access to confidential informant files, Court of Appeals relies particularly heavily on sound discretion of trial judge to protect rights of accused as well as government.

[4] CRIMINAL LAW ⇐ 919(1)
110k919(1)
To be entitled to new trial based on government's nondisclosure of alleged Brady material, defendant must prove that there is reasonable probability that disclosure of evidence would have changed outcome of trial.

[5] CRIMINAL LAW ⇐ 919(1)
110k919(1)
Reasonable probability exists that disclosure of alleged Brady material would have changed outcome of trial, so as to require that new trial be granted, if evidence undermines confidence in outcome.

[6] CONSPIRACY ⇐ 51
91k51
Drug conspirator is accountable at sentencing for all drug transactions that he was aware of or that he should have reasonably foreseen. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[7] CRIMINAL LAW ⇐ 1158(1)
110k1158(1)
Court of Appeals will not reverse sentencing determination in drug conspiracy case, unless it is based on clearly erroneous drug volume. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[8] CONSPIRACY ⇐ 51
91k51
Defendant, as head of drug ring, was properly held

accountable for drug volume of entire conspiracy for sentencing purposes. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[9] CONSPIRACY ⇦ 51
91k51
Financier with whom head of drug ring agreed to split profits was properly held accountable, for sentencing purposes, for all of the cocaine picked up by courier after financier joined conspiracy, which supported his sentence, without regard to whether financier could also be held accountable for drugs handled by conspirators before he joined conspiracy. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[10] CONSPIRACY ⇦ 51
91k51
At least 20 kilograms of cocaine were reasonably foreseeable to participant in narcotics conspiracy which involved more than 50 kilograms of cocaine, where conspirator in question played active role as regular transporter and distributor of cocaine. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[11] CONSPIRACY ⇦ 47(12)
91k47(12)
Finding that defendant was not merely a casual buyer of drugs from conspirator, but active participant in drug ring, was sufficiently supported by evidence of defendant's long-term relationship with conspirator, of his attempts to warn conspirator after another member of conspiracy was stopped by law enforcement agents, of his frequent purchase of cocaine in distribution quantities, and of other conspirator's selling him cocaine on credit.

[12] CONSPIRACY ⇦ 24(1)
91k24(1)
Buyer-seller transaction alone cannot support conviction for conspiracy to distribute narcotics.

[13] CONSPIRACY ⇦ 47(12)
91k47(12)
Evidence of frequent and repeated narcotics transactions, especially when credit arrangements are made, can support drug conspiracy conviction.

[14] CONSPIRACY ⇦ 40
91k40
Purchaser of drugs for redistribution need not be accountable as employee of seller for jury to find that purchaser has joined in and furthered conspiracy to distribute narcotics.

[15] CONSPIRACY ⇦ 23.1
91k23.1
Evidence that parties must negotiate terms of every transaction, seek to maximize their gains at expense of others, or engage in other forms of opportunistic behavior at expense of group, suggest that transaction costs among group are high and counsels against a finding of conspiracy between members.

[16] CONSPIRACY ⇦ 51
91k51
Drug conspirator's sentence was properly calculated with reference to volume of drugs involved in conspiracy as whole, where conspirator's frequent large purchases over a long period of time for resale to third parties made his venture dependent to a considerable extent upon success of conspiracy, and there was not divergence between his aims and those of conspiracy. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[17] CONSPIRACY ⇦ 24(1)
91k24(1)
Scope of drug conspirators' liability is determined by scope of agreement they actually entered, not necessarily by total volume of larger conspiracy. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[18] CONSPIRACY ⇦ 24(1)
91k24(1)
District court must scrutinize agreement that individual drug conspirator entered into to determine whether he actually agreed to become involved in conspiracy to distribute a given quantity of drugs. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[19] CONSPIRACY ⇦ 24(1)
91k24(1)
Conspiracy liability cannot exceed scope of narcotics defendant's agreement to further illegal narcotics activity. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[20] CONSPIRACY ⇦ 24(2)
91k24(2)
Separate conspiracies exist when each of conspirators' agreements has its own end, and each constitutes an end in itself.

[21] DRUGS AND NARCOTICS ⇦ 190
138k190
Forfeiture of real estate is appropriate where

property is used, in any way, to facilitate any drug-related offense, unless connection between offense and property is incidental and fortuitous.

[22] DRUGS AND NARCOTICS ⚿ 195
138k195
Drug conspirator's home was subject to forfeiture, given evidence that conspirator used home to conduct drug-related business over the telephone and apparently gave his home number to other conspirator to facilitate contacts between them.

[23] CRIMINAL LAW ⚿ 1214
110k1214
Forfeiture of home that drug conspirator used to conduct drug-related business was not excessive fine, where confiscated property had close relationship to narcotics activity, and conspirator's $30,000 equity in property was considerably less than value of cocaine which he arranged to sell by telephone call from property.

[23] DRUGS AND NARCOTICS ⚿ 191
138k191
Forfeiture of home that drug conspirator used to conduct drug-related business was not excessive fine, where confiscated property had close relationship to narcotics activity, and conspirator's $30,000 equity in property was considerably less than value of cocaine which he arranged to sell by telephone call from property.

[24] CRIMINAL LAW ⚿ 394.3
110k394.3
Government provided "good cause" for its delay in sealing surveillance tapes which it had made of drug conspirator's telephone conversations, so that tapes did not have to be suppressed based on government's failure to seal them in timely manner, where second surveillance period prevented any need for sealing between periods, government explained its delay between periods as necessary to draft surveillance request affidavit and to get request processed by federal bureaucracy. 18 U.S.C.A. § 2518(8)(a).

[24] TELECOMMUNICATIONS ⚿ 527
372k527
Government provided "good cause" for its delay in sealing surveillance tapes which it had made of drug conspirator's telephone conversations, so that tapes did not have to be suppressed based on government's failure to seal them in timely manner, where second surveillance period prevented any need for sealing between periods, government explained its delay between periods as necessary to draft surveillance request affidavit and to get request processed by federal bureaucracy. 18 U.S.C.A. § 2518(8)(a).

[25] CRIMINAL LAW ⚿ 394.3
110k394.3
To determine whether surveillance tapes should be suppressed based on government's failure to seal them in timely manner, Court of Appeals had to determine whether government established "good cause" for sealing delays. 18 U.S.C.A. § 2518(8)(a).

[26] TELECOMMUNICATIONS ⚿ 527
372k527
Government's burden of establishing its compliance with statutory prerequisites for Title III electronic surveillance is not great, and requirement that government exhaust normal investigative procedures must be viewed in practical and commonsense fashion. 18 U.S.C.A. § 2518(1)(c).

[27] TELECOMMUNICATIONS ⚿ 527
372k527
Government sufficiently established necessity for electronic surveillance of drug conspirator's telephone and pager, even assuming that government could have prosecuted conspirator without electronic surveillance tapes, where wiretaps both allowed government to ascertain extent and structure of conspiracy and provide enough evidence to convict defendant and other key players in drug ring. 18 U.S.C.A. § 2518(1)(c).

[28] WITNESSES ⚿ 344(2)
410k344(2)
Defendants were properly precluded from cross-examining government's chief witness as to the details of his prior lies under oath, where witness freely admitted his criminal activity while a police officer, his drug use, and the lies he told to conceal his illegal acts, and jury found his frequently corroborated testimony credible regardless.

[28] WITNESSES ⚿ 345(2)
410k345(2)
Defendants were properly precluded from cross-examining government's chief witness as to the

details of his prior lies under oath, where witness freely admitted his criminal activity while a police officer, his drug use, and the lies he told to conceal his illegal acts, and jury found his frequently corroborated testimony credible regardless.

[29] WITNESSES ⇐ 267
410k267
Trial judges retain wide discretion to impose reasonable limits on cross- examination based on concerns about, among other things, harassment, prejudice, confusion of issues, witness' safety, or interrogation that is repetitive or only marginally relevant.

[30] WITNESSES ⇐ 328
410k328
Defendants were properly precluded from cross-examining government's chief witness regarding antidepressive and antianxiety medication, including Prozac, which he was taking at time of trial and when events he described had occurred, notwithstanding defendants' contention that drugs could have affected witness' perception and memory, where defendants did not offer any expert testimony regarding effects of drugs either generally or on witness; cross-examination would be more prejudicial and confusing than useful for impeachment.

[31] WITNESSES ⇐ 282.5
410k282.5
Formerly 410k2821/2
Follow-up questions were improper where government's witness, during cross-examination, stated that he did not remember statement about which defendant wanted to question him.

[32] WITNESSES ⇐ 309
410k309
District court properly refused to allow witness to testify, where witness' invocation of right against self-incrimination precluded effective cross-examination. U.S.C.A. Const.Amend. 5.

[33] CRIMINAL LAW ⇐ 867
110k867
Narcotics defendant was not entitled to mistrial after law enforcement officer, mistaking him for another officer, asked him a question about cocaine presented as an exhibit, where defendant did not respond in any way, no evidence was presented that any juror overheard interaction, and trial judge properly instructed jury to consider only the evidence formally presented in trial.

[34] CRIMINAL LAW ⇐ 921
110k921
Defendant is entitled to new trial only if there is reasonable possibility that jury's verdict has been affected by material not properly admitted into evidence.

[35] CRIMINAL LAW ⇐ 1155
110k1155
Court of Appeals reviews district court's ruling on defendant's motion for mistrial under abuse-of-discretion standard, and will reverse district court's decision only if it has very strong conviction of error.

***1455** Barry Rand Elden, Asst. U.S. Atty., Bennett E. Kaplan (argued), Office of U.S. Atty., Criminal Receiving, Appellate Div., Helen B. Greenwald, Asst. U.S. Atty., Criminal Div., Jack O'Malley, Office of State's Atty. of Cook County, Chicago, IL, for U.S.

Michael B. Mann (argued), Zavislak & Mann, Oakbrook, IL, for defendant-appellant Victor Plescia.

James R. Meltreger, Peter A. Regulski (argued), Anthony J. Onesto, Onesto, Giglio, Meltreger & Associates, Chicago, IL, for defendant-appellant Frank Bonavolante.

Alexander M. Salerno, Berwyn, IL, argued, for defendant-appellant Camillio Grossi.

Cheryl I. Niro, Oak Park, IL, argued, for defendant-appellant Anthony Grossi.

Robert A. Korenkiewicz, Chicago, IL, argued, for defendant-appellant Norman Demma.

Before POSNER, Chief Judge, CUMMINGS and ENGEL, [FN*] Circuit Judges.

FN* Honorable Albert J. Engel, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

***1456** ENGEL, Circuit Judge.

The five defendants in this case appeal the convictions and sentences arising out of a sizeable Chicago-based cocaine conspiracy spanning several years. Because we feel that the vast weight of the evidence supports the convictions and the sentences and that any possible error was harmless, we affirm.

Victor Plescia headed the conspiracy, which began during or before 1986. He sent couriers, including chief prosecution witness Nickalos Rizzato and defendant Anthony Grossi, and he went himself many times to Miami, where he had a cocaine supplier. Rizzato made at least ten trips over several years to pick up over 50 kilograms of cocaine, and as many trips carrying cash to pay the Miami supplier. In 1988, with an initial investment of $40,000, Frank Bonavolante began to finance cocaine purchases in return for a share of the resale profits. After Plescia or a courier brought the cocaine to Chicago, Camillio Grossi and his son, Anthony Grossi, or others distributed it in street-use quantities. When Bonavolante or Plescia wanted cocaine for their own use, Plescia got it from one of the Grossis. Plescia also set up deals between the Grossis and others, including Norman Demma, who regularly bought quantities of cocaine for redistribution, sometimes on credit.

Federal officials began to investigate the drug ring in 1989. With the aid of a confidential informant, the officers identified Plescia as the leader of the conspiracy. An undercover agent met with Plescia to arrange a drug purchase, and Plescia told the agent a considerable amount of detail about the operation. With the accumulating evidence against Plescia, federal agents applied for and received permission for Title III electronic surveillance of Plescia's mobile phone and pager. Surveillance agents recorded many conversations between the defendants in which Plescia coordinated the activity of the conspiracy. The wiretap in place, officers stopped a coconspirator named Kevin Geiger after he met with Plescia. The police then recorded the activity as Plescia called and paged the other four defendants, warning them that Geiger had been stopped with narcotics and telling them to lay low for a while. Plescia did not then reach Demma, despite calling his residence numerous times. In paging Bonavolante, Plescia used the code number 8, which Rizzato testified indicated drug-related activity.

Once the conspiracy resumed normal operations, the federal agents recorded a series of phone conversations in which Demma told Plescia he wanted to purchase more cocaine, Plescia called Anthony Grossi to check availability, then Plescia called back Demma at his residence and set up the drug transaction. The transaction, observed by federal agents, occurred in a parking lot where Plescia and Demma parked before entering a cafe. Afterward, federal agents pursued and caught Demma, who had thrown the cocaine out of his car during the chase. Then they let him go and monitored the burst of communications among the defendants. Demma immediately called Plescia to warn him that the agents followed them and may have bugged Plescia's phone or pager. Plescia again called Bonavolante and the Grossis to warn them of the attention from drug enforcement officers, and Plescia agreed to replace Demma's lost cocaine. When the U.S. had established the roles and identities of the people involved in the conspiracy and had sufficient evidence against them, all five were arrested, indicted, and tried.

The five defendants were tried in one proceeding with two juries, one for Plescia, Anthony Grossi, and Demma and one for Bonavolante and Camillio Grossi. Each defendant had separate counsel. The juries returned verdicts of guilty against all defendants, on most counts. All five were convicted of conspiring to traffic in narcotics and of various counts of using a telephone or pager to facilitate their drug business. All of the defendants now appeal, claiming that numerous reversible errors occurred.

We have considered all the arguments offered by the defendants, and we find sufficient merit for discussion in only a few. We will briefly mention and dismiss some other claims in Section IV of this opinion.

I. The Gambling Tapes

[1] Bonavolante and Camillio Grossi argue that the trial judge committed reversible ***1457** error in denying them access to and use of certain evidence which they believe to be exculpatory. During and preceding the drug conspiracy, Bonavolante directed an illegal gambling conspiracy in which Camillio Grossi and Plescia were involved. Federal agents separately investigated the gambling conspiracy,

again using Title III electronic surveillance, and recorded twelve conversations between Bonavolante and others not involved in the drug ring. One of the tapes mentioned Camillio Grossi's role in the gambling operation. Bonavolante and Grossi defended in the drug prosecution by claiming that their activities, while illegal and conspiratorial, were limited to gambling, not drugs. They wished to offer the twelve tapes of gambling conversations as evidence to counter the government's tapes in which the defendants allegedly held drug-related conversations; in both sets of conversations, the speakers primarily used general language such as "thing," "the stuff," "that guy," and "anything" as well as a euphemism about "groceries" and "a quarter of salami." However, the gambling investigation had not been completed at the time of this trial, and disclosure of the tapes would have jeopardized the separate investigation and prosecution. The trial judge ruled that the U.S. need not disclose the tapes to the defendants. The U.S. disclosed the tapes to the defendants on appeal, after disclosure posed no danger to the other investigation.

Bonavolante and Camillio Grossi claim that the tapes tended to exculpate them, and that therefore they had a right to them under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They cite as support for their claim a Ninth Circuit case, United States v. Abascal, 564 F.2d 821 (9th Cir.1977). The government in that case argued that real estate language used in a taped conversation referred to LSD, and the defendant wanted to present other taped conversations using similar language which actually concerned real estate deals. The Abascal court held that suppression of the defense's tapes represented prejudicial error as to the charges of use of a telephone to further illegal activity. 564 F.2d at 830. That case is easily distinguishable, however, because the district court in Abascal had improperly suppressed the evidence as hearsay (564 F.2d at 830), whereas here, the court balanced the defendants' interests against the government's very real interest in keeping the tapes confidential. Thus, Bonavolante and Grossi must make a stronger case than did the defendant in Abascal to justify reversal of the ruling.

[2][3][4][5] We review the district court's ruling, made after an in camera review of the material, for an abuse of discretion. "When a criminal defendant seeks access to confidential informant files, we rely particularly heavily on the sound discretion of the trial judge to protect the rights of the accused as well as the government." United States v. Phillips, 854 F.2d 273, 277 (7th Cir.1988). To win a new trial, defendants must prove that there is a reasonable probability that disclosure of the evidence would have changed the outcome of the trial. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). Such a reasonable probability exists if the evidence undermines confidence in the outcome. Phillips, 854 F.2d at 277.

The defendants characterize the suppressed tapes as groundbreaking, likely to have convinced the jury that Grossi and Bonavolante limited their criminal activity to gambling and that they were simply swept up with the others, admittedly their friends and associates, who were the real cocaine conspirators. Yet the defendants did receive, and did admit into evidence several tapes made during the drug investigation of conversations limited to gambling. Bonavolante and Grossi fail to explain how the suppressed tapes differed significantly from these, or how the suppressed tapes could have augmented the admitted tapes except by volume. Thus the defendants were able to present their gambling defense without the suppressed tapes. The government admitted that both had been involved in a gambling conspiracy, and it admitted freely that several of the tapes from the drug investigation exclusively concerned gambling. The defendants presented their gambling defense using these and the "substitution theory" described below, and the jury rejected it. Moreover, the suppressed tapes were too ***1458** obscure and confusing to be effectual. Almost all of the so-called "code" words used in the suppressed tapes are generalities, and the taped conversations are vague and rambling in the extreme. Bonavolante and Grossi would have had to stage a miniature gambling trial simply to explain the suppressed tapes. We find it difficult to see how the tapes could have improved the defendants' case perceptibly, much less how they might have changed the outcome in the face of the government's evidence.

Further, even if the defendants had not had similar evidence to present, we do not believe that the gambling tapes are effectively exculpatory. Despite the defendants' characterizations, the drug tapes

primarily involve not code words, which require a prior agreement to acquire their secret meaning, but non-specific words like "thing," "anything," "stuff," "friend," and "guy." These words were given meaning by the speakers' conspiracy, as the government demonstrated by their actions before and after the calls. As such, their meaning cannot be refuted by a demonstration that at another time, the words had been used to mean something else; that is the very nature of such generalities, that they mean different things at different times. If someone says "that thing" and points at something, then the act of pointing provides a context for the generic word, which then means the object pointed at--until someone points at something else.

When "code" words rather than generalities appeared on the government's tapes, the government did not claim to have broken the code; rather, it demonstrated by the defendants' observed actions before and immediately after the calls that the "code" words must have referred to drugs. The probative value of the government's tapes lay not in the actual words, but in the way the conversations interacted with drug activity observed by the agents. For example, the U.S. introduced a taped conversation in which Demma spoke with Plescia and asked for "a quarter." As defense counsel points out, "a quarter" could refer to gambling paraphernalia or orders. In this case, however, Plescia told Demma he would make some inquiries, hung up, immediately called Camillio Grossi and asked for "a quarter of salami." Grossi replied, "Groceries like last time." Later that afternoon, Grossi delivered 125 grams of cocaine to Plescia, who delivered it in turn to Demma. These actions strongly indicate that the three defendants had just set up a drug transaction, and that "a quarter of salami" meant a quantity of cocaine. Tapes on which Bonavolante and gambling conspirators used the word "groceries" in other contexts, even about Grossi, would not undermine a jury's conclusion that in the Demma-Plescia-Grossi conversations, the defendants were talking about drugs, particularly because the suppressed conversations were all held with other people, several months before the taped drug conversations. Sometimes the word "groceries" means food, even to a drug conspirator.

The other tapes do not offer another context for the drug conversations, but are distinguishable precisely because they are set in another context. Even if the tapes were exculpatory, they would not suffice to undermine our confidence in the verdict. The trial judge had discretion to admit or suppress the gambling tapes, and we hold that he did not abuse that discretion.

II. Sentencing

[6][7] All five defendants challenge their sentences. All except Camillio Grossi were sentenced according to U.S. Sentencing Guideline § 2D1.1, which holds a drug conspirator accountable in sentencing "for all drug transactions that he was aware of or that he should have reasonably foreseen." United States v. Edwards, 945 F.2d 1387, 1394 (7th Cir.1991). The defendants claim that the trial judge attributed excessive quantities of cocaine to the conspiracy and to each conspirator. This court will not reverse a sentence unless it is based on a clearly erroneous drug volume. United States v. Mojica, 984 F.2d 1426, 1443 (7th Cir.1993).

Rizzato, the chief prosecution witness and one of the drug couriers, provided most of the information regarding the quantity of cocaine handled by the drug ring. He testified that he made at least ten trips to Florida to pick up cocaine, and that while most trips he carried 5 kilograms, on one occasion he ***1459** picked up 10 kilograms. He also testified that he was not the only courier, that Anthony Grossi made at least one trip to pick up cocaine, and that another courier made several trips. He also testified that Plescia often went to Florida to pay for or pick up cocaine. Accordingly, the trial court held that the conspiracy was responsible for more than 50, but less than 150, kilograms of cocaine.

[8] Plescia, as head of the drug ring, was held responsible for the drug volume of the entire conspiracy, and was sentenced in the 50 to 150 kilogram sentencing range. He argues on appeal that the record only supports a finding of 45 kilograms, but his rationale is flawed. He points out that Rizzato admitted to having lied in the past, concludes that Rizzato's word alone is untrustworthy, and concedes that motel slips and mileage records corroborate eight trips to pick up 5 kilograms of cocaine and one to pick up 10 kilograms for a total of 45 kilograms. However, it is not for us to judge the credibility of witnesses. The defendants did their best to impeach Rizzato,

including gaining his admission of previous lies, but the jury still found Rizzato credible, as did the trial court. The jury and the trial judge are best qualified to judge the credibility of witnesses appearing before them. Rizzato testified to having brought at least 55 kilograms from Florida to Chicago, and other couriers transported indefinite quantities beyond that amount. We affirm Plescia's sentence.

[9] Bonavolante argues that since he did not join the conspiracy until 1988, he should not be held accountable for the entire volume handled by the conspiracy. We have earlier held that "The judge may sentence a late entrant on the basis of all the drugs distributed only if the earlier distributions occurred as part of the conspiracy to which the defendant agreed." Edwards, 945 F.2d at 1397. That seems to be the case here. In any event, we need not reexamine the question whether a conspirator may be held accountable for drug distributions before the conspirator joined the ring, for there is evidence of more than ten trips by different couriers to Florida to purchase cocaine after Bonavolante joined the conspiracy. Since Rizzato testified that he never picked up less than 5 kilograms of cocaine per trip, it is reasonable to infer that different conspirators picked up over 50 kilograms of cocaine after Bonavolante joined the conspiracy. Given Bonavolante's status as financier with whom Plescia split the profits, the quantity was reasonably foreseeable to him.

[10] The trial court found that more than 20 kilograms of cocaine were reasonably foreseeable to Anthony Grossi. Since Rizzato, the Title III tapes, and the DEA agents' observation of Anthony's activities all indicate that he was an active participant in both the transportation and the distribution of cocaine and that he and Camillio Grossi worked together in holding and distributing the drugs, we find the trial court's conclusion amply supported by the record.

Unlike his codefendants, Camillio Grossi incurred his sentence under 21 U.S.C. § 841(b)(1)(A), because he had a prior conviction for a felony drug offense. That statute imposes a minimum sentence of 240 months if any previously convicted felon commits another offense involving more than 5 kilograms of cocaine. Since this mandatory minimum sentence exceeds the Guidelines range (188-235 months) for conviction for a felony drug offense involving more than 50 kilograms, the evidence need indicate only that over five kilograms of cocaine were reasonably foreseeable to Camillio Grossi. The evidence demonstrates Grossi's active role as a regular distributor of cocaine and easily supports his sentence.

For the reasons given, we affirm the sentences of these four defendants. We consider Demma's sentence below.

III. Demma's Conspiracy Conviction and Sentence

[11][12] Norman Demma argues on appeal, as he did at trial, that he was never a member of the conspiracy but merely in a buyer-seller relationship with Plescia. Demma correctly states that a buyer-seller transaction alone cannot support a conviction for conspiracy to distribute narcotics. United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir.1991). Demma argues that his transactions ***1460** with Plescia were isolated, and that neither had an interest in the other's drug activities beyond each purchase. However, the evidence against Demma indicates a significantly greater relationship between Demma and Plescia than Demma argues now.

[13][14][15] Our circuit has held numerous times that "Evidence of frequent and repeated transactions, especially when credit arrangements are made, can support a conspiracy conviction. United States v. Dortch, 5 F.3d 1056 (7th Cir.1993), cert. denied, ---- U.S. ----, 114 S.Ct. 1077, 127 L.Ed.2d 394 (1994); United States v. Fort, 998 F.2d 542, 546 (7th Cir.1993); United States v. Edwards, 945 F.2d 1387, 1398, cert. denied, 503 U.S. 973, 112 S.Ct. 1590, 118 L.Ed.2d 308 (1992); [United States v. Sergio, 934 F.2d 875, 869 (7th Cir.1991)]." United States v. Fagan, 35 F.3d 1203, 1206 (7th Cir.1994). A purchaser of drugs for redistribution need not be accountable as an employee to the seller for a jury to find that the purchaser had joined in and furthered a conspiracy to distribute narcotics.

> It was up to the jury to determine whether [the defendant] had an ongoing relationship with other members of the conspiracy which would support the conclusion that he joined the agreement to distribute cocaine to the Windtramps. The jury was given a buyer-seller instruction; its verdict demonstrates that it rejected that interpretation of the facts. We cannot agree that the jury's conclusion was irrational or unsupported by

> probative evidence. Indeed, the evidence of an ongoing relationship in this case is even stronger than the evidence held to be sufficient in Fort. In Fort, there was only one completed transaction and a promise of future deals. [998 F.2d] at 543. Here, [the defendant] completed three transactions, and trial testimony established that a fourth would have occurred if the Windtramps had been able to locate him. This evidence suggests prolonged cooperation, indicating trust and "implying something more than a series of spot dealings at arm's length between dealers who have no interest in the success of each other's enterprise."

Dortch, 5 F.3d at 1066, quoting United States v. Lechuga, 994 F.2d 346, 349 (7th Cir.1993) (en banc). The Townsend court adds, "Evidence that the parties must negotiate the terms of every transaction, seek to maximize their gains at the expense of others, or engage in other forms of opportunistic behavior at the expense of the group, suggests that the transaction costs among the group are high and counsel against a finding of conspiracy between the members." Townsend, 924 F.2d at 1395.

In this case, Demma had bought cocaine from Plescia for years, ending only when the government broke up the drug ring. Demma bought in distribution quantities, not merely for personal use, and he arranged another purchase every three weeks to a month. On two occasions during the investigation, Plescia gave Demma cocaine on credit. Moreover, agents found Demma's home telephone number on a sheet of paper in Plescia's bedroom when they searched it. When Geiger, who was involved in the drug ring but apparently had no other connection with Demma, was stopped by DEA agents, Plescia called Demma's home six times in an attempt to warn him. Plescia also called Demma later at his home to set up a drug deal involving cocaine with a street value of $50,000. Nor was the relationship one-sided; after being chased and stopped by DEA agents, Demma called Plescia to warn him that DEA agents might be following him or might have wiretapped Plescia's phone or pager. Demma's long-term relationship with Plescia and his drug ring contradicts the claim that Demma was merely a casual buyer. Rather, the evidence supports the jury's conclusion that Demma was a conspirator with an interest in the success of the ring, who acted in furtherance of its illegal goals.

Moreover, this court established in Townsend that "limited participation can be probative of limited agreement" (924 F.2d at 1402) which nonetheless constitutes conspiracy, even if it is a more limited conspiracy than that charged by the government. Plainly, Demma's interaction with Plescia individually rises to the level of an ongoing agreement sufficient to constitute a conspiracy to distribute the drugs actually sold to and distributed by Demma. Townsend held that even if ***1461** the evidence supported conviction for a different conspiracy than the one with which the defendant was charged and indicted, this court will affirm the conviction. 924 F.2d at 1402. Whether the Demma-Plescia agreement was a separate conspiracy or a part of the larger conspiracy run by Plescia is relevant to Demma's sentence, but the evidence fully justifies his conviction for conspiracy.

[16] Demma's sentencing challenge, however, merits a closer examination. The judge sentenced Demma, like Plescia and Bonavolante, according to the entire volume of cocaine, more than 50 kilograms. Demma argues on appeal that he should not be held responsible for the entire volume of cocaine turned over by the larger conspiracy run by Plescia. Demma was involved in the conspiracy from its early days, making monthly or more frequent transactions over a period of years. He knew Plescia well, and since Plescia was willing to describe the scope of the drug ring to an undercover agent trying to buy cocaine, it is more likely than not that Demma knew the approximate volume of drugs Plescia bought and sold. Demma also knew Rizzato, the courier, and Camillio Grossi. However, Demma distributed relatively small quantities, and the government does not claim that he handled 50 kilograms himself.

[17][18][19] The scope of conspirators' liability is determined by the scope of the agreement they actually entered, not necessarily by the total volume of a larger conspiracy. "Townsend requires a trial court to scrutinize the agreement that an individual defendant entered into to determine whether he actually agreed to become involved in a conspiracy to distribute a given quantity of drugs.... Townsend makes clear that conspiracy law contains an important limiting principle--namely, that conspiracy liability cannot exceed the scope of a defendant's agreement to further criminal activity." Edwards, 945 F.2d at 1396. While Demma clearly

conspired to distribute illegal narcotics, his relative independence suggests that he may have conspired with Plescia to distribute some lesser amount than that distributed by the larger drug ring.

Our past decisions offer some guidance. In Townsend, an independent marijuana purchaser-dealer was held to be a conspirator in the overall marijuana conspiracy, but not the related cocaine and heroin conspiracies involving many of the same coconspirators. 924 F.2d at 1402. We see a closer parallel to Demma in United States v. Auerbach, 913 F.2d 407 (7th Cir.1990). The defendant in Auerbach claimed, like Demma, that as one of several purchasers from a drug ring, he did not take part in the larger conspiracy. This court disagreed.

> The evidence established that Helish dealt continuously with [his supplier] throughout the spring and summer of 1985. His purchases were not discrete transactions requiring limited contact with the conspiracy; rather, they required an ongoing relationship that soured only when Helish failed to move the marijuana fast enough.... "[I]f each [defendant retailer] knew, or had reason to know, that other retailers were involved ... in a broad project for the smuggling, distribution and retail sale of narcotics, and had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture, the jury could find that each had, in effect, agreed to participate in the overall scheme." United States v. Grier, 866 F.2d 908, 924 (7th Cir.1989).... "While the parties to the agreement must know that others are participating in the conspiracy, they neither have to personally know the individuals involved nor do they have to participate in every facet of the conspiracy scheme."

Auerbach, 913 F.2d at 415, quoting United States v. Adamo, 882 F.2d 1218, 1224 (7th Cir.1989). In Edwards, 945 F.2d at 1400, this court affirmed the conspiracy conviction of "an insubstantial supplier who made a late entrance into the conspiracy," reversing his sentence only in consideration of the short period of his participation.

[20] Here, Demma's frequent large purchases over a long time made his venture dependent to a considerable extent upon the success of Plescia's operation. As the Auerbach court noted, " 'Separate conspiracies exist when each of the conspirators' agreements ***1462** has its own end, and each constitutes an end in itself.' ... Here, there was no divergence between [the defendant]'s aims and those of the conspiracy; both sought to get the same [narcotics] into the hands of users on the street." 913 F.2d at 416. We affirm Demma's sentence, determined with reference to the volume of drugs involved in the overall Plescia conspiracy.

[21][22] Finally, Demma challenges the forfeiture of his house, calling it inappropriate under forfeiture law and an excessive fine in violation of the Excessive Fines Clause of the Constitution. We find without extended discussion that the forfeiture was proper. Forfeiture of real estate is appropriate where the property is used in any way to facilitate any drug-related offense, unless the connection between the offense and the property is "incidental and fortuitous." United States v. 916 Douglas Ave., 903 F.2d 490, 493 (7th Cir.1990). The government claimed the house primarily on the basis of one phone call made by Plescia to Demma at his house in which the two set up a large cocaine transaction. There is no doubt that Demma used the privacy of his home to conduct drug-related business over the telephone, and he apparently gave his home number to Plescia so that he and others could contact Demma. The connection in this case is not incidental and fortuitous, but a fitting situation for forfeiture.

[23] Because Demma did not make his Excessive Fines argument until this appeal, we review only for plain error. United States v. Olano, ---U.S. ----, ----, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993). No such error appears in this case. Although the Supreme Court has not articulated a clear standard by which to judge claims of excessive fines, Justice Scalia in a concurrence wrote, "the question is not how much the confiscated property is worth, but whether the confiscated property has a close relationship to the offense." Austin v. United States, --- U.S. ----, ----, 113 S.Ct. 2801, 2815, 125 L.Ed.2d 488 (1993) (Scalia, J., concurring). See also Alexander v. United States, --- U.S. ----, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). We have already found such a connection, and even if we consider how much the property was worth, Demma's claim fails. While Demma attacks the forfeiture of the house for one lone phone call, the government replies that Demma's equity in his one-half interest in the house was worth around $30,000, while the drug deal arranged in the phone call

concerned $50,000 worth of cocaine. Nor is there any reason to believe that this was most likely the only drug deal made from Demma's home. The government's power of forfeiture over the property used in illegal drug transactions is one of its harsher powers, but the fine levied on Norman Demma in this case is far from an extreme example of its use.

IV. Other Contentions

The remainder of the defendants' arguments merit little discussion, so we briefly mention only a few. Several of the issues which defendants raise now were not properly preserved for appeal. An important example involves the defendants' expert witness on tapes and tape recordings. Plescia claims now that the expert testimony was crucial to Plescia's argument that the Title III surveillance tapes recorded by the government had been tampered with and should not be trusted. However, the pre-trial hearing on this issue revealed that the witness did not then intend to testify that he believed the tapes had been changed. His testimony regarding the technical aspects of the tapes was specialized and confusing, and the inferences Plescia wished to draw were speculative. Nonetheless, the district court did not then exclude the testimony. Instead, he invited the defendants to bring the witness to the stand during trial, so the judge could hear the questions and the government's objections before ruling on admissibility. The defendants never called their expert to the stand, and thus they waived their claim that his testimony should have been permitted. United States v. Addo, 989 F.2d 238, 242 (7th Cir.1993).

Similarly, Demma claims now that the court improperly refused to re-open the proofs at the end of the trial to allow him to testify. However, just after his lawyer made the motion, in the judge's chambers with only his own counsel and the judge, Demma refused ***1463** to testify. Several times during the trial, Demma had been informed of his right to testify, he had discussed the issue with his lawyer at some length, and he always refused, thereby waiving the right.

[24][25] Only Anthony Grossi preserved the argument for suppression of the Title III tapes. He argues that the district court should have suppressed the tapes because the government failed to seal them in a timely manner upon expiration of the permitted surveillance period as required by 18 U.S.C. § 2518(8)(a). That section provides:

> Immediately upon the expiration of the period of the order [authorizing the surveillance], or extensions thereof, ... recordings [made of the electronic surveillance] shall be made available to the judge issuing such order and sealed under his directions.

To determine whether the tapes should have been suppressed, "we must consider whether the Government established good cause for the sealing delays that occurred in this case." United States v. Ojeda Rios, 495 U.S. 257, 265, 110 S.Ct. 1845, 1850, 109 L.Ed.2d 224 (1990). The government notes first that because a second surveillance period followed the first, it was treated as an extension of the first, preventing any need for sealing between the periods. United States v. Carson, 969 F.2d 1480, 1488 (3d Cir.1992). Second, the government reasonably explains the delay between the periods as necessary to draft the Title III surveillance request affidavit and to get the request processed by the federal bureaucracy. Third, the government points out that it did seal the tapes two weeks after the end of the first period in a good-faith effort to comply with the statute in the face of an innocent delay in processing the request for a second surveillance period. We believe that the government has provided good cause for the delay and has fulfilled the demands of the sealing statute.

[26][27] Other of the defendants' contentions are simply unsuccessful. Defendants argue that the Title III electronic surveillance was improper under 18 U.S.C. § 2518(1)(c) because investigators had enough evidence without it and/or could have obtained sufficient evidence through ordinary investigative techniques. However, "[o]ur Circuit recognizes that 'the government's burden of establishing its compliance with [subsection 2518(1)(c)] is not great,' and that the requirement that the government exhaust 'normal investigative procedures' be reviewed in a 'practical and common-sense fashion.' " United States v. Zambrana, 841 F.2d 1320, 1329 (7th Cir.1988) (citations omitted). From a practical perspective, the defendants' claim fails. Even if it were true that the government could have prosecuted Plescia without the tapes, the wiretaps both allowed the government to ascertain the extent and structure of the conspiracy and provided enough evidence to convict these five, the key players in the drug ring.

It would have been far more difficult or impossible to determine the extent of their involvement, such as Bonavolante's role as financier, by merely observing transactions from a distance.

Plescia argues that tapes of his conversations with an informant, who did not testify at trial, should have been suppressed as hearsay. The informant's statements, however, were not offered for their truth, but only to give context to Plescia's own self-incriminating words. See United States v. Davis, 890 F.2d 1373, 1380 (7th Cir.1989).

[28] The chief witness for the prosecution was the courier Rizzato, a Chicago police officer on disability who had been involved in the conspiracy from the beginning, with a brief hiatus from 1988 to 1989. The defendants claim that they were improperly limited in their attempts to impeach him several ways. First, they cross-examined him regarding several lies he had told while under oath in the past, lies with considerable detail and specificity. He admitted that he had in the past lied while under oath, and he admitted that his lies had been creative and detailed. However, the trial court refused to allow cross-examination into the details of the lies because their prejudicial effect would outweigh any probative value. Fed.R.Evid. 403. In fact, Rizzato had lied several times in telling people that he had killed African-American gang members in retaliation for the murder of his brother, also a Chicago police officer, by African-American gang ***1464** members. Rizzato had also lied while under oath at a hearing in the Chicago Police Department regarding his positive drug test for cocaine. Rizzato had claimed that a woman he had met when feeling lonely and depressed had slipped him the drug, which he had thought was something else.

[29] "[T]rial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). Given that Rizzato freely admitted on the stand that he had lied in detailed ways while under oath, and given the prejudicial effect a claim of the murder of African-American gang members would have, we feel that further cross-examination into the details was unnecessary, probably prejudicial, and properly precluded. Rizzato willingly admitted his criminal activity while a police officer, his drug use, and the lies he told to conceal his illegal acts, and the jury found his frequently corroborated testimony credible regardless.

[30] The trial judge also prevented the defendants from cross-examining Rizzato regarding certain anti-depressive and anti-anxiety medication, including Prozac, which he was taking at the time of trial and when the events he described had occurred. The defendants argue that these drugs could have affected Rizzato's perception and memory, but they did not offer any expert testimony regarding the effects of the medications either generally or on Rizzato. The trial judge correctly ruled that line of cross-examination more prejudicial and confusing than useful for impeachment, particularly because Prozac had often been mentioned negatively in popular media at that time.

[31] Camillio Grossi and Bonavolante further attack the trial judge's decision not to allow their follow-up questions regarding Rizzato's brother-in-law, Carlo Plescia, in support of his defense theory that Rizzato had replaced Carlo Plescia, the real financier of the drug ring, with Grossi and Bonavolante, leader of a gambling ring, in an attempt to protect his sister's husband. Since Rizzato had testified that he did not remember the statement about which Bonavolante wanted to question him, follow-up questions were improper. Bonavolante and Grossi were not prejudiced, because Rizzato fully described his relationship with Carlo Plescia and implicated him in the drug conspiracy and because the defendants were able to present their substitution theory elsewhere.

[32] Camillio Grossi and Bonavolante also wished to call a witness to testify that Rizzato told him he intended to substitute them for Carlo Plescia. However, the witness, who was also involved in the conspiracy, stated that he would plead the Fifth Amendment right against self-incrimination on cross-examination. The government demonstrated in a hearing that the witness would effectively preclude its impeachment of him for considerable bias and previous inconsistent statements by claiming the Fifth. The district court may refuse to permit a witness to testify when that witness' right

against self-incrimination precludes effective cross-examination. United States v. Herrera-Medina, 853 F.2d 564, 567-68 (7th Cir.1988). The trial judge therefore properly refused to allow the witness to testify. Further, the defendants were not greatly disadvantaged. The witness could only have tried further to impeach Rizzato, but he could not have proven the substitution theory, because Rizzato's statements to the witness would represent impermissible hearsay if offered for their truth.

[33][34][35] Plescia argues that the judge should have declared a mistrial because a DEA officer, mistaking him for another officer, asked him a question about the cocaine present as an exhibit. Plescia did not respond in any way. The judge questioned the jurors and determined that there is no indication that any juror overheard the very brief interaction. The judge properly instructed the jury immediately thereafter to consider only the evidence formally presented in the trial. A defendant is entitled to a new trial only if there is a "reasonable possibility" that the jury's verdict has been affected by material not properly admitted into ***1465** evidence. United States v. Davis, 15 F.3d 1393, 1413 (7th Cir.1994). We review the district court's ruling for an abuse of discretion, "and, as an appellate court sitting one step removed from the trial, we shall reverse the district court's decision only if we have a very strong conviction of error." United States v. Sanders, 962 F.2d 660, 669 (7th Cir.1992) (citations omitted). We find that the district court committed no error, because there is no reasonable possibility that the jury was affected by the exchange.

This was a long and complex trial. In such a trial it is almost inevitable that some error or at least questionable ruling may occur during the course of it. It is equally true, however, that the adverse impact upon a jury of such rulings, where otherwise isolated, is diminished in proportion to the length of the trial so that "while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the result." Cf. In re Beverly Hills Fire Litigation, 695 F.2d 207, 227 (6th Cir.1982). That observation is particularly true here. As a whole, the trial was conducted in an orderly fashion and with conscientious regard for the defendants' rights. Nothing we have seen in the record here undermines our belief that the defendants received a fair trial, were properly found guilty and were sentenced appropriately. Accordingly, we AFFIRM.

END OF DOCUMENT

INSTA-CITE

CITATION: 48 F.3d 1452

Direct History

1 U.S. v. Plescia, 773 F.Supp. 1068 (N.D.Ill., 1991) (NO. 90 CR 463)
Affirmed by
=> 2 **U.S. v. Plescia,** 48 F.3d 1452, 41 Fed. R. Evid. Serv. 892 (7th Cir.(Ill.), Mar 08, 1995) (NO. 92-1222, 92-1225, 92-1223, 92-1226, 92-1224, 93-3405), rehearing and suggestion for rehearing en banc denied (Apr 19, 1995)
Certiorari Dismissed by
3 Grossi v. U.S., 116 S.Ct. 32, 132 L.Ed.2d 914, 64 USLW 3167 (U.S., Sep 08, 1995) (NO. 95-276)
AND Certiorari Denied by
4 Demma v. U.S., 116 S.Ct. 114, 133 L.Ed.2d 66, 64 USLW 3242 (U.S., Oct 02, 1995) (NO. 95-5053)
AND Certiorari Denied by
5 Grossi v. U.S., 116 S.Ct. 114, 133 L.Ed.2d 66, 64 USLW 3242 (U.S., Oct 02, 1995) (NO. 95-5264)
AND Certiorari Denied by
6 Plescia v. U.S., 116 S.Ct. 114, 133 L.Ed.2d 66, 64 USLW 3242 (U.S., Oct 02, 1995) (NO. 94-9447)
AND Certiorari Denied by
7 Grossi v. U.S., 116 S.Ct. 329, 133 L.Ed.2d 230, 64 USLW 3270 (U.S., Oct 10, 1995) (NO. 95-5925)
Rehearing Denied by
8 Grossi v. U.S., 116 S.Ct. 556, 133 L.Ed.2d 457, 64 USLW 3379 (U.S., Nov 27, 1995) (NO. 95-5925)

=> 9 **U.S. v. Plescia,** 48 F.3d 1452, 41 Fed. R. Evid. Serv. 892 (7th Cir.(Ill.), Mar 08, 1995) (NO. 92-1222, 92-1225, 92-1223, 92-1226, 92-1224, 93-3405), rehearing and suggestion for rehearing en banc denied (Apr 19, 1995)
Certiorari Denied by
10 Bonavolante v. U.S., 116 S.Ct. 351, 133 L.Ed.2d 247, 64 USLW 3286 (U.S., Oct 16, 1995) (NO. 95-6034)

Related References

11 U.S. v. Geiger, 847 F.Supp. 613 (N.D.Ill., Mar 24, 1994) (NO. 92 C 4750, 90 CR 463)

UNITED STATES of America, Plaintiff-Appellee,
v.
David J. TOWNSEND, Defendant-Appellant.

No. 93-2463.

United States Court of Appeals,
Fifth Circuit.

Aug. 25, 1994.

Defendant was convicted in the United States District Court for the Southern District of Texas, Melinda Harmon, J., of evading excise taxes on gasoline. Defendant appealed. The Court of Appeals, Reynaldo G. Garza, Circuit Judge, held that: (1) evidence was sufficient to support finding that defendant took affirmative acts of tax evasion; (2) evidence was sufficient to support finding that defendant acted willfully in evading payment of excise taxes; and (3) district court did not abuse its discretion by restricting cross-examination, for purpose of impeaching credibility, of employee of defendant's company concerning employee's conduct in allegedly falsifying company's corporate records.

Affirmed.

[1] CRIMINAL LAW ⇐ 1159.2(7)
110k1159.2(7)
Standard of review for sufficiency of evidence appeals is whether rational fact finder could find essential elements constituting crime beyond a reasonable doubt.

[2] CRIMINAL LAW ⇐ 1144.13(5)
110k1144.13(5)
In viewing evidence under rational fact finder standard, Court of Appeals is obliged to take all inferences reasonably drawn from the evidence in the light most favorable to verdict.

[3] INTERNAL REVENUE ⇐ 5263.10
220k5263.10
To prove offense of tax evasion, government must prove: (1) existence of tax deficiency; (2) affirmative act constituting evasion or attempted evasion of tax; and (3) that defendant acted willfully. 26 U.S.C.A. § 7201.

[4] INTERNAL REVENUE ⇐ 5263.10
220k5263.10
Statute prohibiting tax evasion is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade tax of anyone. 26 U.S.C.A. § 7201.

[5] INTERNAL REVENUE ⇐ 5299
220k5299
Evidence was sufficient to support finding that defendant took affirmative acts of tax evasion; defendant prepared fraudulent registration for tax-free transactions, presented fraudulent form to gasoline sellers, arranged for sale of gasoline to unregistered retailer, and signed exemption certificate certifying that he was registered to purchase tax-free gasoline. 26 U.S.C.A. § 7201.

[6] INTERNAL REVENUE ⇐ 5300
220k5300
Evidence was sufficient to support finding that defendant acted willfully in evading payment of excise taxes on gasoline sales; defendant was experienced in motor fuels industry and demonstrated familiarity with legal duties imposed by federal tax scheme, obtained and fraudulently completed registration for tax-free transactions and presented it to distributors, manifested knowledge that his actions were unlawful by attempting to hide them from distributor and Internal Revenue Service (IRS) agents, and attempted to conceal transactions by conducting them through bank account which was not maintained by his company. 26 U.S.C.A. § 7201.

[7] CRIMINAL LAW ⇐ 1153(4)
110k1153(4)
District Court's ruling restricting defendant's cross-examination of witnesses would be reviewed under abuse of discretion standard.

[8] CRIMINAL LAW ⇐ 1170.5(5)
110k1170.5(5)
Formerly 110k11701/2(5)
If Court of Appeals finds abuse of discretion in district court's ruling restricting defendant's cross-examination of witnesses, it views error under harmless error doctrine.

[9] CRIMINAL LAW ⇐ 662.7

110k662.7
Right and opportunity to cross-examine adverse witness is guaranteed by Sixth Amendment. U.S.C.A. Const.Amend. 6.

[10] WITNESSES ⚿ 267
410k267
Trial court is given wide latitude in imposing reasonable restraints upon defendant's right to cross-examination of witnesses.

[11] WITNESSES ⚿ 349
410k349
Trial court may not place witness' character or reputation for veracity outside scope of inquiry on cross-examination.

[12] WITNESSES ⚿ 344(5)
410k344(5)
District Court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination, for purpose of impeaching credibility, of employee of company concerning employee's conduct in allegedly falsifying company's corporate records; district court disputed defendant's contention that records were falsified, and held that admitting the evidence would only mislead and confuse jury, and prolong trial. Fed.Rules Evid.Rules 403, 608(b), 28 U.S.C.A.

[13] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
Court of Appeals will reverse decision of trial court in excluding or admitting evidence only upon showing that trial court abused its discretion in weighing probative value of evidence against its prejudicial effect. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[14] WITNESSES ⚿ 344(5)
410k344(5)
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination of two employees of company concerning their conduct in allegedly falsifying company's corporate records, for purpose of demonstrating their propensity, motive, and opportunity to falsify excise tax forms; evidence of conduct was introduced to show conformity rather than motive or intent, in contravention to rule governing evidence of similar bad acts, crimes, or wrongs. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[15] WITNESSES ⚿ 352
410k352
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination of gasoline buyer regarding buyer's alleged bad business practices, for purposes of revealing evidence of bad acts admissible to prove intent or opportunity; district court found no evidence that buyer knew of or aided defendant in tax evasion scheme. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[16] WITNESSES ⚿ 344(1)
410k344(1)
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination of gasoline buyer regarding buyer's alleged bad business practices, for purpose of impeaching buyer's credibility; district court did not find that buyer participated in any tax evasion scheme, and admission of evidence of trivial acts such as untimely payment, absent evidence of fraudulent scheme, could confuse issues and mislead jury. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[17] WITNESSES ⚿ 374(1)
410k374(1)
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by prohibiting cross-examination into letter from company official expressing official's desire to align himself with Internal Revenue Service's (IRS) position in order to avoid company's tax liability; defendant failed to show any evidence that official would receive any benefit from cooperating with government. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[18] CRIMINAL LAW ⚿ 1170(1)
110k1170(1)
In tax evasion case against defendant chief executive officer of gasohol blending company, exclusion of testimony that defendant was not personally liable for excise tax was harmless error, since anyone who willfully evaded tax would be in violation of statute regardless of who owed tax. Fed.Rules Evid.Rule 403, 28 U.S.C.A.; 26 U.S.C.A. § 7201.

[19] CRIMINAL LAW ⇐ 469.2
110k469.2
Admissibility of expert testimony rests within sound discretion of district court and will be reversed only upon clear showing of abuse of discretion.

[19] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
Admissibility of expert testimony rests within sound discretion of district court and will be reversed only upon clear showing of abuse of discretion.

[20] CRIMINAL LAW ⇐ 478(1)
110k478(1)
To qualify as expert, witness must have specialized knowledge or training such that his or her testimony will assist fact finder in determination of fact issue.

[21] CRIMINAL LAW ⇐ 470(2)
110k470(2)
Expert's testimony in tax evasion case did not concern mental state of defendant so as to usurp jury's role; expert did not opine that defendant intended to file fraudulent form, but rather that form was invalid, and expert did not express opinion about defendant's state of mind. Fed.Rules Evid.Rule 704(b), 28 U.S.C.A.

[22] CRIMINAL LAW ⇐ 338(7)
110k338(7)
In tax evasion case, probative value of expert's opinion as to existence of tax deficiency and defendant's personal liability for tax outweighed its prejudicial effect; testimony presented by government would invariably be prejudicial to criminal defendant, expert's testimony as to existence of tax deficiency was probative of element required for successful prosecution of tax evasion, and testimony that defendant was personally liable arguably had probative value in that someone would be more likely to evade their own tax than another's. Fed.Rules Evid.Rule 403, 28 U.S.C.A; 26 U.S.C.A. § 7201.

[23] INTERNAL REVENUE ⇐ 5317
220k5317
In tax evasion case, district court did not abuse its discretion in refusing to instruct jury that it could find defendant liable for evading taxes only if he personally owed taxes; instruction traced tax evasion statute and informed jury that it could convict defendant for evading his company's tax liability, and proposed instruction was not substantively correct. 26 U.S.C.A. § 7201.

[24] CRIMINAL LAW ⇐ 1152(1)
110k1152(1)
Standard of review for district court's refusal to give proffered jury instruction is abuse of discretion.

[25] CRIMINAL LAW ⇐ 1172.1(1)
110k1172.1(1)
Conviction will not be reversed for improper jury instructions unless instructions failed to correctly state the law.

[26] CRIMINAL LAW ⇐ 835
110k835
Refusal to deliver requested jury instruction is reversible error only if proposed instruction was: (1) substantively correct; (2) not substantively covered in jury charge; and (3) concerned important issue in trial, such that failure to give requested instruction seriously impaired defendant from presenting defense.

[26] CRIMINAL LAW ⇐ 1173.2(1)
110k1173.2(1)
Refusal to deliver requested jury instruction is reversible error only if proposed instruction was: (1) substantively correct; (2) not substantively covered in jury charge; and (3) concerned important issue in trial, such that failure to give requested instruction seriously impaired defendant from presenting defense.

***264** H. Michael Sokolow, Asst. Federal Public Defender, Roland E. Dahlin, Federal Public Defender, Houston, TX, for appellant.

Paula C. Offenhauser, Asst. U.S. Atty., Lawrence Finder, U.S. Atty., Houston, TX, Karen M. Quesnel, Robert E. Lindsay, Chief, Alan Hechtkopf and Gail Brodfuehrer, Crim. Appeals & Tax Enforcement Policy Section, Tax Div., Dept. of Justice, Washington, DC, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Defendant was convicted under I.R.C. § 7201 for evasion of excise tax. The district court found a tax deficiency, affirmative acts constituting tax evasion, and that defendant acted willfully. For the reasons discussed below we affirm.

I. Introduction

This case involves the use of a fraudulent Form 637 in an attempt to circumvent federally imposed excise tax. In 1987 federal law imposed an excise tax of nine cents on each gallon of gasoline sold for highway use. A ***265** wholesale distributor of gasoline holding a valid "Registration for Tax-Free Transactions," or Form 637, could purchase gasoline free of the excise tax. A Form 637 enables a distributor to purchase gas tax-free and sell it tax-free to a registered wholesaler or retailer. The distributor becomes liable for the excise tax if it sells to an unregistered buyer. In this case Appellant fraudulently presented a Form 637 to several distributors, purchased the gas, and then promptly sold the gas to an unregistered buyer.

II. Background

David Townsend, the inventor of a gasoline oxygenating product, moved his California-based fuel blending business (Anafuel) to Houston, Texas in 1986. Townsend, with Lloyd Maxwell, Lamar Maxwell, David Maxwell, Don Maxwell, and Arthur Maxwell formed Petrolife, Inc. (Petrolife), a gasohol blending company. Appellant Townsend was named chief executive officer, Lloyd Maxwell was named the secretary-treasurer and chief financial officer, and Lamar Maxwell was named president.

In November of 1986 Petrolife decided to apply for a Form 637. Signed by Lloyd Maxwell as chief financial officer and dated November 20, 1986, the form was submitted to the IRS. IRS Agent Mike Grayson met with Lloyd Maxwell and Charles Crockett, a Petrolife employee, to discuss the application. Agent Grayson explained the requirements of the Form 637 and told them that it could take several months to obtain approval. Petrolife decided that they were not prepared to disclose all the necessary financial information required for approval at that time. Consequently, the application was deferred. Mr. Crockett was to retain Petrolife's copies of the application until the corporation was ready to reapply. Petrolife never reapplied for the Form 637.

Subsequently, Appellant asked Mr. Crockett for the application. Mr. Crockett handed the application to him under the assumption that he was seeking to reapply for approval. Later that day Townsend showed Mr. Crockett the Form 637 and said that he had obtained a registration number and the signature of the IRS district director. [FN1]

> FN1. Mr. Crockett testified that he was surprised that Townsend was able to procure approval of the Form 637 so quickly and seemingly without leaving the building. It was his understanding that it could take several months to obtain approval.

In July of 1987 Townsend contacted Jetero, a gasoline distributor, and expressed interest in making a purchase. Jetero met with Townsend and discussed forms Jetero required before fuel could be supplied. Townsend provided the necessary forms, including the fraudulent Form 637. These forms listed Petrolife as a manufacturer selling gasohol and listed Petrolife/Anafuel as the purchaser. Upon receipt of the required forms Jetero commenced supplying the fuel tax-free. The Jetero invoices were addressed to "Petrolife, Attn: David J. Townsend."

A total of 264,030 gallons of gasoline were purchased from Jetero in August of 1987.

Townsend also contacted Crown, another gasoline distributor, expressing his desire to purchase gasoline. After he provided the requested documentation, including the fraudulent Form 637, Crown began supplying gasoline. The checks used to pay for the gas listed Petrolife/Anafuel as purchaser. A total of 161,679 gallons of gasoline were purchased from Crown in August of 1987.

The gasoline supplied by Jetero and Crown was shipped to Mr. Chehade Boulos, a service station operator. The funds used by Townsend were drawn from an account opened in the name of Anafuel at the Lone Star Bank. Mr. Boulos would make deposits to this account in exchange for the gasoline shipments. The bank would then issue cashier checks, which were used to pay Crown and Jetero. Basically, Townsend used the funds prepaid by Mr. Boulos to make the payments to Crown and Jetero.

No taxes were paid by Townsend or Petrolife on the gasoline sold to Mr. Boulos. [FN2] By using the fraudulent Form 637 and purchasing gas through an Anafuel account, Townsend acted without the knowledge or ***266** consent of the other officers of Petrolife. When Mr. Crockett became aware of Appellant's transactions he informed Mr. Lloyd Maxwell of his intention to inform the IRS. Mr. Maxwell approved.

FN2. Mr. Boulos testified that he thought the taxes were included in the purchase price of the gasoline.

IRS Agent Grayson became aware of the fraudulent Form 637 during a routine inspection of Jetero's records. Agent Grayson immediately knew the form was invalid. First, he knew that Petrolife's Form 637 had never been approved. Second, the registration number did not correspond to the numbers issued by the Houston office. Third, the signatures on the form were not signed properly. Agent Grayson spoke with Mr. Gonzales, the owner of Jetero, concerning the problem. Mr. Gonzales told Appellant that the registration number was invalid. Townsend responded rather angrily that the number was correct. Later he told Mr. Gonzales that he had a new temporary number. Notwithstanding the temporary number, Mr. Gonzales refused to sell any more gasoline to Townsend on advice of the IRS.

IRS Agent Vitz took over the investigation. Agent Vitz observed the same inconsistencies in the Petrolife Form 637 and therefore contacted Townsend. On September 5, 1987 Agent Vitz requested more information regarding the application. Townsend promised that the information would be forthcoming. After receiving no new information, Agent Vitz paid a visit to his office. Townsend again stated that the registration number was a temporary number issued by the Houston office. But no temporary numbers had issued in 1987.

Agent Taylor met with Townsend and showed him the fraudulent Form 637 and asked if he had ever seen this form. Townsend replied that Mr. Crockett had presented this form to him but that he, Townsend, had never given it to anyone.

On May 20, 1992 a grand jury indicted Townsend for attempting to evade federal excise taxes in violation of I.R.C. § 7201. Townsend was convicted by a jury before Honorable Melinda Harmon in March of 1993. He was sentenced to 14 months in prison and three years supervised release; he was fined $10,000 and specially assessed $50.

Townsend appeals the district court's rulings on four bases. The first basis asserted is whether there was sufficient evidence to support a conviction. Second is whether the district court abused its discretion in limiting Appellant's cross-examination of certain witnesses. The third basis is whether the district court abused its discretion in allowing opinion testimony concerning Appellant's liability on federal excise tax. The fourth basis Appellant urges is whether the district court erred in failing to include a proposed jury instruction in the charge. For reasons discussed below, we affirm the decision of the district court.

III. Discussion

1. Sufficiency of the Evidence to Support the Conviction

[1][2] The standard of review for sufficiency of evidence appeals is whether a rational fact finder could find the essential elements constituting the crime beyond a reasonable doubt. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir.1987), cert. denied, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). In viewing the evidence under the rational fact finder standard, this Court is obliged to take all inferences reasonably drawn from the evidence in the light most favorable to the verdict. United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir.1989).

[3][4] To prove a violation of I.R.C. § 7201 the government must prove (1) the existence of a tax deficiency, (2) an affirmative act constituting an evasion or attempted evasion of the tax, and (3) that the defendant acted willfully. Sansone v. United States, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); United States v. Wisenbaker, 14 F.3d 1022, 1024 (5th Cir.1994). The first issue that must be addressed is whether there was a tax deficiency. Wisenbaker, 14 F.3d at 1024. Excise taxes for the quarter ending September 30, 1987 were due and owing in the amount of $38,313.81 [FN3] on ***267** the gasoline bought from Crown and Jetero and resold to Mr. Boulos. The existence of a

tax deficiency was not contested by Appellant. However, Appellant did take issue as to who owed the tax. He claims that Petrolife owed the tax and he therefore could not be convicted of evading tax of another. This is clearly wrong. I.R.C. § 7201 provides that it is a violation for "any person" to willfully attempt to evade or defeat "any tax." I.R.C. § 7201 is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade the tax of anyone. See id. at 1024-25. It is the act of evasion that is proscribed; adopting the limited reading Appellant asserts would severely restrict if not defeat the purpose of the statute.

FN3. A total of 425,709 gallons of gasoline was bought and resold: 264,030 gallons from Jetero and 161,679 gallons from Crown. The deficiency arose automatically when the tax became due at the end of the quarter and no excise tax return was filed.

[5] The second issue that must be determined is whether Appellant committed an affirmative act of tax evasion. Id. at 1024. Townsend contends that the government failed to prove this element. Taken in the light most favorable to the verdict, the evidence reveals that Townsend committed numerous affirmative acts. Townsend prepared a fraudulent Form 637 that contained two forged signatures and a fabricated registration number. He presented the fraudulent Form 637 to Crown and Jetero in furtherance of his tax-free transaction. He also arranged for the purchase and subsequent sale of gasoline to Mr. Boulos, an unregistered retailer. Townsend signed a customer card agreement enabling him to purchase tax-free gasoline from Crown and signed a federal excise tax exemption certificate required by Jetero, certifying that he was registered to purchase tax-free gasoline. He arranged for the purchase to be made with cashiers checks that were paid from funds deposited by Mr. Boulos into an account opened in the name of Anafuel over which Townsend's son had signature authority. Subsequent to the purchase and sale, Townsend told Agent Taylor that he had never presented the Form 637 to anyone when in fact he had. Finally, he told Agent Vitz that he had obtained a temporary registration number, which turned out to be fabricated. Taking this evidence as true establishes beyond a reasonable doubt that Townsend took affirmative acts of tax evasion.

[6] The final issue in which this Court must inquire is whether Appellant acted willfully. Id. at 1024. The U.S. Supreme Court has recognized that the term "willfully" connotes a voluntary, intentional violation of a known legal duty. United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976). I.R.C. § 7201 imposes that duty and the evidence taken in the light most favorable to the verdict establishes that Appellant acted willfully in violation of this duty. Townsend was experienced in the motor fuels industry and demonstrated familiarity with legal duties imposed by the federal tax scheme. He was no proverbial babe in the woods. He obtained and fraudulently completed a Form 637 and presented it to distributors. Townsend manifested knowledge that his actions were unlawful by attempting to hide them from both Jetero and the IRS agents. Finally he attempted to conceal the gasoline transactions by conducting them through a non-Petrolife bank account. Therefore, the evidence established a tax deficiency, revealed affirmative acts constituting an attempt to evade the excise tax, and demonstrated that Townsend acted willfully.

2. Cross-Examination of Government Witnesses

[7][8][9][10][11] Appellant argues that the district court erred in restricting his cross-examination of various government witnesses regarding (a) falsification of corporate records, (b) bad business practices, and (c) testimony that Townsend was personally liable for excise tax. The applicable Federal Rules of Evidence are 403, 404(b), and 608(b). [FN4] "The admission or exclusion of evidence at trial is a matter committed to the discretion of the trial court." United States v. Moody, 903 ***268** F.2d 321, 326 (5th Cir.1990). We review the trial court's ruling under the abuse of discretion standard. Id. If we find that an abuse of discretion has occurred we view the error under the harmless error doctrine. Id. The right and opportunity to cross-examine an adverse witness is guaranteed by the sixth amendment. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674; Moody, 903 F.2d at 329. However, the trial court is given "wide latitude" in imposing reasonable restraints upon defendant's right to cross-examination. Moody, 903 F.2d at 329. [FN5]

FN4. Appellant asserts due process violations yet

cites only evidentiary authority. Accordingly, we will address each issue under the Federal Rules of Evidence.

FN5. The trial court may not place the witness's character or reputation for veracity outside the scope of inquiry. Moody, 903 F.2d at 329; See generally United States v. Garza, 754 F.2d 1202, 1206 (5th Cir.1985).

A. Falsification of Corporate Records

[12] Townsend contends that the district court abused its discretion in overly restricting the cross-examination of Mr. Crockett and Mr. Maxwell concerning their conduct in allegedly falsifying Petrolife's corporate records. Townsend claims that Mr. Crockett's deposition indicated that the records were falsified in anticipation of bankruptcy and the IRS investigation. Appellant sought to introduce this evidence in hopes of impeaching their testimony. Rule 608(b) of the Federal Rules of Evidence provides that a witness may be questioned about specific instances of conduct, in the discretion of the trial court, to attack the witness's reputation for truthfulness. Rule 403 requires the trial court to balance the dangers of unfair prejudice, confusion of the issues, misleading the jury, or waste of time against the probative value of the evidence.

[13] The district court found that Mr. Crockett's deposition did not support Appellant's assertion that the corporate minutes were falsified. The district court disputed Appellant's contention of falsification finding a lack of evidence to support this line of questioning. [FN6] Furthermore, the district court held that admitting the evidence would only serve to mislead and confuse the jury, and prolong the trial. This Court will reverse a decision of the trial court in excluding or admitting evidence only upon a showing that the trial court abused its discretion in weighing the probative value of the evidence against its prejudicial effect. United States v. York, 888 F.2d 1050, 1056 (5th Cir.1989). Because Appellant cannot show an abuse of discretion we affirm the district court's decision to exclude this evidence.

FN6. The district court found that the corporate minutes had not been kept up to date and it was unclear from the deposition what, if any, part of the minutes were not true. Based on Mr. Crockett's explanation of the deposition, the court found insufficient evidence of fraud.

[14] Appellant also contends that the evidence of falsification demonstrates Mr. Crockett's and Mr. Maxwell's propensity, motive, and opportunity to falsify the Form 637. The motives for falsification, Townsend asserts, were for personal and corporate gain and self-vindication. He claims that these motives were the same as those that allegedly led Mr. Maxwell and Mr. Crockett to apply for the Form 637 and to testify against Townsend. Further, Townsend contends that the scheme to falsify the corporate records was "sufficiently similar if not identical to the offense of falsifying a Form 637."

Rule 404(b) provides that a defendant may offer through extrinsic evidence or by cross-examination similar bad acts, crimes, or wrongs to show motive, opportunity, intent, and the like. [FN7] However, under Rule 404(b), evidence of crimes, wrongs, or acts is not admissible if offered to prove the character of a witness in order to show that the witness acted in conformity therewith on a particular occasion. As discussed above, the district court did not find a scheme or plan to falsify the corporate records, thereby refuting the reasons Appellant proffered for introducing the evidence. Furthermore, Appellant's brief indicates that the evidence was introduced for purposes of showing conformity rather than motive or intent in direct contravention to Rule 404(b). Appellant alleged ***269** that the "scheme to falsify documents to mislead or defraud the bankruptcy court and the IRS was sufficiently similar if not identical to the offense of falsifying a Form 637." Therefore, this Court affirms the district court's decision in excluding the evidence. Because the district court did not commit error, we do not reach application of the harmless error doctrine.

FN7. See also United States v. Luffred, 911 F.2d 1011, 1015 (5th Cir.1990) (holding that prior bad acts may be relevant under Fed.R.Evid. 404(b) to prove that a witness had the opportunity and ability to concoct a fraudulent or deceitful scheme).

B. Bad Business Practices

[15] Townsend also contends that the district court erred in curtailing his cross-examination of Mr. Boulos. Appellant asserts that Mr. Boulos's alleged bad business practices would reveal his motive and

intent to use Townsend's son to set up a bank account. Mr. Boulos, Appellant contends, failed to timely pay his bills, "bounced" checks, and sold substandard gasoline. The unauthorized use of the bank account circumvented a credit check by Crown and Jetero in furtherance of the tax evasion scheme. Under 404(b) evidence of crimes, bad acts, or wrongs are admissible to prove intent or opportunity. However, the district court found no evidence showing that Mr. Boulos knew of or aided Townsend in the tax evasion scheme.

[16] Townsend asserts that Mr. Boulos was also guilty of tax evasion if he knowingly carried out the scheme to buy gas tax-free. These facts would serve to impeach Mr. Boulos under 608(b). Rule 608(b) provides that specific acts of misconduct, though they cannot be proved by extrinsic evidence, may be elicited on cross-examination to impeach the credibility of a witness. But again Rule 403 serves to temper the otherwise unreigned use of 608(b). The district court did not find that Mr. Boulos participated in any scheme of tax evasion and therefore excluded this testimony. The district court did not abuse its discretion because trivial acts, such as untimely payment, should be excluded, absent evidence of a fraudulent scheme, because the dangers of confusing the issues and misleading the jury substantially outweigh any minor probative value the testimony would have.

C. Evidence of Townsend's liability for the excise tax

[17] Townsend contends that the district court abused its discretion in prohibiting cross-examination into areas of the Comptroller's decision and Mr. Maxwell's letter, dated March 27, 1989. The Comptroller held that Petrolife rather than Townsend was liable for state excise tax. In the Maxwell letter Mr. Maxwell allegedly expressed the desire to align himself with the IRS's position in order to avoid Petrolife's tax liability. Appellant contends that he had a right to impeach the witness and reveal the motivation and bias of Mr. Maxwell's adversarial testimony. Appellant has failed to show any evidence in the record indicating an arrangement under which Mr. Maxwell would receive any benefit for cooperating with the government. The district court found, under Rule 403, that the probative value of the testimony was substantially outweighed by the danger of confusion of the issues. Because Appellant has failed to show that the district court abused its discretion, we affirm the district court on this point. York, 888 F.2d at 1056; see also United States v. Sutherland, 929 F.2d 765, 777 (1st Cir.) cert. denied, --- U.S. ----, 112 S.Ct. 83, 116 L.Ed.2d 56 (1991) (holding that appellant failed to demonstrate a basis for suspecting bias other than a conclusory allegation).

[18] Agent Vitz testified that Townsend was liable for the excise tax. Appellant contends that he had a right to cross-examine Agent Vitz concerning the Maxwell letter and the Comptroller's decision holding Petrolife liable for state excise tax. The district court excluded this testimony under Rule 403. We find no error requiring reversal. Anyone who willfully evades a tax is in violation of I.R.C. § 7201 regardless of who owed the tax. [FN8] Thus, exclusion of testimony that Townsend was not personally liable was harmless error.

FN8. As discussed supra all that is required to establish a violation of I.R.C. § 7201 is proof beyond a reasonable doubt of a tax deficiency, affirmative acts of evasion, and willfulness.

3. Expert Testimony

The government called Agent Vitz as a summary witness and an expert on excise ***270** tax. Agent Vitz testified that Townsend became liable for the excise tax when he sold it to Mr. Boulos. Agent Vitz also calculated the tax deficiency owed on the gas sold to Mr. Boulos. Appellant contends that the district court erred in admitting this testimony because it interfered with the jury's function, it was inadmissible under Fed.R.Evid. 704(b), and it was inadmissible under Fed.R.Evid. 403.

[19][20] The admissibility of expert testimony rests within the sound discretion of the district court and will be reversed only upon a clear showing of abuse of discretion. United States v. Charroux, 3 F.3d 827, 833 (5th Cir.1993). Rule 703 provides that a qualified expert may testify in the form of an opinion if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence. To qualify as an expert, the witness must have specialized knowledge or training such that his or her testimony will assist the fact finder in the determination of a fact issue. United States v. Bourgeois, 950 F.2d 980, 987 (5th

Cir.1992). Agent Vitz's training in accounting and experience in tax prosecutions qualifies him as an expert. There is no evidence that the district court abused its discretion in accepting Agent Vitz as an expert as Townsend failed to object to Agent Vitz's qualifications. Accordingly, we will address the substance of his testimony rather than his qualifications.

[21] Appellant contends that Agent Vitz's testimony was an usurpation of the jury's role in violation of Rule 704(b). Rule 704(b) states that an expert shall not testify with respect to the mental state of a defendant in a criminal trial. Agent Vitz did not opine that Townsend intended to file a fraudulent Form 637, rather he testified that the form was invalid. Agent Vitz did not express an opinion about Appellant's state of mind. Accordingly, his testimony was not excludable under Rule 704(b). United States v. Webster, 960 F.2d 1301, 1308-09 (5th Cir.) cert. denied, --- U.S. ----, 113 S.Ct. 355, 121 L.Ed.2d 269 (1992).

[22] Rule 403 operates to exclude otherwise admissible evidence if the probative value is substantially outweighed by its prejudicial effects. Appellant contends that Agent Vitz's testimony was prejudicial. Testimony presented by the government will invariably be prejudicial to a criminal defendant. But Rule 403 only excludes evidence that would be unfairly prejudicial to the defendant. Here, the probative value of the evidence was not substantially outweighed by its prejudicial effects. Agent Vitz testified as to the existence of a tax deficiency, an element required for a successful prosecution under I.R.C. § 7201. He also opined that Townsend was personally liable on the excise tax. This arguably has probative value. Someone would be more likely to evade their own tax rather than another's. Because this testimony was probative and not unfairly prejudicial, we find no error.

4. Jury Instructions

[23] Appellant requested the district judge to instruct the jury that it could find him liable for a violation of I.R.C. § 7201 only if he personally owed the taxes. The district court refused, instructing the jury that it could convict the defendant for attempting to evade taxes owed by another. Appellant cries foul.

[24][25][26] The standard of review is abuse of discretion. United States v. Chaney, 964 F.2d 437, 444 (5th Cir.1992). A conviction will not be reversed unless the instructions failed to correctly state the law. United States v. Coleman, 997 F.2d 1101, 1105 (5th Cir.1993), cert. denied, --- U.S. ---, 114 S.Ct. 893, 127 L.Ed.2d 86 (1994). The issue this Court must decide is whether the district court abused its discretion by refusing the proposed instruction. A refusal to deliver a requested jury instruction is reversible error only if the proposed instruction was (1) substantively correct, (2) not substantively covered in the jury charge, and (3) concerned an important issue in the trial, such that failure to give the requested instruction seriously impaired the defendant from presenting a defense. United States v. Mollier, 853 F.2d 1169, 1174 (5th Cir.1988).

The actual jury charge correctly stated the law. The instruction traced I.R.C. § 7201 and informed the jury that they could convict ***271** Townsend for evading Petrolife's tax liability. See United States v. Troy, 293 U.S. 58, 55 S.Ct. 23, 79 L.Ed. 197 (1934); United States v. Wisenbaker, 14 F.3d 1022, 1026-27 (5th Cir.1994). Appellant's proposed instruction was not substantively correct. Appellant contends that the jury should have been instructed to find Townsend guilty only if he personally owed the tax. Because I.R.C. § 7201 proscribes evasion of any tax, this instruction fails the first prong of the test. Accordingly, we affirm the district court's ruling.

For the above stated reasons the defendant's conviction is AFFIRMED.

END OF DOCUMENT

INSTA-CITE

CITATION: 31 F.3d 262

Direct History

=> 1 **U.S. v. Townsend,** 31 F.3d 262, 74 A.F.T.R.2d 94-6198, 74 A.F.T.R.2d 94-7548 (5th Cir.(Tex.), Aug 25, 1994) (NO. 93-2463)
Certiorari Denied by
2 Townsend v. U.S., 115 S.Ct. 773, 130 L.Ed.2d 668, 63 USLW 3516 (U.S., Jan 09, 1995) (NO. 94-7024)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
47B C.J.S. Internal Revenue Sec.1256 Note 62

Christopher Stacy POOL, Petitioner/Appellant,
v.
Earl B. DOWDLE, Respondent/Appellee.

No. 86-2172.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 13, 1987.

Decided Dec. 15, 1987.

Defendant who had previously been convicted of aggravated assault on police officer petitioned for habeas relief. The United States District Court for the District of Arizona, Earl H. Carroll, J., accepted magistrate's recommendation and dismissed petition without evidentiary hearing. Defendant appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) exclusion of police detective's expert testimony, regarding proper procedure to be used by undercover officer in identifying himself to suspect, did not deprive defendant charged with aggravated assault of Sixth Amendment right to present defense, and (2) exclusion of evidence regarding police department's discipline of officer did not deprive defendant of constitutional right to cross-examine witnesses against him.

Affirmed.

Nelson, Circuit Judge, concurred in part and dissented in part and filed opinion.

[1] CRIMINAL LAW ⚿ 675
110k675
Formerly 110k469
Exclusion of police detective's expert testimony, regarding proper procedure to be used by undercover officer in identifying himself to suspect, did not deny habeas petitioner charged with aggravated assault of Sixth Amendment right to present defense; jurors could have decided whether habeas petitioner knew victim was police officer without expert's testimony, which was merely cumulative of other evidence and not major part of attempted defense. U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW ⚿ 662.1
110k662.1
Evidence regarding police department's discipline of officer for improperly using police vehicle on off-duty job was only peripherally relevant to officer's credibility as witness; accordingly, trial court's decision to exclude evidence did not deprive defendant of constitutional right to confront witnesses against him. U.S.C.A. Const.Amend. 6.

[2] WITNESSES ⚿ 344(2)
410k344(2)
Evidence regarding police department's discipline of officer for improperly using police vehicle on off-duty job was only peripherally relevant to officer's credibility as witness; accordingly, trial court's decision to exclude evidence did not deprive defendant of constitutional right to confront witnesses against him. U.S.C.A. Const.Amend. 6.

***778** Ron Kilgard, Phoenix, Ariz., for petitioner-appellant.

Barbara A. Jarrett, Phoenix, Ariz., for respondent-appellee.

Appeal from the United States District Court for the District of Arizona.

Before HUG, NELSON and NOONAN, Circuit Judges.

NOONAN, Circuit Judge:

Christopher Stacy Pool appeals the denial of his petition for habeas corpus. His case has been ably argued on appeal, but we affirm the decision of the district court.

FACTS AND PROCEEDINGS

In 1982 Pool was a thirty-year-old produce salesman. He was out on bail pending trial for assault. He had been convicted in 1977 of possessing marijuana and had served a three year sentence of probation.

On the evening of February 19, 1982, Pool was driving his father's Toyota in a deserted part of Yuma County, accompanied by his friend Brian Twist. Twist had invited Pool to go rabbit-hunting and Pool had brought a gun with him; but Twist suggested that Pool first aid him in planting two marijuana plants and as they drove they looked for a place to plant the plants.

Paul Connolly, a deputy sheriff of Yuma County, was working that night for a private employer, Camille Allec, patrolling for pay to catch thieves in Allec's citrus groves. Connolly had worked in this capacity for two years and had made about thirty stops or arrests. He drove a "beat up" Yuma County Sheriff Department's 1969 Ford pickup truck, not readily identifiable as a police vehicle. He himself was wearing levis, boots, and his uniform shirt with gold letters and gold circles on the arms and his police badge and name plate; he was also wearing a gun and gunbelt.

Connolly passed Pool in the Toyota and made a U-turn to follow him, eventually finding the Toyota parked on a rural road. Connolly parked head-on with the Toyota. There was no street lighting. Connolly's own lights lit up the car, and he saw two people in the front seat and the plants in the rear. Connolly radioed his number, his location, the license number of the Toyota and the fact that it had marijuana in it to the Sheriff's Department. He then turned on the red grill lights of his truck, walked in front of these lights and approached the driver's side of the Toyota.

According to his testimony at the trial, Connolly had his flashlight in his right hand and shined the light into the truck. He saw the driver reach for his midsection and noticed a bulge on his right side. He ordered both driver and passenger to put their hands on the dashboard. He heard the driver say "fucking pig." He saw the top two inches of an automatic pistol. With his right hand--his shooting hand--occupied with the flashlight, Connolly believes he threw the light into the car. He yelled and dove into the bushes, down a bank. As he dove, or just before, he heard the pop of a shot. He rolled twice, then turned, and fired back twice at headlights that turned out to be his own. One bullet was later found to have damaged the truck's radiator, the other to have ricocheted off, leaving a dent. After his two shots, he crawled into a small hole. About 20 minutes later, Deputy Will Brooks drove up. The Toyota had gone. Connolly came out of the hole and told Brooks that "two Indians just took a shot at me and are armed with a .45 or .9 mm."

At the trial, Pool and Twist testified that they were blinded by Connolly's lights. ***779** When Connolly told them to place their hands on the dashboard, Pool was scared and reached for the gun. As he pulled up the gun he was hit in the face with the flashlight. To this extent, Pool and Twist's testimony was not contrary to Connolly's. Pool, however, denied saying anything to Connolly except "Get back" as he, Pool, put his hands on his gun, and both Pool and Twist maintained that they did not recognize Connolly as a police officer. On the critical issue of the shooting, Pool testified that before he fired he heard "a cannon blast" in his car and thought, "This man is trying to kill me." He then "cocked the gun and stuck it out the window and fired a shot at the same time trying to start the car." As he drove off, Pool heard "at least two shots." Twist's testimony as to the events was vague and not such as to inspire confidence in his memory or veracity. In his own words, he was "in total confusion."

Pool was charged with the crime of aggravated assault with a deadly weapon. His defense was that he acted with justification. His first trial ended in a hung jury. In the second trial, the judge charged the jury that Pool was justified if two conditions were satisfied: that a reasonable person in his situation would have believed that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force; and that he used or threatened no more physical force than would have appeared necessary to a reasonable person in his situation. No objection was made to this standard instruction. The case was sent to the jury at 6:12 p.m. and at 7:26 p.m. the jury returned a verdict of guilty.

Douglas W. Keddie, the trial judge, denied a motion for a new trial on July 13, 1982. He sentenced Pool to nine years in prison. Pool appealed to the Arizona Court of Appeals, attacking the admission of the marijuana and evidence of his bail status. He also challenged a limitation put on the cross-examination of Connolly and Brooks and the exclusion of expert testimony on proper procedures for a police stop. Other errors assigned were the denial of a directed verdict; denial of a motion to change the judge who was accused by Pool of prejudice; error in the jury instruction on Pool's bail status; and error in rejecting Pool's proffered instructions on retreat. The Court of Appeals affirmed the conviction; the Supreme Court of Arizona refused to review.

Pool, represented by new counsel, applied for

habeas corpus. A magistrate recommended that his petition be dismissed without an evidentiary hearing. The district court accepted this recommendation and on March 10, 1986 denied the petition. Pool appealed to this court.

ISSUES

Pool presses two claims:

First, Pool maintains he was denied his rights under the Sixth Amendment "to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). He sought to put on the stand a detective from the City of Yuma Police Department who as an expert would testify as to the proper police procedure to be used by an undercover officer identifying himself. The detective had testified at the first trial which ended in a deadlocked jury; Judge Keddie, who presided at both trials, stated that by the time of the second trial he had been persuaded by the prosecutor's objections that the testimony was irrelevant and that the jury did not need it to understand the situation. Pool contends that the detective's testimony "directly rebutted the theory of the government's case that a reasonable person would have identified Mr. Connolly as a police officer."

Second, Pool points to matter that Judge Keddie's rulings precluded both juries from hearing: Five days after the encounter with Pool, Connolly was reprimanded for not reporting that he had been working for two years for pay for a private employer and using the county's truck and gas; also for not giving "an adequate answer" to the Sheriff's inquiry as to why the Sheriff had not been informed. Connolly was docked "100 hours of comp time" to compensate for the gas and wear and tear on the truck. ***780** The reprimand was to stay in his file one year.

The reprimand became an issue when defense counsel wanted to show that Connolly had lied to defense counsel in his pretrial statements. As part of that proof, defense counsel sought to introduce the reprimand. Judge Keddie interpreted the pretrial statements made by Connolly to defense counsel as ambiguous and did not believe the reprimand relevant to Connolly's credibility. Accordingly, he refused to allow examination on either the reprimand or the statements to counsel.

On appeal to this court, Pool urges that cross-examination on the reprimand was necessary to bring out bias against Pool on Connolly's part. As expressed by Pool's brief:

> Connolly had a motive and bias to testify falsely, not only to ingratiate himself with his superiors, but also to put a good face on his activities on the evening of the alleged crime, and ultimately, to get back at Mr. Pool .... [He] may reasonably have hoped that his reprimand would be suspended if he cooperated in the prosecution.

Pool argues further that Connolly's reprimand could be interpreted as a reprimand for equivocating when questioned by the Sheriff and in this way would also have a bearing on his credibility. Denial of the opportunity to attack Connolly's credibility is, Pool maintains, a violation of the right "to be confronted with witnesses against him." United States Constitution, Amendment VI; Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

ANALYSIS

We review anew the legal issues presented to the district court. Chatman v. Marquez, 754 F.2d 1531 (9th Cir.1985).

[1] First. The admissibility of expert testimony is normally in Arizona as elsewhere a matter of discretion for the trial judge. State v. Williams, 132 Ariz. 153, 160, 644 P.2d 889 (1982). Expert testimony is unnecessary if the jury is qualified without such testimony to determine the issue intelligently. State v. Chapple, 135 Ariz. 281, 292-93, 660 P.2d 1208 (1983). We do not find Arizona's application of these standard doctrines to have violated the Sixth Amendment. If the jury believed Connolly, the jury would have found that Pool knew he was police because he used the opprobrious street term for a policeman. If the jury believed Pool himself, the jury would have found that Pool fired after being shot at by Connolly. Without expert testimony the jury would have known that such an approach by Connolly would not constitute proper police procedure. If the jury did not believe Pool, the expert's testimony would not have helped him. No constitutional error was committed in excluding the testimony. In any event, the expert testimony would have been cumulative and was not "a major part of the attempted defense." Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir.1983).

[2] Second, as to the reprimand: the observation in it that Connolly's answer was "inadequate" does not show that he was a liar; the observation merely means that he did not have a good explanation. That the Sheriff's Department already had a good idea of Connolly's practice is evident from the arrests he had made in the past and the police communications he used; it is a reasonable inference that the reprimand came about because of the publicity. In ruling on peripheral evidence, a trial court must have a range of discretion within which a mistake, if there is one, is not automatically constitutional error. Police discipline of a police witness may be the only evidence of possible bias and so severe in degree that a motive to lie may be created. Cf. United States v. Garrett, 542 F.2d 23 (6th Cir.1976). In Pool's case, the existence of the reprimand in Connolly's file would not have significantly increased his desire to ingratiate himself with his superiors. He had already lost "the comp time." The reprimand was to be removed from the file within nine months of the trial. Every police officer, it may be supposed, looks better with a certain kind of superior if his testimony leads to a conviction. This possible reason for discounting police testimony is not materially enhanced ***781** by the presence of a mild, soon-to-be extinguished censure. Finally, that the encounter with Connolly had led to the reprimand would not have shown that Connolly had a different degree of bias against Pool than the jury already knew that he had. The jury knew from Connolly's own lips that Pool had put him to flight, driven him into a hole, and led him to shoot up his own vehicle. If the jury did not infer from this story that Connolly could have little love for the defendant, a bureaucratic censure would not have changed the jury's view of Connolly's animus. No constitutional right was denied in limiting the cross-examination in this regard. Unlike Davis v. Alaska where a traditional method of impeaching a witness was denied by the trial court, there was here only a remote and peripheral challenge to Connolly's credibility.

AFFIRMED.

NELSON, Circuit Judge, concurring in part and dissenting in part.

Pool sought to introduce expert testimony relevant to whether he recognized Connolly as an officer. The expert witness would have explained the standard police procedures used by officers to identify themselves to frightened suspects. From this evidence, the jury might have inferred that reasonable people do not always recognize police officers. This insight might have led the jury to conclude that Pool did not recognize Connolly as an officer because Connolly failed to use the standard procedure to identify himself.

Excluding the relevant expert testimony was constitutionally valid. The sixth amendment does not require the admission of all relevant evidence. Rather, courts may constitutionally exclude evidence if society's interest in fair and efficient trials outweighs the defendant's interest in presenting the evidence. Perry v. Rushen, 713 F.2d 1447, 1451-52 (9th Cir.1983), cert. denied, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984). In this case, the state's interest in excluding evidence on collateral issues was legitimate. The trial court could reasonably have feared that the expert testimony would divert the jury's attention from the issue of Pool's guilt to the collateral issue of Connolly's improper method of identifying himself.

Against the State's interest in preventing jury confusion we must weigh Pool's interest in presenting the evidence. This was quite small. The jury could have concluded that Pool did not recognize Connolly as an officer from other much more direct evidence, such as the darkness, the shining headlights, Connolly's clothes, and Connolly's failure verbally to identify himself. The inference from the expert testimony to the conclusion that Pool did not recognize Connolly as a police officer was indirect and problematic. I therefore conclude that the trial court reasonably excluded the relevant expert testimony. I agree that no sixth amendment violation occurred.

I disagree, however, that excluding evidence and cross-examination on Connolly's reprimand was constitutionally permissible. The confrontation clause secures a defendant's right to cross-examine witnesses in order to expose their motivation for testifying. Davis v. Alaska, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974). Although this right does not preclude trial judges from imposing "limits on defense counsel's inquiry into the potential bias of a prosecution witness," Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), neither does it

allow the trial court to prohibit all inquiry into the possibility that an event might have furnished the witness with a motive for favoring the prosecution. See id.

In this case, Pool sought to cross-examine Connolly on evidence "about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." Van Arsdall, 106 S.Ct. at 1435. The jury might have found that the reprimand gave Connolly a motive to lie based on any one of several reasonable inferences. Having learned that officer Connolly was punished for his moonlighting, the jury might have concluded that Connolly sought to regain his lost comp. time, or to avoid more severe action by helping the prosecution to obtain ***782** a conviction. The jury might also have realized that the officer would have reason to make his infraction seem less serious to his superiors by avoiding the further charge that in addition to moonlighting and using state property without permission, he handled the arrest inappropriately. Finally, learning that Connolly had been sanctioned, and presumably that the department would no longer permit Connolly to earn the extra income using department property, the jury might have developed further reason to suspect that Connolly disliked Pool and had reason to seek revenge. Because a jury might have found that the reprimand gave Connolly an incentive to lie, excluding the evidence and precluding all cross-examination on the issue violated Pool's confrontation clause rights. See United States v. Garrett, 542 F.2d 23 (6th Cir.1976).

Although trial courts may exclude cumulative evidence of bias, see, e.g., United States v. Jackson, 756 F.2d 703 (9th Cir.1985) (allowing limitation of cross-examination regarding a witness's paid cooperation with law enforcement officials because evidence had already been admitted regarding the witness's payment in exchange for cooperation), the evidence of bias excluded in this case was not cumulative. Other facts might have suggested that Connolly had reason to dislike Pool. But these other facts are not cumulative of the additional and independent motive for lying created by the reprimand. To the contrary, the reprimand constitutes an independent incentive for Connolly to lie. Pool had a constitutional right to expose this incentive for the jury.

I would reverse Pool's conviction based on this constitutional error. I cannot conclude beyond a reasonable doubt that the error was harmless. See Van Arsdall, 106 S.Ct. at 1438. The case was based largely on Connolly's testimony, and therefore on his credibility. Because his testimony was important, not cumulative, and uncorroborated, and because the prior trial ended in deadlock, indicating that the prosecution's case was not overwhelmingly strong, even a small increase in the evidence of Connolly's bias might have altered the outcome of this case.

END OF DOCUMENT

INSTA-CITE

CITATION: 834 F.2d 777
=> 1 **Pool v. Dowdle,** 834 F.2d 777 (9th Cir.(Ariz.), Dec 15, 1987)
(NO. 86-2172)

FEDERAL LAW RESEARCH
F.O.I.A.
ERIC JASO
ATTORNEY WORK PRODUCT

5 USCA § 552 (FOIA)

Brian DICKERSON, Plaintiff-Appellant,
v.
DEPARTMENT OF JUSTICE,
Defendant-Appellee.
No. 92-1458.
United States Court of Appeals,
Sixth Circuit.
Argued Jan. 19, 1993.
Decided April 30, 1993.

Newspaper editor requested, pursuant to Freedom of Information Act (FOIA), release of record on investigation conducted by Federal Bureau of Investigation (FBI) into disappearance more than 15 years earlier of former union official. After FBI denied request, editor brought suit to compel Department of Justice to produce records. The United States District Court for the Eastern District of Michigan, George LaPlata, J., denied relief, and editor appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that: (1) Vaughn index was not required, and (2) records came within FOIA exemption for records compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.

Affirmed.

Beckwith, District Judge, sitting by designation, delivered separate concurring opinion.

Batchelder, Circuit Judge, delivered separate dissenting opinion.

[1] RECORDS ⇐ 65
326k65
"Vaughn index" is document-by-document index, specially prepared for litigation purposes, in which agency describes contents of its records and reasons why each of the disputed items is claimed to be exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552.
See publication Words and Phrases for other judicial constructions and definitions.

[2] RECORDS ⇐ 60
326k60
Law enforcement records cannot reasonably be expected to interfere with enforcement proceedings, for purposes of Freedom of Information Act (FOIA) exemption, unless there is at least reasonable chance that enforcement proceeding will occur. 5 U.S.C.A. § 552(b)(7)(A).

[3] RECORDS ⇐ 65
326k65
District court did not have to require Federal Bureau of Investigation (FBI) to compile Vaughn index of FBI file relating to disappearance of former union official more than 15 years earlier before concluding that records relating to disappearance were within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings, based upon affidavits of several FBI officials and its in-camera review of FBI file documents assembled for purpose of briefing one of the affiants on status of investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇐ 65
326k65
In connection with dispute over whether records come within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes, valuable time should not normally have to be spent on preparation and analysis of Vaughn index insofar as question to be resolved is whether actual enforcement proceedings are still being contemplated; as practical matter, affidavits by people with knowledge of and responsibility for investigation usually ought to suffice. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇐ 60
326k60
Federal Bureau of Investigation (FBI) records relating to disappearance of former union official more than 15 years earlier were exempt from disclosure under Freedom of Information Act (FOIA) as records compiled for law enforcement purposes whose production could reasonably be expected to

interfere with enforcement proceedings; FBI made sufficient showing that investigation of disappearance remained active and that production of record could reasonably be expected to interfere with future prosecution. 5 U.S.C.A. § 552(b)(7)(A).

[6] RECORDS ⇐ 67
326k67
On appellate record it did not appear that prospects for finding any "reasonably segregable" nonpublic portions of Federal Bureau of Investigation (FBI) files relating to disappearance of union official more than 15 years earlier that could properly be made public were such as to justify remand. 5 U.S.C.A. § 552(b).

***1427** Herschel P. Fink (argued and briefed), Michael A. Gruskin (briefed), Steven M. Ribiat, Honigman, Miller, Schwartz & Cohn, Detroit, MI, for plaintiff-appellant.

L. Michael Wicks, Asst. U.S. Atty., Detroit, MI, Stephen G. Harvey, Leonard Schaitman, U.S. Dept. of Justice, Appellate Staff, Civil Div., Scott R. McIntosh (argued and briefed), U.S. Dept. of Justice, Appellate Div., Washington, DC, for defendant-appellee.

Before: NELSON and BATCHELDER, Circuit Judges; and BECKWITH, District Judge. [FN*]

FN* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

DAVID A. NELSON, Circuit Judge.

Pursuant to the Freedom of Information Act--a statute which, subject to certain exceptions, makes federal government records available to anyone who asks for them--plaintiff Brian Dickerson requested the release of records on an investigation conducted by the Federal Bureau of Investigation into the disappearance of Jimmy Hoffa, former president of the Teamsters Union.

Citing 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings," the government denied the request. Mr. Dickerson brought suit in the Eastern District of Michigan to compel the Department of Justice to produce the records. The district court (La Plata, J.) ultimately decided that production was not required.

In making its decision the district court focused on the question whether a "concrete prospective law enforcement proceeding" [FN1] could still be discerned--i.e., whether there was still a reasonable chance that someone would be prosecuted in connection with Mr. Hoffa's disappearance. Based on affidavits of several FBI officials and an in camera review of FBI file documents assembled for the purpose of briefing one of the affiants on the status of the investigation, the district court found that "the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." The court further found that disclosure of the requested documents could reasonably be expected to interfere with such proceedings. The court made these findings without having required the government to provide a document-by-document analysis of the files.

FN1. The phrase originated with Senator Hart, a supporter of Freedom of Information Act amendments adopted in 1974. See 120 Cong.Rec. 17033 (1974), quoted in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232, 98 S.Ct. 2311, 2322, 57 L.Ed.2d 159 (1978).

The issues presented on appeal are (1) whether the district court abused its discretion in not insisting on a full document-by-document analysis and in limiting its in camera review to the briefing materials; (2) whether the district court dealt correctly with the factual side of the case; and (3) whether the district court ought to have found that at least some non-public portions of the

investigatory files were not protected *1428 from disclosure. Resolving each of these issues in favor of the government, we shall affirm the judgment of the district court.

I

Jimmy Hoffa disappeared in Detroit, Michigan, on July 30, 1975. It is widely believed that he was abducted and killed. Mr. Hoffa's disappearance led to an FBI investigation that has not, to date, resulted in any criminal proceedings being brought.

The investigation is documented in two large files, one maintained in the FBI's field office in Detroit and the other at FBI headquarters in Washington. At the time with which we are concerned in this proceeding the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes.

On July 25, 1989, counsel for the Detroit Free Press, a newspaper that employs plaintiff Dickerson in an editorial capacity, sent sweeping Freedom of Information Act requests on the Hoffa investigation to Justice Department and FBI officials in Detroit and Washington. When the requests were denied, Mr. Dickerson sued the Department of Justice under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly. This section of the statute, which places the burden of sustaining non-disclosure on the government, directs the court to determine the matter de novo. It also provides that the court "may examine the ... agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in [5 U.S.C. § 552(b)]...."

The Department of Justice filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserting that no documents had been improperly withheld. Both parties subsequently moved for summary judgment.

The plaintiff's summary judgment motion was accompanied by newspaper articles referring to a statement by Kenneth P. Walton, a retired head of the FBI's Detroit field office, to the effect that although he knew who had murdered Jimmy Hoffa, there would never be a prosecution because of the government's unwillingness to disclose confidential sources. The Justice Department filing was accompanied by "declarations," or affidavits, in which two FBI headquarters officials, Angus B. Llewellyn and Jim E. Moody, attested that the Hoffa investigation was still pending.

The Llewellyn declaration went on to give a general description of the contents of the investigatory files, categorizing the records by source or function. The declaration also sought to explain why law enforcement records contained in the files were exempt from production not only under subsection (7)(A) of 5 U.S.C. § 552(b), but also under subsection (7)(C) (exempting such records if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy"); subsection (7)(D) (exempting them if they "could reasonably be expected to disclose the identity of a confidential source"); and subsection (7)(E) (exempting them if they "would disclose techniques and procedures for law enforcement investigations or prosecutions ... if such disclosure could reasonably be expected to risk circumvention of the law").

The Moody declaration focused on the (7)(A) exemption. The declaration explained, among other things, that

> "The files responsive to plaintiff's [Freedom of Information Act] request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this

investigation."
The Moody declaration stated that the FBI was continuing its efforts to develop information for use in criminal proceedings, and the declaration sought to show why production of ***1429** the records could reasonably be expected to interfere with such proceedings.

In January of 1991 the district court denied both of the motions for summary judgment on the ground that there was a material issue of fact concerning the prospect of future enforcement proceedings. The Justice Department moved for reconsideration, supporting its motion with a declaration executed by William M. Baker, the Assistant Director of the FBI in charge of the agency's Criminal Investigation Division.

Mr. Baker declared under penalty of perjury that it was his responsibility to determine whether the investigation into the Hoffa disappearance should be pursued; that in his judgment the investigation warranted the continuing efforts of the FBI; that he had allocated continued FBI resources to the investigation; that he believed "that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted;" and that public disclosure of the information in the Hoffa file could reasonably be expected, for reasons specified in the declaration, to interfere with enforcement proceedings against those responsible for the disappearance. Mr. Baker further declared that the statement attributed to the former field office head "did not reflect and does not reflect official FBI policy."

[1] In response to the motion for reconsideration plaintiff Dickerson filed a reply brief stating that Mr. Baker's declaration was essentially identical to one he had filed in a Freedom of Information Act suit brought in a federal district court in Missouri by Mr. Hoffa's daughter, Barbara Crancer. The brief pointed out that the declaration had not dissuaded the district court in Missouri from ordering the government to submit a Vaughn index on the smaller of the two Hoffa files, [FN2] and it noted that FBI Director William Sessions had testified before a Senate Subcommittee that it is "doubtful" that the government will ever have sufficient evidence to bring to trial those responsible for Mr. Hoffa's disappearance. [FN3]

FN2. A "Vaughn index," which takes its name from a technique developed in Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure. See Osborn v. Internal Revenue Service, 754 F.2d 195, 196 (6th Cir.1985), and the cases there cited, for a statement of the criteria such an index must meet. The requirement for a Vaughn index in Mrs. Crancer's case was subsequently upheld by a divided three judge panel of the Court of Appeals for the Eighth Circuit, see In re Department of Justice, 950 F.2d 530 (8th Cir.1991), but the panel decision has been vacated in connection with the granting of a rehearing en banc. See Order at 950 F.2d 538. As of this writing the en banc court has not announced its decision.

FN3. The Justice Department later submitted an official transcript of the subcommittee hearing showing that Director Sessions had declined to comment on the likelihood of indictments being obtained, and that it was Oliver B. Revell, Executive Assistant Director-Investigations, and not Director Sessions, who made the "doubtful" comment.

Plaintiff Dickerson's reply brief further advised the court that the Missouri proceedings had disclosed the existence of two categories of documents that might quickly reveal the status of the Hoffa investigation: documents containing the results of high level strategy conferences, with synopses of the investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. The plaintiff's brief

suggested that the court conduct an in camera review of all documents in these two categories. Since the Missouri court had already ordered the Justice Department to prepare a Vaughn index on the 68-volume file from FBI headquarters in Washington, plaintiff Dickerson suggested that the Department should be ordered to produce a copy of that index as well.

In the meantime, plaintiff Dickerson had served notice of the depositions of FBI Director Sessions and declarants Llewellyn, Moody and Baker, and the Justice Department had moved for a stay of discovery. The motion was referred to a magistrate judge, who conducted two telephone conferences on the matter.

In the course of the first conference the Justice Department indicated a willingness to go through the headquarters file and segregate, ***1430** for in camera review by the court, all documents in the two categories singled out by the plaintiff. Government counsel later confirmed with declarant Moody, Chief of the FBI's Organized Crime Unit, that such documents had not yet been physically segregated. Mr. Moody disclosed to counsel, however, and counsel disclosed at the second telephone conference with the magistrate judge, that Moody already had a file of documents, culled from the field office records in Detroit, that contained an update on the Hoffa investigation. This file had recently been assembled on Mr. Moody's own initiative to prepare him to testify if he should be ordered to give his deposition. The Moody file had not been put together with the idea of turning it over to the court for in camera review, counsel explained, but the government offered to make it available to the court for that purpose, along with all documents in the two categories specified by the plaintiff.

The magistrate judge expressed an interest in keeping the scope of any in camera review manageable, and counsel for plaintiff Dickerson agreed that the district judge would be more likely to undertake such a review if the quantity of materials were not excessive. The telephone conference led to an order in which the magistrate judge directed that the Moody file be sent to Michigan for possible in camera inspection by District Judge La Plata. The plaintiff's request to depose the four FBI officials was deferred in the meantime.

Judge La Plata concluded that with the addition of Assistant Director Baker's declaration, the declarations alone might be sufficient. In view of the testimony before the Senate subcommittee, however, and in view of the length of time that had elapsed since Mr. Hoffa's disappearance, Judge La Plata elected to review the Moody file (consisting of some 335 pages) in its entirety.

Having completed a careful and thorough review of the Moody file in camera, the court expressed itself as "satisfied beyond any doubt" that the investigation was active, that it was continuing, and that it was directed toward the institution of criminal proceedings. Because the court likewise found that disclosure of the documents sought by plaintiff Dickerson and his newspaper could reasonably be expected to interfere with enforcement proceedings, the court entered summary judgment in favor of the Department of Justice. A subsequent motion for reconsideration was denied, and this appeal followed.

II

[2] Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings," it has been suggested, unless there is at least "a reasonable chance that an enforcement proceeding will occur...." Nevas v. Dept. of Justice, 789 F.Supp. 445, 448 (D.D.C.1992). [FN4] We agree, and we turn first to the procedure followed by the district court in preparing itself to determine the likelihood that enforcement proceedings might still occur in the Hoffa case. (The court's determination of the likelihood that disclosure of the requested documents might interfere with any such proceedings also has a procedural aspect, and we shall touch on this at the same time.)

FN4. Even where exemption (7)(A) has

become inapplicable, however, records compiled in the course of the investigation may still be exempt if production could be expected to constitute an unwarranted invasion of personal privacy or disclose the identity of a confidential source, or if production would disclose law enforcement techniques and procedures that could be expected to risk circumvention of the law in other cases. See 5 U.S.C. § 552(b)(7)(C), (D), and (E). In the case at bar the district court made no determination as to the applicability of these sections, and we shall confine our analysis to exemption (7)(A).

[3] Although requested to follow the lead of the district court in Missouri in ordering the compilation of a Vaughn index on the FBI headquarters file, Judge La Plata did not do so. Plaintiff Dickerson maintains that the court committed reversible error in granting the government's summary judgment motion without having had the benefit of such an index.

Depending on the nature of the case, the use of a Vaughn index may have obvious advantages from the perspective of one or another of the litigants or from the perspective of the courts. See, for example, Ingle v. ***1431** Dept. of Justice, 698 F.2d 259 (6th Cir.1983), where we indicated that a Vaughn index makes the playing field more nearly level for the party seeking disclosure, facilitates effective appellate review, and may obviate any need for the courts to review documents in camera. In the context of a case that did not involve exemption (7)(A), we have said that a Vaughn index should be obtained in "most" Freedom of Information Act cases. Osborn v. Internal Revenue Service, 754 F.2d 195, 197 (6th Cir.1985).

As we subsequently explained in a Vaughn decision of our own, however, Osborn created no hard and fast rule with respect to Vaughn indices as such. Vaughn v. United States, 936 F.2d 862, 867 (6th Cir.1991). The government must provide sufficient information in sufficient detail to enable the court "to make a reasoned, independent assessment of the claim of exemption," but no particular method of doing so is mandated; "[a] court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information." Id. The Supreme Court has consistently taken what it terms "a practical approach" to Freedom of Information Act matters, see John Doe Agency v. John Doe Corp., 493 U.S. 146, 157, 110 S.Ct. 471, 477, 107 L.Ed.2d 462 (1989), and this circuit tries to do the same.

Where exemption (7)(A) is concerned, as a practical matter, it is often feasible for the courts to make "generic determinations" about interference with enforcement proceedings. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 98 S.Ct. 2311, 2317-18, 57 L.Ed.2d 159 (1978). [FN5] In many (7)(A) cases, at least, affidavits of the sort presented by the government here would seem to provide an adequate basis for making such determinations.

FN5. The plaintiff in Robbins Tire was seeking disclosure of witness statements taken by the National Labor Relations Board. The plaintiff contended that such statements could be withheld under exemption (7)(A) only upon a showing of a particularized risk of interference with a particular enforcement proceeding. The Supreme Court rejected the contention that no "generic determinations" of likely interference could ever be made, concluding instead that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2324. When Robbins Tire was decided, exemption (7)(A) required a showing that disclosure "would" interfere with enforcement proceedings. Congress subsequently amended the statute by dropping the word "would" and replacing it with the current formula, which protects law enforcement

records to the extent that disclosure "could reasonably be expected to interfere...." (Emphasis supplied.) See Pub.L. 99-570, § 1802(a) (1986). This statutory change strengthens the conclusion reached by the Supreme Court in Robbins Tire, of course.

[4] The case at bar may be somewhat unusual in that here the district court was initially uncertain whether an actual enforcement proceeding was still being contemplated and whether the "purpose and point" of the investigation that generated the records in question had "expired." See Robbins Tire, 437 U.S. at 232, 98 S.Ct. at 2322, referring to legislative history indicating that "with the passage of time, ... when the investigation is all over and the purpose and point of it has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure." But insofar as the question to be resolved by the courts is whether actual enforcement proceedings are still being contemplated, it does not seem to us that valuable time should normally have to be spent on the preparation and analysis of a Vaughn index. As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.

Here the district court believed that the government's affidavits might be sufficient standing alone to support a finding on whether the point and purpose of the investigation had expired, but the court nonetheless felt the need for a reality check of some kind. The Moody file seemed like a sensible place to start, and we think it was clearly within the court's discretion to begin there. If the Moody file had turned out not to be helpful, the court could obviously have moved on to an in camera inspection of the two groups of ***1432** documents that both parties had suggested the court might wish to examine. After reviewing all of the documents in the Moody file, however, the court concluded that there was no need to go further. We too have reviewed the Moody file in its entirety, and we see no abuse of discretion in the district court's decision on this score.

Plaintiff Dickerson argues that the decision to review only documents "hand-picked" by the government deprived him of the benefits of the adversary process. But the materials in the Moody file were selected, as we have seen, for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it in camera. The idea of a court review of the Moody file in isolation originated with the magistrate judge, not with the government. The review process was necessarily non-adversarial, to be sure, but the process would have been equally non-adversarial if the documents under review had included the additional materials the government had said it was willing to turn over to the court.

The approach developed by the magistrate judge was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents in camera than he would have wanted to see. This approach makes sense to us. The adversaries could and did present arguments on the sufficiency of the affidavits that formed the government's main line of defense, [FN6] and review of any documents in camera might well have been deemed superfluous; we think it was reasonable for the magistrate judge to offer Judge La Plata the documents that had already been segregated, and we think it was reasonable for Judge La Plata to decide, after reviewing them, that he had seen all he needed to see in order to make a proper decision.

FN6. Plaintiff Dickerson complains about the failure of the district court to hear oral argument, but each side had ample opportunity to present its case through briefs. In addition, of course, there were two telephone conferences with the magistrate judge.

III
A

[5] The district court was correct, we believe,

in its finding on the likelihood of a criminal prosecution being brought.

It is clear, as we read the record, that the Hoffa investigation remains active. In the judgment of Assistant Director Baker--the person whose responsibility it is to determine whether the investigation should still be pursued, and, if so, what FBI resources should be devoted to it--the investigation warrants the FBI's continued efforts to bring to trial those responsible for Mr. Hoffa's disappearance.

Mr. Baker has allocated continued FBI resources to the Hoffa investigation, according to his declaration, and the declaration says that the investigation "is ongoing and still absorbs FBI management and field agent resources on a regular basis." The documents in the Moody file are consistent with Mr. Baker's representation that the Hoffa investigation remains active.

The fact that the investigation is continuing does not mean that a prosecution will definitely be brought, of course, but the Baker declaration says that FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. "[W]ith the passage of time," Mr. Baker continues, "persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." Attesting to a "belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted," Mr. Baker says that he "would not knowingly permit scarce FBI resources to be devoted to a futile investigation."

FBI retiree Walton and Executive Assistant Director Revell may consider it doubtful whether anyone will ever be brought to trial in the Hoffa case, and they may be right. Neither of them is responsible for deciding whether it is worthwhile to continue the investigation, however, and the official who does have that responsibility--Assistant Director Baker--obviously believes that there is still a reasonable prospect of a prosecution being brought. No court is likely to be able to match Mr. Baker's expertise on that kind *1433 of question, and, like the district court, we are disposed to defer to his judgment.

B

The district court was also correct, we believe, in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution.

In some contexts, the Supreme Court has said, the most obvious risk of interference with enforcement proceedings is that witnesses will be coerced or intimidated into changing their testimony or not testifying at all. Robbins Tire, 437 U.S. at 239, 98 S.Ct. at 2325. The declarations of Messrs. Llewellyn and Moody both demonstrate that witness intimidation is a genuine concern in the Hoffa investigation--an investigation that the FBI has designated a "Racketeering Influenced and Corrupt Organization-La Cosa Nostra Labor Racketeering Investigation." If the perpetrators of the crime knew what investigative leads the FBI is pursuing, who the prime suspects are, and the nature of the evidence gathered to date, as one of the affidavits explains, they "could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi...."

In organized crime investigations such as this one, moreover, it has been the experience of declarant Moody, the chief of the Organized Crime Section of the FBI's Criminal Investigation Division, that informants can provide information critical to the successful conclusion of the investigation. Public disclosure of the Hoffa investigation files, Mr. Moody has declared, would discourage such individuals from coming forward.

Another important issue, particularly in homicide cases, has to do with the corroboration of evidence. Verification of statements given by future witnesses becomes harder, Mr. Moody has indicated, where the factual information developed in the investigation has entered the public domain.

In addition, the record before us shows that the Hoffa files contain information regarding other pending and prospective criminal proceedings. The prospect of interference with such enforcement proceedings is not without significance.

Although the government has the burden of showing that production of the records could reasonably be expected to interfere with enforcement proceedings, the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is. See Robbins Tire, 437 U.S. at 224, 98 S.Ct. at 2318. Having regard to the important public interest that exemption (7)(A) was designed to protect, having regard to the fact that the language of the exemption has been broadened by Congress to protect records that "could" be expected to interfere, as opposed to records that "would" interfere, and having regard to the obvious risks that public disclosure of these active investigation files would entail, we agree with the district court that the burden with respect to interference has been met in this case.

IV

[6] The Llewellyn declaration characterizes the documents in the Hoffa investigation files as follows:

"Documents setting forth leads to be conducted.
Documents containing information received from confidential informants.
Information and documents provided by local law enforcement.
Interviews of third parties and cooperating witnesses.
Public source information such as newspaper clippings and press releases.
Public and sealed court documents.
Laboratory reports setting forth results of examinations.
Polygraph worksheets and reports."

To the extent that public source information and public judicial materials are included in the files, the government has agreed to make the relevant documents available to plaintiff Dickerson. All that is in controversy here is the non-public portions of the files.

Plaintiff Dickerson candidly acknowledges, in a footnote toward the end of his principal brief, that it is open to the government to justify the assertion of a (7)(A) exemption on a "category-of-document" basis rather than ***1434** by proceeding document by document. He points out, however, that there is no blanket exemption for investigatory files as such, and he argues that we should at least remand the case with instructions that the government be required to segregate and produce all nonexempt material. In support of this suggestion he quotes the last sentence of 5 U.S.C. § 552(b), which says that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

It is doubtless true that by deleting large portions of the information contained in the Hoffa files, the government could render whatever was left useless to any law-breaker. (And useless to plaintiff Dickerson and his newspaper, we might add.) But the words "reasonably segregable" must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned. On the record before us we do not believe that the prospects for finding any "reasonably segregable" non-public portions of the Hoffa files that could properly be made public are such as to justify the remand that plaintiff Dickerson seeks.

The judgment of the district court is AFFIRMED.

BECKWITH, District Judge, concurring.

I.

I concur with Judge Nelson's results and his reasoning. I write separately, because I am convinced that more compelling grounds exist for exempting the Department of Justice's Hoffa file than that which was the basis of the district court's decision.

In the Llewellyn declaration, the Department of Justice cited at least three exemptions from the Freedom of Information Act in addition to exemption 7(A) of 5 U.S.C. § 522(b). The first such exemption is 7(C), the exemption for information, the disclosure of which "could reasonably be expected to be an unwanted invasion of personal privacy." The second is exemption 7(D) for information that "could reasonably be expected to disclose the identity of a confidential source." The third such exemption is 7(E), the exemption for information that "would disclose techniques and procedures for law enforcement investigations or prosecutions ... [when] such disclosure could reasonably be expected to risk circumvention of the law."

Apparently, the trial court considered each of the cited exemptions. Nevertheless, that court rested its decision entirely on exemption 7(A), concluding that the Department of Justice was engaged in an ongoing investigation directed toward the potential institution of criminal proceedings. Judge Nelson has properly confined his analysis to a review of the trial court's decision based upon exemption 7(A). I agree that the contents of the Moody file sufficiently support the trial court's conclusion that the contents of the Hoffa file are exempt under 7(A). The question is a close one, however, as is illustrated by the dissent.

My review of the Moody file suggests that each of the four exemptions discussed above supports the nondisclosure of some or all of the documents in the Hoffa file. Had the district court based its decision on all four exemptions, the correctness of the decision would have been beyond question and our review would have been much simpler.

II.

My review of the Moody file further suggests that the various exemptions are so intertwined, overlapping, and inextricable that virtually nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, confidential source identity, various individuals' privacy, and law enforcement investigative techniques. For this reason, the trial court could not have ordered a Vaughn index without risking inadvertent release of exempt and sensitive information.

There being no constitutional outline for the manner in which a trial court must approach its analysis of a government claim of exemption from the Freedom of Information Act, it cannot be said that the trial court in this instance failed to independently, adequately, and objectively assess the validity of the government's claim. The trial court was ***1435** under no obligation to follow Plaintiff's proffered procedure when another effective option was available. For that reason, I cannot agree with the dissent's criticism of the trial court's failure to order the production of an index.

BATCHELDER, Circuit Judge, dissenting.

I.

Over the past seventeen years, the Department of Justice has compiled a file of nearly four hundred volumes of documents on the disappearance of Jimmy Hoffa, a man, and a mystery, surely needing no introduction. Appellant Brian Dickerson, who happens to be editor of a major Detroit newspaper, has exercised the privilege Congress has given the public to request access to the documents in this file. While granting this privilege, Congress has also recognized that good government, in some circumstances, requires secrecy. Nonetheless, it has placed the burden of showing the need for secrecy on government agencies wishing to protect certain documents from public scrutiny. Since I believe the Government has fallen woefully short in carrying its burden, I dissent.

II.

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " Vaughn v. United States, 936 F.2d 862, 865

(6th Cir.1991) (quoting Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772, 109 S.Ct. 1468, 1481, 103 L.Ed.2d 774 (1989)); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 151, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973)). The Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978)). It requires " 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Vaughn, 936 F.2d at 865 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976)). The exemptions are to be "narrowly construed." Id. " '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. Vaughn, 936 F.2d at 866 (citing Department of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989)).

A. Existence of an ongoing law enforcement proceeding.

In reviewing a District Court's decision under the FOIA, the Court of Appeals must "determine first whether the District Court had an adequate factual basis for its decision, and second, decide whether upon that basis the court's decision was clearly erroneous." Vaughn, 936 F.2d at 866 (citing Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir.1983)). I agree with the majority that the record shows that the FBI has continued to pursue the Hoffa disappearance investigation and that officials believe that eventual prosecution is not out of the question. William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division, who apparently has the authority to decide whether to continue the investigation, made a sworn declaration to that effect, and that is good enough to establish the existence of "a concrete prospective law enforcement proceeding."

***1436** B. Interference with an ongoing law enforcement proceeding.

While the existence of such an ongoing proceeding is necessary to a finding of exemption under § 522(b)(7)(A), Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986), [FN1] showing that such a proceeding indeed exists does not serve to exempt the entire file on the proceeding. Id. The Government also must prove that the documents, if released, could interfere with enforcement proceedings. Here, the Government essentially did nothing more than assure the reviewing court that all 400 volumes on Hoffa relate to their enforcement efforts, and recite (using language remarkably similar to statutory and case language) the harms that will result from any disclosure save for press clippings. It has not met its further burden of proof.

> FN1. To restate, § 522(b)(7)(A) exempts "investigatory records compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." The earlier version of this provision exempted such records where production "would" interfere with enforcement. See North v. Walsh, 881 F.2d 1088, 1098 n. 14 (D.C.Cir.1989) ("This change 'relieves the agency of the burden of proving to a certainty' that

> disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting Reporters Committee for Freedom of the Press v. Department of Justice, 816 F.2d 730 (D.C.Cir.), modified on reh'g, 831 F.2d 1124 (1987), rev'd on other grounds, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). The Congress has lessened the Government's burden, but the causal connection between specific documents and potential interference still must be established; the statute still does not permit "blanket assertions" such as the Government has made here.

FOIA cases seem to pit citizen suspicion against government defensiveness. The fact that one side knows the entire truth and the other must guess at it (as, indeed, must the judge) requires adherence to procedures meant to inform the court as to the nature of government documents without revealing their actual contents, and to retain as much fairness in the adversary proceeding as possible given the imbalance of information. See Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992) (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (" 'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.' ").

The majority places great emphasis on the "public interest that exemption 7(A) was designed to protect" and the "obvious risks that public disclosure of these ... files would entail." I do not quarrel with the majority's observation that the release of documents containing, for example, the names of witnesses and informants might well lead to witness intimidation and destruction of evidence by those implicated in an ongoing investigation. Indeed, in enforcement exemption cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy." Campbell v. Department of Health & Human Services, 682 F.2d 256 (D.C.Cir.1982).

However, I believe the majority understates the Government's burden of showing that specific documents in its possession contain sensitive information. The majority admits that "the mere fact that the burden of justifying nondisclosure rests with the government does not illuminate the question of how heavy the burden is," and notes that Congress "broadened" exemption 7(A) from covering only records which "would" be expected to interfere with enforcement proceedings to those records which "could" be expected to interfere. While I recognize that Congress loosened up the standard somewhat from the seemingly unprovable "would interfere" standard to the more reasonable "could interfere," I certainly do not believe that in amending the statute Congress changed the underlying premise of the Act, that " 'disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). Permitting the Government to satisfy its burden by simply assuring the court that all of the requested papers in a giant, seventeen year old file relate in some way to an ongoing investigation, as I think happened here, potentially robs the Act of all effectiveness in attaining this objective.

***1437** This Circuit has recognized that the focus of a FOIA case is the contents of the documents requested, not the purpose for which the Government possesses them. The Act grants disclosure exemptions for documents containing information which would most likely harm an ongoing investigation in a specific way if made public. Thus,

> a court must have sufficiently detailed information regarding the contents of withheld documents along with reasoning for the application of specific FOIA exemptions to enable the court to make an independent assessment of both the contents of the documents in issue and the applicability of any asserted exemptions.

Vaughn, 936 F.2d at 869. The court may not grant " 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law

enforcement purposes." Robbins Tire & Rubber Co., 437 U.S. at 236, 98 S.Ct. at 2324. The Government "must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation." Campbell, 682 F.2d at 265 (emphasis added). The trial court has considerable discretion as to what procedures it uses to decide whether certain documents are exempt from disclosure, but whatever procedure the court chooses must suffice to produce enough evidence on which to rule, and to produce a record an appeals court can consult to review the decision. Vaughn, 936 F.2d at 869.

Reading the majority opinion may leave one with the distinct impression that we really have no idea what information lurks in the massive Hoffa file. That impression would be correct. The record presented us does not allow this court to make the requisite independent assessment of whether each document or category of documents would interfere with the Government's enforcement efforts. Obviously, the Government need not produce each and every document for the judge to decide whether its contents merit exemption from release. The Government's submissions may describe the documents by categorizing them according to their content and nature, Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986); the indexing and categorizing of documents, particularly where the requested documents are voluminous, is preferred to in chambers inspections, Vaughn, 936 F.2d at 866. While courts have smiled on the use of Vaughn indices in sorting out large volumes of documents, and in their discretion sometimes ordered such indices produced, so long as the Government provides sufficiently specific and detailed information to permit the court to make a reasoned determination, "no particular method ... is mandated." Id. at 867.

Just because the Act does not mandate a particular method does not mean that any method will do. The Llewellyn declaration, which the majority believes adequately provides a categorization of the documents in the file, falls short in two respects. First, categories such as "information and documents provided by local law enforcement" and "public and sealed court documents" are not "sufficiently distinct to allow a court to determine, as to each category, whether the specific claimed exemption(s) are properly applied." Vaughn, 936 F.2d at 868. The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' " Bevis, 801 F.2d at 1389 (quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C.Cir.1986)).

Second, even though a few of Mr. Llewellyn's categories, such as "documents containing information from confidential informants," more appropriately describe materials that fit the exemption, I do not believe the Government's task ends there with respect to showing that the documents it seeks to keep secret fit in those clearly exempt categories. A category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide "adequate detail and justification" to satisfy the claimed exemption. Id. at 869. While our decision in Vaughn is careful not to prescribe specific methods, I think our opinion in that case, which affirmed the exemptions claimed there, describes considerably more effort on the part of the affiant than we see here. The affiant in Vaughn did assign the documents to rather general categories, but she

> ***1438** also indicated, by page number, which of the 1,000+ documents were included in each of the categories. For each of the categories, [the affiant] then discusses the legal grounds and exemptions upon which the government relies in withholding the specific documents contained within each category. Attached to her affidavit is an exhibit which summarizes, by document page number, the exemption(s) relied on for withholding each of the 1,000+ pages.

Vaughn, 936 F.2d at 868 (emphasis added). This passage, it seems to me, illustrates the rule that the Government must demonstrate that the contents of identifiable documents actually fit the exemption claimed. The record here does not allow us to see how this fit has been made. For example, while the

Government has told us that the Hoffa file contains informant interviews, which comes as no surprise, it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing any of them could harm the ongoing investigation. [FN2] See Bevis, 801 F.2d at 1389 ("[T]he FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

> FN2. A word on the "Moody file." Our decision in Vaughn makes it clear that in camera review of documents is not favored, particularly where the Government chooses to proceed using categories of documents, rather than presenting all the documents it seeks to exempt to the reviewing court. See Vaughn, 936 F.2d at 868-69. The Government admits that the documents in this file were compiled to help Agent Moody prepare his affidavit, and does not suggest that the documents somehow represent others in the Hoffa file. Allowing us to peek at a few documents from the Hoffa file does nothing to prove that the rest of the file is exempt.

Our decision in Vaughn, following fairly straightforward Supreme Court precedent, requires that the Government make a choice in arguing for exemption from FOIA disclosure. It may present the court with a highly detailed Vaughn index, it may create more general exempt categories and then show how each document fits into them, or it may haul the entire file into chambers for hands-on review by the judge; the last of these, as I have explained, we have strongly discouraged. By holding in this case that the Government has met its burden of showing the entire Hoffa file to be exempt under § 522(b)(7)(A), the majority leaves FOIA law in this Circuit with the worst of all worlds. The Government has defined several general categories of documents, not all of them properly exempt, and then handed the court an admittedly nonrepresentative packet of secret documents to inspect in chambers. Neither effort sufficed to show how each and every document in the Hoffa file fits the proffered statutory exemption; the two methods taken together do not add up to a proper or sufficient showing. I am at a loss to reconcile the majority's opinion either with our Vaughn decision or with the Supreme Court's teachings on FOIA law.

C. Segregability of portions of the file.

I also disagree with the majority's conclusion that the Government has adequately shown that none of the Hoffa file, save for "public" documents such as newspaper clippings, is "reasonably segregable" under § 522(b). This provision requires the Government to release "any materials that do not properly fall within a legitimately withheld category." Bevis, 801 F.2d at 1390. Since I do not think the Government adequately showed what the Hoffa file contains, I certainly do not think it adequately demonstrated that none of this immense file falls outside of the statutory exemptions, as the statute itself requires. The Act does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the caselaw indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress's priorities. Neither, might I add, is it our place to judge whether the material a citizen requests from the Government is "useless."

***1439** III.

It is difficult to ignore the fact that the documents Mr. Dickerson has requested may contain the secrets to Jimmy Hoffa's disappearance. One may be predisposed in favor of government secrecy or against, or may

approve or disapprove of investigative reporting by the media. However, in enacting FOIA, Congress has chosen to value government disclosure over government convenience and economy, and chosen not to favor or disfavor certain persons or their reasons for asking the Government to disclose documents. Here, a private citizen has made a specific request. Congress has placed a heavy burden on the government agency wishing to keep the requested documents secret, and that burden has not been met. While it may well be that the Hoffa file should remain a secret, I do not believe that the Government has yet proven why. I dissent.

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871406-JASO,ERIC H

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DATE AND TIME PRINTING ENDED:	12/01/93	10:20:45 am (Central)
OFFLINE TRANSMISSION TIME:		00:01:28
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NUMBER OF LINES CHARGED:	873	

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FOIA

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943454-BITTMAN,ROBERT

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FOIA

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Brian **DICKERSON**, Plaintiff-Appellant,
v.
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 92-1458.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 19, 1993.

Decided April 30, 1993.

Newspaper editor requested, pursuant to Freedom of Information Act (FOIA), release of record on investigation conducted by Federal Bureau of Investigation (FBI) into disappearance more than 15 years earlier of former union official. After FBI denied request, editor brought suit to compel Department of Justice to produce records. The United States District Court for the Eastern District of Michigan, George LaPlata, J., denied relief, and editor appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that: (1) Vaughn index was not required, and (2) records came within FOIA exemption for records compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.

Affirmed.

Beckwith, District Judge, sitting by designation, delivered separate concurring opinion.

Batchelder, Circuit Judge, delivered separate dissenting opinion.

[1] RECORDS ⇦ 65
326k65
"Vaughn index" is document-by-document index, specially prepared for litigation purposes, in which agency describes contents of its records and reasons why each of the disputed items is claimed to be exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552.

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

[2] RECORDS ⇦ 60
326k60
Law enforcement records cannot reasonably be expected to interfere with enforcement proceedings, for purposes of Freedom of Information Act (FOIA) exemption, unless there is at least reasonable chance that enforcement proceeding will occur. 5 U.S.C.A. § 552(b)(7)(A).

[3] RECORDS ⇦ 65
326k65
District court did not have to require Federal Bureau of Investigation (FBI) to compile Vaughn index of FBI file relating to disappearance of former union official more than 15 years earlier before concluding that records relating to disappearance were within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings, based upon affidavits of several FBI officials and its in-camera review of FBI file documents assembled for purpose of briefing one of the affiants on status of investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇦ 65
326k65
In connection with dispute over whether records come within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes, valuable time should not normally have to be spent on preparation and analysis of Vaughn index insofar as question to be resolved is whether actual enforcement proceedings are still being contemplated; as practical matter, affidavits by people with knowledge of and responsibility for investigation usually ought to suffice. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) records relating to disappearance of former union official more than 15 years earlier were exempt from disclosure under Freedom of Information Act (FOIA) as records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings; FBI made sufficient showing that investigation of disappearance remained active and that production of record could reasonably be expected to interfere with future prosecution. 5 U.S.C.A. §

552(b)(7)(A).

[6] RECORDS ⇐ 67
326k67
On appellate record it did not appear that prospects for finding any "reasonably segregable" nonpublic portions of Federal Bureau of Investigation (FBI) files relating to disappearance of union official more than 15 years earlier that could properly be made public were such as to justify remand. 5 U.S.C.A. § 552(b).

*1427 Herschel P. Fink (argued and briefed), Michael A. Gruskin (briefed), Steven M. Ribiat, Honigman, Miller, Schwartz & Cohn, Detroit, MI, for plaintiff-appellant.

L. Michael Wicks, Asst. U.S. Atty., Detroit, MI, Stephen G. Harvey, Leonard Schaitman, U.S. Dept. of Justice, Appellate Staff, Civil Div., Scott R. McIntosh (argued and briefed), U.S. Dept. of Justice, Appellate Div., Washington, DC, for defendant-appellee.

Before: NELSON and BATCHELDER, Circuit Judges; and BECKWITH, District Judge. [FN*]

FN* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

DAVID A. NELSON, Circuit Judge.

Pursuant to the Freedom of Information Act--a statute which, subject to certain exceptions, makes federal government records available to anyone who asks for them--plaintiff Brian Dickerson requested the release of records on an investigation conducted by the Federal Bureau of Investigation into the disappearance of Jimmy Hoffa, former president of the Teamsters Union.

Citing 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings," the government denied the request. Mr. Dickerson brought suit in the Eastern District of Michigan to compel the Department of Justice to produce the records. The district court (La Plata, J.) ultimately decided that production was not required.

In making its decision the district court focused on the question whether a "concrete prospective law enforcement proceeding" [FN1] could still be discerned--i.e., whether there was still a reasonable chance that someone would be prosecuted in connection with Mr. Hoffa's disappearance. Based on affidavits of several FBI officials and an in camera review of FBI file documents assembled for the purpose of briefing one of the affiants on the status of the investigation, the district court found that "the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." The court further found that disclosure of the requested documents could reasonably be expected to interfere with such proceedings. The court made these findings without having required the government to provide a document-by-document analysis of the files.

FN1. The phrase originated with Senator Hart, a supporter of Freedom of Information Act amendments adopted in 1974. See 120 Cong.Rec. 17033 (1974), quoted in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232, 98 S.Ct. 2311, 2322, 57 L.Ed.2d 159 (1978).

The issues presented on appeal are (1) whether the district court abused its discretion in not insisting on a full document-by-document analysis and in limiting its in camera review to the briefing materials; (2) whether the district court dealt correctly with the factual side of the case; and (3) whether the district court ought to have found that at least some non-public portions of the investigatory files were not protected *1428 from disclosure. Resolving each of these issues in favor of the government, we shall affirm the judgment of the district court.

I

Jimmy Hoffa disappeared in Detroit, Michigan, on July 30, 1975. It is widely believed that he was abducted and killed. Mr. Hoffa's disappearance led to an FBI investigation that has not, to date, resulted in any criminal proceedings being brought.

The investigation is documented in two large files, one maintained in the FBI's field office in Detroit

and the other at FBI headquarters in Washington. At the time with which we are concerned in this proceeding the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes.

On July 25, 1989, counsel for the Detroit Free Press, a newspaper that employs plaintiff Dickerson in an editorial capacity, sent sweeping Freedom of Information Act requests on the Hoffa investigation to Justice Department and FBI officials in Detroit and Washington. When the requests were denied, Mr. Dickerson sued the Department of Justice under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly. This section of the statute, which places the burden of sustaining non-disclosure on the government, directs the court to determine the matter de novo. It also provides that the court "may examine the ... agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in [5 U.S.C. § 552(b)]...."

The Department of Justice filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserting that no documents had been improperly withheld. Both parties subsequently moved for summary judgment.

The plaintiff's summary judgment motion was accompanied by newspaper articles referring to a statement by Kenneth P. Walton, a retired head of the FBI's Detroit field office, to the effect that although he knew who had murdered Jimmy Hoffa, there would never be a prosecution because of the government's unwillingness to disclose confidential sources. The Justice Department filing was accompanied by "declarations," or affidavits, in which two FBI headquarters officials, Angus B. Llewellyn and Jim E. Moody, attested that the Hoffa investigation was still pending.

The Llewellyn declaration went on to give a general description of the contents of the investigatory files, categorizing the records by source or function. The declaration also sought to explain why law enforcement records contained in the files were exempt from production not only under subsection (7)(A) of 5 U.S.C. § 552(b), but also under subsection (7)(C) (exempting such records if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy"); subsection (7)(D) (exempting them if they "could reasonably be expected to disclose the identity of a confidential source"); and subsection (7)(E) (exempting them if they "would disclose techniques and procedures for law enforcement investigations or prosecutions ... if such disclosure could reasonably be expected to risk circumvention of the law").

The Moody declaration focused on the (7)(A) exemption. The declaration explained, among other things, that

> "The files responsive to plaintiff's [Freedom of Information Act] request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation."

The Moody declaration stated that the FBI was continuing its efforts to develop information for use in criminal proceedings, and the declaration sought to show why production of ***1429** the records could reasonably be expected to interfere with such proceedings.

In January of 1991 the district court denied both of the motions for summary judgment on the ground that there was a material issue of fact concerning the prospect of future enforcement proceedings. The Justice Department moved for reconsideration, supporting its motion with a declaration executed by William M. Baker, the Assistant Director of the FBI in charge of the agency's Criminal Investigation Division.

Mr. Baker declared under penalty of perjury that it was his responsibility to determine whether the investigation into the Hoffa disappearance should be pursued; that in his judgment the investigation warranted the continuing efforts of the FBI; that he had allocated continued FBI resources to the investigation; that he believed "that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted;" and that public

disclosure of the information in the Hoffa file could reasonably be expected, for reasons specified in the declaration, to interfere with enforcement proceedings against those responsible for the disappearance. Mr. Baker further declared that the statement attributed to the former field office head "did not reflect and does not reflect official FBI policy."

[1] In response to the motion for reconsideration plaintiff Dickerson filed a reply brief stating that Mr. Baker's declaration was essentially identical to one he had filed in a Freedom of Information Act suit brought in a federal district court in Missouri by Mr. Hoffa's daughter, Barbara Crancer. The brief pointed out that the declaration had not dissuaded the district court in Missouri from ordering the government to submit a Vaughn index on the smaller of the two Hoffa files, [FN2] and it noted that FBI Director William Sessions had testified before a Senate Subcommittee that it is "doubtful" that the government will ever have sufficient evidence to bring to trial those responsible for Mr. Hoffa's disappearance. [FN3]

FN2. A "Vaughn index," which takes its name from a technique developed in Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure. See Osborn v. Internal Revenue Service, 754 F.2d 195, 196 (6th Cir.1985), and the cases there cited, for a statement of the criteria such an index must meet. The requirement for a Vaughn index in Mrs. Crancer's case was subsequently upheld by a divided three judge panel of the Court of Appeals for the Eighth Circuit, see In re Department of Justice, 950 F.2d 530 (8th Cir.1991), but the panel decision has been vacated in connection with the granting of a rehearing en banc. See Order at 950 F.2d 538. As of this writing the en banc court has not announced its decision.

FN3. The Justice Department later submitted an official transcript of the subcommittee hearing showing that Director Sessions had declined to comment on the likelihood of indictments being obtained, and that it was Oliver B. Revell, Executive Assistant Director-Investigations, and not Director Sessions, who made the "doubtful" comment.

Plaintiff Dickerson's reply brief further advised the court that the Missouri proceedings had disclosed the existence of two categories of documents that might quickly reveal the status of the Hoffa investigation: documents containing the results of high level strategy conferences, with synopses of the investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. The plaintiff's brief suggested that the court conduct an in camera review of all documents in these two categories. Since the Missouri court had already ordered the Justice Department to prepare a Vaughn index on the 68-volume file from FBI headquarters in Washington, plaintiff Dickerson suggested that the Department should be ordered to produce a copy of that index as well.

In the meantime, plaintiff Dickerson had served notice of the depositions of FBI Director Sessions and declarants Llewellyn, Moody and Baker, and the Justice Department had moved for a stay of discovery. The motion was referred to a magistrate judge, who conducted two telephone conferences on the matter.

In the course of the first conference the Justice Department indicated a willingness to go through the headquarters file and segregate, ***1430** for in camera review by the court, all documents in the two categories singled out by the plaintiff. Government counsel later confirmed with declarant Moody, Chief of the FBI's Organized Crime Unit, that such documents had not yet been physically segregated. Mr. Moody disclosed to counsel, however, and counsel disclosed at the second telephone conference with the magistrate judge, that Moody already had a file of documents, culled from the field office records in Detroit, that contained an update on the Hoffa investigation. This file had recently been assembled on Mr. Moody's own initiative to prepare him to testify if he should be ordered to give his deposition. The Moody file had not been put together with the idea of turning it over to the court for in camera review, counsel explained, but the government offered to make it available to the court for that purpose, along with all documents in the two categories specified by the plaintiff.

The magistrate judge expressed an interest in keeping the scope of any in camera review manageable, and counsel for plaintiff Dickerson agreed that the district judge would be more likely to undertake such a review if the quantity of materials were not excessive. The telephone conference led to an order in which the magistrate judge directed that the Moody file be sent to Michigan for possible in camera inspection by District Judge La Plata. The plaintiff's request to depose the four FBI officials was deferred in the meantime.

Judge La Plata concluded that with the addition of Assistant Director Baker's declaration, the declarations alone might be sufficient. In view of the testimony before the Senate subcommittee, however, and in view of the length of time that had elapsed since Mr. Hoffa's disappearance, Judge La Plata elected to review the Moody file (consisting of some 335 pages) in its entirety.

Having completed a careful and thorough review of the Moody file in camera, the court expressed itself as "satisfied beyond any doubt" that the investigation was active, that it was continuing, and that it was directed toward the institution of criminal proceedings. Because the court likewise found that disclosure of the documents sought by plaintiff Dickerson and his newspaper could reasonably be expected to interfere with enforcement proceedings, the court entered summary judgment in favor of the Department of Justice. A subsequent motion for reconsideration was denied, and this appeal followed.

II

[2] Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings," it has been suggested, unless there is at least "a reasonable chance that an enforcement proceeding will occur...." Nevas v. Dept. of Justice, 789 F.Supp. 445, 448 (D.D.C.1992). [FN4] We agree, and we turn first to the procedure followed by the district court in preparing itself to determine the likelihood that enforcement proceedings might still occur in the Hoffa case. (The court's determination of the likelihood that disclosure of the requested documents might interfere with any such proceedings also has a procedural aspect, and we shall touch on this at the same time.)

FN4. Even where exemption (7)(A) has become inapplicable, however, records compiled in the course of the investigation may still be exempt if production could be expected to constitute an unwarranted invasion of personal privacy or disclose the identity of a confidential source, or if production would disclose law enforcement techniques and procedures that could be expected to risk circumvention of the law in other cases. See 5 U.S.C. § 552(b)(7)(C), (D), and (E). In the case at bar the district court made no determination as to the applicability of these sections, and we shall confine our analysis to exemption (7)(A).

[3] Although requested to follow the lead of the district court in Missouri in ordering the compilation of a Vaughn index on the FBI headquarters file, Judge La Plata did not do so. Plaintiff Dickerson maintains that the court committed reversible error in granting the government's summary judgment motion without having had the benefit of such an index.

Depending on the nature of the case, the use of a Vaughn index may have obvious advantages from the perspective of one or another of the litigants or from the perspective of the courts. See, for example, Ingle v. ***1431** Dept. of Justice, 698 F.2d 259 (6th Cir.1983), where we indicated that a Vaughn index makes the playing field more nearly level for the party seeking disclosure, facilitates effective appellate review, and may obviate any need for the courts to review documents in camera. In the context of a case that did not involve exemption (7)(A), we have said that a Vaughn index should be obtained in "most" Freedom of Information Act cases. Osborn v. Internal Revenue Service, 754 F.2d 195, 197 (6th Cir.1985).

As we subsequently explained in a Vaughn decision of our own, however, Osborn created no hard and fast rule with respect to Vaughn indices as such. Vaughn v. United States, 936 F.2d 862, 867 (6th Cir.1991). The government must provide sufficient information in sufficient detail to enable the court "to make a reasoned, independent assessment of the claim of exemption," but no particular method of doing so is mandated; "[a] court's primary focus must be on the substance, rather than the form, of the information supplied by

the government to justify withholding requested information." Id. The Supreme Court has consistently taken what it terms "a practical approach" to Freedom of Information Act matters, see John Doe Agency v. John Doe Corp., 493 U.S. 146, 157, 110 S.Ct. 471, 477, 107 L.Ed.2d 462 (1989), and this circuit tries to do the same.

Where exemption (7)(A) is concerned, as a practical matter, it is often feasible for the courts to make "generic determinations" about interference with enforcement proceedings. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 98 S.Ct. 2311, 2317-18, 57 L.Ed.2d 159 (1978). [FN5] In many (7)(A) cases, at least, affidavits of the sort presented by the government here would seem to provide an adequate basis for making such determinations.

FN5. The plaintiff in Robbins Tire was seeking disclosure of witness statements taken by the National Labor Relations Board. The plaintiff contended that such statements could be withheld under exemption (7)(A) only upon a showing of a particularized risk of interference with a particular enforcement proceeding. The Supreme Court rejected the contention that no "generic determinations" of likely interference could ever be made, concluding instead that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2324. When Robbins Tire was decided, exemption (7)(A) required a showing that disclosure "would" interfere with enforcement proceedings. Congress subsequently amended the statute by dropping the word "would" and replacing it with the current formula, which protects law enforcement records to the extent that disclosure "could reasonably be expected to interfere...." (Emphasis supplied.) See Pub.L. 99-570, § 1802(a) (1986). This statutory change strengthens the conclusion reached by the Supreme Court in Robbins Tire, of course.

[4] The case at bar may be somewhat unusual in that here the district court was initially uncertain whether an actual enforcement proceeding was still being contemplated and whether the "purpose and point" of the investigation that generated the records in question had "expired." See Robbins Tire, 437 U.S. at 232, 98 S.Ct. at 2322, referring to legislative history indicating that "with the passage of time, ... when the investigation is all over and the purpose and point of it has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure." But insofar as the question to be resolved by the courts is whether actual enforcement proceedings are still being contemplated, it does not seem to us that valuable time should normally have to be spent on the preparation and analysis of a Vaughn index. As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.

Here the district court believed that the government's affidavits might be sufficient standing alone to support a finding on whether the point and purpose of the investigation had expired, but the court nonetheless felt the need for a reality check of some kind. The Moody file seemed like a sensible place to start, and we think it was clearly within the court's discretion to begin there. If the Moody file had turned out not to be helpful, the court could obviously have moved on to an in camera inspection of the two groups of ***1432** documents that both parties had suggested the court might wish to examine. After reviewing all of the documents in the Moody file, however, the court concluded that there was no need to go further. We too have reviewed the Moody file in its entirety, and we see no abuse of discretion in the district court's decision on this score.

Plaintiff Dickerson argues that the decision to review only documents "hand-picked" by the government deprived him of the benefits of the adversary process. But the materials in the Moody file were selected, as we have seen, for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it in camera. The idea of a court review of the Moody file in isolation originated with the magistrate judge, not with the government. The review process was necessarily non-adversarial, to be sure, but the process would have been equally non-adversarial if the documents under review had included the additional materials the government had said it was willing to turn over to the court.

The approach developed by the magistrate judge was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents in camera than he would have wanted to see. This approach makes sense to us. The adversaries could and did present arguments on the sufficiency of the affidavits that formed the government's main line of defense, [FN6] and review of any documents in camera might well have been deemed superfluous; we think it was reasonable for the magistrate judge to offer Judge La Plata the documents that had already been segregated, and we think it was reasonable for Judge La Plata to decide, after reviewing them, that he had seen all he needed to see in order to make a proper decision.

FN6. Plaintiff Dickerson complains about the failure of the district court to hear oral argument, but each side had ample opportunity to present its case through briefs. In addition, of course, there were two telephone conferences with the magistrate judge.

III

A

[5] The district court was correct, we believe, in its finding on the likelihood of a criminal prosecution being brought.

It is clear, as we read the record, that the Hoffa investigation remains active. In the judgment of Assistant Director Baker--the person whose responsibility it is to determine whether the investigation should still be pursued, and, if so, what FBI resources should be devoted to it--the investigation warrants the FBI's continued efforts to bring to trial those responsible for Mr. Hoffa's disappearance.

Mr. Baker has allocated continued FBI resources to the Hoffa investigation, according to his declaration, and the declaration says that the investigation "is ongoing and still absorbs FBI management and field agent resources on a regular basis." The documents in the Moody file are consistent with Mr. Baker's representation that the Hoffa investigation remains active.

The fact that the investigation is continuing does not mean that a prosecution will definitely be brought, of course, but the Baker declaration says that FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. "[W]ith the passage of time," Mr. Baker continues, "persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." Attesting to a "belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted," Mr. Baker says that he "would not knowingly permit scarce FBI resources to be devoted to a futile investigation."

FBI retiree Walton and Executive Assistant Director Revell may consider it doubtful whether anyone will ever be brought to trial in the Hoffa case, and they may be right. Neither of them is responsible for deciding whether it is worthwhile to continue the investigation, however, and the official who does have that responsibility--Assistant Director Baker--obviously believes that there is still a reasonable prospect of a prosecution being brought. No court is likely to be able to match Mr. Baker's expertise on that kind *1433 of question, and, like the district court, we are disposed to defer to his judgment.

B

The district court was also correct, we believe, in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution.

In some contexts, the Supreme Court has said, the most obvious risk of interference with enforcement proceedings is that witnesses will be coerced or intimidated into changing their testimony or not testifying at all. Robbins Tire, 437 U.S. at 239, 98 S.Ct. at 2325. The declarations of Messrs. Llewellyn and Moody both demonstrate that witness intimidation is a genuine concern in the Hoffa investigation--an investigation that the FBI has designated a "Racketeering Influenced and Corrupt Organization-La Cosa Nostra Labor Racketeering Investigation." If the perpetrators of the crime knew what investigative leads the FBI is pursuing, who the prime suspects are, and the nature of the evidence gathered to date, as one of the affidavits explains, they "could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi...."

In organized crime investigations such as this one, moreover, it has been the experience of declarant Moody, the chief of the Organized Crime Section of the FBI's Criminal Investigation Division, that informants can provide information critical to the successful conclusion of the investigation. Public disclosure of the Hoffa investigation files, Mr. Moody has declared, would discourage such individuals from coming forward.

Another important issue, particularly in homicide cases, has to do with the corroboration of evidence. Verification of statements given by future witnesses becomes harder, Mr. Moody has indicated, where the factual information developed in the investigation has entered the public domain.

In addition, the record before us shows that the Hoffa files contain information regarding other pending and prospective criminal proceedings. The prospect of interference with such enforcement proceedings is not without significance.

Although the government has the burden of showing that production of the records could reasonably be expected to interfere with enforcement proceedings, the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is. See Robbins Tire, 437 U.S. at 224, 98 S.Ct. at 2318. Having regard to the important public interest that exemption (7)(A) was designed to protect, having regard to the fact that the language of the exemption has been broadened by Congress to protect records that "could" be expected to interfere, as opposed to records that "would" interfere, and having regard to the obvious risks that public disclosure of these active investigation files would entail, we agree with the district court that the burden with respect to interference has been met in this case.

IV

[6] The Llewellyn declaration characterizes the documents in the Hoffa investigation files as follows:

"Documents setting forth leads to be conducted.
Documents containing information received from confidential informants.
Information and documents provided by local law enforcement.
Interviews of third parties and cooperating witnesses.
Public source information such as newspaper clippings and press releases.
Public and sealed court documents.
Laboratory reports setting forth results of examinations.
Polygraph worksheets and reports."

To the extent that public source information and public judicial materials are included in the files, the government has agreed to make the relevant documents available to plaintiff Dickerson. All that is in controversy here is the non-public portions of the files.

Plaintiff Dickerson candidly acknowledges, in a footnote toward the end of his principal brief, that it is open to the government to justify the assertion of a (7)(A) exemption on a "category-of-document" basis rather than ***1434** by proceeding document by document. He points out, however, that there is no blanket exemption for investigatory files as such, and he argues that we should at least remand the case with instructions that the government be required to segregate and produce all nonexempt material. In support of this suggestion he quotes the last sentence of 5 U.S.C. § 552(b), which says that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

It is doubtless true that by deleting large portions of the information contained in the Hoffa files, the government could render whatever was left useless to any law-breaker. (And useless to plaintiff Dickerson and his newspaper, we might add.) But the words "reasonably segregable" must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned. On the record before us we do not believe that the prospects for finding any "reasonably segregable" non-public portions of the Hoffa files that could properly be made public are such as to justify the remand that plaintiff Dickerson seeks.

The judgment of the district court is AFFIRMED.

BECKWITH, District Judge, concurring.

I.

I concur with Judge Nelson's results and his reasoning. I write separately, because I am convinced that more compelling grounds exist for exempting the Department of Justice's Hoffa file than that which was the basis of the district court's decision.

In the Llewellyn declaration, the Department of Justice cited at least three exemptions from the Freedom of Information Act in addition to exemption 7(A) of 5 U.S.C. § 522(b). The first such exemption is 7(C), the exemption for information, the disclosure of which "could reasonably be expected to be an unwanted invasion of personal privacy." The second is exemption 7(D) for information that "could reasonably be expected to disclose the identity of a confidential source." The third such exemption is 7(E), the exemption for information that "would disclose techniques and procedures for law enforcement investigations or prosecutions ... [when] such disclosure could reasonably be expected to risk circumvention of the law."

Apparently, the trial court considered each of the cited exemptions. Nevertheless, that court rested its decision entirely on exemption 7(A), concluding that the Department of Justice was engaged in an ongoing investigation directed toward the potential institution of criminal proceedings. Judge Nelson has properly confined his analysis to a review of the trial court's decision based upon exemption 7(A). I agree that the contents of the Moody file sufficiently support the trial court's conclusion that the contents of the Hoffa file are exempt under 7(A). The question is a close one, however, as is illustrated by the dissent.

My review of the Moody file suggests that each of the four exemptions discussed above supports the nondisclosure of some or all of the documents in the Hoffa file. Had the district court based its decision on all four exemptions, the correctness of the decision would have been beyond question and our review would have been much simpler.

II.

My review of the Moody file further suggests that the various exemptions are so intertwined, overlapping, and inextricable that virtually nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, confidential source identity, various individuals' privacy, and law enforcement investigative techniques. For this reason, the trial court could not have ordered a Vaughn index without risking inadvertent release of exempt and sensitive information.

There being no constitutional outline for the manner in which a trial court must approach its analysis of a government claim of exemption from the Freedom of Information Act, it cannot be said that the trial court in this instance failed to independently, adequately, and objectively assess the validity of the government's claim. The trial court was ***1435** under no obligation to follow Plaintiff's proffered procedure when another effective option was available. For that reason, I cannot agree with the dissent's criticism of the trial court's failure to order the production of an index.

BATCHELDER, Circuit Judge, dissenting.

I.

Over the past seventeen years, the Department of Justice has compiled a file of nearly four hundred volumes of documents on the disappearance of Jimmy Hoffa, a man, and a mystery, surely needing no introduction. Appellant Brian Dickerson, who happens to be editor of a major Detroit newspaper, has exercised the privilege Congress has given the public to request access to the documents in this file. While granting this privilege, Congress has also recognized that good government, in some circumstances, requires secrecy. Nonetheless, it has placed the burden of showing the need for secrecy on government agencies wishing to protect certain documents from public scrutiny. Since I believe the Government has fallen woefully short in carrying its burden, I dissent.

II.

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " Vaughn v. United States, 936 F.2d 862, 865 (6th Cir.1991) (quoting Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772, 109 S.Ct. 1468, 1481,

103 L.Ed.2d 774 (1989)); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 151, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973)). The Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978)). It requires " 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Vaughn, 936 F.2d at 865 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976)). The exemptions are to be "narrowly construed." Id. " '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. Vaughn, 936 F.2d at 866 (citing Department of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989)).

A. Existence of an ongoing law enforcement proceeding.

In reviewing a District Court's decision under the FOIA, the Court of Appeals must "determine first whether the District Court had an adequate factual basis for its decision, and second, decide whether upon that basis the court's decision was clearly erroneous." Vaughn, 936 F.2d at 866 (citing Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir.1983)). I agree with the majority that the record shows that the FBI has continued to pursue the Hoffa disappearance investigation and that officials believe that eventual prosecution is not out of the question. William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division, who apparently has the authority to decide whether to continue the investigation, made a sworn declaration to that effect, and that is good enough to establish the existence of "a concrete prospective law enforcement proceeding."

***1436** B. Interference with an ongoing law enforcement proceeding.

While the existence of such an ongoing proceeding is necessary to a finding of exemption under § 522(b)(7)(A), Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986), [FN1] showing that such a proceeding indeed exists does not serve to exempt the entire file on the proceeding. Id. The Government also must prove that the documents, if released, could interfere with enforcement proceedings. Here, the Government essentially did nothing more than assure the reviewing court that all 400 volumes on Hoffa relate to their enforcement efforts, and recite (using language remarkably similar to statutory and case language) the harms that will result from any disclosure save for press clippings. It has not met its further burden of proof.

FN1. To restate, § 522(b)(7)(A) exempts "investigatory records compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." The earlier version of this provision exempted such records where production "would" interfere with enforcement. See North v. Walsh, 881 F.2d 1088, 1098 n. 14 (D.C.Cir.1989) ("This change 'relieves the agency of the burden of proving to a certainty' that disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting Reporters Committee for Freedom of the Press v. Department of Justice, 816 F.2d 730 (D.C.Cir.), modified on reh'g, 831 F.2d 1124 (1987), rev'd on other grounds, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). The Congress has lessened the Government's burden, but the causal connection between specific documents and potential interference still must be established; the statute still does not permit "blanket assertions" such as the Government has made here.

FOIA cases seem to pit citizen suspicion against

government defensiveness. The fact that one side knows the entire truth and the other must guess at it (as, indeed, must the judge) requires adherence to procedures meant to inform the court as to the nature of government documents without revealing their actual contents, and to retain as much fairness in the adversary proceeding as possible given the imbalance of information. See Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992) (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (" 'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.' ").

The majority places great emphasis on the "public interest that exemption 7(A) was designed to protect" and the "obvious risks that public disclosure of these ... files would entail." I do not quarrel with the majority's observation that the release of documents containing, for example, the names of witnesses and informants might well lead to witness intimidation and destruction of evidence by those implicated in an ongoing investigation. Indeed, in enforcement exemption cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy." Campbell v. Department of Health & Human Services, 682 F.2d 256 (D.C.Cir.1982).

However, I believe the majority understates the Government's burden of showing that specific documents in its possession contain sensitive information. The majority admits that "the mere fact that the burden of justifying nondisclosure rests with the government does not illuminate the question of how heavy the burden is," and notes that Congress "broadened" exemption 7(A) from covering only records which "would" be expected to interfere with enforcement proceedings to those records which "could" be expected to interfere. While I recognize that Congress loosened up the standard somewhat from the seemingly unprovable "would interfere" standard to the more reasonable "could interfere," I certainly do not believe that in amending the statute Congress changed the underlying premise of the Act, that " 'disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). Permitting the Government to satisfy its burden by simply assuring the court that all of the requested papers in a giant, seventeen year old file relate in some way to an ongoing investigation, as I think happened here, potentially robs the Act of all effectiveness in attaining this objective.

***1437** This Circuit has recognized that the focus of a FOIA case is the contents of the documents requested, not the purpose for which the Government possesses them. The Act grants disclosure exemptions for documents containing information which would most likely harm an ongoing investigation in a specific way if made public. Thus,

> a court must have sufficiently detailed information regarding the contents of withheld documents along with reasoning for the application of specific FOIA exemptions to enable the court to make an independent assessment of both the contents of the documents in issue and the applicability of any asserted exemptions.

Vaughn, 936 F.2d at 869. The court may not grant " 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Robbins Tire & Rubber Co., 437 U.S. at 236, 98 S.Ct. at 2324. The Government "must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation." Campbell, 682 F.2d at 265 (emphasis added). The trial court has considerable discretion as to what procedures it uses to decide whether certain documents are exempt from disclosure, but whatever procedure the court chooses must suffice to produce enough evidence on which to rule, and to produce a record an appeals court can consult to review the decision. Vaughn, 936 F.2d at 869.

Reading the majority opinion may leave one with the distinct impression that we really have no idea what information lurks in the massive Hoffa file. That impression would be correct. The record presented us does not allow this court to make the requisite independent assessment of whether each document or category of documents would interfere with the Government's enforcement efforts. Obviously, the Government need not produce each and every document for the judge to decide whether its contents merit exemption from release. The Government's submissions may describe the

documents by categorizing them according to their content and nature, Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986); the indexing and categorizing of documents, particularly where the requested documents are voluminous, is preferred to in chambers inspections, Vaughn, 936 F.2d at 866. While courts have smiled on the use of Vaughn indices in sorting out large volumes of documents, and in their discretion sometimes ordered such indices produced, so long as the Government provides sufficiently specific and detailed information to permit the court to make a reasoned determination, "no particular method ... is mandated." Id. at 867.

Just because the Act does not mandate a particular method does not mean that any method will do. The Llewellyn declaration, which the majority believes adequately provides a categorization of the documents in the file, falls short in two respects. First, categories such as "information and documents provided by local law enforcement" and "public and sealed court documents" are not "sufficiently distinct to allow a court to determine, as to each category, whether the specific claimed exemption(s) are properly applied." Vaughn, 936 F.2d at 868. The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' " Bevis, 801 F.2d at 1389 (quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C.Cir.1986)).

Second, even though a few of Mr. Llewellyn's categories, such as "documents containing information from confidential informants," more appropriately describe materials that fit the exemption, I do not believe the Government's task ends there with respect to showing that the documents it seeks to keep secret fit in those clearly exempt categories. A category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide "adequate detail and justification" to satisfy the claimed exemption. Id. at 869. While our decision in Vaughn is careful not to prescribe specific methods, I think our opinion in that case, which affirmed the exemptions claimed there, describes considerably more effort on the part of the affiant than we see here. The affiant in Vaughn did assign the documents to rather general categories, but she

***1438** also indicated, by page number, which of the 1,000+ documents were included in each of the categories. For each of the categories, [the affiant] then discusses the legal grounds and exemptions upon which the government relies in withholding the specific documents contained within each category. Attached to her affidavit is an exhibit which summarizes, by document page number, the exemption(s) relied on for withholding each of the 1,000+ pages.

Vaughn, 936 F.2d at 868 (emphasis added). This passage, it seems to me, illustrates the rule that the Government must demonstrate that the contents of identifiable documents actually fit the exemption claimed. The record here does not allow us to see how this fit has been made. For example, while the Government has told us that the Hoffa file contains informant interviews, which comes as no surprise, it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing any of them could harm the ongoing investigation. [FN2] See Bevis, 801 F.2d at 1389 ("[T]he FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

FN2. A word on the "Moody file." Our decision in Vaughn makes it clear that in camera review of documents is not favored, particularly where the Government chooses to proceed using categories of documents, rather than presenting all the documents it seeks to exempt to the reviewing court. See Vaughn, 936 F.2d at 868-69. The Government admits that the documents in this file were compiled to help Agent Moody prepare his affidavit, and does not suggest that the documents somehow represent others in the Hoffa file. Allowing us to peek at a few documents from the Hoffa file does nothing to prove that the rest of the file is exempt.

Our decision in Vaughn, following fairly straightforward Supreme Court precedent, requires that the Government make a choice in arguing for exemption from FOIA disclosure. It may present the court with a highly detailed Vaughn index, it may create more general exempt categories and then show how each document fits into them, or it may

haul the entire file into chambers for hands-on review by the judge; the last of these, as I have explained, we have strongly discouraged. By holding in this case that the Government has met its burden of showing the entire Hoffa file to be exempt under § 522(b)(7)(A), the majority leaves FOIA law in this Circuit with the worst of all worlds. The Government has defined several general categories of documents, not all of them properly exempt, and then handed the court an admittedly nonrepresentative packet of secret documents to inspect in chambers. Neither effort sufficed to show how each and every document in the Hoffa file fits the proffered statutory exemption; the two methods taken together do not add up to a proper or sufficient showing. I am at a loss to reconcile the majority's opinion either with our Vaughn decision or with the Supreme Court's teachings on FOIA law.

C. Segregability of portions of the file.

I also disagree with the majority's conclusion that the Government has adequately shown that none of the Hoffa file, save for "public" documents such as newspaper clippings, is "reasonably segregable" under § 522(b). This provision requires the Government to release "any materials that do not properly fall within a legitimately withheld category." Bevis, 801 F.2d at 1390. Since I do not think the Government adequately showed what the Hoffa file contains, I certainly do not think it adequately demonstrated that none of this immense file falls outside of the statutory exemptions, as the statute itself requires. The Act does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the caselaw indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress's priorities. Neither, might I add, is it our place to judge whether the material a citizen requests from the Government is "useless."

***1439** III.

It is difficult to ignore the fact that the documents Mr. Dickerson has requested may contain the secrets to Jimmy Hoffa's disappearance. One may be predisposed in favor of government secrecy or against, or may approve or disapprove of investigative reporting by the media. However, in enacting FOIA, Congress has chosen to value government disclosure over government convenience and economy, and chosen not to favor or disfavor certain persons or their reasons for asking the Government to disclose documents. Here, a private citizen has made a specific request. Congress has placed a heavy burden on the government agency wishing to keep the requested documents secret, and that burden has not been met. While it may well be that the Hoffa file should remain a secret, I do not believe that the Government has yet proven why. I dissent.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS CTA

In re DEPARTMENT OF JUSTICE, Petitioner.
Barbara Ann CRANCER, Appellee,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Appellant.

Nos. 91-2080, 91-2164.

United States Court of Appeals,
Eighth Circuit.

Submitted May 11, 1992.

Decided Aug. 5, 1993.

Freedom of Information Act (FOIA) suit was brought. The United States District Court for the Eastern District of Missouri, Stephen Nathaniel Limbaugh, J., required government to provide Vaughn index covering each document sought. Appeal was taken. The Court of Appeals, 950 F.2d 530, affirmed. En banc rehearing was granted. The Court of Appeals, Wollman, Circuit Judge, held that Vaughn index could not be required.

Writ of mandamus issued, orders vacated, and case remanded.

McMillian, Circuit Judge, dissented and filed opinion joined by Arnold, Chief Judge.

[1] FEDERAL COURTS ⇐ 524
170Bk524
Court of Appeals had jurisdiction under All Writs Act to decide whether district court committed usurpation of power by directing Department of Justice to produce Vaughn index when invoking Freedom of Information Act (FOIA) exemption for law enforcement records; if district court lacked authority, writ would be proper remedy, and issue of availability of writ was intertwined with merits of the interlocutory matter. 5 U.S.C.A. § 552(b)(7)(A); 28 U.S.C.A. § 1651(b).

[2] RECORDS ⇐ 50
326k50
Consistent with policy of broad disclosure under Freedom of Information Act (FOIA), government is required to release all requested information upon demand of any number of public. 5 U.S.C.A. § 552.

[3] RECORDS ⇐ 62
326k62
Once information is requested under Freedom of Information Act (FOIA), government must provide the information, unless it determines that specific exemption applies. 5 U.S.C.A. § 552.

[4] RECORDS ⇐ 62
326k62
Vaughn index could not be required for law enforcement records allegedly exempt from disclosure under Freedom of Information Act (FOIA); thus, district court should not have required government, after identifying each document, to provide detailed justification statement covering each refusal to release agency records or portions. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇐ 65
326k65
Government need not produce fact-specific and document-specific Vaughn index in order to satisfy burden of establishing application of Freedom of Information Act (FOIA) exemption for law enforcement records; contents of requested documents are irrelevant, and court must focus on particular categories of documents and likelihood that release of documents in those categories could reasonably be expected to threaten enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[6] RECORDS ⇐ 65
326k65
To satisfy burden with regard to Freedom of Information Act (FOIA) exemption for law enforcement records, government must define functional categories of documents, conduct document-by-document review to assign documents to proper categories, and explain to court how release of each category would interfere with enforcement proceeding. 5 U.S.C.A. § 552(b)(7)(A).

[7] RECORDS ⇐ 65
326k65
If generic index submitted by government is not sufficient to sustain Freedom of Information Act (FOIA) exemption for law enforcement records, then district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with

enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[8] RECORDS ⇐ 66
326k66
District court may examine disputed documents in camera to make firsthand determination of application of Freedom of Information Act (FOIA) exemption for law enforcement records if categories submitted by government remain too general after district court requests more specific, distinct categories. 5 U.S.C.A. § 552(b)(7)(A).

[9] RECORDS ⇐ 63
326k63
While district court may not order Vaughn index as aid to review of claim for exemption under Freedom of Information Act (FOIA) exemption for law enforcement records, court must satisfy itself that requested documents have been properly withheld. 5 U.S.C.A. § 552(b)(7)(A).

***1304** Scott R. McIntosh, Washington, DC, argued (Stuart M. Gerson, Stephen B. Higgins, Leonard Schaitman and Scott R. McIntosh, on the petition for rehearing), for appellant.

Richard E. Greenberg, Clayton, MO, argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

In In re Department of Justice, 950 F.2d 530 (8th Cir.1991) (Crancer I), a panel of this court upheld the district court's order requiring the government to provide a Vaughn [FN1] index after the government had invoked Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1988). We granted the government's suggestion for rehearing en banc and vacated the panel's decision. We now issue a writ of mandamus, vacate the challenged order, and remand the case to the district court for further proceedings.

FN1. See Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

I.

In 1987, Barbara Ann Crancer filed a Freedom of Information Act (FOIA) request with the Department of Justice. Crancer sought the release of certain information uncovered during the investigation conducted by the Federal Bureau of Investigation into the disappearance of her father, Jimmy Hoffa, the former president of the International Brotherhood of Teamsters. The FBI's investigation has resulted in the accumulation of more than 13,800 pages of records relating to Hoffa's disappearance.

The Department denied Crancer's request on the basis of Exemption 7(A), contending that the Hoffa FBI file contains "records or information compiled for law enforcement purposes," the release of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

After exhausting her administrative remedies, Crancer brought suit to compel the Department to provide her with the documents she had requested. During the pendency of her suit, Crancer filed a second, broader request seeking any and all materials relating to the FBI's investigation into Hoffa's disappearance. After this request was administratively denied by the Department, also on the basis of Exemption 7(A), Crancer amended her complaint to include her second request.

The Department moved for summary judgment on the basis of the claimed exemption. The district court ordered the Department to provide Crancer with a Vaughn index so that she could effectively oppose the government's pending motion. The court's order required the Department to produce an "itemized, indexed inventory of every agency record or portion thereof responsive to plaintiff's FOIA request," together with a "detailed justification statement covering each refusal to release [an] agency record[ ] or portions thereof." D.Ct. Order of July 27, 1990, at 1. The Department asked the court to reconsider its order directing the production of the Vaughn index. This request was denied. The Department then requested that the district court modify its earlier order and allow the Department to provide a categorical description of the documents contained in the Hoffa FBI file. The Department submitted a list of nine categories of documents and

an affidavit describing the potential interference with enforcement proceedings that would result if it were required to compile a Vaughn index. The district court denied this request and ordered the Department to submit the Vaughn index to a magistrate judge for in camera review.

In lieu of submitting a Vaughn index, the Department asked the magistrate judge to review the actual documents in camera. The magistrate judge denied this request, but extended the time period in which the Vaughn index was to be submitted. The Department then asked the district court to ***1305** reconsider the magistrate judge's order or, in the alternative, to certify the matter for interlocutory appeal. These requests were also denied.

The Department then sought relief from this court, asserting jurisdiction under the collateral order doctrine, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), or the All Writs Act, 28 U.S.C. § 1651(b).

In Crancer I, the panel asserted jurisdiction under the All Writs Act and upheld the district court's order requiring the preparation of a Vaughn index. The panel first determined that the Department could not be required to provide a specific factual showing and explanation describing why each document is exempt. It went on to hold, however, that the Department could be required to make a specific factual showing to demonstrate why each document belongs in a certain category, along with an explanation describing why the category itself is exempt from disclosure.

II.

[1] We first examine whether, and the basis upon which, we have jurisdiction to hear this case.

We possess discretionary writ-issuing authority under the All Writs Act, 28 U.S.C. § 1651(b). As noted by the panel in Crancer I, mandamus is "available only in those exceptional circumstances amounting to a judicial usurpation of power." In re Ford Motor Co., 751 F.2d 274, 275 (8th Cir.1984).

The panel determined that:

> [The Department's] argument is a novel one and has not been directly addressed by any court. If [the Department] is correct in its contention that the district court lacked authority to order a Vaughn index, then a writ would be the proper remedy. Because the issue of whether the writ is available is intertwined with the merits of this interlocutory matter, we must decide whether the district court had authority to require a Vaughn-type index in these circumstances.

Crancer I, 950 F.2d at 532 (citation omitted). We agree with the panel's analysis and believe that this case presents a unique situation. Thus, we conclude that we have jurisdiction to decide the question whether the district court's order directing the Department to produce a Vaughn index in the face of the Department's invocation of Exemption 7(A) constituted a judicial usurpation of power.

III.

[2] "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). Consistent with this policy of broad disclosure, the government is required to release all requested information upon the demand of any member of the public. Id. at 221, 98 S.Ct. at 2316; see also Curran v. Department of Justice, 813 F.2d 473 (1st Cir.1987); Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987). Congress fashioned certain explicit exemptions from disclosure, however, in order to preserve vital government policies and, in some cases, to protect individuals. See 5 U.S.C. § 552(b)(1)-)9; see also Robbins Tire, 437 U.S. at 220-21, 98 S.Ct. at 2316 ("Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests.").

[3] Once information is requested under FOIA, therefore, the government must provide the information unless it determines that a specific exemption applies. Likewise, the government bears the burden of demonstrating that the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). The district court must determine de novo whether the government has satisfied its burden. Id.

In the face of a claimed statutory exemption, district courts have sometimes required the

government to provide a Vaughn index. "This indexing procedure is perceived as necessary to permit the district court and the requesting party to evaluate the [government's] decision to withhold records and to ensure its compliance with the mandates of the FOIA." Barney v. IRS, 618 F.2d 1268, 1272 (8th Cir.1980) (per curiam).

***1306** A Vaughn index provides a specific factual description of each document sought by the FOIA requester. Specifically, such an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. Crancer I, 950 F.2d at 533. "For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided." Id.; see also Barney, 618 F.2d at 1272.

[4] Exemption 7(A) of FOIA provides that the act "does not apply to matters that are--* * * (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A). The government contends that the courts have interpreted this exemption differently from other FOIA exemptions, with the result that a district court may not order the production of a Vaughn index when Exemption 7(A) is invoked.

In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), the Supreme Court addressed the burden that the government must bear when asserting Exemption 7(A). In that case, the FOIA requester, an employer, sought from the National Labor Relations Board all statements made by potential witnesses prior to a Board hearing on the employer's unfair labor practices. Id. at 216, 98 S.Ct. at 2314. On appeal, the employer argued that the district court had erred by not requiring the government to make an individualized showing that each withheld document fit within the limits of Exemption 7(A). The Supreme Court rejected this argument, interpreting Exemption 7(A) of FOIA to require the government to prove that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324.

In support of its ruling, the Supreme Court noted that:

> [t]here is a readily apparent difference between [Exemption 7(A)] and [Exemptions 7(B)-(D)]. The latter [exemptions] refer to particular cases ... and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since [Exemption 7(A)] speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

437 U.S. at 223-24, 98 S.Ct. at 2318. The Court then examined Exemption 7's legislative history, which appeared to confirm the Court's observation regarding the distinguishing characteristic of Exemption 7(A). Id. at 224-34, 98 S.Ct. at 2318. The Court further noted that had Congress intended that "the Government in each case show a particularized risk to its individual 'enforcement proceedin[g],' " it could have done so. Id. at 234, 98 S.Ct. at 2323.

The Court also addressed Congress's 1974 amendment of Exemption 7(A). This amendment was designed "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Id. at 236, 98 S.Ct. at 2324. The Court's discussion of President Ford's veto of the 1974 amendment and the subsequent congressional override is instructive for our present analysis. The President was concerned that the 1974 amendment to Exemption 7(A) "would require the Government to 'prove ...--separately for each paragraph of each document--that disclosure "would" cause' a specific harm" to enforcement proceedings. Id. at 235, 98 S.Ct. at 2323 (citation omitted). Congressional supporters of the amendment termed the President's interpretation of the amendment " 'ludicrous,' " stating that the " 'burden is substantially less than we would be led to believe by the President's message.' " Id. (citation omitted). [FN2]

> FN2. For further discussion of the legislative history of the 1974 amendment to Exemption 7(A), see Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 626, 102 S.Ct. 2054, 2061, 72 L.Ed.2d 376 (1982); Campbell v. Department of

Health and Human Serv., 682 F.2d 256, 261-63 (D.C.Cir.1982).

The Court concluded that although the 1974 amendment to Exemption 7(A) was designed ***1307** to eliminate blanket exemptions for records found in investigatory files, Congress did not intend that generic determinations of those materials entitled to Exemption 7(A) protection could never be made. Rather, the government must demonstrate, and courts must determine, whether "disclosure of particular kinds of investigatory records ... would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. In other words, Congress intended that certain types or categories of investigatory records be withheld under Exemption 7(A) because disclosure of documents within those categories generally would interfere with enforcement proceedings.

With this understanding, post-Robbins Tire courts have made these determinations generically, category-of-document by category-of-document. In Barney v. IRS, for example, we were confronted with the question whether, in the wake of Robbins Tire, the government was required to provide a Vaughn index after the government invoked Exemption 7(A). 618 F.2d 1268 (8th Cir.1980) (per curiam). We held that "[t]o sustain its burden of showing documents were properly withheld under exemption 7(A) the government had to establish only that they were investigatory records compiled for law enforcement purposes and that production would interfere with pending enforcement proceedings." Id. at 1272-73. The Barney court bolstered its conclusion by emphasizing that "[u]nder exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." Id. at 1273 (citing Robbins Tire, 437 U.S. at 234-35, 98 S.Ct. at 2323).

Congress amended Exemption 7 in 1986 to lessen the burden on the government in establishing the application of Exemption 7(A). Freedom of Information Reform Act of 1986 (FIRA), Pub.L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986). Whereas under the 1974 version of Exemption 7(A), the government bore the burden of showing that the production of the requested law enforcement records "would interfere with enforcement proceedings," under the 1986 version the government need only show that the production of law enforcement records or information "could reasonably be expected to interfere with law enforcement proceedings."

In 1989, the Supreme Court revisited the government's burden under Exemption 7, this time focusing on the use of categorical determinations under Exemption 7(C), which covers documents whose production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) ("Reporters Committee "). In Reporters Committee, a group of journalists requested that the FBI disclose an individual's computerized criminal history file, known colloquially as the person's "rap sheet." The Supreme Court held that the production of rap sheets "as a categorical matter" could reasonably be expected to constitute an unwarranted invasion of a citizen's privacy. Id. at 780, 109 S.Ct. at 1485.

The Court discussed its earlier approval of a categorical approach to Exemption 7(A) in Robbins Tire. The Court noted that it had based its ruling in Robbins Tire on the perception that Exemption 7(A)'s reference to the plural "enforcement proceedings" supported a categorical approach when 7(A) was invoked, in contrast to the singular references in the other subsections of Exemption 7, which seemed to suggest a case-by-case balancing. Finding that "[j]ust as one can ask whether a particular rap sheet is a 'law enforcement record' that meets the requirements of [Exemption 7(C)], so too can one ask whether rap sheets in general ... are 'law enforcement records' that meet the stated criteria," the Court concluded that its approval of a categorical approach for Exemption 7(A) applied with equal force to the other subsections in Exemption 7. Id. at 779, 109 S.Ct. at 1485. Because the Court found that the disclosure of computerized compilations of an individual's criminal history could always be expected to constitute an invasion of an individual's privacy, it held that rap sheets as a category are exempted from disclosure under FOIA. Id. at 780, 109 S.Ct. at 1485.

The Court also supported its holding that a

categorical approach was appropriate for Exemption 7(C) as well as 7(A) by pointing to ***1308** the 1986 amendment. The Court stated that the amended 7(C), which like 7(A) had changed from the more stringent "would" to the more flexible "could reasonably be expected to," was enacted "to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." Id. at 777 n. 22, 109 S.Ct. at 1484 n. 22. The Court further noted that the amendment was designed to "replace a focus on the effect of a particular disclosure 'with a standard of reasonableness ... based on an objective test.' " Id. This reasonableness standard, the Court concluded, "amply supports a categorical approach to the balance of private and public interests in Exemption 7(C)." Id. The Court's conclusion concerning the effect of the amendment applies with equal force to Exemption 7(A), given the Court's conclusion that all of the Exemption 7 subsections should be interpreted similarly with respect to the use of categorical justifications.

Recently, the Court further explained its categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). Seeking to support a claim that the government had failed to disclose exculpatory evidence in his earlier criminal case, Landano sought all of the FBI files connected with the police officer's murder for which Landano had been convicted. After releasing a portion of its files, the FBI withheld certain documents on the grounds that they were exempt under Exemption 7(D), which applies to law enforcement records or information whose production "could reasonably be expected to disclose the identity of a confidential source." The district court largely rejected the government's categorical explanations and held that the FBI had to articulate "case-specific reasons for non-disclosure" of all information other than records pertaining to regular FBI informants. Id., --- U.S. at ----, 113 S.Ct. at 2018. The Court of Appeals for the Third Circuit affirmed, holding that the government had to provide detailed explanations relating to each alleged confidential source in order to justify nondisclosure under Exemption 7(D). Id., ---U.S. at ----, 113 S.Ct. at 2019.

The Supreme Court reversed and remanded. The Court first rejected the government's argument that it is entitled to a presumption under FOIA that all FBI sources are confidential and that any records relating to FBI sources should be presumptively exempt from disclosure. The Court noted that the government's proposed presumption was not rebuttable, as argued by the government, but amounted to an irrebuttable presumption or blanket exemption that found no support in the language or legislative history of Exemption 7(D). Id., --- U.S. at ----, 113 S.Ct. at 2023.

The Court, however, did not agree with the Third Circuit's requirement that the government must provide a detailed justification relating to each alleged confidential source. To the contrary, the Court stated that the government could point to categories of documents, the circumstances surrounding which would support the inference that the sources to whom they pertained were confidential. Id., --- U.S. at ----, 113 S.Ct. at 2023. For example, the Court suggested that "paid informants normally expect their cooperation with the FBI to be kept confidential," implying that the government need only present a category of documents relating to paid informants, whose production could reasonably be expected to disclose the informant's identity, in order to justify nondisclosure under Exemption 7(D). Id. As a second example, the Court opined that eyewitnesses to a gang-related murder could also probably be presumed to be confidential. Id. The Court concluded that such a generic, categorical approach best articulated Congress's intent "to provide ' " 'workable' rules" ' of FOIA disclosure." Id. (citing Reporters Committee, 489 U.S. at 779, 109 S.Ct. at 1485).

Thus, we conclude that the Supreme Court has consistently interpreted Exemption 7 of FOIA (specifically so far subsections 7(A), 7(C), and 7(D)) to permit the government to proceed on a categorical basis in order to justify nondisclosure under one of Exemption 7's subsections. See Landano, --- U.S. at ---- - ----, 113 S.Ct. at 2023-24; Reporters Committee, 489 U.S. at 779-80, 109 S.Ct. at 1485; Robbins Tire, 437 U.S. at 241-43, 98 S.Ct. at 2326-27. The Court's interpretation ***1309** of Exemption 7 and Congress's intent in enacting it has been strengthened by the 1986 amendment, which provided for greater flexibility and lessened the government's burden. See Reporters Committee, 489 U.S. at 777 n. 22, 109 S.Ct. at 1484 n. 22.

Our interpretation of Exemption 7(A) in Barney mirrors the Supreme Court's interpretation. Moreover, consistent with the teachings of Robbins Tire, our analysis in Barney is in accord with the principle that " 'the inherent nature of the requested documents is irrelevant to the question of exemption.' " Curran, 813 F.2d at 474 (quoting Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987)). This interpretation is consistent with decisions from other circuits. See, e.g., Lewis v. IRS, 823 F.2d 375, 378 (9th Cir.1987); Curran, 813 F.2d at 475; Church of Scientology of Calif. v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986); Campbell, 682 F.2d at 265. [FN3]

FN3. The panel attempted to distinguish these cases on the ground that the appellate courts were reviewing district court decisions that had found Vaughn indices not to be required. Crancer I, 950 F.2d at 534. We find this reasoning unpersuasive. Whatever the procedural posture, the Supreme Court has made clear that the government does not have to provide fact-specific information with respect to each document to justify its claim that Exemption 7(A) applies. As demonstrated, the actual contents of the documents are not relevant when the propriety of Exemption 7(A) is in dispute. See Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2323. Rather, the government may meet its burden by showing how disclosure of each category of documents would likely interfere with the investigation. Id.

The District of Columbia Circuit, which originally developed the Vaughn index, has succinctly explained the relationship between Exemption 7(A), as interpreted by Robbins Tire, and the use of Vaughn indices:

> [w]hen ... a claimed FOIA exemption consists of a generic exclusion [such as Exemption 7(A)], dependent upon the category of records rather than the subject matter which each individual record contains, resort to a Vaughn index is futile. Thus, in NLRB v. Robbins Tire & Rubber Co., [citation omitted], the Supreme Court upheld, without any provision of a Vaughn index, the Labor Board's refusal to provide under FOIA witness statements obtained in the investigation of pending unfair labor practice proceedings. A Vaughn index would have served no purpose since ... [Exemption 7(A)] did not require a showing that each individual document would produce such interference, but could rather be applied generically, to classes of records such as witness statements.

Church of Scientology, 792 F.2d at 152 (Scalia, J.).

In light of the above discussion, the district court's order for a Vaughn index in the present case appends an additional requirement to Exemption 7(A) that exceeds the bounds of the statute as interpreted by the Supreme Court and this court. The district court's order required the government, after identifying each document, to provide a "detailed justification statement covering each refusal to release said agency records or portions thereof." D.Ct. Order of July 27, 1990, at 1. This goes beyond the categorical explanations that the Supreme Court in Robbins Tire held to be sufficient to justify nondisclosure under Exemption 7(A).

[5] In sum, the government bears the burden of establishing that Exemption 7(A) applies. And under Robbins Tire, Exemption 7(A) does not require that the government produce a fact-specific, document-specific, Vaughn index in order to satisfy that burden. The contents of the requested documents are irrelevant. It is the particular categories of documents, and the likelihood that the release of documents within those categories could reasonably be expected to threaten enforcement proceedings, on which the court must focus. The district court, therefore, acted beyond the scope of its authority when it ordered the Department to produce a Vaughn index.

IV.

[6] "Although generic determinations are permitted, and the government need not justify its 7(A) refusal on a document-by-document basis, there must nevertheless be some minimally sufficient showing." Curran, 813 F.2d at 475. To satisfy its burden with regard to Exemption 7(A), the government must define functional categories of documents; ***1310** it must conduct a document-by-document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings. [FN4] See Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986).

FN4. We express no opinion as to whether the

> categorical index submitted by the Department in this case satisfies the Bevis paradigm. The proceeding below was, for all intents and purposes, focused only on whether the district court could order a Vaughn index. On remand, the Department should submit its categorical index and affidavits in accordance with the principles set forth in this opinion.

[7] If the generic index submitted by the government is not sufficient to sustain the 7(A) exemption, then the district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with enforcement proceedings. See Campbell, 682 F.2d at 265. Indeed, this is what the court ordered in Bevis, 801 F.2d at 1390. "The chief characteristic of an acceptable taxonomy should be functionality--that is, the classification should be clear enough to permit a court to ascertain 'how each .. category of documents, if disclosed, would interfere with the investigation.' " Curran, 813 F.2d at 475 (citing Campbell, 682 F.2d at 265).

[8] If the categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination. 5 U.S.C. § 552(a)(4)(B); Lewis, 823 F.2d at 378; see also Cleary v. FBI, 811 F.2d 421, 423 (8th Cir.1987) (in camera examination in 7(C) and (D) exemption case); Parton v. United States Dep't of Justice, 727 F.2d 774 (8th Cir.1984); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir.1978).

In **Dickerson v. Department of Justice, 992 F.2d 1426** (6th Cir.1993), the plaintiff sought the release of information from the Hoffa FBI file and requested a Vaughn index. The district court accepted the government's categorical index, examined certain documents in camera, and granted summary judgment to the government on the basis of Exemption 7(A). The court stated that it was "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422 (E.D.Mich. July 31, 1991).

On appeal, the Court of Appeals for the Sixth Circuit reviewed the file that had been submitted to the district court and concluded that the district court had not abused its discretion in ruling that there was no need to go beyond the documents that the FBI had submitted. **Dickerson, 992 F.2d at 1431-32.** The court of appeals also held that the district court was correct in finding that the FBI's investigation remains active and that it was directed toward the institution of criminal proceedings. **Id. at 1432.** Further, the Sixth Circuit held that the district court was correct "in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution." **Id. at 1433.**

[9] In the present case, the district court was apparently of the belief that the Department was not asserting Exemption 7(A) in good faith or that it had not individually reviewed the requested documents to place them in their functional categories. While the district court may not order a Vaughn index as an aid to its review, it still must satisfy itself that the requested documents have been properly withheld. The Department's failure to demonstrate that the sought-after documents relate to an ongoing investigation or could reasonably be expected to interfere with future law enforcement proceedings will carry with it the loss of the 7(A) exemption. In that regard, we note that although the Sixth Circuit's affirmative holding on that issue in Dickerson will not be binding on the district court on remand, that holding does give credence to the Department's assertion of the 7(A) exemption in the present case.

In summary, Congress enacted Exemption 7(A) to prohibit interference in an ongoing criminal investigation. The Supreme Court's decision in Robbins Tire to allow generic category-by-category classifications in Exemption 7(A) cases, rather than detailed fact- ***1311** specific explanations on a document-by-document basis, serves an important interest: "[p]rovision of the detail which a satisfactory Vaughn Index entails would itself probably breach the dike." Curran, 813 F.2d at 475. "Withal, a tightrope must be walked [in Exemption 7(A) cases]: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag." Id. In short, we will not allow the cure, Exemption 7(A), to "become the carrier of the disease." Id.

The writ of mandamus prayed for is issued. The

orders directing the production of a Vaughn index are vacated, and the case is remanded to the district court for further proceedings consistent with this opinion.

McMILLIAN, Circuit Judge, with whom RICHARD S. ARNOLD, Chief Judge, joins, dissenting.

"Free people are, of necessity, informed; uninformed people can never be free." Sen. Judiciary Comm., Freedom of Information, 88th Cong., 1st Sess. 3 (1963) (remarks of Sen. Edward Long).

As discussed below, although I agree with much of the analysis in the majority opinion, I do not agree that the district court exceeded the scope of its authority when it ordered the Department of Justice (hereinafter the government) to prepare a Vaughn index of FBIHQ file 9-60052, the FBI's investigatory file concerning the investigation into the disappearance and presumed murder of Teamsters president Jimmy Hoffa in July 1975. Accordingly, I would deny the petition for writ of mandamus.

COLLATERAL ORDER

First, I do not agree that we have appellate jurisdiction to review the government's appeal, No. 91-2164. As discussed below, the term "Vaughn index" is derived from Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), and a Vaughn index is typically a detailed affidavit which "permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information." Id., 484 F.2d at 826. In my view, the district court order in the present case requiring the preparation of a Vaughn index was essentially a discovery order in this FOIA litigation. Discovery orders are "generally not appealable as collateral orders even when they are attacked as burdensome." Hinton v. Department of Justice, 844 F.2d 126, 131 (3d Cir.1988). The Vaughn index is not an end in itself; by definition, the Vaughn index does not itself disclose anything of substance. "[A] Vaughn index does not accord a requester any of the substantive relief [the requester] seeks.... Rather, the [Vaughn] index is a tool for determining the requester's substantive rights [under FOIA]." Id. at 130.

It is true that "[the Freedom of Information Act (FOIA)] was not intended to supplement or displace rules of discovery." John Doe Agency v. John Doe Corp., 493 U.S. 146, 153, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989). However, the present case involves only the FOIA requests themselves. It is a discrete civil action. The FOIA is not being used here as a discovery tool to supplement or displace discovery in connection with other litigation, for example, other criminal or civil proceedings. In discovery proceedings the issue is whether the information sought is relevant and necessary; however, in FOIA litigation the only issue is whether the agency has properly withheld the information sought under one of the specific statutory exemptions. See, e.g., North v. Walsh, 279 U.S.App.D.C. 373, 881 F.2d 1088, 1095 (1989) (FOIA request seeking documents from Office of Independent Counsel concerning on-going criminal investigation of plaintiff).

I also do not agree that the district court order is appealable under the final collateral order exception. Hinton v. Department of Justice, 844 F.2d at 131. Collateral orders are appealable if (1) the order conclusively decides the disputed issue, (2) the issue is entirely distinct from the merits of the case, and (3) the order would be effectively unreviewable if the appeal were postponed until the issuance of a final order. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). At this point in the present case, the district court has only ordered the preparation of a Vaughn index and has yet to ***1312** conclusively decide the merits of the government's claim of exemption under Exemption 7(A). The district court agreed to consider the Vaughn index in camera; the district court has not even decided whether or not to disclose the Vaughn index itself to the public or counsel for plaintiff. As noted above, the preparation of a Vaughn index "does not accord a requester any of the substantive relief [he or she] seeks." Id. at 130. The substantive relief the requester wants is access to the government's records, not the preparation of or access to the Vaughn index of those records. The preparation of a Vaughn index is only a preliminary or preparatory step. As was noted by the panel majority opinion,

the present case

> is unique because it is not a review of a district court's order that documents be disclosed, nor is it a review of a district court's decision that documents are exempt from disclosure. [The present] case asks us to determine what a district court may do while deciding whether documents are or are not exempt from disclosure.

950 F.2d at 533.

MANDAMUS

In the present case the government does not argue the district court abused its discretion in ordering a Vaughn index; the government argues the district court lacked the authority to order a Vaughn index. The government has thus presented the issue in terms of the power or authority of the district court. The government argues that Exemption 7(A) is different from other FOIA exemptions and that the district court can never require the preparation of a Vaughn index when the government agency invokes Exemption 7(A). As noted by the panel majority opinion, this is a novel argument that squarely challenges the authority of the district court to act. 950 F.2d at 532. Because the government has presented its argument in terms of the district court's authority to act, and not in terms of whether or not the district court abused its discretion, I agree that, under these unique circumstances, we have jurisdiction to review the district court order by petition for writ of mandamus.

THE VAUGHN INDEX

A healthy distrust of government, and a corresponding suspicion of government secrecy, is the underlying premise of FOIA. FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978) (Robbins). FOIA's "general philosophy [is] 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Department of Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976), citing S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). " 'Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information,' and therefore provided the 'specific exemptions under which disclosure could be refused.' " John Doe Agency v. John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475, citing FBI v. Abramson, 456 U.S. 615, 621, 102 S.Ct. 2054, 2059, 72 L.Ed.2d 376 (1982). The statutory exemptions are to be narrowly construed, Department of Air Force v. Rose, 425 U.S. at 361, 96 S.Ct. at 1599, the district courts review the claim of exemptions de novo, and the burden of justifying nondisclosure, that is, the burden of establishing that the information requested is protected from disclosure by a specific exemption, is on the agency. See 5 U.S.C. § 552(a)(4)(B).

As noted by the panel majority opinion, the district court's responsibility to review de novo the government's claimed exemptions is complicated by the fact that "ordinarily a government agency, and not the court, has access to the documents in question." 950 F.2d at 533. "The party requesting the disclosure must rely upon his [or her] adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding ***1313** agency's arguments." Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992). This is the precise difficulty at the heart of the present case and it is also what precipitated the invention of the Vaughn index.

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure....
>
> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation.

Vaughn v. Rosen, 484 F.2d at 823-24. Thus, in FOIA litigation, the plaintiff, the party seeking disclosure, is placed in the awkward and frustrating position of speculating about the likely contents of documents that it has never seen.

In Vaughn v. Rosen the plaintiff was a law professor doing research on the Civil Service Commission. The professor sought disclosure of the evaluations of certain government agencies' personnel management programs and certain other special reports of the Bureau of Personnel Management. The government claimed that the documents contained information of a personal nature about the government agency employees and that disclosure would constitute an invasion of the employees' personal privacy. The court of appeals noted that the plaintiff's lack of knowledge necessarily meant that he quite literally did not know, and therefore could not inform the court, whether or not the government's factual characterization of the documents as containing information of a personal nature was accurate. Id., 484 F.2d at 824. The court of appeals observed that the plaintiff's lack of knowledge not only hampered his ability to litigate in the district court (he was essentially limited to arguing that the exemption is very narrow and that the general nature of the documents sought made it unlikely that they contained personal information), but

> [t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, ... and hence the typical process of dispute resolution is impossible....
>
> The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to [FOIA]. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously, an appellate court is even less suited to making this inquiry than is a trial court.

Id., 484 F.2d at 824-25. The FOIA requester in the present case is in the same position as the law professor in Vaughn v. Rosen.

The Vaughn v. Rosen court concluded that, contrary to the intent of Congress, FOIA "actually encourage[d] the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed." Id., 484 F.2d at 826. Not only did FOIA contain "no inherent incentives that would affirmatively spur government agencies to disclose information," id., but "since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, ... [FOIA] encourage[d] agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information." ***1314** Id. These concerns compelled the Vaughn v. Rosen court to develop what has become known as the Vaughn index in order to "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." Id.

As noted by the panel majority opinion,

> [t]here is no prescribed form for a Vaughn index; any form is acceptable as long as the affidavits provided by the government assist the court's efforts to decide the issues at hand. Regardless of form, however, certain components are integral parts of any Vaughn index. Specifically, Vaughn indices usually communicate descriptions of each and every document contained in the file, including a general description of each document's contents and general facts about their creation (such as date, time, and place). For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

950 F.2d at 533 (citations omitted). "Specificity is the defining requirement of the Vaughn index and affidavit; affidavits cannot support summary judgment [upholding the government's claimed

exemption] if they are 'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.' " King v. United States Department of Justice, 265 U.S.App.D.C. 62, 830 F.2d 210, 219 (1987) (footnotes omitted). "To accept an inadequately supported exemption claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a de novo review.' " Id. Whether the government's affidavit or affidavits constitute an adequate Vaughn index is a question of law reviewed de novo. Wiener v. FBI, 943 F.2d at 978, citing Binion v. United States Department of Justice, 695 F.2d 1189, 1193 (9th Cir.1983).

Preparation of the Vaughn index does more than require the government agency to review and classify the documents in question. The resulting Vaughn index is more than a litigation tool that the FOIA requester can use to challenge the government's withholding of those documents. It is important to remember that requiring the government agency to prepare a Vaughn index

> forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he [or she] can present his [or her] case to the trial court.

Lykins v. Department of Justice, 233 U.S.App.D.C. 349, 725 F.2d 1455, 1463 (1984). "The index thus functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." Wiener v. FBI, 943 F.2d at 977-78; see also Davis v. CIA, 711 F.2d 858, 861 (8th Cir.1983), cert. denied, 465 U.S. 1035, 104 S.Ct. 1307, 79 L.Ed.2d 705 (1984).

ROBBINS DECISION

As has already been discussed, Exemption 7(A) is the law enforcement exemption and provides that disclosure is not required of "matters that are ... investigatory records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In the present case the government argues the district court lacked the authority to require the preparation of a Vaughn index because a Vaughn index is not required when Exemption 7(A) is invoked, citing Robbins, 437 U.S. at 223-24, 234-36, 98 S.Ct. at 2317-18, 2323. In Robbins the FOIA plaintiff was an employer seeking disclosure of witness statements prior to an unfair labor practice hearing. Following a contested representation election, the regional director of the NLRB filed an unfair labor practice charge against the employer for pre-election actions. A hearing was scheduled. Prior to the hearing, the employer sought disclosure of all potential witnesses' statements collected by the NLRB during its investigation. The regional director denied the request on the ground that the witness statements were exempt from disclosure under several FOIA exemptions, ***1315** in particular Exemption 7(A). The employer appealed to the NLRB General Counsel. However, before the expiration of FOIA's 20-day response period, 5 U.S.C. § 552(a)(4)(B), the employer filed a FOIA action in federal district court, seeking disclosure of the witness statements and an injunction against holding the hearing until the documents had been disclosed. The NLRB argued that witness statements were exempt from disclosure under Exemption 7(A) because their production would interfere with an enforcement proceeding, the pending unfair labor practice hearing. The district court disagreed and ordered the NLRB to produce the witness statements.

The issue whether Exemption 7(A) was generic, or categorical, or case-specific emerged on appeal. The court of appeals rejected the NLRB's categorical or generic approach and concluded that the 1974 legislative history demonstrated that Exemption 7(A) was available only after a specific evidentiary showing of the possibility of actual interference in an individual case. Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 728 (5th Cir.1977). The court of appeals rejected the NLRB's arguments that the premature revelation of its case through the production of the witness statements before the hearing was the kind of interference that would justify nondisclosure and that pre-hearing production of witness statements would discourage potential witnesses from making statements at all. Id. at 729-31. The court of appeals acknowledged that the possibility of "interference" in the form of witness intimidation by the employer during the period between disclosure

of the witness statements to the employer and the hearing, but held that the NLRB had failed to demonstrate that the witness statements were exempt because it had not introduced any evidence that witness intimidation was likely in this particular case. Id. at 732. But see, e.g., Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir.) (holding statements of employees and union representatives obtained in NLRB investigation exempt from disclosure under Exemption 7(A) until completion of administrative and judicial proceedings), cert. denied, 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976).

The Supreme Court reversed. The Court endorsed the generic, or categorical, interpretation of Exemption 7(A) and held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing." 437 U.S. at 236, 98 S.Ct. at 2324. First, the Court noted that the language of the exemption, specifically the plural reference to "enforcement proceedings," suggested that "certain generic determinations" might be made under Exemption 7(A). Id. at 224, 98 S.Ct. at 2318. The Court concluded that the early legislative history supported this interpretation, id. at 225-26, 98 S.Ct. at 2318-19 (referring to Sen. Humphrey's concerns in 1966 about the need to protect statements of agency witnesses from disclosure prior to agency proceedings, specifically witnesses in unfair labor practice proceedings), as well as the reported decisions until 1974. Id. at 226, 98 S.Ct. at 2319 (citing cases). The Court also noted that the legislative history of the 1974 amendment of Exemption 7 showed "[t]hat the 1974 Congress did not mean to undercut the intent of the 1966 Congress with respect to Senator Humphrey's concern about interference with pending NLRB enforcement proceedings." Id. at 232, 98 S.Ct. at 2322; see id. at 226-32, 98 S.Ct. at 2319-22 (noting background of 1974 amendment, particularly Congressional disapproval of several D.C.Cir. decisions upholding "blanket exemptions" for all government records contained in investigatory files that had been compiled for law enforcement purposes; 1974 amendment changed scope of exemption from "files" to "records" and enumerated specific purposes and objectives of exemption).

The Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of law enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. The Court agreed that "[t]he most obvious risk of interference with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony ***1316** or not testify at all." Id. at 239, 98 S.Ct. at 2325. In addition, prehearing disclosure of witnesses' statements "would disturb the existing balance of relations in unfair labor practice proceedings," id. at 236, 98 S.Ct. at 2324, especially since, "[h]istorically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case." Id. The Court also noted that the use of FOIA as the mechanism for providing a litigant with earlier and greater access to the agency's case than the litigant would otherwise have was likely to cause substantial delays in the administrative process and thus interfere with enforcement proceedings. Id. at 237-38, 98 S.Ct. at 2324. [FN5]

FN5. As noted by the majority opinion, at 1307 supra, the Supreme Court recently affirmed the Robbins categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, ----, ---- - ----, 113 S.Ct. 2014, 2021, 2023-24, 124 L.Ed.2d 84 (1993) (rejecting blanket exemption for "all" FBI sources as confidential for purposes of Exemption 7(D); however, "more narrowly defined circumstances" may support inference of confidentiality, for example, generic category of paid informants). See also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (holding "rap sheets" constituted generic category of law enforcement records which could reasonably be expected to constitute an unwarranted invasion of privacy within meaning of Exemption 7(C)). I do not dispute the continued validity of the Robbins categorical approach. What is in dispute in the present case is whether, as a threshold matter, we know enough about the nature of the records in question to review the accuracy of the government's

> classification of the records into generic categories. I submit that we do not.

APPLICATION OF EXEMPTION 7(A)

I do not think Robbins supports the government's argument in the present case. As noted by the panel majority opinion, after Robbins endorsed the generic, or categorical, application of Exemption 7(A), many courts of appeals

> altered their views on the need for a Vaughn index when Exemption 7(A) is involved. The rationale underlying these post-Robbins decisions has been that a Vaughn index is unnecessary because the government is permitted to demonstrate interference based on categories of documents and need not demonstrate interference with enforcement proceedings on a document-by-document basis. E.g., Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986) (Scalia, J.); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir.1980) (per curiam). Moreover, in each of these cases, the appellate court was reviewing a district court's decision not to require a Vaughn index when the government had already provided adequate descriptions of the documents sought, as well as adequate explanations as to how the particular types of documents at issue could interfere with law enforcement proceedings.
>
> At no time, however, has an appellate court suggested that Robbins alters the district court's statutory obligation to review the claimed exemption's applicability. Robbins does not allow for exemption merely because documents appear in a law enforcement agency's file. When an agency relies upon Robbins and offers categorical justifications for exemption under Exemption 7(A), the agency must still review each document individually.... The district court is well within its authority to verify that the agency has actually examined and properly categorized each document. It may accomplish this task by requiring an affidavit that describes, on a document-by-document basis, the documents in the file, the categories into which each document is placed, and a description of how disclosure of each category of documents might interfere with enforcement proceedings. Robbins merely prevents a district court from ordering a document-by-document explanation as to how each document will interfere with enforcement proceedings. In other words, though the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis, it can require the government to justify its chosen categorization on a document-by-document basis. 950 F.2d at 533-34 (parenthetical omitted from Barney citation; citations omitted; footnote omitted).

In Robbins it was not disputed that the documents in question were in fact witness ***1317** statements. Nor was it disputed in Robbins that, at least in general, disclosure of witness statements prior to the unfair labor practice proceeding could interfere with that proceeding. What was disputed was whether the agency could rely on that generality or whether the agency had to make a specific factual showing that disclosure of those particular witness statements would interfere with that particular proceeding. Similarly, in Barney v. IRS, there was no dispute about the categorization of the documents in question; the district court and this court were "satisfied that the government's affidavits adequately described the documents, the categories to which they belonged, and the possible harms of disclosure." 950 F.2d at 534, citing 618 F.2d at 1272-73 (witness statements, documentary evidence, IRS agent's work papers, internal agency memoranda). See Curran v. Department of Justice, 813 F.2d 473, 476 (1st Cir.1987) (apparent from agency affidavit that agency conducted individualized, document-by-document search, subdivided records into types and then into functional categories).

The same cannot be said in the present case. Here, the parties disputed not only the nature of the individual documents, but also the type of category used by the government, as well as the appropriate categorization or placement of the documents into particular categories. This basic lack of agreement about the nature and categorization of the documents distinguishes the present case from Robbins and Barney.

In the present case, the district court required preparation of a Vaughn index, and in response the government filed several public affidavits or declarations and a document which it captioned a "categorical index." The district court was clearly not satisfied with the government's response. As noted by the penal majority opinion, "[t]he district court's dissatisfaction [with the government's

response was] understandable given the government's blanket assertion that all 13,800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages." Id. at 535; cf. Wiener v. FBI, 943 F.2d at 978 (noting the FBI's use of "boilerplate" explanations drawn from a "master" FOIA response). Furthermore, the district court believed that the FOIA requester had raised serious questions about the validity of the government's search and categorization of the documents. Id. Compare Curran v. Department of Justice, 813 F.2d at 476 (district court found no reason to impugn good faith of agency). The district court also concluded that it needed additional information "about each document, not only to verify that the government has fulfilled its obligation to examine each document, but also to enable it to understand or challenge the categories created by the government." 950 F.2d at 535.

By requiring the preparation of a Vaughn index in the present case, the district court was attempting to develop an adequate record. Only the government knows what is in the Hoffa file; the FOIA requester and the district court do not know, much less this court. As noted above, the record indicates only that the file consists of at least 13,800 pages in 70 volumes; the file is almost certainly larger now. Some of these pages are public source material which the government has already made available to the FOIA requester. According to the categorical index, which consists of a total of five double-spaced pages, each and every page falls within one of nine categories, the disclosure of which could reasonably be expected to interfere with law enforcement proceedings. The district court's dissatisfaction with the categorical index was directed more at the procedural and substantive accuracy of the government's classification of individual pages than at the categories identified by the government. (The majority opinion expresses no opinion on the sufficiency of the Baker affidavit and the categorical index. See supra at 1309 n. 4 supra.) In any event, as noted by the panel majority opinion, the district court's concern about whether all the documents are described by the government's categories cannot be resolved merely by requiring more specific or more detailed categories. 950 F.2d at 535.

In my view, assuming for purposes of analysis that the government's categories are sufficiently specific, the district court acted within its authority in requiring the government to verify that it had actually examined and accurately categorized each document. ***1318** Indeed, it was its duty to do so. King v. United States Department of Justice, 830 F.2d at 219 (acceptance of inadequately supported exemption claim "would constitute abandonment of the trial court's obligation under FOIA to conduct a de novo review"). The district court did not know (and we do not know) whether the government's categorization of the documents was correct or, for that matter, whether the government had examined each document individually. The district court decided that, without a Vaughn index, it could not verify whether there was a correlation between the documents and the categories. Because all the documents necessarily fall into exempt categories, unless the district court can verify that each document has been examined and accurately categorized, the Robbins categories will become "no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendments of FOIA." Bevis v. Department of State, 255 U.S.App.D.C. 347, 801 F.2d 1386, 1389 (1986), citing Robbins, 437 U.S. at 236, 98 S.Ct. at 2324.

As noted by the panel majority opinion, preparation of a Vaughn index in the present case does not require the government to demonstrate document-by-document how disclosure of each document could reasonably be expected to interfere with pending law enforcement proceedings. 950 F.2d at 535. Like the district court and the panel majority, I accept the category-by-category approach. What I do not accept is the government's conclusory assertions that each and every document in the Hoffa file falls within one of its nine categories. In other words, what is disputed, and what the district court sought to verify by requiring the preparation of a Vaughn index, is whether the government's categorization of each document is accurate. Without such a record, the FOIA requester cannot test the government's claim of exemption, the district court cannot conduct the required de novo review of the government's decision not to disclose (without undertaking the arduous task of actually reviewing the documents itself), and this court cannot conduct a meaningful review of the district court's decision.

It should be noted that the district court could decide to modify its order requiring the government to prepare a Vaughn index for the entire Hoffa file. In the proceedings before the district court, the government argued that preparation of a Vaughn index for the entire Hoffa file would be inordinately time-consuming and would necessarily divert scarce resources from other law enforcement activities. The district court could require the government to prepare a Vaughn index for a representative sample of the documents in the Hoffa file. "Representative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved." Bonner v. United States Department of State, 289 U.S.App.D.C. 56, 928 F.2d 1148, 1151 (1991); accord The Washington Post v. United States Department of Defense, 766 F.Supp. 1, 15 (D.D.C.1991).

Alternatively, the district court could decide to conduct an in camera review of a representative sample of the documents in the Hoffa file. In camera review is discretionary. Robbins, 437 U.S. at 224, 98 S.Ct. at 2318. Limited in camera review might be particularly helpful in the present case. "[A] finding of bad faith or contrary evidence is not a prerequisite to in camera review; a trial judge may order such an inspection 'on the basis of an uneasiness, on a doubt [the judge] wants satisfied before [taking] responsibility for a de novo determination.' " Meeropol v. Meese, 252 U.S.App.D.C. 381, 790 F.2d 942, 958 (1986), citing Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187, 1195 (1978). One district judge and one appellate panel have examined in camera a selection made by the government of the documents contained in the Hoffa file and concluded that those documents established that the criminal investigation into Hoffa's disappearance is active and continuing and that production of those records could reasonably be expected to interfere with enforcement proceedings. Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422, slip op. at 5-6 (E.D.Mich. July 31, 1991), aff'd, **992 F.2d 1426** (6th Cir.1993).

For the reasons set forth above, I would hold the district court has the authority to require the government to prepare a Vaughn index even when Exemption 7(A) is invoked ***1319** and would deny the government's application for writ of mandamus.

END OF DOCUMENT

WASHINGTON POST COMPANY, Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, et al.

No. 88-5037.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 17, 1988.

Decided Dec. 16, 1988.

Newspaper sought access to report compiled by outside directors of drug selling company from Department of Justice under the Freedom of Information Act. The United States District Court for the District of Columbia, Norma Holloway Johnson, J., granted the Government summary judgment on its claims the report was protected from disclosure under FOIA exemptions, and the newspaper appealed. The Court of Appeals, Mikva, Circuit Judge, held that: (1) FOIA exemption shielding material specifically exempted from disclosure by another statute did not preclude disclosure of the report based on federal criminal rule prohibiting government attorney from disclosing matters occurring before grand jury; (2) FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy did not preclude disclosure of the report, as none of the privacy interests encompassed by that exemption would be implicated by disclosure of the report; and (3) to withstand challenge to applicability of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, Government bears burden of showing that trial or adjudication is pending or truly imminent and that it is more probable than not that disclosure of the material sought would seriously interfere with fairness of those proceedings.

Reversed in part; remanded with directions in part.

[1] RECORDS ⇦ 55
326k55
FOIA exemption shielding material specifically exempted from disclosure by another statute did not justify denying newspaper access to report compiled by outside directors of drug selling company from Department of Justice, based on criminal rule prohibiting government attorney from disclosing matters occurring before grand jury, although the report had been subpoenaed by grand jury, had been used by government lawyers to question witnesses before jury, and was available to jurors. 5 U.S.C.A. § 552(b)(3); Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

[2] RECORDS ⇦ 60
326k60
FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy, did not justify precluding newspaper's access to report compiled by outside directors of drug selling company from Department of Justice, as none of the privacy interests encompassed by the exemption would be implicated by disclosure of the report. 5 U.S.C.A. § 552(b)(7)(C).

[3] RECORDS ⇦ 60
326k60
FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy, does not shield information relating to business judgments and relationships even if disclosure might tarnish someone's professional reputation. 5 U.S.C.A. § 552(b)(7)(C).

[4] RECORDS ⇦ 60
326k60
Protection accorded reputation by FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy, would generally shield material when disclosure would show that individual was target of law enforcement investigation. 5 U.S.C.A. § 552(b)(7)(C).

[5] RECORDS ⇦ 65
326k65
To withstand challenge to applicability of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, Government bears burden of showing that trial or adjudication is pending or truly imminent and that it is more probable than not that disclosure of the material sought would seriously interfere with fairness of those proceedings. 5 U.S.C.A. § 552(b)(7)(B).

[6] RECORDS ⇦ 60
326k60
Where Government was denying access to material generated by someone else pursuant to FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, Government must be able to confirm to its own satisfaction that trial or adjudication is pending or truly imminent and that it is more probable than not that disclosure of material sought would seriously interfere with fairness of those proceedings. 5 U.S.C.A. § 552(b)(7)(B).

[7] RECORDS ⇦ 63
326k63
Whether prerequisites for application of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication were satisfied would be remanded to district court for determination; whether prerequisites were satisfied was for district court to ascertain in first instance, and record did not contain factual findings necessary to resolve whether the prerequisites were satisfied. 5 U.S.C.A. § 552(b)(7)(B).

[8] RECORDS ⇦ 60
326k60
Unsupported assertion from nongovernment party that there was unspecified litigation pending did not satisfy prerequisite for applying FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, as that unsupported assertion did not show trial or adjudication was pending or truly imminent. 5 U.S.C.A. § 552(b)(7)(B).

[9] RECORDS ⇦ 60
326k60
Even if drug seller were faced with current litigation arising from its marketing of particular drug, it would not automatically follow that disclosure of report compiled by outside directors of selling company would deprive seller of fair trial, for purposes of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication. 5 U.S.C.A. § 552(b)(7)(B).

[10] RECORDS ⇦ 60
326k60
Prerequisite requiring showing that it is more probable than not that disclosure of material sought would seriously interfere with fairness of trial or adjudication required separate findings from other prerequisite, requiring showing that trial or adjudication is pending or truly imminent, in determining applicability of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication. 5 U.S.C.A. § 552(b)(7)(B).

***98 **192** Barbara P. Percival, with whom Boisfeuillet Jones, Jr. and Denise E. Holmes, Washington, D.C., were on the brief, for appellant.

Thomas J. McIntyre, Atty., Dept. of Justice, with whom Jay B. Stephens, U.S. Atty., and John D. Bates and R. Craig Lawrence, Asst. U.S. Attys., were on the brief, for appellee, U.S. Dept. of Justice, Washington, D.C., John Facciala, Asst. U.S. Atty., and Miriam M. Nisbet and Timothy J. Reardon III, Attys., Dept. of Justice, Washington, D.C., also entered appearances for appellee.

Charles F.C. Ruff, Richard F. Kingham and Bruce N. Kuhlik, Washington, D.C., were on the brief for appellee, Eli Lilly and Co.

Before WALD, Chief Judge, and MIKVA and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

The Washington Post Company ("Post") is pursuing access to a report, compiled by outside directors of Eli Lilly and Company ("Lilly"), from the Department of Justice ("Department") under the Freedom of Information Act ("FOIA"). The Department claims that the document is protected from disclosure under four of the Act's exemptions, 5 U.S.C. § 552(b)(3), (4), (7)(B), (7)(C) (1982 & Supp.1988). The district court granted the government summary judgment on all four grounds, and the Post appeals. We reverse the court's decision ***99 **193** as to the applicability of exemption (3) and (7)(C), remand the record for a determination of whether the requirements of (7)(B), as discussed below, are met in this case, and retain the case as to exemption (4). The district court concluded that the report was commercial information that fell within exemption (4) because it was confidential or, in the alternative, privileged as a "self-evaluative report." We need not address this less precedent-bound question unless exemption (7)(B) is found not to be applicable. If, however, it is determined that the report is not shielded under exemption (7)(B), we will decide the exemption (4) question at that time.

I. BACKGROUND

In 1982, Eli Lilly introduced an arthritis drug, benoxaprofen, under the brand name Oraflex, but withdrew it a few months later, after reports of deaths and other severe adverse reactions. The company faced several product liability suits, an investigation by the Food and Drug Administration ("FDA") and a threatened shareholder derivative suit. In December 1982, Lilly's board of directors established a special committee of outside directors which, with the help of an outside law firm, began an investigation. The committee was charged with evaluating the company's development and marketing of the drug and determining whether the company had any claims against employees or others and, if it did, whether it would be in its best interests to pursue them.

Soon after, the Department, at the request of the FDA, began its own investigation. There apparently had been numerous deaths and other severe reactions in other countries attributed to Oraflex. Lilly did not report these reactions to the FDA, either in its application for permission to distribute Oraflex in this country or afterward. Nor did Lilly include liver failure, kidney failure or jaundice--the reactions that had occurred overseas--in its Oraflex labels as possible adverse reactions. If Lilly knew of these deaths and other severe reactions, through reports from its foreign subsidiaries or otherwise, it was subject to federal prosecution for not reporting this information to the FDA and for not including it on labels of Oraflex distributed in the United States.

On July 8, 1983, the Department made a written request to Lilly for certain documents, including any investigations conducted by Lilly that concerned reports of adverse reactions made by Lilly's foreign subsidiaries to its U.S. headquarters or that concerned Lilly's reporting of these adverse reactions to the FDA. Lilly decided to cooperate with the Department, after the Department assured it in writing that material made available would remain confidential and any third-party requests, including FOIA ones, would be resisted. When the special committee's report, entitled "Report and Recommendations of the Special Committee of the Board of Directors of Eli Lilly and Company Concerning the Development and Marketing of Oraflex," was completed in October 1983, Lilly submitted it to the Department. The Department's investigation proceeded apace, and in March 1984, the Department impanelled a grand jury to consider indictments of the company and possibly individuals.

Lilly's open letters and reports to shareholders announced the special committee's report and the Department and grand jury investigations. A Post reporter, covering the Oraflex story, first requested a copy of the report under FOIA in April 1984. The Department denied the request on exemption (3), (7)(A) and 7(C) grounds, but on administrative appeal, the department refused to disclose the report on exemption (4) and 7(B) grounds. The Post filed this suit to compel production, but the district court below granted summary judgment for the Department on all four grounds asserted in its motion: exemptions (3), (4), (7)(B) and (7)(C).

II. DISCUSSION

A. Exemption (3)

[1] Exemption (3) shields material that is "specifically exempted from disclosure by [another]

statute." 5 U.S.C. § 552(b)(3). The court below found that Federal Rule of *100 **194 Criminal Procedure 6(e) protects Lilly's report because it prohibits an attorney for the government from disclosing "matters occurring before the grand jury." Fed.R.Crim.P. 6(e). The court found that the report was a matter occurring before the grand jury because the report was subpoenaed by the grand jury in September 1984, was used by government lawyers to question witnesses before the jury, and was available to the jurors. Our review compels the conclusion that exemption (3) has no bearing on this case.

This court has consistently held that Rule 6(e) does not draw a "veil of secrecy" over all documents about activity investigated by the grand jury or even all documents revealed to the grand jury. SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1382 (D.C.Cir.), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). The relevant inquiry is whether the document would reveal the inner workings of the grand jury, such as witness names, or the substance of testimony or the direction and strategy of the investigation. See Fund for Constitutional Government v. National Archives, 656 F.2d 856, 869-70 (D.C.Cir.1981). Moreover, the document itself must reveal the inner workings; the government cannot immunize a document by publicizing the link. See Senate of Puerto Rico v. Department of Justice, 823 F.2d 574, 583 (D.C.Cir.1987).

The report at issue here was in existence almost five months before the grand jury was impanelled. It had a purpose wholly separate from grand jury deliberations, as it was commissioned by a private corporation to evaluate that corporation's past conduct, defenses, liabilities and potential civil claims against others. Nor would the report have revealed anything whatsoever about the grand jury's deliberations had the government not disclosed the report's role in those deliberations. When the Post first requested disclosure of the report, it was not yet before the grand jury. That the grand jury subpoenaed it five months later and that it used the report to question witnesses would not be known by the Post today had the Department not recounted the report's grand jury role in this litigation.

Therefore, we hold that exemption (3) does not constitute a ground for denying the Post's FOIA request. We find not only that the Department has failed to show that disclosure would reveal the grand jury's inner workings; we find that such a showing could not be made on these facts. The government's decision to persist in arguing this basis for denial, on appeal, despite this court's 1987 decision in Senate of Puerto Rico v. Department of Justice, was questionable at best.

B. Exemption (7)(C)

[2] Exemption (7)(C) exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). We need not dwell on whether the special committee's report is information compiled for law enforcement purposes. The Post concedes that it is. But we find that none of the privacy interests encompassed by (7)(C) would be implicated by disclosure of the special committee's report.

[3] The disclosures with which the statute is concerned are those of "an intimate personal nature" such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation. Sims v. CIA, 642 F.2d 562, 574 (D.C.Cir.1980). Information relating to business judgments and relationships does not qualify for exemption. See id. at 575. This is so even if disclosure might tarnish someone's professional reputation. See Cohen v. EPA, 575 F.Supp. 425, 429 (D.D.C.1983). The report that the Post seeks here would not reveal anything of a private nature about any employees mentioned, as it is an investigation and assessment of the business decisions of Lilly employees during the development and marketing of a commercial product. It may be that such a report, if it accused *101 **195 individual employees of having committed a crime, would implicate the privacy interest of personal honor. But there is no reason to assume that this report accuses anyone of breaking the law and the government does not so allege.

[4] Nonetheless, it is true that the protection accorded reputation would generally shield material when disclosure would show that an individual was the target of a law enforcement investigation. See

Fund for Constitutional Government v. National Archives, 656 F.2d 856, 866 (D.C.Cir.1981). The report in question does not, however, in itself identify any particular employees as targets of the Department's investigation. Since the report was prepared by Lilly for its own business purposes, the inclusion of a name in the special committee's report does not divulge whether the individual was a target of any law enforcement investigation or even whether the individual was considered, by law enforcement personnel, to have any relevance to their inquiry.

C. Exception (7)(B)

Exemption (7)(B) exempts "records or information compiled for law enforcement purposes" to the extent that production "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). It is settled that the report satisfies the first part of this definition. The legitimacy of the Department's invoking (7)(B) turns on the meaning and applicability of the second portion of the exemption.

What is required to establish that production of a document being sought under FOIA would deprive a person of a right to a fair trial is a question of first impression for this court. In framing a test, we write on a virtually clean slate. Few courts have decided (7)(B) questions and the legislative history on this provision is scant. The wording of the statute is all Congress has given us to work with. See United States Department of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 8 (1975) [hereinafter "A.G. Mem."], reprinted in House Comm. on Gov. Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 Source Book, at 518 (1975) [hereinafter "Sourcebook"]. The exemption was enacted as part of the FOIA amendments of 1974. Congress replaced the old section (7), which protected any investigatory record not otherwise available, with the six tightly drawn categories of protection listed in § 552(b)(7). The wording of the second of those categories, now (7)(B), survived intact and without debate from the floor amendment by Senator Philip Hart.

We begin this analysis, as we must, within the framework that precedent does provide. FOIA is to be interpreted with a presumption favoring disclosure and exemptions are to be construed narrowly. See Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). The burden of proof rests on the party who seeks to prevent disclosure. See EPA v. Mink, 410 U.S. 73, 79, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). That burden cannot be met by mere conclusory statements; the agency must show how release of the particular material would have the adverse consequence that the Act seeks to guard against. See Campbell v. HHS, 682 F.2d 256, 259 (D.C.Cir.1982).

The Attorney General's Memorandum on the 1974 Amendments, of interest whether or not due deference, interpreted the exemption as protecting the rights of private persons, including corporations, and applying to both civil and criminal proceedings as well as agency adjudications. The exemption, according to the Attorney General, was meant to prevent disclosures from conferring an unfair advantage upon one party to an adversary proceeding or leading to prejudicial publicity in pending cases that might inflame jurors or distort administrative judgment. See A.G. Mem. at 9, Sourcebook at 519.

The few cases that have addressed (7)(B) as a ground for withholding documents have rejected it as inapplicable because one or another threshold element was not established. ***102 **196** In Playboy Enterprises, Inc. v. Department of Justice, 516 F.Supp. 233, 246 (D.D.C.1981), aff'd in pertinent part, 677 F.2d 931 (D.C.Cir.1982), the district court rejected the ground because no proceedings were pending. Two district courts have found (7)(B) grounds inapplicable because the government failed to show that publicity would be so prejudicial as to deprive someone of a fair trial or impartial adjudication. See Associated General Contractors of America v. Small Business Administration, 1 Gov't Disclosure Cas. (P-H) ¶ 79,119, at 79,158 (D.D.C. Oct. 1, 1979) (finding proffer inadequate to show extent of publicity and prejudice that would result); Education/Instruccion, Inc. v. Department of Housing and Urban Development, 471 F.Supp. 1074, 1078 (D.Mass.1979) (holding that administrative adjudicator's seeing investigative report could not vitiate impartiality as law permits investigator to sit as adjudicator on same matter).

Perhaps the major value of the Attorney General's Memorandum, in conjunction with this sparse case law, is to emphasize the wide variety of persons and proceedings but narrow range of situations to which (7)(B) applies. As with all FOIA exemptions, (7)(B) is limited to protecting material only where release would bring about the adverse consequence that Congress sought to prevent.

[5][6] Today, we hold that to withstand a challenge to the applicability of (7)(B) the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings. Where the government is denying access to material generated by someone else, as here, the government must be able to confirm, to its own satisfaction, whether by affidavit or otherwise, that (1) and (2) above are satisfied.

[7][8] Whether the first and second prong of this test are satisfied is, in the first instance, for the district court to ascertain. The record before us in this case does not contain the factual findings necessary to resolve the question, and we therefore remand the record for a determination of this point. The court below did find that there were no longer any criminal proceedings pending or imminent, as the Department of Justice had accepted a guilty plea from Lilly and a nolo contendere plea from the Chief Medical Officer of Lilly Research Laboratories and planned no further indictments. The court also found that the parties asserted that four civil product liability cases were pending. But the status of those or other civil cases at this point is not clear. The Department's brief deferred entirely to Lilly on this question. Lilly merely asserted, in a footnote, that there was litigation pending, without specification. Such an unsupported assertion, from a non-government party, does not rise to the level of proof necessary to satisfy the first prong of a (7)(B) exemption.

[9][10] Even if Lilly were faced with current litigation arising from its marketing of Oraflex, it would not automatically follow that disclosure of the report would deprive Lilly of a fair trial. The second prong is not a redundancy but requires separate findings. Congress made the threshold of (7)(B) higher than for most of the other exemptions for law enforcement material. Whereas (7)(A), (C), (D) and (F) permit records to be withheld if release "could reasonably be expected to" cause a particular evil, (7)(B) requires that release "would" deprive a person of fair adjudication. § 552(b)(7)(A)-(F). It may be that release of the document to the Post could be expected to lead to publicity which was not just disadvantageous to Lilly but of a nature and degree that judicial fairness would be compromised. It may be that disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties. The trial court, on remand, is best situated to consider whether the facts here are sufficient to meet (7)(B)'s second prong.

*103 **197 III. CONCLUSION

Accordingly, we remand the record to the district court for a determination of whether the Department of Justice is entitled, under 5 U.S.C. § 552(b)(7)(B), to withhold the "Report and Recommendations of the Special Committee of the Board of Directors of Eli Lilly and Company Concerning The Development and Marketing of Oraflex" which was requested by The Washington Post. In addition, we reverse the district court's findings that exemptions (3) and (7)(C) permit the Department of Justice to resist The Washington Post's FOIA request.

The record is forthwith remanded to the district court for further proceedings, consistent with this opinion.

It is so ordered.

END OF DOCUMENT

Elmer G. PRATT,
v.
William H. WEBSTER, Director, Federal Bureau of Investigation, et al.,
Appellants.
Elmer G. PRATT
v.
William H. WEBSTER, Director, Federal Bureau of Investigation, et al.,
Appellants.

Nos. 81-1907, 81-1922.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 19, 1981.

Decided Jan. 22, 1982.

Plaintiff filed a proceeding against the Federal Bureau of Investigation relying on provisions of the Freedom of Information Act and the Privacy Act. The United States District Court for the District of Columbia, 508 F.Supp. 751, Barrington D. Parker, J., held that certain documents were not the result of any legitimate law enforcement purpose, and thus ordered their disclosure. The FBI appealed. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that federal agencies, including the FBI, must meet the threshold requirements of the exemption from disclosure for investigatory records compiled for law enforcement purposes before they may withhold requested documents on the basis of any of its subparts, and that the FBI sufficiently established that those documents were exempt from disclosure as investigatory records, even though methods used by the FBI in its counterintelligence program may have been improper.

Reversed and remanded.

[1] RECORDS ⇦ 60
326k60
Freedom of Information Act exemption from disclosure for investigatory records compiled for law enforcement purposes requires agency, including Federal Bureau of Investigation, to establish that material is investigatory record, was compiled for law enforcement purposes and satisfy requirements of one of the six subparts of exemption. 5 U.S.C.A. §§ 552, 552(b)(7).

[2] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation records do not per se meet threshold criterion of exemption from disclosure for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[3] RECORDS ⇦ 60
326k60
Although Freedom of Information Act makes no distinction on its face between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions for purposes of exemption for investigatory records compiled for law enforcement purposes, it would be unnecessarily "wooden" to treat both groups identically when they claim that exemption as basis for withholding documents. 5 U.S.C.A. §§ 552, 552(b)(7).

[4] RECORDS ⇦ 60
326k60
When mixed-function agency seeks to withhold disclosure of documents under exemption for investigatory records compiled for law enforcement purposes, court must scrutinize with some skepticism the particular purpose claimed for disputed documents redacted under that exemption. 5 U.S.C.A. §§ 552, 552(b)(7).

[5] RECORDS ⇦ 65
326k65
Court can accept less exacting proof from agency whose principal mission is criminal law enforcement than from mixed-function agency for purposes of Freedom of Information Act exemption from disclosure for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[6] RECORDS ⇦ 60
326k60
For federal law enforcement agency to pass threshold of Freedom of Information Act exemption from disclosure for investigatory records compiled for law enforcement purposes, agency's investigatory activities that give rise to document sought must be related to enforcement of federal laws or to maintenance of national security and nexus between investigation and agency's law enforcement duties must be based on information

sufficient to support at least "a colorable claim" of its rationality. 5 U.S.C.A. §§ 552, 552(b)(7).

[7] RECORDS ⇐ 60
326k60
Location of non-exempt document in investigatory file does not necessarily make that document exempt from disclosure under Freedom of Information Act exemption for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[8] RECORDS ⇐ 60
326k60
Even if counterintelligence activities of Federal Bureau of Investigation included questionable, and at times illegal, methods, that did not mandate that records concerning counterintelligence program were not exempt from disclosure under Freedom of Information Act exemption for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[9] RECORDS ⇐ 65
326k65
Although affidavit stating that certain records compiled as part of Federal Bureau of Investigation's counterintelligence program were investigatory records compiled for law enforcement purposes and were collected in course of lawful national security investigation or other mandated investigations imposed by law was only "minimal showing" for purposes of Freedom of Information Act exemption for investigatory records, affidavit was sufficient to establish FBI's concern for possible violations or security risks. 5 U.S.C.A. §§ 552, 552(b)(7).

[10] RECORDS ⇐ 60
326k60
In Freedom of Information Act action seeking FBI records, district court incorrectly distinguished documents concerning FBI's counterintelligence program from other documents for which it found law enforcement purpose, even though methods frequently used by FBI in its counterintelligence activities offered ready distinction from more typical means of law enforcement, since exemption for investigatory records compiled for law enforcement purposes refers to purposes rather than to methods. 5 U.S.C.A. §§ 552, 552(b)(7).

[11] RECORDS ⇐ 54
326k54
Formerly 326k53
Freedom of Information Act requires disclosure of government records to fullest extent possible and allows withholding of only so much of document as fits squarely within enumerated exception. 5 U.S.C.A. § 552.

[12] RECORDS ⇐ 50
326k50
Proper and effective means of redress for allegedly improper methods attributed to FBI's counterintelligence program is not Freedom of Information Act action, even though FOIA is important mechanism for discovering malfeasance of government agencies, since it can do no more than reveal those actions. 5 U.S.C.A. § 552.

***409 **18** Appeals from the United States District Court for the District of Columbia (D.C.Civil Action No. 78-1688).

Susan Sleater, Dept. of Justice, Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., and Leonard Schaitman, Dept. of Justice, Washington, D. C., were on the brief for appellants.

Jonathan W. Lubell, New York City, for appellee. David G. Lubell, Newark, N. J., and William H. Schaap, Washington, D. C., also entered appearances for appellee.

Before MacKINNON, ROBB and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

This case is a logical sequel to the decision of this Circuit a little more than a year ago in Abramson v. Federal Bureau of Investigation, 658 F.2d 806 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981) (No. 80-1735). In Abramson we held, inter alia, that documents in the possession of the Federal Bureau ***410 **19** of Investigation ("FBI") must satisfy the threshold language of Exemption 7 of the Freedom of Information Act ("FOIA") [FN1]-"investigatory records compiled for law enforcement purposes"-

before any of the constituent parts of Exemption 7 may be asserted as a basis for nondisclosure of agency records requested under the Act.[FN2] Abramson, 658 F.2d at 811-12. Because the District Court in Abramson found that certain of the requested records (i.e., "name check" summaries) were compiled solely for political purposes, and because the Government did not challenge that finding on review, see id. at 810-11, that case presented the question of whether the threshold language of Exemption 7 was to have any application to the FBI. Based on the plain meaning of section (b)(7) of FOIA, we held that it did.

FN1. 5 U.S.C. s 552 (1976 & Supp. IV 1980).

FN2. Exemption 7 of the Freedom of Information Act provides: (b) This section does not apply to matters that are-.... (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. 5 U.S.C. s 552(b)(7) (1976) (emphasis added).

The decision in Abramson, however, did not reach one of the principal questions raised by this appeal. Because the Government did not challenge the finding in Abramson that the records at issue were not compiled for law enforcement purposes, we had no occasion to pass upon the appropriate judicial test for determining whether documents held by the FBI are indeed "investigatory records compiled for law enforcement purposes." This case, however, requires us to express and apply such a test.

In this case, Elmer G. ("Geronimo") Pratt, a former officer of the Black Panther Party, requested from the FBI all documents and records filed under his name and all other records containing his name or pertaining to him. Through his original request to the FBI, administrative appeals within the agency, and his action in the District Court, Pratt has obtained over 1,200 documents in whole or in part. At issue on this appeal is the proper treatment to be accorded twenty documents, all of which were generated by the FBI's Counter-Intelligence Program ("COINTELPRO") activities directed at the Black Panther Party.

The District Court held that the disputed documents were not the result of "any legitimate law enforcement purpose," Pratt v. Webster, 508 F.Supp. 751, 761 (D.D.C.1981), and hence did not satisfy the Exemption 7 threshold. Although we note that certain of these documents evince illegal FBI practices, we are constrained to find that the records sought derived at least in part from a purpose to enforce and prevent violations of the criminal laws. In light of this finding, we must reverse the decision of the District Court denying the Government's requests for nondisclosure. We remand so that the District Court may consider the proper application of the subparts of Exemption 7 to the twenty documents in question.

I. BACKGROUND

A. Factual Background

During the late 1960s, plaintiff-appellee Pratt was the Deputy Minister of Defense for the Southern California Branch of the Black Panther Party ("BPP"). During the late 1960s and early 1970s the Black Panther Party was the object of intensive scrutiny by the FBI as an allegedly subversive, and potentially violent, domestic organization.[***411** FN3] ****20** Pratt's position in the BPP made his activities a likely subject of concern and surveillance by the FBI.

FN3. See generally Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S.Rep.No.755, 94th Cong., 2d Sess., Book III at 185-223 (1976) (hereinafter cited as Church Committee Report) (chapter titled "The FBI's Covert Action Program To Destroy The Black Panther Party"), reprinted in Jt.App. at 316-34.

On July 28, 1972, Pratt was found guilty of murder and robbery in a California state court and,

on August 28, 1972, he was sentenced to a term of life imprisonment, which he is presently serving in San Quentin Prison.[FN4] The murder for which Pratt was convicted occurred on December 18, 1968, in Santa Monica, California. Pratt has consistently maintained his innocence of that crime, claiming that on the night of the murder he was attending a meeting with BPP officials in Oakland, California, several hundred miles from Santa Monica.

FN4. The fact that Pratt is presently incarcerated, of course, in no way alters or diminishes his rights under FOIA. See 5 U.S.C. s 552(a)(3) (1976); Moorefield v. Secret Service, 611 F.2d 1021, 1023 n.2 (5th Cir.), cert. denied, 449 U.S. 909, 101 S.Ct. 283, 66 L.Ed.2d 139 (1980).

Based in part on his belief that the FBI possessed documents that would verify his presence in Oakland on December 18, 1968, and thus substantiate his alibi, Pratt filed two FOIA requests with the FBI. Complaint PP 3, 8, 12, 25, reprinted in Jt.App. at 7-9, 12. On June 5, 1976, Pratt requested then FBI Director Clarence Kelley to provide him with:

> All files, records, memoranda, or other data or materials filed under my name or obtainable by your agency by searching through other files and materials for documents which contain my name.

On May 20, 1977, the FBI released 499 partially expurgated pages to Pratt. Pratt appealed certain deletions within the agency and, on September 8, 1977, he made a supplemental request for "any records pertaining to him which may be contained in the Bureau's files concerning" five named organizations and twenty-two named individuals.

Through his supplemental request and the processing of his administrative appeals, Pratt eventually obtained access to over 1,000 documents, totaling several thousand pages. The FBI deleted portions of many of these documents, claiming that the deletions were justified by Exemptions 1, 2, 7(C), 7(D), 7(E) and 7(F) of FOIA.[FN5] Because Pratt and his counsel believed that the deletions made in the released documents did not comply with FOIA and that the FBI had not fully searched its files, Pratt instituted this action in the District Court seeking to compel a further search and full disclosure.

FN5. FOIA Exemptions 1 and 2 provide: (b) This section does not apply to matters that are-(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; (2) related solely to the internal personnel rules and practices of an agency. 5 U.S.C. s 552(b)(1), (2) (1976). (Exemption 7 is set out in note 2 supra.)

B. Proceedings in the District Court

The District Court directed the FBI to submit affidavits, pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), indexing and explaining the agency's deletions. The court determined that the first Vaughn index was inadequate and ordered the FBI to submit new and more detailed Vaughn filings. These were submitted in November 1979.

On April 6, 1979, while the District Court proceedings were pending, Congressman Paul McCloskey requested the FBI "to determine whether there is any evidence in the files to indicate the possibility of Pratt's innocence or doubt as to Pratt's guilt" of the December 18, 1968 Santa Monica murder. In response to Congressman McCloskey's request, the FBI conducted a search ***412 **21** of its California field offices.[FN6] On June 18, 1980, as a result of this search, the FBI released to Pratt 1,290 pages of previously withheld documents.

FN6. The FBI searched only its Washington, D. C. Headquarters files in response to Pratt's FOIA requests. Because Pratt was advised of this during the processing of his administrative appeals and did not make a separate disclosure request to each field office, the District Court held that the FBI's failure to expand its original search to all field offices did not make the search irresponsive. Pratt v. Webster, 508 F.Supp. 751, 762 (D.D.C.1981).

On February 15, 1980, the FBI moved for summary judgment based on its second Vaughn index and the completeness of its document production. On February 12, 1981, the District Court denied the FBI's motion for summary judgment. Pratt v. Webster, 508 F.Supp. 751 (D.D.C.1981). The District Court ordered all

documents containing redactions based on Exemptions 1 and 7(E) submitted for in camera review. 508 F.Supp. at 756-58, 760-61. The deletions from partially disclosed documents based on Exemptions 2, 7(C) and 7(D) were upheld, id. at 758-60, with the exception of nine documents generated by COINTELPRO activities. The District Court held that these COINTELPRO documents could not "reasonably be considered or interpreted as generated through any legitimate law enforcement purpose," and hence could not "be redacted pursuant to exemption (b)(7)." Id. at 761. Finally, the District Court ordered the agency to explain certain inadequacies in its search of FBI Headquarters files and expanded the scope of Pratt's FOIA suit to include all documents generated by COINTELPRO concerning Pratt. Id. at 762-64.

In response to an Order of the District Court, dated February 13, 1981, the FBI identified for the court sixteen COINTELPRO documents contained in the June 1980 release of documents from the search of FBI California field offices. The FBI also submitted an affidavit and index seeking to justify deletions from twelve of these documents. The agency sought reconsideration of the court's earlier ruling that COINTELPRO documents were not "compiled for law enforcement purposes" and hence not within Exemption 7's purview; in the alternative, the agency claimed that Exemption 6 of FOIA [FN7] justified the deletions in the additional sixteen and in the original nine COINTELPRO documents.

FN7. FOIA Exemption 6 provides: This section does not apply to matters that are-.... (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. s 552(b)(6) (1976).

In a June 16, 1981 Memorandum Opinion, the District Court ordered the release of material from five documents that had been expurgated based on an Exemption 1 claim. Deletions from fifty-seven other documents based on Exemption 1 and from two documents based on Exemption 7(E) were approved after in camera review. Pratt v. Webster, --- F.Supp. ----, Civ. No. 78-1688, Memorandum Opinion at 2-4 (D.D.C. June 16, 1981), reprinted in Jt. App. at 336-38. The District Court also sought further explanation of the scope of the agency's document search. Id. at 5-9, reprinted in Jt.App. at 339-43. Finally, the District Court refused to alter its previous ruling on the applicability of Exemption 7 to COINTELPRO documents, accepted a deletion from one COINTELPRO document based on Exemption 6, and sought further description of the proposed deletions from four other COINTELPRO documents. Id. at 9-12, reprinted in Jt.App. at 343-46.

On August 7, 1981, the District Court approved the deletion of identifying information from one additional COINTELPRO document based on the FBI's Exemption 6 claim. The District Court also ordered release of the remaining COINTELPRO documents in their entirety, denied the Government's request for a stay of disclosure pending appeal, and granted summary judgment to the defendants in all remaining aspects of the case. Pratt v. Webster, --- F.Supp. ----, Civ. No. 78-1688 (D.D.C. Aug. 7, 1981), reprinted in Jt.App. at 377-80.

***413 **22** The Government appealed to this court from the District Court's Memorandum Opinion and Order of June 16, 1981 and from its Order of August 7, 1981. We issued a stay of the ordered disclosure of the COINTELPRO documents pending appeal. Pratt v. Webster, No. 81-1907 (D.C.Cir. Aug. 14, 1981) (per curiam). On appeal the Government challenges only the District Court's disclosure order with respect to the twenty disputed COINTELPRO documents. [FN8] Thus, the proper treatment of these twenty documents under FOIA Exemptions 6 and 7 is the only issue before us.

FN8. The COINTELPRO documents at issue on appeal are document numbers 22, 519, 520, 521, 521a, 522, 522a, 524, COINT-2, COINT-3, COINT-4, COINT-6, COINT-7, COINT-8, COINT-10, COINT-11, COINT-12, COINT-13, COINT-14, and COINT-15. Document numbers 523, COINT-1, COINT-5, COINT-9, and COINT-16, also generated by COINTELPRO activities, have been released in their entirety. Documents COINT-7 and COINT-12 are apparently identical. Finally, because Pratt has not cross-appealed, the deletions of individual identities from documents 22 and COINT-4 approved by the District Court on the basis of Exemption 6 are not before us.

II. LEGAL ANALYSIS OF THE EXEMPTION 7 THRESHOLD

A. The Existence of an Exemption 7 Threshold for Law Enforcement Agencies

The Freedom of Information Act was enacted by Congress in 1966, and substantively amended in 1974 and 1976, in order to provide a statutory right of public access to documents and records held by agencies of the federal government. As such, FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965). Subsection (a)(3) of the Act, under which Pratt has proceeded in this case, requires "each agency" to make available upon request any records it possesses "to any person." 5 U.S.C. s 552(a)(3) (1976).

The broad right of access and disclosure under FOIA is subject to nine exemptions set out in subsection (b), 5 U.S.C. s 552(b) (1976). See 5 U.S.C. s 552(c) (Supp. IV 1980). Like the rest of the Act, all but two of these exemptions on their face apply with equal force and effect to all federal agencies.[FN9]

FN9. One exemption and a part of another apply only to a limited set of agencies. Exemption 8 applies only to agencies "responsible for the regulation or supervision of financial institutions." 5 U.S.C. s 552(b)(8) (1976). Exemption 7(D) allows all agencies to refuse to disclose the identity of a confidential source (if the exemption's threshold criterion is met), but also allows "a criminal law enforcement authority" conducting a criminal investigation and "an agency conducting a lawful national security intelligence investigation" to withhold all confidential information provided only by a confidential source. 5 U.S.C. s 552(b)(7)(D) (1976). See note 39 infra. These two exemptions with specific agency applications are the exceptions that prove the rule of the general applicability of the other exemptions.

(1) In this case we are primarily concerned with the appropriate interpretation of one exemption, Exemption 7, as applied to a single agency, the FBI. There is no indication in the threshold language of Exemption 7 that it does not apply to documents held by the FBI. Rather, in all cases Exemption 7 protects from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that" one of the exemption's subparts applies. This statutory language on its face prescribes a three-part test for withholding information under Exemption 7: In order to be withheld, the material (1) must be an "investigatory record," (2) must have been "compiled for law enforcement purposes," and (3) must satisfy the requirements of one of the six subparts of Exemption 7.[FN10]

FN10. Abramson v. FBI, 658 F.2d 806, 811-12 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, which was written to guide executive departments and agencies in the application of FOIA, adopted a similar separation between the Exemption 7 threshold and the exemption's subparts: Once it is determined that a request pertains to "investigatory records compiled for law enforcement purposes," the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7. Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 6-7 (Feb. 1975) (emphasis added), reprinted in House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 516-17 (Jt.Comm.Print 1975) (hereinafter cited as 1975 Source Book).

***414 **23** The Government contends, however, that the FBI need not establish a law enforcement purpose for its investigatory files in order to qualify its records for redaction under the subparts of Exemption 7. It argues that "the threshold Exemption 7 criterion of 'investigatory records compiled for law enforcement purposes' was meant to define the FBI's files rather than limit the Bureau's potential access to the exemption." Appellants' Brief at 20. The Government primarily relies on two decisions by the First and Eighth Circuits, Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980); Irons v. Bell, 596 F.2d 468 (1st Cir. 1979).[FN11] In those cases, the courts held:

FN11. The Government also relies on Abrams v. FBI, 511 F.Supp. 758 (N.D.Ill.1981), and on language in Church of Scientology v. Department of the Army, 611 F.2d 738, 748 n.5 (9th Cir. 1979), and Larouche v. Kelley, 522 F.Supp. 425, 437 (S.D.N.Y.1981). The Government frankly concedes, however, that the language in Church of Scientology and in Larouche is dicta. Appellants' Brief at 21, 26-27; see also note 30 infra.

> The character of the materials excluded under Exemption 7 at least suggests that "law enforcement purpose" is as much a description of the type of agency the exemption is aimed at as it is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties.

Irons, 596 F.2d at 474, quoted in part in Kuehnert, 620 F.2d at 666.

(2) The simplest response to the Government's contention that FBI records per se meet the threshold criterion of Exemption 7 is that that argument has been rejected by this Circuit in Abramson v. FBI, 658 F.2d 806 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).[FN12] In Abramson we were confronted with a FOIA request to the FBI for a group of "name checks," i.e., "summaries of information from FBI files on certain public personalities which had been prepared pursuant to requests received from the White House." 658 F.2d at 808. The District Court in Abramson had held that the name checks were not compiled pursuant to any law enforcement purpose, but nevertheless applied Exemption 7(C) to prevent disclosure as "an unwarranted invasion of personal privacy." 5 U.S.C. s 552(b)(7)(C) (1976). We reversed, holding, inter alia, that documents in the possession of the FBI must nevertheless pass the Exemption 7 threshold before any of the six subparts in Exemption 7 may be applied to prevent disclosure. Id. at 811-12.

FN12. The issue directly before the Supreme Court this Term in FBI v. Abramson, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951, is not the question of the effect of FOIA Exemption 7's threshold language on documents held by the FBI. The Solicitor General's petition for certiorari to the Court identified the question presented as: "Does information contained in records compiled for law enforcement purposes and privileged from disclosure under Exemption 7(C) of FOIA lose that exempt status when it is incorporated into records compiled for purposes other than law enforcement?" 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). Thus, the Court is principally concerned in Abramson with the "pass through" issue of whether information once contained in an exempt document loses its exempt status when it is recompiled in an otherwise non-exempt document. Of course, the question presented in a petitioner's brief before the Supreme Court does not operate as a jurisdictional limit on the Court's authority to reach a proper disposition of a case. See Piper Aircraft Co. v. Reyno, --- U.S. ----, 102 S.Ct. 252, 261 n.12, 70 L.Ed.2d 252 (1981). Nevertheless, even if the Court should reach beyond the "pass through" issue in Abramson and decide that Exemption 7's threshold language has no application to FBI records, that decision would not affect the outcome of this case. See section III infra.

The Government argues that Abramson does not foreclose their contention that records held by the FBI per se satisfy the Exemption 7 threshold. Appellants' Brief ***415 **24** at 39-41. That argument is simply untenable. If the panel in Abramson had accepted the Government's per se argument, the documents held by the FBI would have passed the Exemption 7 threshold despite their lack of law enforcement purpose, and the court would have had to consider whether the District Court correctly ruled that Exemption 7(C) justified nondisclosure. Quite the contrary, the Abramson court did not reach the Exemption 7(C) question and reversed the District Court because, failing the Exemption 7 threshold, the "name check" summaries were improperly withheld under FOIA. See Abramson, 658 F.2d at 812. Thus, the Government's per se argument is foreclosed by the plain holding of this court in Abramson.[FN13]

FN13. The two arguments that the Government makes in an attempt to distinguish Abramson are wholly unconvincing. First, the Government notes that three months before the decision in Abramson this Circuit had stated that the question whether Exemption 7 applies to documents of a law enforcement agency not compiled pursuant to any law enforcement purpose was an open issue in this Circuit. Lesar v. Department of Justice, 636 F.2d 472, 486 n.83 (D.C.Cir.1980) (citing Irons v. Bell

and Kuehnert v. FBI). Based on this observation the Government argues that the Abramson panel could not have intended to answer this open question since it failed to cite Lesar or the decisions of other Circuits in its written opinion. Appellants' Brief at 39-40. However, to contend that the issues a court decides are determined by the cases it fails to cite is absurd. Second, the Government argues that Abramson decided a different question than the one it now presents about the Exemption 7 threshold criterion. The Government observes that the Abramson panel decided the "pass through" question and that this issue is the one now pending before the Supreme Court. See note 12 supra. While this Circuit did decide the "pass through" question in Abramson, that was not the only issue presented. In fact, Abramson's brief in this court stated: The issue is whether the court and/or the government can withhold documents under any subpart of Section b(7) after a court has ruled that there was no law enforcement purpose with respect to the compilation of documents being withheld. Brief for Appellant at 14, Abramson v. FBI, 658 F.2d 806 (D.C.Cir.1980). The Supreme Court's review of only a single issue (in fact, the only issue pursued by the Government) does not deny the presence of others in this court's decision in the case. Notably, the Government has made no attempt to reconcile its per se argument in this case with either the language or the holding in Abramson.

The three-pronged test for Exemption 7 claims that the Abramson opinion sets out, 658 F.2d at 811-12, follows from the plain meaning of the statute, [FN14] is consistent with ***416 **25** this Circuit's judicial interpretations of Exemption 7 both before and after the 1974 amendments,[FN15] and was even adopted as the appropriate interpretation of the exemption in the Attorney General's Memorandum on the 1974 Amendments.[FN16] If the Government is now suggesting that arguments of public policy require that FOIA be rewritten, those arguments should be directed not to us, but to the Congress. [FN17] We continue to hold that federal agencies, including the FBI, must meet the threshold requirements of Exemption 7 before they may withhold requested documents on the basis of any of its subparts.

FN14. As we recently noted, "(r)esort to the legislative history of a statutory provision is not necessary when the meaning of the provision is plain from its language." Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1056 (D.C.Cir.1981) (en banc); accord, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223, 98 S.Ct. 2311, 2317, 57 L.Ed.2d 159 (1978). Even if we look beyond the statutory language to the legislative history, we find the Government's arguments unconvincing. The Government cites occasions in the legislative history in which the FBI's investigatory files are mentioned as examples of material covered by Exemption 7. Appellants' Brief at 30-34. This is not surprising, since the FBI's investigatory records are typically compiled for a law enforcement purpose, and since there is perhaps no better example of the usual application of Exemption 7. "No reference to the FBI or any other particular agency appears in the Act itself, however, and there is no indication that any agency is to be treated differently from another with respect to the (b)(7) exemption." Note, The Investigatory Files Exemption to the FOIA: The D. C. Circuit Abandons Bristol-Myers, 42 Geo.Wash.L.Rev. 869, 874 (1974) (footnote omitted). Moreover, the Government has not cited and we have not found any direct suggestion in the legislative history that FBI records generated without any law enforcement purpose may be withheld under Exemption 7. The Government's legislative history argument-that Congress meant to describe FBI files by the threshold language of Exemption 7 rather than to limit the FBI's access to the exemption-further loses credibility on a close reading of the history. In 1973 committee hearings, for example, Assistant Attorney General Robert G. Dixon, Jr. of the Department of Justice Office of Legal Counsel suggested amending Exemption 7 to expand its reach: "If the act is to be amended, perhaps the time has come to put in an exemption expressly covering the files of the FBI and other Federal investigators working with the FBI." Hearings on H.R. 5425 and H.R. 4960 Before a Subcomm. of the House Comm. on Government Operations, 93d Cong., 1st Sess. 152 (1973). In 1974, of course, Congress did amend Exemption 7, but it did not expand the exemption's coverage as desired by Assistant Attorney General Dixon. In this case the Department of Justice now argues, without any explanation of Dixon's remarks, that Exemption 7 means exactly what Assistant Attorney General Dixon suggested and what Congress never enacted. We are unpersuaded.

FN15. See, e.g., Lesar v. Department of Justice, 636 F.2d 472, 486-87 (D.C.Cir.1980); Weissman v. CIA, 565 F.2d 692, 694-96 (D.C.Cir.1977); Rural Hous. Alliance v. Department of Agriculture, 498 F.2d 73, 79-82 (D.C.Cir.1974); Weisberg v. Department of Justice, 489 F.2d 1195, 1198, 1202 (D.C.Cir.1973) (en banc), cert. denied, 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772 (1974). See also Demetracopoulos v. FBI, 510 F.Supp. 529, 531-32 (D.D.C.1981); Fonda v. CIA, 434 F.Supp. 498, 506-07 (D.D.C.1977).

FN16. See note 10 supra.

FN17. The First Circuit in Irons noted that there were "strong policy reasons" for accepting the Government's per se argument for FBI documents. Irons v. Bell, 596 F.2d 468, 474 (1st Cir. 1979). To the extent that the First Circuit reached its result based on arguments of public policy, we must respectfully disagree with its approach. This Circuit has consistently held that whether any government document should be disclosed or protected against disclosure is a matter of public policy for legislative determination. It is not for this court to rewrite a statute. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1066-1067, 1075 (D.C.Cir.1981) (en banc).

B. The Definition of the Exemption 7 Threshold Test for Law Enforcement Agencies

Our conclusion that a threshold test exists for the application of FOIA Exemption 7 to documents held by law enforcement agencies is, however, only the beginning of our inquiry. The resolution of this case necessarily requires the expression of that threshold test and its application to the COINTELPRO documents presented here.[FN18]

FN18. The panel in Abramson was not required by the facts of that case to enunciate a test for the Exemption 7 threshold and did not attempt to do so. The District Court in that case declared that "there has been absolutely no showing that these particular records were compiled for law enforcement purposes." Abramson v. FBI, Civ. No. 77-2206, Order at 2 (D.D.C. Nov. 30, 1979), quoted in Abramson v. FBI, 658 F.2d 806, 811 (D.C.Cir.1980). The Government did not contest that conclusion on appeal, Brief for Appellees at 8 n.5, Abramson v. FBI, 658 F.2d 806, 811 (D.C.Cir.1980), and did not pursue that issue after the panel's decision. Petition for Rehearing and Suggestion for Rehearing en banc at 2 n.1, 4 n.5, Abramson v. FBI, 658 F.2d 806 (D.C.Cir.1980).

1. The Deference Accorded Law Enforcement Agencies Claiming a "Law Enforcement Purpose"

(3) While FOIA makes no distinction on its face between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions, it would be unnecessarily wooden to treat both groups identically when they claim Exemption 7 as a basis for withholding. In fact, courts often accord different treatment to Exemption 7 claims from different agencies. E.g., Church of Scientology v. Department of the Army, 611 F.2d 738, 748 (9th Cir. 1979); Irons v. Bell, 596 F.2d 468, 473 (1st Cir. 1979); Ramo v. Department of the Navy, 487 F.Supp. 127, 130-31 (N.D.Cal.1979), appeal docketed, No. 79-4791 (9th Cir. Aug. 6, 1981) (submission vacated pending Supreme Court decision in FBI v. Abramson); see Note, FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations, 65 Minn.L.Rev. 1139, 1145-49 (1981). This judicial development, most often taking the form of more exacting scrutiny of Exemption 7 claims by agencies whose principal function is not law enforcement, is well-grounded in congressional purpose, common ***417 **26** sense, and notions of judicial economy.[FN19] Three related justifications for the differential review can be posited.

FN19. The different treatment accorded to criminal law enforcement agencies under the Exemption 7 threshold is not inconsistent with our rejection of the Government's suggested per se approach for these agencies' Exemption 7 claims. The per se approach would totally eliminate any threshold requirement for criminal law enforcement agencies and make a mockery of the plain wording of the exemption. In contrast, treating law enforcement and mixed-function agencies differently under Exemption 7 does not judicially erase words from the statute.

First, Congress amended Exemption 7 of FOIA in 1974 in response to a series of decisions by this Circuit that had interpreted the exemption rigidly.[FN20] These decisions, if left to stand,

threatened to exempt large portions of agency files whenever a label of "law enforcement purpose" and "investigatory file" could be attached to agency records.[FN21] In the view of the Congress, this result would have substantially undercut the Act's disclosure requirements, especially in the context of agencies with both general administrative and law enforcement functions. Congress' amendment of Exemption 7 in 1974 was intended to overrule those judicial decisions and, therefore, evinced in part an intent that the exemption not be read too broadly in its application to agencies with general administrative and regulatory functions. [FN22]

FN20. A brief exchange on the Senate floor between Senator Kennedy, the Floor Manager of the FOIA Amendments, and Senator Hart, the sponsor of the amendment to Exemption 7, identified the decisions as Weisberg v. Department of Justice, 489 F.2d 1195 (D.C.Cir.1973) (en banc), cert. denied, 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772 (1974); Aspin v. Department of Defense, 491 F.2d 24 (D.C.Cir.1973); Ditlow v. Brinegar, 494 F.2d 1073 (D.C.Cir.) (per curiam), cert. denied, 419 U.S. 974, 95 S.Ct. 238, 42 L.Ed.2d 188 (1974); and Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370 (D.C.Cir.1974). 120 Cong.Rec. 17,039-40 (1974), reprinted in 1975 Source Book, supra note 10, at 349.

FN21. On the floor of the Senate Senator Hart quoted from Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 372 (D.C.Cir.1974) (footnote omitted): Recent decisions of this court construing exemption 7 have considerably narrowed the scope of our inquiry. The sole question before us is whether the materials in question are "investigatory files compiled for law enforcement purposes." Should we answer that question in the affirmative, our role is "at an end." See 120 Cong.Rec. 17,034 (1974), reprinted in 1975 Source Book, supra note 10, at 335-36.

FN22. In a Memorandum Letter inserted in the Congressional Record, Senator Hart sought to relieve opposing Senators' concerns about his proposed amendment's effect on the FBI and identified his primary concern as the unnecessary withholding of information by other regulatory agencies. Thus, my amendment more than adequately safeguards against any problem which might be raised for the (Federal) Bureau (of Investigation). The point is that the "law enforcement" exemption has been broadly construed to include any investigation by a government agency of a federally funded or monitored activity. The courts only require that the investigation might result in some government "sanction" such as a cutoff of funds-and not necessarily a prosecution. The investigations of auto defects, harmful children's toys, or federally-assisted hospitals could all be hidden completely from public view, and from criticism of government inaction or favoritism, unless my amendment is adopted. This is the danger which the ABA proposal seeks to correct. These are rarely FBI investigations. 120 Cong.Rec. 17,040 (1974), reprinted in 1975 Source Book, supra note 10, at 351. See also 120 Cong.Rec. 36,626 (1974), reprinted in 1975 Source Book, supra note 10, at 413-14 (remarks of Rep. Reid).

Second, in its 1974 amendment to Exemption 7, Congress set out six subparts to the exemption representing the potential harms that it believed justified nondisclosure of government investigatory records. These subparts, perhaps predictably, apply more extensively in criminal than in civil law enforcement. [FN23] Thus, the language of the exemption itself suggests a greater congressional concern with the secrecy of documents ***418 **27** held by agencies, such as the FBI, principally committed to criminal law enforcement. [FN24]

FN23. The language of FOIA Exemption 7 is set out in note 2 supra. Exemption 7(D), for example, explicitly allows more information to be withheld from documents compiled in the course of a criminal investigation than in a civil investigation, and Exemption 7(F), which seeks to protect law enforcement personnel, has more obvious application in the criminal context.

FN24. The Conference Committee on the 1974 amendments added to Exemption 7(D) the language that allows all information from a confidential source as well as the source's identity to be withheld in the case of criminal and lawful national security investigations. See note 39 infra. It also added Exemption 7(F), which exempts information that might endanger law enforcement personnel. These changes were made "to accommodate unusual requirements of some agencies such as the

Federal Bureau of Investigation," 120 Cong.Rec. 34,162 (1974), reprinted in 1975 Source Book, supra note 10, at 378 (remarks of Rep. Moorhead, House Floor Manager), in response to concerns expressed by President Ford. See Letter from President Ford to Senator Kennedy (Aug. 20, 1974), and Letter from Senator Kennedy and Representative Moorhead to President Ford (Sept. 23, 1974), reprinted in 120 Cong.Rec. 33,158-59 (1974), and 1975 Source Book, supra note 10, at 368-72; H.R.Rep.No.1380, 93d Cong., 2d Sess. 12-13 (1974) (Conference Report), reprinted in 1975 Source Book, supra note 10, at 229-30. The Congress' special concern for criminal law enforcement agencies was similarly expressed in other passages from the legislative history of the 1974 FOIA amendments. See, e.g., note 22 supra.

Third, courts can usually assume that government agencies act within the scope of their legislated authority. This assumption is not the product of wishful judicial thinking, but instead results from our observations over time that, despite occasional and regrettable lapses, government agencies typically go about their intended business. This experience has specific application to the court's consideration of FOIA Exemption 7 claims by different types of federal agencies.

(4) On the one hand, the assumption that a mixed-function agency is acting within the scope of its authority tells a court nothing about whether it has met the Exemption 7 threshold requirement of a "law enforcement purpose." Law enforcement, indeed, is often one of such an agency's proper functions, but other functions are also a major part of the agency's day-to-day business. Thus, a court must scrutinize with some skepticism the particular purpose claimed for disputed documents redacted under FOIA Exemption 7. Ramo v. Department of the Navy, 487 F.Supp. 127, 131 (N.D.Cal.1979), appeal docketed, No. 79-4791 (9th Cir. Aug. 6, 1981) (submission vacated pending Supreme Court decision in FBI v. Abramson). If courts accept a mixed-function agency's claims of "law enforcement purpose" without thoughtful consideration, the excessive withholding of agency records which Congress denounced and sought to avoid with the 1974 amendments might well result.

(5) On the other hand, the generally accurate assumption that federal agencies act within their legislated purposes implies that an agency whose principal mission is criminal law enforcement will more often than not satisfy the Exemption 7 threshold criterion.[FN25] Thus, a court can accept less exacting proof from such an agency that the purpose underlying disputed documents is law enforcement. This less exacting judicial scrutiny of a criminal law enforcement agency's purpose in the context of the FOIA Exemption 7 threshold is further bolstered by Congress' concern that inadvertent disclosure of criminal investigations, information sources, or enforcement techniques might cause serious harm to the legitimate interests of law enforcement agencies. [FN26]

FN25. The FBI is certainly one of the most obvious examples of such an agency. See 28 U.S.C. ss 531-537 (1976).

FN26. In support of Senator Hart's floor amendment that eventually became Exemption 7, Senator Kennedy commented: "(I)t seems to be that the amendment itself has considerable sensitivity built in to protect against the invasion of privacy, and to protect the identities of informants, and most generally to protect the legitimate interests of a law enforcement agency to conduct (a criminal) investigation ...." 120 Cong.Rec. 17,040 (1974), reprinted in 1975 Source Book, supra note 10, at 350.

Thus, we conclude that a court may apply a more deferential attitude toward the claims of "law enforcement purpose" made by a criminal law enforcement agency. The result of this conclusion is that our prior precedent identifying the standard for ascertaining law enforcement purpose vel ***419 **28** non of general regulatory and administrative agencies, while instructive, is not necessarily determinative of the issue for criminal law enforcement agencies. These specialized agencies require a separate standard of judicial review.

2. The "Law Enforcement Purpose" of Law Enforcement Agencies

On one of the few occasions that required this Circuit to ascertain the presence or absence of a "law enforcement purpose" for FOIA Exemption 7, in a case involving a mixed-function agency, the court drew a line between general agency oversight (including program monitoring) and agency

investigations specifically directed at allegedly illegal activity. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81-82 (D.C.Cir.1974).[FN27] At issue in Rural Housing Alliance was the disclosure of portions of a report by the Department of Agriculture's Inspector General regarding allegations of governmental housing discrimination in Florida. In expressing the "law enforcement purpose" test for the District Court to apply on remand, the court identified law enforcement investigations as "investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." Id. at 81 (footnote omitted). The panel further stated: "The purpose of the 'investigatory files' is thus the crucial factor.... If the purpose of the investigation was ... an inquiry as to an identifiable possible violation of law, then such inquiry would have been 'for law enforcement purposes' whether the individual were a private citizen or a government employee." Id. at 82.[FN28]

FN27. While Rural Housing Alliance is of the same vintage as the four decisions of this Circuit that Congress overruled with the 1974 amendment of Exemption 7, see note 20 supra and accompanying text, it has retained its precedential value. Congress did not change the "law enforcement purpose" language in Exemption 7 that was the subject of Rural Housing Alliance ; instead Congress codified the exemption's policy concerns so that once a law enforcement purpose was found, the judicial inquiry was not "at an end." See note 21 supra.

FN28. This means of distinguishing investigations for law enforcement purposes from more routine oversight and monitoring has been termed the "special intensity" test. See, e.g., Gregory v. FDIC, 470 F.Supp. 1329, 1333-34 (D.D.C.1979), rev'd on other grounds, 631 F.2d 896 (D.C.Cir.1980) (per curiam); Note, FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations, 65 Minn.L.Rev. 1139, 1147 (1981).

Because we believe that a court may apply a more deferential standard with respect to claims of "law enforcement purpose" made by a criminal law enforcement agency, the test enunciated in Rural Housing is not adequate to dispose of the question at issue here. We must, therefore, consider alternative tests suggested by other courts.

The various courts that have rejected the per se argument, i.e., that all law enforcement agency files manifest a law enforcement purpose, have, quite naturally, each phrased their tests in slightly different language. For example, Judge Weinfeld has opined: "The appropriate test is whether the records indicate that the agency was gathering information with the good faith belief that the subject may violate or has violated federal law, or was merely monitoring the subject for purposes unrelated to enforcement of federal law." Lamont v. Department of Justice, 475 F.Supp. 761, 773 (S.D.N.Y.1979) (footnote omitted). The Northern District of California announced "a liberal test that would require that the FBI show a sufficient connection between the conduct of the investigation and legitimate concerns for maintaining national security or preventing criminal activity." Ramo v. Department of the Navy, 487 F.Supp. 127, 131 (N.D.Cal.1979), appeal docketed, No. 79-4791 (9th Cir. Aug. 6, 1981) (submission vacated pending Supreme Court decision in FBI v. Abramson).[FN29] ***420 **29** Shortly after the decision in Ramo, the Ninth Circuit stated that: "An agency which has a clear law enforcement mandate, such as the FBI, need only establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed." Church of Scientology v. Department of Defense, 611 F.2d 738, 748 (9th Cir. 1979).[FN30] Chief Judge Peckham interpreted the language from Church of Scientology as requiring "that an agency with a clear law enforcement purpose ... need only be held to a minimal showing that the activity which generated the documents was related to the agency's function." Dunaway v. Webster, 519 F.Supp. 1059, 1076 (N.D.Cal.1981). Finally, Judge Weinfeld has tersely commented: "To meet this requirement an agency must demonstrate at least 'a colorable claim of a rational nexus' between activities being investigated and violations of federal law." Malizia v. Department of Justice, 519 F.Supp. 338, 347 (S.D.N.Y.1981) (footnote omitted).[FN31]

FN29. The Court in Ramo apparently was willing to go further than some other courts have in discarding the "special intensity" test's requirement of a specific, alleged violation or a particular,

suspected person. "To invoke the exemption, the (FBI) need not show that the files reflect a specific suspected violation of the law; however, it must show that the investigation was based on some legitimate law enforcement purpose." 487 F.Supp. at 131.

FN30. While the language from Church of Scientology quoted above clearly requires some Exemption 7 threshold test, even for FBI documents, the Government has cited a footnote from the same page of the opinion which suggests that the Ninth Circuit accepted the per se approach of Irons v. Bell and Kuehnert v. FBI. The footnote states in part: "Koch, however, is not persuasive because the agency involved was the FBI, for whom (sic) a separate showing of 'law enforcement purpose' is unnecessary." 611 F.2d at 748 n.5. As did the court in Dunaway v. Webster, 519 F.Supp. 1059, 1075-76 (N.D.Cal.1981), we interpret this apparent inconsistency in favor of the textual language.

FN31. Ironically, the language most often cited or quoted as part of the appropriate test for measuring the law enforcement purpose of a law enforcement agency-"a colorable claim of a rational nexus between the organizations and activities being investigated and violations of federal laws"-originated in Irons v. Bell, 596 F.2d 468, 472 (1st Cir. 1979). When the documents presented in Irons failed to meet even this threshold test, the First Circuit concluded that a criminal law enforcement agency need not meet any threshold requirement in order to avail itself of Exemption 7's subparts. Id. at 474. For the reasons noted above, we reject this position of the First Circuit as patently inconsistent with Exemption 7.

(6) As we read these various tests, however phrased, and consider the applicable language of FOIA (and the related legislative history), it appears inescapable to us that there are two critical conditions that must be met for a law enforcement agency to pass the Exemption 7 threshold. First, the agency's investigatory activities that give rise to the documents sought must be related to the enforcement of federal laws or to the maintenance of national security. To satisfy this requirement of a "nexus," the agency should be able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible security risk or violation of federal law. The possible violation or security risk is necessary to establish that the agency acted within its principal function of law enforcement, rather than merely engaging in a general monitoring of private individuals' activities. While Congress intended that "law enforcement purpose" be broadly construed,[FN32] it was not meant to include investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to the national security and violations of the criminal ***421 **30** laws and of apprehending those who do violate the laws. See Lamont v. Department of Justice, 475 F.Supp. 761, 774-76 (S.D.N.Y.1979) (seventeen years of generalized monitoring unrelated to law enforcement).

FN32. The Exemption 7 "law enforcement purpose" includes both civil and criminal investigations and proceedings within its scope. See, e.g., Rural Hous. Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C.Cir.1974). Exemption 7(D)'s reference to "lawful national security intelligence investigation(s)" makes clear that it also extends beyond typical civil and criminal law enforcement. The Conference Report on the 1974 FOIA amendments commented: "(N)ational security" is to be strictly construed to refer to military security, national defense, or foreign policy. The term "intelligence" in section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions. H.R.Rep.No.1380, 93d Cong., 2d Sess. 13 (1974), reprinted in 1975 Source Book, supra note 10, at 230. See Stein v. Department of Justice, 662 F.2d 1245, 1260-61 (7th Cir. 1981).

Second, the nexus between the investigation and one of the agency's law enforcement duties must be based on information sufficient to support at least "a colorable claim" of its rationality. This second condition is deferential to the particular problems of a criminal law enforcement agency. Such an agency, in order to carry out its functions, often must act upon unverified tips and suspicions based upon mere tidbits of information. A court, therefore, should be hesitant to second-guess a law

enforcement agency's decision to investigate if there is a plausible basis for its decision. Nor is it necessary for the investigation to lead to a criminal prosecution or other enforcement proceeding in order to satisfy the "law enforcement purpose" criterion. E.g., Bast v. Department of Justice, 665 F.2d 1251, 1254 (D.C.Cir.1981); Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 82 n.48 (D.C.Cir.1974); cf. Founding Church of Scientology, Inc. v. Regan, 670 F.2d 1158, 1161 (D.C.Cir.1981) (enforcement proceeding not required for operation of Exemption 7(D)).[FN33] Of course, the agency's basis for the claimed connection between the object of the investigation and the asserted law enforcement duty cannot be pretextual or wholly unbelievable. See Abramson v. FBI, 658 F.2d 806, 811 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981) (asserting appointment functions of Nixon White House as basis for "name checks" of individuals prominently associated with liberal causes).

FN33. We believe that the Third Circuit's conclusion that " 'law enforcement purposes' must relate to some type of enforcement proceeding, and one that is pending," Committee on Masonic Homes v. NLRB, 556 F.2d 214, 219 (3d Cir. 1977) (footnote omitted), has no application to an agency whose principal function is criminal law enforcement. Therefore, we also dismiss the First Circuit's concern, expressed in Irons v. Bell, 596 F.2d 468, 474 (1st Cir. 1979), that the need to shield legitimate law enforcement efforts from harmful FOIA disclosures might lead to frivolous prosecutions.

Thus, while our measure of a criminal law enforcement agency's "law enforcement purpose" is necessarily deferential, in recognition of the realities of these agencies' duties and the importance of their functions, it is not vacuous. In order to pass the FOIA Exemption 7 threshold, such an agency must establish that its investigatory activities are realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached. Either of these concerns must have some plausible basis and have a rational connection to the object of the agency's investigation.

III. APPLICATION OF THE EXEMPTION 7 THRESHOLD IN THIS CASE

In this case the FBI averred that all of the records responsive to Pratt's FOIA request were "investigatory records compiled for law enforcement purposes." Affidavit of David S. Byerly at 7-10, 35 (Nov. 21, 1979), reprinted in Jt.App. at 79-82, 111. The District Court accepted this statement of purpose for all of the documents in the original production except for nine COINTELPRO documents, which it held "cannot reasonably be considered or interpreted as generated through any legitimate law enforcement purpose." Pratt v. Webster, 508 F.Supp. 751, 761 (D.D.C.1981). The District Court's February 13 Order led to the inclusion of sixteen additional COINTELPRO documents in this litigation, all of which had previously been identified during the field office search requested by Congressman McCloskey.[FN34] The District Court similarly concluded that none of these COINTELPRO documents satisfied the Exemption 7 threshold. With the exception of two passages deleted under Exemption 6 as "clearly unwarranted invasions of personal privacy," [FN35] the District Court ordered that ***422 **31** all twenty-five COINTELPRO documents be released in their entirety. With all respect for the District Court's otherwise exemplary handling of this case, we must disagree.

FN34. See note 6 and accompanying text supra.

FN35. See text at notes 7-8 supra.

At the outset, it is clear that the District Court singled out this handful of documents only because they were designated as "COINTELPRO" documents. See id. Document 22, labeled as a COINTELPRO document, was the only document found to lack a law enforcement purpose out of a particular file of 156 documents. This entire file was a national security file generated by an investigation "instituted as a result of the FBI receiving information that (Pratt) was engaged in activities which could involve a violation of" 18 U.S.C. ss 2383-2385 (1976), Affidavit of David S. Byerly at 8 (Nov. 21, 1979), reprinted in Jt.App. at 80. Documents 519 to 524 include eight documents, see note 8 supra, out of more than 400 referring to Pratt that were collected from investigatory files of other individuals or

organizations by means of the FBI's "see" or cross references. The FBI averred that "(a)ll 'see' reference documents herein are investigatory records compiled for law enforcement purposes and were collected in the course of lawful national security investigations or other mandated investigations imposed by law." Affidavit of David S. Byerly at 35 (Nov. 21, 1979), reprinted in Jt.App. at 111. The District Court accepted the FBI's claim of law enforcement purpose for all of these documents except for the eight bearing the appellation "COINTELPRO." Pratt v. Webster, 508 F.Supp. at 759-61.

(7) We recognize, of course, that Exemption 7 refers to "records" rather than files, 5 U.S.C. s 552(b)(7) (1976), and that the location of a non-exempt document in an investigatory file does not necessarily make that document exempt from FOIA's disclosure requirements. See 5 U.S.C. s 552(b) (1976). We believe, however, that the District Court distinguished these nine documents from the other documents contained in the same files not on the FOIA grounds of law enforcement purpose, but on the grounds of law enforcement method.

(8) The FBI's Counter-Intelligence Program has been the subject of congressional inquiry, see Church Committee Report, note 3 supra, and of individual litigation, see, e.g., Black Panther Party v. Smith, 661 F.2d 1243 (D.C.Cir.1981); Hobson v. Wilson, Civ. No. 76-1326 (D.D.C. Dec. 23, 1981) (judgment on verdict to anti-war demonstrators); Stern v. Richardson, 367 F.Supp. 1316 (D.D.C.1973). Those proceedings have established that COINTELPRO activities included the use of questionable, and at times illegal, methods. The documents at issue in this case also reveal questionable actions by the FBI to foment distrust and suspicion and to create and enhance dissension within the Black Panther Party. See Pratt v. Webster, 508 F.Supp. at 761; Jt.App. at 104-06, 113-41, 229-83. But whatever we may think of the FBI's methods, we cannot conclude therefrom that the COINTELPRO activities involved in this case lacked any law enforcement purpose.

The Church Committee Report's discussion of the FBI's actions against the BPP (offered by Pratt as Exhibit 1 to his May 21, 1981 Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, reprinted in Jt.App. at 316-34) quoted from a February 1968 FBI memorandum expanding the agency's program against what it termed "black nationalist groups," including the BPP. That memorandum described the program's goals as follows:

> 1. Prevent a coalition of militant black nationalist groups....
> 2. Prevent the rise of a messiah who could unify and electrify the militant nationalist movement ... Martin Luther King, Stokely Carmichael and Elijah Muhammad all aspire to this position....
> 3. Prevent violence on the part of black nationalist groups....
> 4. Prevent militant black nationalist groups and leaders from gaining respectability by discrediting them....
> 5. ... prevent the long-range growth of militant black nationalist organizations, especially among youth.

***423 **32** Church Committee Report, supra note 3, Book III at 187, reprinted in Jt.App. at 316. While many of the FBI's goals and methods in its COINTELPRO activities against the BPP give us serious pause, we believe that the third goal on this list-the prevention of violence-establishes that law enforcement was a "significant aspect" of the FBI's overall purpose. See Koch v. Department of Justice, 376 F.Supp. 313, 315 (D.D.C.1974).

(9) In particular, we believe that the documents at issue in this case evince law enforcement as a "significant aspect" of the FBI's purpose.[FN36] Document 22 is part of an investigatory file based on FBI concerns that Pratt might violate three specific provisions of the Criminal Code. From the record before us, we cannot conclude that that concern was implausible or irrational, especially since the District Court recognized the validity of that concern with respect to the other 155 documents in the file. Documents 519 to 524 were all found in the FBI's "see" reference files and, according to the Government's affidavits, were "investigatory records compiled for law enforcement purposes and were collected in the course of lawful national security investigations or other mandated investigations imposed by law." Affidavit of David S. Byerly at 35 (Nov. 21, 1979), reprinted in Jt.App. at 111. While this affidavit is indeed a "minimal showing," it appears sufficient to establish the FBI's concern for possible violations or security risks. See Dunaway v. Webster, 519 F.Supp. 1059,

1076 (N.D.Cal.1981). Our conclusion again is bolstered by the District Court's acceptance of the FBI's law enforcement purpose with respect to all other "see" reference documents.

FN36. We do not intimate that all COINTELPRO documents would pass the Exemption 7 threshold, or even that all COINTELPRO documents concerning the Black Panther Party would necessarily meet this test. Those issues simply are not before us. We are concerned in this case only with a handful of COINTELPRO documents located in general investigatory files of the FBI.

Documents COINT-1 to COINT-16 were located through the FBI's supplemental search for records concerning Pratt in the agency's California field offices. Several of these COINTELPRO documents are directly related to the documents disclosed from the previous search of FBI Headquarters. For example, document COINT-5 was apparently a supplement by the Los Angeles office to its previously dispatched document 520. See Jt.App. at 117-24, 240-41. In addition, the subject matter of these sixteen COINT documents is often the same as is found in documents 519 to 524. In short, these documents, but for their COINTELPRO label, are indistinguishable from other FBI documents for which the District Court found a law enforcement purpose. Moreover, these documents provide independent support for a claim of law enforcement purpose. Document COINT-1, for example, discusses cooperation with the Los Angeles Police Department in identifying violations of state and local laws, reports on the arrest of a BPP member for firearms violations, and identifies Pratt "as a possible bomb suspect." Jt.App. at 229-30.

(10) Thus, we conclude that the District Court incorrectly distinguished COINTELPRO documents from other documents for which it found a law enforcement purpose. While the methods frequently used by the FBI in its COINTELPRO activities offer a ready distinction from more typical means of law enforcement, FOIA Exemption 7 refers to purposes rather than to methods. Because law enforcement was a significant aspect of the FBI's purpose, we conclude that the District Court erred in holding that these documents failed to pass the Exemption 7 threshold. Accordingly, we reverse its holding in this regard.[FN37]

FN37. In defense of the District Court's decision, Pratt raises an issue not addressed by the court below. He contends that the COINTELPRO documents are not "investigatory records" and therefore fail to meet the Exemption 7 threshold criterion on this ground. Appellee's Brief at 19-27. Pratt takes an unusually narrow view of the meaning of "investigatory records," however, and his view was not shared by Congress. The Conference Report on the 1974 FOIA amendments noted that the term "intelligence" in Exemption 7(D) "is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions." H.R.Rep.No.1380, 93d Cong., 2d Sess. 13 (1974) (Conference Report), reprinted in 1975 Source Book, supra note 10, at 230. Exemption 7(D), of course, is operable only when a document satisfies both parts of the threshold and part 7(D) itself. Hence, Congress' definition of "intelligence" necessarily implies that the term "investigatory records" includes within its scope records generated by positive intelligence-gathering and counter-intelligence, as well as by a more typical criminal investigation. On this basis we conclude that the COINTELPRO documents at issue in this appeal, like the documents which surrounded them in the FBI's files, are "investigatory records" within the meaning of the Exemption 7 threshold.

***424 **33** Our conclusion that the twenty COINTELPRO documents at issue in this appeal [FN38] meet the Exemption 7 threshold criterion requires us to return the case to the District Court. On remand the District Court must determine whether the withholding of portions of the contested documents, which the Government seeks on the basis of Exemptions 7(C) and 7(D),[FN39] is justified.[FN40]

FN38. See note 8 supra.

FN39. Exemption 7(D) allows the deletion of the name of a confidential source and any information that would disclose the identity of a confidential source whenever a document is an "investigatory record ( ) compiled for law enforcement purposes." If the record was "compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation,"

Exemption 7(D) also allows the withholding of "confidential information furnished only by the confidential source." 5 U.S.C. s 552(b)(7)(D) (1976); see Radowich v. United States Attorney, 658 F.2d 957, 959 (4th Cir. 1981); Duffin v. Carlson, 636 F.2d 709, 712 (D.C.Cir.1980) (distinguishing two clauses of Exemption 7(D)). These additional requirements are more exacting than the threshold requirement of "law enforcement purpose," Dunaway v. Webster, 519 F.Supp. 1059, 1076, 1080 (N.D.Cal.1981), and, in the case of a national security intelligence investigation, may require a determination of the lawfulness of the investigation's methods. See H.R.Rep.No.1380, 93d Cong., 2d Sess. 13 (1974) (Conference Report), reprinted in 1975 Source Book, supra note 10, at 230; 120 Cong.Rec. 34,167 (1974), reprinted in 1975 Source Book, supra note 10, at 391-92 (colloquy of Rep. Horton and Rep. Moorhead). We leave these issues for the District Court to consider on remand.

FN40. Our disposition of this case on Exemption 7 grounds makes it unnecessary for us to consider the Government's Exemption 6 claims. The Government has asserted Exemption 7(C) or Exemption 7(D) or both as a basis for the deletions from each of the thirteen documents for which it also asserts Exemption 6. Because everything that can be withheld on the basis of Exemption 6 as "a clearly unwarranted invasion of personal privacy" can also be withheld on the basis of 7(C) (if the threshold is met) as "an unwarranted invasion of personal privacy," Exemption 6's application would not allow the deletion of any additional information from these COINTELPRO documents.

IV. CONCLUSION

Because of public interest in the effective disclosure of malfeasance by government agencies, we feel compelled to add a few words about the practical effect of our decision and about the means for redress of any alleged wrongs committed by federal agencies.

(11) FOIA requires disclosure of government records to the fullest extent possible and allows the withholding of only so much of the document as fits squarely within an enumerated exemption. In this case, for example, the Government primarily seeks only to delete the names of its FBI Special Agents and the identities of its confidential sources; the FBI's plans to increase discord within the Black Panther Party and to discredit its leaders have been revealed. The public's interest in the disclosure of government malfeasance is therefore not defeated by the FOIA exemptions or by our interpretation in this case of the reach of one of them.

Of course, nothing we say or hold represents our approval of the measures attributed to the FBI's Counter-Intelligence Program by the Church Committee Report, note 3 supra. The use of government force and deception to quash lawful political dissent and expression is antithetical to a democratic society. Where substantiated, we find these actions reprehensible.

(12) The proper and most effective means of redress for these actions, however, is not a FOIA action. While a suit under the Freedom of Information Act is an important mechanism for discovering the malfeasance of government agencies, see, e.g., Stern v. Richardson, 367 F.Supp. 1316 (D.D.C.1973) (disclosing existence of COINTELPRO), it can do no more than reveal these actions. FOIA is thus a useful supplement to, but not a substitute for, private damage actions by aggrieved individuals and political action by concerned citizens and their representatives. The Church Committee Report is a prime example of the latter, and ***425 **34** a recent case in the District Court for the District of Columbia exemplifies the former, Hobson v. Wilson, Civ. No. 76-1326 (D.D.C. Dec. 23, 1981).[FN41] Our holding in this case in no way limits access to either of these remedies.[FN42]

FN41. In Hobson a jury awarded more than $700,000 to seven community activists and an anti-war organization that had sued the FBI and the District of Columbia Police Department for illegal harassment and surveillance under COINTELPRO. See Jury Awards $711,937.50 to Demonstrators, Washington Post, Dec. 24, 1981, at 1, col. 3.

FN42. Although he does not disagree with the views expressed in the last two paragraphs of this section IV, Judge Robb believes the expression of these views is unnecessary to the decision.

V. DISPOSITION

For the foregoing reasons, we hold that the twenty COINTELPRO documents at issue in this appeal meet the "law enforcement purpose" criterion of the FOIA Exemption 7 threshold. As a result, we reverse the decision of the District Court in this regard and remand the case to the District Court for its consideration of the Government's claims for nondisclosure under Exemptions 7(C) and 7(D) and for any other proceedings consistent with this opinion.

So ordered.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96

INSTA-CITE

CITATION: 673 F.2d 408

Direct History

1 Pratt v. Webster, 508 F.Supp. 751 (D.D.C., Feb 12, 1981) (NO. CIV. 78-1688)
Decision Reversed by
=> 2 **Pratt v. Webster,** 673 F.2d 408, 218 U.S.App.D.C. 17 (D.C.Cir., Jan 22, 1982) (NO. 81-1907, 81-1922)

Negative Indirect History

Declined to Follow by
3 Shaw v. F.B.I., 749 F.2d 58, 242 U.S.App.D.C. 36 (D.C.Cir., Dec 05, 1984) (NO. 84-5084)
4 Hopkinson v. Shillinger, 866 F.2d 1185, 27 Fed. R. Evid. Serv. 919 (10th Cir.(Wyo.), Jan 23, 1989) (NO. 86-2571), rehearing denied (Dec 01, 1989) (Additional History)
5 Jones v. F.B.I., 41 F.3d 238 (6th Cir.(Ohio), Nov 17, 1994) (NO. 92-3962) (Additional History)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS DCT

Lenny EPPS, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.

Civ. A. No. 89-84 SSH.

United States District Court,
District of Columbia.

Sept. 15, 1992.

Action was brought under Freedom of Information Act (FOIA) to compel disclosure of documents relating to requester's federal prosecution and resulting conviction. On motion of United States Attorney's Office (USAO) to dismiss complaint and Federal Bureau of Investigation's (FBI's) and Drug Enforcement Administration's (DEA's) motions for summary judgment, the District Court, Stanley S. Harris, J., held that: (1) District Court did not have subject matter jurisdiction over action to compel USAO to disclose documents, and (2) FBI and DEA records were exempt from disclosure under FOIA.

Motions granted.

[1] RECORDS ⇦ 53
326k53
There are nine exemptions to Freedom of Information Act's (FOIA's) general rule of disclosure, and burden is on government to show that requested information which it declines to produce is exempt. 5 U.S.C.A. § 552.

[1] RECORDS ⇦ 65
326k65
There are nine exemptions to Freedom of Information Act's (FOIA's) general rule of disclosure, and burden is on government to show that requested information which it declines to produce is exempt. 5 U.S.C.A. § 552.

[2] RECORDS ⇦ 65
326k65
In determining whether agency has satisfied burden of showing that requested documents are exempt from disclosure under Freedom of Information Act (FOIA), court may rely solely on agency affidavits. 5 U.S.C.A. § 552.

[3] RECORDS ⇦ 52
326k52
Because primary purpose of Freedom of Information Act (FOIA) is to allow people to know what their government is doing, each requester is treated equally, regardless of his or her reason for requesting information. 5 U.S.C.A. § 552.

[4] RECORDS ⇦ 63
326k63
District court did not have subject matter jurisdiction over action to compel United States Attorney's Office (USAO) to disclose documents relating to criminal investigation pursuant to Freedom of Information Act (FOIA), where direct request for documents had not been made to USAO. 5 U.S.C.A. § 552.

[5] RECORDS ⇦ 63
326k63
Under the Freedom of Information Act (FOIA), administrative remedies must be exhausted prior to judicial review. 5 U.S.C.A. § 552.

[6] RECORDS ⇦ 57
326k57
Federal Bureau of Investigation (FBI) records involving specific payments made by FBI to nongovernment informants were not "predominantly internal" and were not protected from disclosure under Freedom of Information Act (FOIA) exemption for documents relating solely to internal personnel records and practices of agency. 5 U.S.C.A. § 552(b)(2).

[7] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) records involving specific payments made by FBI to nongovernment informants were exempt from disclosure under Freedom of Information Act (FOIA) exemption for records that would disclose techniques and procedures for law enforcement investigations or prosecutions. 5 U.S.C.A. § 552(b)(7)(E).

[8] RECORDS ⇦ 57
326k57
Internal Drug Enforcement Administration (DEA) markings and phrases regarding treatment of and distribution of DEA documents were exempt from disclosure under Freedom of Information Act (FOIA) exemption for documents related solely to

internal personnel rules and practices of agency. 5 U.S.C.A. § 552(b)(2).

[9] RECORDS ⇦ 55
326k55
Information developed by Federal Bureau of Investigation (FBI) before grand jury, including identities of witnesses and strategy or direction of criminal investigation, were exempt from disclosure under Freedom of Information Act (FOIA) exemption for documents specifically exempted from disclosure by statute, in view of rule prohibiting government attorney from disclosing grand jury matters. 5 U.S.C.A. § 552(b)(3); Fed.Rules Cr.Proc.Rule 6(e)(2), 18 U.S.C.A.

[10] RECORDS ⇦ 55
326k55
Information obtained by Federal Bureau of Investigation (FBI) through interception of wire or oral communications was exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552(b)(3); 18 U.S.C.A. §§ 2511(2)(a)(ii), 2517.

[11] RECORDS ⇦ 57
326k57
Draft affidavit in possession of Federal Bureau of Investigation (FBI) containing United States Attorney work product was exempt from disclosure under Freedom of Information Act (FOIA) as interagency memorandum which would not be available to party other than agency in litigation with agency. 5 U.S.C.A. § 552(b)(5).

[12] RECORDS ⇦ 58
326k58
Federal Bureau of Investigation (FBI) autopsy photographs were not subject to disclosure under Freedom of Information Act (FOIA) exemption for disclosures that would constitute clearly unwarranted invasion of privacy. 5 U.S.C.A. § 552(b)(6).

[13] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) felony arrest records were categorically exempt from disclosure under Freedom of Information Act (FOIA) exemption for law enforcement records, the disclosure of which would constitute unwarranted invasion of personal privacy. 5 U.S.C.A. § 552(b)(7)(C).

[14] RECORDS ⇦ 60
326k60
Identities of Federal Bureau of Investigation (FBI) employees, identities of other federal government employees, identities or information about third parties mentioned in FBI investigative files, identities or information about individuals who were of investigative interest to FBI, identities or information about third parties who provided information to FBI, and identities of state or local law enforcement personnel were exempt from disclosure under Freedom of Information Act (FOIA) exemption for law enforcement records whose disclosure could be expected to constitute unwarranted invasion of personal privacy. 5 U.S.C.A. § 552(b)(7)(C).

[15] RECORDS ⇦ 64
326k64
Freedom of Information Act (FOIA) exemption for law enforcement records whose disclosure would constitute unwarranted invasion of personal privacy requires court to balance privacy interests in nondisclosure against public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[16] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) records concerning identities and information about confidential sources, and information provided under assurance of confidentiality, were exempt from disclosure under Freedom of Information Act (FOIA) exemption for records or information compiled for law enforcement purposes to extent that production could reasonably be expected to disclose identity of confidential source. 5 U.S.C.A. § 552(b)(7)(D).

[17] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) polygraph charts and lists of polygraph questions, techniques used to protect or relocate witnesses, and mechanics of investigation techniques were exempt from disclosure under Freedom of Information Act (FOIA) exemption permitting withholding of records or information compiled with law enforcement purposes to extent disclosure would reveal techniques and procedures for law

enforcement investigations or prosecutions. 5 U.S.C.A. § 552(b)(7)(E).

[18] RECORDS ⇐ 60
326k60
Names or initials of Federal Bureau of Investigation (FBI) employees, other government employees, and state and local law enforcement officers, together with names and identities of Drug Enforcement Administration (DEA) special agents, supervisory special agents and other law enforcement officers were exempt from disclosure under Freedom of Information Act (FOIA) exemption for disclosures of law enforcement records that could reasonably be expected to endanger life or physical safety of any individual, where party requesting records and his associates had demonstrated violent tendencies. 5 U.S.C.A. § 552(b)(7)(F).

***789** Lenny Epps, pro se.

Claire M. Whitaker, Asst. U.S. Atty., Office of the U.S. Atty., Washington, D.C., for defendants.

OPINION

STANLEY S. HARRIS, District Judge.

Plaintiff filed suit in January 1989 under the Freedom of Information Act (FOIA) to compel disclosure of documents relating to his federal prosecution and resulting conviction. Defendant United States Attorney's Office (USAO) moves to have plaintiff's complaint dismissed, and defendants the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) seek summary judgment against plaintiff Epps. Upon consideration of defendants' motion, plaintiff's opposition, defendants' reply, and plaintiff's surreply, the Court grants the motion of the USAO, the FBI, and the DEA.

Background

Plaintiff seeks documents relating to a 1986 conviction. He argues that he was wrongly convicted and that he has a heightened need to obtain certain government documents to attempt to prove his innocence. In March of 1988, Epps sent a FOIA request to the Department of Justice requesting:

> from all law enforcement agenicies [sic] such as the F.B.I., D.E.A. and the Baltimore, [ ]City Police Dept. and any other agencies that participated in the investigations of case NO. Y-85-0547 that obtain any information such as papers Notes (rough) or transcribed in this investigation of U.S. v. Maurice C. Proctor and Lenny Epps Case No. Y-85-0547.

The USAO moves for dismissal of the portion of the complaint against it based on plaintiff's failure to have sought documents through the administrative process prior to filing this action. Defendants the FBI and the DEA, who have already responded to plaintiff's request, argue that they have produced all unprotected documents and portions of documents as required under the FOIA. Accordingly, the FBI and the DEA move for summary judgment with respect to the portions of the complaint against them.

Discussion

[1] The purpose of the FOIA, 5 U.S.C. § 552 is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." National Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). Accordingly, the FOIA represents "a general philosophy of full agency disclosure." Department of the Air Force v. Rose, 425 U.S. 352, 360, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976) (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). However, there are nine exemptions to this general rule of disclosure, Baldrige v. Shapiro, 455 U.S. 345, 352, 102 S.Ct. 1103, 1108, 71 L.Ed.2d 199 (1982), and the burden is on the government to show that the requested information which it declines to produce is exempt. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755, 109 S.Ct. 1468, 1472, 103 L.Ed.2d 774 (1989).

[2] To be entitled to summary judgment, each movant agency must "prove [ ] that no substantial and material facts are in dispute and that [it] is entitled to judgment as a matter of law." Weisberg v. Department of Justice, 627 F.2d 365, 368 (D.C.Cir.1980). To meet this burden, the agency must "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [the FOIA's] inspection requirements." National Cable

Television Ass'n v. Federal Communications Comm'n, 479 F.2d 183, 186 (D.C.Cir.1973). In determining whether the agency has ***790** satisfied this burden, the Court may rely solely on agency affidavits. See Goland v. CIA, 607 F.2d 339, 352 (D.C.Cir.), vacated in part on other grounds, 607 F.2d 339 (D.C.Cir.1978), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). The affidavits, however, "must be 'relatively detailed' and nonconclusory." Id. (quoting Vaughn v. Rosen, 484 F.2d 820, 826 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974)).

[3] Because the primary purpose of the FOIA is to allow people to know what their government is doing, National Labor Relations Bd., 437 U.S. at 242, 98 S.Ct. at 2327, each requester is treated equally, regardless of his reason for requesting the information. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C.Cir.1989), cert. denied, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990).

I. United States Attorney's Office

[4] Although the USAO acknowledges assisting the FBI with plaintiff's FOIA request as to USAO-originated information, it argues that plaintiff did not make a direct request to it. Until this suit was filed, the USAO was unaware that plaintiff wished to obtain documents from it. Wright Declaration ¶ 3-5. Accordingly, the USAO moves that plaintiff's complaint be dismissed as to it because plaintiff seeks judicial review of a FOIA request that was never made. However, the USAO also states that it will now treat plaintiff's letter of March 15, 1988, as a request and respond accordingly. Wright Declaration ¶ 6.

[5] Under the FOIA, administrative remedies must be exhausted prior to judicial review. American Fed'n of Gov't Employees v. Department of Commerce, 907 F.2d 203, 209 (D.C.Cir.1990); Spannaus v. Department of Justice, 824 F.2d 52, 58 (D.C.Cir.1987); Stebbins v. Nationwide Mut. Ins. Co., 757 F.2d 364, 366 (D.C.Cir.1985). Accordingly, the USAO's motion is granted, and plaintiff's complaint against it is dismissed without prejudice for lack of subject matter jurisdiction. Hymen v. Merit Sys. Protection Bd., 799 F.2d 1421, 1423 (9th Cir.1986), cert. denied, 481 U.S. 1019, 107 S.Ct. 1900, 95 L.Ed.2d 506 (1987); see Dettmann v. Department of Justice, 802 F.2d 1472, 1477 (D.C.Cir.1986).

II. Federal Bureau of Investigation/Drug Enforcement Administration

A. Exemption (b)(2)

[6] Exemption (b)(2) allows agencies to withhold documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The FBI cites exemption (b)(2) to justify its deletion of "dates, amounts and method of payment on behalf of witnesses." Superneau Declaration ¶ 20. Plaintiff argues that payments to witnesses do not fall under exemption (b)(2) because witnesses are not personnel, and the payments are not internal.

To support its position, the FBI relies on Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C.Cir.1981) (en banc). In Crooker, the court defined the limits of exemption (b)(2) in a two-part test, holding that a document does not have to be disclosed if (1) it is "predominantly internal," and (2) "if disclosure significantly risks circumvention of agency regulations or statutes." Crooker, 670 F.2d at 1074. The exemption was further expanded in National Treasury Employees Union v. Customs Serv., 802 F.2d 525 (D.C.Cir.1986), in which the court stated that "[w]here disclosure of a particular set of documents would render those documents operationally useless, the Crooker analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure." National Treasury Employees Union, 802 F.2d at 530-31.

In the present case, the FBI has specifically stated that "this exemption was asserted where it was logically determined that harm could result to the FBI's investigative function." Superneau Declaration ¶ 20. From this statement it is reasonable to conclude that the FBI has met the "circumvention" test. However, it does not satisfy the "predominantly internal" requirement. ***791** Crooker does not discuss payments to witnesses, nor do any of the District of Columbia Circuit cases which Crooker cites. Instead, Crooker addresses law enforcement training manuals and discusses cases which involve documents of a more internal

nature than the witness payments in this case. See, e.g., Lesar v. Department of Justice, 636 F.2d 472 (D.C.Cir.1980) (concerning symbols used to refer to FBI informants); Cox v. Department of Justice, 601 F.2d 1 (D.C.Cir.1979) (per curiam) (concerning United States Marshals' manual giving details concerning weapons, handcuffs, and transportation of prisoners); Jordan v. Department of Justice, 591 F.2d 753 (D.C.Cir.1978) (en banc) (involving documents relating to guidelines for prosecutorial discretion); Vaughn v. Rosen, 523 F.2d 1136 (D.C.Cir.1975) (involving reports prepared by the Civil Service Commission to provide advice to agencies on how to improve their personnel programs). For this reason, the Court finds that the records requested involving specific payments made by the FBI to non-government informants are not "predominantly internal," and cannot be protected by exemption (b)(2).

[7] However, this does not end the inquiry. In 1986, Congress codified the "circumvention" test in Crooker, adding it to exemption (b)(7)(E). See Kaganove v. Environmental Protection Agency, 856 F.2d 884, 888-89 (7th Cir.1988), cert. denied, 488 U.S. 1011, 109 S.Ct. 798, 102 L.Ed.2d 789 (1989). The Court finds that exemption (b)(7)(E) applies here and that the FBI can withhold the requested information. Revealing the dates amounts and methods of making payments to witnesses

> would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions [and] such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7)(E). See also Superneau Declaration ¶ 20; Summary Judgment Motion, p. 9.

[8] In addition, the DEA has asserted exemption (b)(2) to protect Geographical Drug Enforcement Program (G-DEP) and Informant Identifier codes, and Narcotics and Dangerous Drugs Information System (NADDIS) numbers. These codes and numbers are "internal DEA markings and phrases regarding the treatment of and distribution of DEA documents.... Suspects could easily decode this information and change their patterns of drug activities, so as to evade detection by the Drug Enforcement Administration." Magruder Declaration ¶ 20. These types of internal markings clearly are exempt under (b)(2). See Lesar, 636 F.2d at 485-86; Maroscia v. Levi, 569 F.2d 1000, 1001-02 (7th Cir.1977); Struth v. FBI, 673 F.Supp. 949, 959 (E.D.Wis.1987); Texas Instruments, Inc., v. Customs Service, 479 F.Supp. 404, 406-07 (D.D.C.1979).

B. Exemption (b)(3)

[9] Next, the FBI argues that information relating to the grand jury, including the identities of witnesses, the deliberations and questions of the jurors, and the strategy or direction of the investigation, should be protected under exemption (b)(3). [FN1] The FBI further argues that information obtained through the interception of a wire or oral communication is protected under the same exemption. Exemption (b)(3) permits nondisclosure of documents

> FN1. The Court notes that plaintiff denies any interest in material originating from the grand jury. Plaintiff's Opposition at 4.

> specifically exempted from disclosure by statute ..., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3).

Under Rule 6(e)(2) of the Federal Rules of Criminal Procedure,

> ***792** an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

Fed.R.Crim.P. 6(e)(2). This rule has been found to satisfy the "statute" requirement of exemption (b)(3). Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C.Cir.1981). Therefore, the FBI does not have to reveal the information developed before the grand jury, including the identities of witnesses and the strategy or direction of the investigation. Fund for Constitutional Gov't, 656 F.2d at 869.

[10] As to the intercepted communications, the FBI argues that 18 U.S.C. 2511(2)(a)(ii) mandates

nondisclosure. In Lam Lek Chong v. Drug Enforcement Admin., 929 F.2d 729 (D.C.Cir.1991), this Circuit found that 18 U.S.C. § 2517 exempts intercepted communications from disclosure under exemption (b)(3). Although it is unclear to the Court why the FBI focuses on § 2511(2)(a)(ii), which does not appear specifically to restrict disclosure by the FBI, the Court nevertheless finds withholding the information proper. Since §§ 2511 and 2517 broadly prohibit disclosure of this type of information, and the entire chapter was discussed generally in Lam Lek Chong, the Court is satisfied that this information is properly exempt from disclosure under (b)(3).

C. Exemption (b)(5)

[11] The FBI further argues that a draft affidavit containing United States Attorney work product can be withheld under exemption (b)(5). Exemption (b)(5) states that the government can withhold documents such as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

This type of material is protected under exemption (b)(5), which is designed to protect the "decision making process of government agencies," National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S.Ct. 1504, 1516, 44 L.Ed.2d 29 (1975), and to encourage "frank discussion of legal and policy issues." Wolfe v. Department of Health and Human Servs., 839 F.2d 768, 773 (D.C.Cir.1988) (en banc). This Circuit stated in Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565 (D.C.Cir.1987), that

> the key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.

Dudman, 815 F.2d at 1568. Disclosing the materials being withheld here, a draft affidavit, could have the effect that Dudman sought to avoid. Therefore, this document is properly exempt from disclosure under (b)(5).

D. Exemption (b)(6)

[12] The FBI also argues that autopsy photographs and felony arrest records should be protected from disclosure by exemption (b)(6), which allows the government to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

Unlike most FOIA exemptions, exemption (b)(6) requires a balancing of interests. Specifically, a court must weigh an individual's privacy interests in nondisclosure against the public's interest in disclosure to decide whether to allow the withholding of information under (b)(6). Horner, 879 F.2d at 874. To do this the Court must first decide whether or not a substantial privacy interest is involved. Horner, 879 F.2d at 874. If the Court finds such an interest, then it

> must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure ***793** would work a clearly unwarranted invasion of personal privacy.

Horner, 879 F.2d at 874-75.

In this case, an individual's interest in not having his or her autopsy photographs released to the public is substantial. Furthermore, the individual's family also has a substantial privacy interest in keeping their deceased relative's photographs out of the public realm. On the other hand, the public's interest in gaining access to these photographs is practically nonexistent when considered in light of the FOIA's purpose of exposing agency action to the public. Horner, 879 F.2d at 878-79. Therefore, the Court finds that the government may refuse to release the autopsy photographs. [FN2]

> FN2. The Court also notes that, in his opposition to the government's summary judgment motion, plaintiff denied any interest in autopsy photographs. Plaintiff's Opposition at 4.

[13] Although felony arrest records might also be properly withheld under exemption (b)(6), the Supreme Court has recently held that rap sheets categorically can be withheld under exemption (b)(7)(C). Reporters Comm., 489 U.S. at 780, 109 S.Ct. at 1485. Finding that the records requested here are essentially the same as the rap sheets requested in Reporters Comm., the Court has no need to analyze the disclosure of the felony arrest records under exemption (b)(6). Instead, the Court

finds that this material is categorically exempt from disclosure under (b)(7)(C). Reporters Comm., 489 U.S. at 780, 109 S.Ct. at 1485.

E. Exemption (b)(7)(C)

[14] Next, the FBI argues that it does not have to reveal (1) the identities of FBI employees, (2) the identities of other federal government employees, (3) the identities and/or information about third parties who are mentioned in FBI investigative files, (4) the identities and/or information about individuals who are of investigative interest to the FBI, (5) the identities and/or information about third-parties who provided information to the FBI, and (6) the identities of state or local law enforcement personnel. Superneau Declaration ¶¶ 30-41. The DEA seeks protection for similar information including Epps's "accomplices, other defendants, informants, innocent third-parties, non-agent DEA personnel and third-parties [in] whom DEA has an investigative interest." Magruder Declaration ¶ 22. Both agencies rely on exemption (b)(7)(C), which excludes

> records or information compiled for law enforcement purposes, but only to the extent that the production ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C).

[15] Exemption (b)(7)(C) requires the Court to balance the privacy interests in nondisclosure against the public interest in disclosure. Reporters Comm., 489 U.S. at 762, 109 S.Ct. at 1475. Case law from this and other circuits supports the exclusion of the type of information requested here. Lesar, 636 F.2d at 487-88 (exempting identities of agents, informants, and information about victims' family and associates); Johnson v. Department of Justice, 739 F.2d 1514, 1518-19 (10th Cir.1984) (exempting identities of FBI agents); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir.1984) (exempting identities of Department of Labor Office of Inspector General officials and persons who gave information); Maroscia, 569 F.2d at 1002 (exempting identities of third-parties, FBI agents, and other law enforcement personnel). As one court has stated:

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

Nix v. United States, 572 F.2d 998, 1006 (4th Cir.1978). Furthermore, plaintiff's unsubstantiated accusations of wrongdoing do not alter this result. Miller v. Bell, 661 F.2d 623, 630 (7th Cir.1981), cert. denied, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 484 ***794** (1982). Accordingly, the Court finds that the information requested was compelled for law enforcement purposes and could reasonably be expected to constitute an unwarranted invasion of privacy. Therefore, the information was properly withheld.

F. Exemption (b)(7)(D)

[16] In addition, the FBI wants to withhold identities and information about confidential sources, and information provided under an assurance of confidentiality. It argues that exemption (b)(7)(D) allows this result. Exemption (b)(7)(D) allows nondisclosure of

> records or information compiled for law enforcement purposes, but only to the extent that the production ... (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

5 U.S.C. § 552(b)(7)(D).

The FBI contends that the sources were confidential sources, arguing that the methods used by the agency when conducting interviews make it clear to the source that the information is being given confidentially.

> Based on my experience as an FBI agent, these factors almost universally create a situation during interviews in which it is clearly, albeit tacitly, understood by all concerned that the information to be provided during the interview is to be afforded maximum confidentiality.

Superneau Declaration ¶ 46. Although plaintiff

disputes the sufficiency of this language, contending that the author lacks personal knowledge, his arguments must fail. This circuit recently analyzed the (b)(7)(D) exemption in Dow Jones & Co. v. Department of Justice, 917 F.2d 571 (D.C.Cir.1990), clarifying any doubt as to the application of the exemption.

> "The law of this circuit is that in the absence of evidence to the contrary, promises of confidentiality are inherently implicit when the FBI solicits information." As long as the department can show "that the information was solicited during the course of law enforcement investigations, the FBI raises the presumption that assurances were given" in exchange for the information.... Since the FBI typically promises confidentiality and rarely--if ever--will a source not desire it, only the starkest and most conclusive evidence of nonconfidentiality will rebut the presumption.

Dow Jones, 917 F.2d at 576-77 (citations omitted) (quoting Schmerler v. FBI, 900 F.2d 333, 337 (D.C.Cir.1990)). Therefore, the fact that the sources were interviewed by the FBI in the course of a law enforcement investigation raises the presumption that they were promised confidentiality, and it is plaintiff's burden to rebut this conclusion. Plaintiff has not met this burden.

Therefore, since the FBI acquired information from these sources during its investigation of Epps's criminal activities, both the names of the confidential sources and the information furnished by them can be withheld.

G. Exemption (b)(7)(E)

[17] The FBI further argues that under exemption (b)(7)(E) it can withhold (1) polygraph charts and lists of polygraph questions, (2) techniques used to protect and/or relocate witnesses, (3) information that, if revealed, would be tantamount to identifying the use of a technique, and (4) mechanics of investigation techniques. Superneau Declaration ¶¶ 53-57. The DEA argues that investigative techniques that are not commonly known to the general public, and that cannot be explained on the public record without being compromised, are also protected by (b)(7)(E). Magruder Declaration ¶ 26. Exemption (b)(7)(E) permits the withholding of

> ***795** records or information compiled for law enforcement purposes, but only to the extent that the production ... (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7)(E).

This exemption is designed to allow the withholding of the type of information involved here. It protects law enforcement agencies from being required to provide information that might help criminals avoid apprehension. See American Soc'y of Pension Actuaries v. Internal Revenue Serv., 746 F.Supp. 188, 190 (D.D.C.1990). Revealing this information could reasonably be expected to compromise the effectiveness of the techniques and hamper law enforcement. Therefore, the FBI can withhold such information.

H. Exemption (b)(7)(F)

[18] Lastly, the FBI relies on exemption (b)(7)(F) to withhold the names and/or initials of FBI employees, other government employees, and state and local law enforcement officers. Superneau Declaration ¶¶ 58-63. The DEA seeks to withhold the "names and identities of DEA Special Agents, Supervisory Special Agents and other law enforcement officers" under the same exemption. Magruder Declaration ¶ 28. Exemption (b)(7)(F) provides nondisclosure of

> records or information compiled for law enforcement purposes, but only to the extent that the production ... (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. 552(b)(7)(F).

The same information withheld under exemption (b)(7)(C) may be withheld under exemption (b)(7)(F) to protect against risk of personal injury. Maroscia, 569 F.2d at 1002. Plaintiff and his associates have demonstrated violent tendencies, Superneau Declaration ¶ 59, and revealing the identities of federal agents and other law enforcement personnel could expose those people to harassment or physical injury. Superneau Declaration ¶ 60. These names and/or initials can be withheld to protect the safety of those involved in the Epps investigation.

Conclusion

For the reasons stated above, the Court grants the motion of the USAO, the FBI, and the DEA. The complaint is dismissed without prejudice as to the USAO for lack of subject matter jurisdiction for failure to exhaust administrative remedies. Because the Court finds that the affidavits of the FBI and the DEA adequately support that each item withheld is exempted from disclosure, the Court grants their summary judgment motion. Accordingly, the case is dismissed.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS CTA

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Lenny EPPS, Appellant,
v.
DEPARTMENT OF JUSTICE; Janet Reno; U.S. Attorney's Office; Federal Bureau of Investigation; and Drug Enforcement Administration.

No. 92-5360.

United States Court of Appeals, District of Columbia Circuit.

April 29, 1993.

D.D.C., 801 F.Supp. 787.

AFFIRMED.

Before: WALD, RUTH B. GINSBURG and SILBERMAN, Circuit Judges.

ORDER

PER CURIAM.

**1 Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted as to that portion of the September 15, 1992 order (the "September 15 order") which grants summary judgment as to the materials withheld by the Drug Enforcement Agency. The record supports the finding that the information withheld by this agency falls within the applicable exemptions to the Freedom of Information Act, 5 U.S.C. § 552, et seq. It is

FURTHER ORDERED that the motion for summary affirmance be denied as to that portion of the September 15 order which grants summary judgment as to the materials withheld by the Federal Bureau of Investigation ("FBI"). It is

FURTHER ORDERED, on the court's own motion, that the portion of the September 15 order which grants summary judgment as to the information withheld by the FBI be vacated. The Vaughn index (Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977 (1974)) submitted by the FBI is conclusory, and, particularly with respect to those documents withheld in their entirety, does not contain sufficient detail to render the district court's decision capable of meaningful review on appeal. See King v. U.S. Dept. of Justice, 830 F.2d 210, 218 (D.C.Cir.1987). It is

FURTHER ORDERED that the portion of the case pertaining to the information withheld by the FBI be remanded for further proceedings in accordance with this court's direction in Proctor v. United States Department of Justice, et al., Nos. 91-5305, et al. (D.C.Cir. Dec. 9, 1992) (case remanded based on FBI's representation that it intended to file a revised Vaughn index).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C.Cir.Rule 15.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS DCT

Thomas FARESE, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.

Civ. A. No. 83-0938.

United States District Court,
District of Columbia.

Dec. 22, 1987.

On remand from the Court of Appeals, 826 F.2d 129 (memorandum decision), and Freedom of Information Act case, the District Court, John Garrett Penn, J., held that documents relating to witness protection program were exempt from disclosure as documents compiled for law enforcement purposes.

Ordered accordingly.

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Material relating to witness protection funding of several individuals who cooperated with the government in criminal law enforcement process and identifying individual who would be subject to unwarranted public attention, harassment, and criticism for having been associated with an official criminal investigation of the document where disclosed were exempt from disclosure under the Freedom of Information Act as documents compiled for law enforcement purposes. 5 U.S.C.A. § 552(b)(7)(C).

***274** Thomas Farese, pro se.

Patricia Carter, Asst. U.S. Atty., Washington, D.C., for defendants.

MEMORANDUM

JOHN GARRETT PENN, District Judge.

The plaintiff filed this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The case is now before the Court on the motion to dismiss filed by the United States Marshals Service (USMS). After giving careful consideration to the motion, the opposition thereto, and the record in this case, the Court concludes that the motion should be granted.

This Court had entered an opinion and order granting the motions filed by the various defendants and dismissing the case. The Court of Appeals affirmed in part and reversed in part. See Farese v. United States Department of Justice, 826 F.2d 129 (D.C.Cir.1987) (Memorandum and Order). The appellate court affirmed with respect to all agencies named as defendants except for USMS and the Federal Bureau of Investigation. The present motion relates only to the USMS.

With respect to the plaintiff's request addressed to the USMS, the Court of Appeals noted that the plaintiff had limited his claim to eleven pages being withheld by USMS. The agency had contended that the documents are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(6) ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy") and (7)(C) ("investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would ... constitute am unwarranted invasion of personal privacy") (Exemptions 6 and 7C).

The appellate court noted that USMS "neither submitted a Vaughn index to the eleven pages nor offered any more specific justification for the withholding of the documents." Court of Appeals Memorandum at 11. The court noted further that "[t]he mere fact that Farese was not referred to in the documents is not a reasonable basis for refusing to release the documents; indeed, the record indicates that Farese had requested documents referring to a named third party." Id.

In the present motion, captioned "Motion to Dismiss", but perhaps better described as a motion for partial summary judgment, USMS has filed two affidavits by Florastine P. Graham, Freedom of Information/Privacy Officer of the USMS. Ms. Graham has identified the eleven pages, setting forth their dates. After reading the Graham Affidavit dated October 20, 1987, and the attachments thereto [FN1], the Court is satisfied that the documents were compiled for law enforcement purposes. Ten of the pages relate to witness protection funding of several third party individuals who cooperated with the government in the criminal law enforcement process and one page relates to another third party

individual. The one page refers to the *275 name, identifying data and arrest history of a third party individual. There is no reference to the plaintiff in the document. Ms. Graham notes that the disclosure of the document would subject the person to unwarranted public attention, harassment and criticism for having been associated with an official criminal investigation.

FN1. See in particular an earlier Graham Affidavit dated September 21, 1984 in which she describes the documents and states that they were compiled for law enforcement purposes. The September 21, 1984 affidavit was filed in Case No. 84-6179-CIV-JAG, United States District Court for the Southern District of Florida.

The remaining ten pages contain similar information reflecting "the names of several Witness Security Program participants, their entry dates into the Program, the number of family members, and the specific funds authorized and disbursed for the different services provided for the physical security of these witnesses and their families." Ms. Graham states that only three of the pages refer to a protected witness previously referred by name by the plaintiff. She goes on to note that the disclosure of the pages would reveal the identities of several persons who cooperated with the government in criminal law enforcement activities.

Nothing in the record of this case suggests that the Graham Affidavits are submitted in bad faith. Moreover, the Court can discern no public interest in disclosure which would outweigh the privacy interest in nondisclosure of the documents.

The plaintiff contends that the affidavits fail to fall within the standard required in these cases. This Court disagrees. USMS has described the documents and given the date of each document. The agency has set forth the nature of the documents and stated why the documents should be exempt from disclosure.

After weighing the above factors, the Court concludes that the USMS motion should be granted. There is simply no basis on which the Court can disagree with the defendant's contention that release of the documents would pose a possible danger to the persons named therein, or that release of the information might subject those persons to harassment. The potential danger is highlighted by the fact that the persons named therein participated with the government in criminal law enforcement and participated in the Witness Security Program.

The motion filed by USMS is granted and an appropriate order has been entered.

END OF DOCUMENT

Ricky DURHAM, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

Civ. A. No. 91-2636 (CRR).

United States District Court, District of Columbia.

Aug. 17, 1993.

Prisoner convicted of murdering former Postal Service carrier sought records pertaining to carrier's murder from Executive Office for United States Attorneys (EOUSA) under Freedom of Information Act (FOIA). EOUSA moved for summary judgment. The District Court, Charles R. Richey, J., held that: (1) documents prepared by attorneys and other government personnel working under prosecuting attorney's direction and supervision in prisoner's criminal case fell within FOIA exemption for interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, and (2) prisoner was not entitled to waiver of fees under FOIA.

Motion granted.

[1] FEDERAL CIVIL PROCEDURE ⇦ 2539
170Ak2539
District court would accept Executive Office for United States Attorneys' (EOUSA) uncontradicted factual assertions, regarding withheld documents' contents, as true with respect to EOUSA's motion for summary judgment in Freedom of Information Act (FOIA) action filed by prisoner, convicted of murder, seeking records pertaining to homicide; prisoner failed to submit his own affidavits or other documentary evidence to contradict EOUSA's factual assertions, declarations submitted by EOUSA were detailed and nonconclusory, and there was no evidence in the record that agency was acting in bad faith. 5 U.S.C.A. § 552; Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[2] RECORDS ⇦ 31
326k31
Prisoner could not receive records under Privacy Act pertaining to homicide for which he was convicted since information prisoner requested was contained in criminal law enforcement records and such information was exempt under Act. 5 U.S.C.A. § 552a(j)(2).

[3] RECORDS ⇦ 57
326k57
Freedom of Information Act (FOIA) exemption for materials related to internal personnel rules and practices of agency permits withholding of information when disclosure would permit circumvention of statute or agency regulation. 5 U.S.C.A. § 552(b)(2).

[4] RECORDS ⇦ 57
326k57
Symbol numbers of informants fall within Freedom of Information Act (FOIA) exemption for materials related to internal personnel rules and practices of agency. 5 U.S.C.A. § 552(b)(2).

[5] RECORDS ⇦ 57
326k57
Prisoner convicted of murder was not entitled under Freedom of Information Act (FOIA) to symbol number of informant used in murder investigation since informant's symbol number fell within FOIA exemption for internal personnel rules and practices of agency. 5 U.S.C.A. § 552(b)(2).

[6] GRAND JURY ⇦ 41.30
193k41.30
The 355 pages of grand jury records, consisting of 256 pages of transcripts of grand jury testimony, 96 grand jury subpoenas, two letters to grand jury witnesses and one page draft memo from grand jury foreman requesting evidence for inspection by grand jury, were within reach of grand jury secrecy rule since these records would enable identification of witnesses or jurors and would show substance of testimony and direction of murder investigation and thus, these records fell within Freedom of Information Act (FOIA) exemption for matters specifically exempted from disclosure by statute. 5 U.S.C.A. § 552(b)(3); Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

[7] GRAND JURY ⇦ 41.30
193k41.30
Grand jury rule pertaining to recording and disclosure of proceedings prohibits disclosure of grand jury records which would tend to reveal some secret aspect of grand jury's investigation, such as identities of witnesses or jurors, substance of

testimony, strategy or direction of investigation and deliberations or questions of jurors. Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

[8] RECORDS ⇐ 55
326k55
Certificate of official record, prepared by Internal Revenue Service employee, regarding individual income tax account of third-party taxpayer, and pages containing printed transcripts of account information of third-party taxpayer, including taxpayer's name, address, social security number, adjusted gross income, taxable income and exemptions, fell within reach of statute limiting disclosure of tax return information and thus, these documents fell within Freedom of Information Act (FOIA) exemption for matters specifically exempted from disclosure by statute. 26 U.S.C.A. § 6103(a), (b)(1, 2); 5 U.S.C.A. § 552(b)(3).

[9] RECORDS ⇐ 57
326k57
Freedom of Information Act (FOIA) exemption, for interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, encompasses all civil discovery rules and includes records not discoverable in litigation due to attorney work product privilege and, thus, any document prepared in anticipation of litigation. 5 U.S.C.A. § 552(b)(5).

[10] FEDERAL CIVIL PROCEDURE ⇐ 1600(3)
170Ak1600(3)
Attorney work product privilege exists even where information has been shared with third party so long as party holds a common interest.

[11] RECORDS ⇐ 57
326k57
Prisoner convicted of murder was not entitled under Freedom of Information Act (FOIA) to documents prepared by attorneys and other government personnel working under prosecuting attorney's direction and supervision in prisoner's criminal case since documents fell within FOIA exemption for interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency; documents reflected trial preparation, trial strategy, interpretations and personal evaluations and opinions regarding events pertinent to criminal case. 5 U.S.C.A. § 552(b)(5).

[12] RECORDS ⇐ 60
326k60
Prisoner convicted of murder was not entitled under Freedom of Information Act (FOIA) to names of third parties mentioned in Executive Office for United States Attorneys' (EOUSA) investigatory files regarding murder of former Postal Service carrier and names and initials of employees and special agents of Federal Bureau of Investigation (FBI), names of Postal Service inspectors and clerical employees of EOUSA since this information fell within FOIA provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of personal privacy; although names of these individuals were of interest to prisoner, they were not of interest to the general public and the personal privacy interests far outweighed the public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[13] RECORDS ⇐ 64
326k64
Freedom of Information Act (FOIA) provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of personal privacy requires balancing of named individual's personal privacy interest and interest of the public in disclosure of information. 5 U.S.C.A. § 552(b)(7)(C).

[14] RECORDS ⇐ 50
326k50
Goal of Freedom of Information Act (FOIA) is to permit the public to scrutinize activities of government; it is not intended to foster dissemination of information gathered by government about private citizens for use of other citizens. 5 U.S.C.A. § 552.

[15] RECORDS ⇐ 60
326k60
Law enforcement agencies are "sources" within meaning of Freedom of Information Act (FOIA) provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to disclose identity of confidential "sources" or information furnished by confidential "sources." 5 U.S.C.A. § 552(b)(7)(D).

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

[16] RECORDS ⇐ 60
326k60
Records containing identities of private citizens and law enforcement authorities who provided information under assurances of confidentiality to Executive Office for United States Attorneys (EOUSA), in connection with murder investigation of former Postal Service carrier, and information provided by confidential sources that could enable identification of those sources were exempt from disclosure under Freedom of Information Act (FOIA) provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to disclose identity of confidential source or information furnished by confidential source. 5 U.S.C.A. § 552(b)(7)(D).

[17] RECORDS ⇐ 60
326k60
Prisoner convicted of murder of former Postal Service carrier was not entitled under Freedom of Information Act (FOIA) to names of, and information that could be used to identify, third parties since names and information fell within FOIA provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to endanger the life or physical safety of any individual; third parties had knowledge about murder and some had requested placement in Federal Witness Protection Program and given prisoner's past violent behavior, disclosure of identity, or information enabling identification, of individuals who assisted government in its case against prisoner could reasonably endanger their lives. 5 U.S.C.A. § 552(b)(7)(F).

[18] RECORDS ⇐ 68
326k68
Person requesting waiver of fees under Freedom of Information Act (FOIA) has initial burden of identifying the public interest in the information. 5 U.S.C.A. § 552(a)(4)(A)(iii).

[19] RECORDS ⇐ 68
326k68
Prisoner convicted of homicide of former Postal Service carrier was required under Freedom of Information Act (FOIA) to pay costs for copying 2,340 pages of public court records, absent showing of how it was in the public interest for Executive Office of United States Attorneys (EOUSA) to provide him with free copies of documents that were easily accessible and available to everyone else for a fee. 5 U.S.C.A. § 552(a)(4)(A)(iii).

[20] RECORDS ⇐ 68
326k68
Indigency alone does not constitute adequate grounds for waiver of fees under Freedom of Information Act. 5 U.S.C.A. § 552(a)(4)(A)(iii).

***430** Ricky Durham, pro se.

David L. Dougherty, Dept. of Justice, Civ. Div., with J. Ramsey Johnson, U.S. Atty., and John D. Bates, Asst. U.S. Atty., for defendant.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

Before the Court are the Defendant's Motion for Summary Judgment and the Plaintiff's Cross-Motion for Summary Judgment in this case under Freedom of Information Act ("FOIA"). 5 U.S.C. § 552. [FN1] After consideration of the filings by both parties, the applicable law, and the record herein, the Court shall grant the Defendant's Motion.

FN1. The above-captioned action was dismissed without prejudice on August 24, 1992, because the Plaintiff indicated that records involved in this action were the same records in dispute in another FOIA action brought by the Plaintiff in which the Court granted Summary Judgment for the Defendant. See Durham v. United States Postal Service, Civil Action No. 91-2234 (D.D.C. Nov. 25, 1992) (order granting summary judgment for the Defendant), aff'd No. 92-5511, 1993 WL 301151 (D.C.Cir. July 27, 1993) (order granting summary affirmance). The Plaintiff subsequently informed the Court that the two cases were not the same and this action was reopened. All motions filed before the dismissal are now properly before the Court.

***431** I. BACKGROUND

The Plaintiff is a prisoner in jail for the homicide

of Kenneth Clark, a former Postal Service Carrier. He is requesting records pertaining to Clark's murder from the Defendant Executive Office for United States Attorneys ("EOUSA") under FOIA. He asks for all investigative records that pertain to himself relating to Clark's murder, the names of all suspects (including criminology reports on one particular suspect), and a waiver of any copying fees.

[1] In response to the Plaintiff's requests, EOUSA provided the Plaintiff with 103 pages in full. EOUSA released 62 pages with some information excised and withheld approximately 1,488 pages in full under certain FOIA Exemptions. See Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Partial Summary Judgment. The Defendant has submitted three detailed declarations which describe the documents that were withheld and indicated under which FOIA exceptions those records fall. See Defendant's Motion for Partial Summary Judgment, Declaration of Virginia L. Wright ("Wright Declaration"); Declaration of Special Agent James L. Vermeersch ("Vermeersch Declaration"); and Declaration of Mary Otto ("Otto Declaration"). [FN2]

FN2. In its Order of July 1, 1992, the Court advised the Plaintiff that he needed to submit his own affidavits or other documentary evidence to contradict the factual assertions in Defendant's Motion for Summary Judgment which were supported by documentary evidence. The Court indicated that if the Plaintiff failed to do so, the Court would adopt the Defendant's uncontradicted factual assertions as true. See Fed.R.Civ.P. 56(e); Neal v. Kelly, 963 F.2d 453, 456 (D.C.Cir.1992). To date, the Plaintiff has not submitted any affidavits or documentary evidence. The declarations submitted by the Defendant are detailed and non-conclusory, and the Court finds no evidence in the record that the agency is acting in bad faith. Therefore, the Court shall accept the Defendant's factual assertions as to their contents. See PHE, Inc. v. Department of Justice, 983 F.2d 248, 252-3 (D.C.Cir.1993).

[2] Because the Defendant has demonstrated that the withheld documents and information fall within FOIA Exemptions (b)(2), (b)(3), (b)(5), (b)(7)(C), (b)(7)(D), (b)(7)(F), the Court shall grant summary judgment for the Defendant. [FN3]

FN3. In his Complaint, the Plaintiff also requests this material under the Privacy Act of 1974, 5 U.S.C. § 552a (1988). However, the Plaintiff does not mention the Privacy Act in his other papers and the Defendants only briefly addresses that statute in their papers. The Court concludes that the Plaintiff also cannot receive the information he requested under the Privacy Act, as the information is contained in criminal law enforcement records. See Vermeersch Declaration, ¶ 21; Wright Declaration, ¶ 13. Such information is therefore exempt under 5 U.S.C. § 552a(j)(2), as implemented by 28 C.F.R. § 16.96 (1991) (FBI), and 28 C.F.R. § 16.81 (1991) (EOUSA).

II. EXEMPTION 2

[3][4][5] The Defendant invokes Exemption 2 to withhold from disclosure an informant's symbol number. [FN4] Under FOIA Exemption 2, material "related solely to the internal personnel rules and practices of an agency" is exempted from disclosure. 5 U.S.C. § 552(b)(2). Exemption 2 permits withholding of information when disclosure would permit circumvention of a statute or agency regulation. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074 (D.C.Cir.1981). It is established law that the symbol numbers of informants fall within Exemption 2. See Lesar v. Department of Justice, 636 F.2d 472, 485-86 (D.C.Cir.1980) (informant codes "plainly fall within the ambit of Exemption 2"); Watson v. United States Department of Justice, 799 F.Supp. 193, 195 (D.D.C.1992) (DEA protection of Informant Identifier codes properly withheld as internal markings). Accordingly, the Court finds that the Defendant here properly withheld the informant source numbers under FOIA Exemption 2. [FN5]

FN4. Informant symbol numbers are used both to protect the confidentiality of an informant's identity, a precaution necessary in order for the agency to maintain the ability to attract informers, and to facilitate the routing of investigative documents to the proper files. Vermeersch Declaration, ¶ 23.

FN5. The Defendant alternatively claims FOIA exemption 7(C) for the informant source number. However, as the Court finds that such information

is exempt under FOIA exemption 2, it is unnecessary to consider the applicability of 7(C).

*432 III. EXEMPTION 3

[6] The Defendant invokes Exemption 3 to justify its refusal to release 355 pages of grand jury records. Exemption 3 permits the withholding of information where:

> [a statute] requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or ... establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). The Defendant cites Rule 6(e) of the Federal Rules of Criminal Procedure as its justification for withholding "256 pages of transcripts of grand jury testimony, 96 grand jury subpoenas, 2 letters to grand jury witnesses, and a one-page draft memo from the grand jury foreman requesting evidence for inspection by the grand jury." Defendant's Motion for Partial Summary Judgment, Wright Declaration, ¶ 17.

[7] Rule 6(e) prohibits the disclosure of grand jury records which would "tend to reveal some secret aspect of the grand jury's investigation[;] such matters as 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.' " Senate of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 582 (D.C.Cir.1987) (quoting SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1382 (D.C.Cir.1980), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289); see Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C.Cir.1981). The Court agrees that the information withheld by the Defendant here would enable the identification of witnesses or jurors, and would show the substance of testimony and the direction of the investigation. Accordingly, the Court finds that the grand jury records were properly withheld under FOIA Exemption 3.

[8] In addition to the grand jury records, the Defendant has also withheld three pages of tax records under this Exemption. [FN6] The relevant statute limiting disclosure of tax return information is 26 U.S.C. § 6103(a), which provides, inter alia, that returns and return information shall be confidential, and shall not be disclosed except as authorized by that title. As the tax information refers to a person other than the Plaintiff, there is no exception in that statute for its disclosure and the Court concludes that this material was properly withheld by the Defendant under this Exemption.

FN6. "Return information," as defined in 26 U.S.C. § 6103(b)(1)(2), encompasses the types of information included here. These records are a Certificate of Official Record, prepared by an Internal Revenue Service employee, regarding the individual income tax account of a third-party taxpayer; and two pages containing printed transcripts of account information of a third-party taxpayer including the taxpayer's name, address, social security number, adjusted gross income, taxable income, and exemptions. Otto Declaration, ¶¶ 8, 11.

IV. EXEMPTION 5

[9][10][11] The Defendant has invoked Exemption 5 to protect 507 pages of documents as work-product prepared by attorneys and other government personnel working under the prosecuting attorney's direction and supervision in the Defendant's criminal case. Wright Declaration, ¶ 18. [FN7] Exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. § 552(b)(5). The Exemption encompasses "all civil discovery rules," Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C.Cir.1987), and has been held to extend to criminal matters as well as civil. See Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir.1983). The Exemption includes records not discoverable in litigation due to attorney work-product privilege, see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, 95 S.Ct. 1504, 1515-16, 44 L.Ed.2d 29 (1975), and thus any document prepared in anticipation of *433 litigation. See Hickman v. Taylor, 329 U.S. 495, 509-10, 67 S.Ct. 385, 392-93, 91 L.Ed. 451 (1947). The work-product privilege exists even where the information has been shared with a third party so long as the party holds a common interest with the agency. See United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299 (D.C.Cir.1980).

FN7. Such documents include 1) a potential witness

list, 2) interviews, 3) telephone messages, 4) opening and closing arguments, 5) trial notes, 6) evidentiary notes, 7) internal memoranda relating to the use of grand jury testimony and potential witness trial testimony, 8) letters to other Federal agencies and Departmental components regarding third-parties and their safety, and 9) draft pleadings. Wright Declaration, ¶¶ 18, 19.

The Defendant here represents that the materials withheld under this Exemption "reflect trial preparation, trial strategy, interpretations and personal evaluations and opinions regarding events pertinent to the criminal litigation in United States v. Ricky Durham." Wright Declaration, ¶ 19. As the documents withheld by the Defendant would not be available to a party in litigation with the Defendant agency, the Court concludes that these documents were properly withheld under FOIA Exemption 5. [FN8]

FN8. The Defendant claims that the documents are also protected under Exemptions 7(C), 7(D), and 7(F). However, as the Court finds that the records properly fall under Exemption 5, it need not reach the alternate claim.

V. EXEMPTIONS 7(C), (D), AND (F)

Pursuant to Exemption 7, the Defendant has withheld the names of confidential sources, agents, agency employees, and third parties mentioned in its investigatory files, and withheld 594 pages of records which it asserts contain information provided by confidential sources that might reveal their identities. Wright Declaration, ¶¶ 20, 22, 24; Vermeersch Declaration, ¶¶ 26, 36.

To qualify under Exemption 7, a document must 1) have been "compiled for law enforcement purposes" and 2) fall into one of six categories enumerated by that section. 5 U.S.C. § 552(b)(7). The Defendant maintains that it compiled the information in the course of investigating the Plaintiff for the murder of the Postal Service employee, Kenneth Clark; for unlawful flight to avoid prosecution; and for drug trafficking. Wright Declaration, ¶ 12; Vermeersch Declaration, ¶¶ 15, 16. Therefore, the Court concludes that the Defendant has demonstrated that this material meets the first requirement that it was "compiled for law enforcement purposes."

As to the second prong, the Defendant claims that the withheld material here falls under 7(C), 7(D), and 7(F); the Court will consider each claim separately.

A. EXEMPTION 7(C)

[12] Under Exemption 7(C), the Defendant has withheld 29 pages of information to protect the names of third parties mentioned in its investigatory files. Vermeersch Declaration, ¶ 26; Wright Declaration, ¶ 20. Exemption 7(C) provides protection when the investigatory material "could reasonably be expected to constitute an unwarranted invasion of personal privacy...." 5 U.S.C. § 552(b)(7)(C).

[13][14] Exemption 7(C) requires a balancing of the named individual's personal privacy interest and the interest of the public in the disclosure of the information. United States Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989); Stern v. FBI, 737 F.2d 84, 91 (D.C.Cir.1984). "It is generally recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." Branch v. FBI, 658 F.Supp. 204, 209 (D.D.C.1987); see also Lesar, 636 F.2d at 488. The names of these individuals, while perhaps of interest to the Plaintiff, are not of interest to the general public. See Simon v. United States Department of Justice, 752 F.Supp. 14, 19, n. 5 (D.D.C.1990). Further, the goal of FOIA is to permit the public to scrutinize the activities of government; it is not intended to foster the dissemination of information gathered by the government about private citizens for the use of other citizens. KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir.1990).

The Defendant has also cited this Exemption to withhold the names and initials of employees and Special Agents of the FBI, the names of Postal Service Inspectors, and clerical employees of EOUSA. Vermeersch Declaration, ¶ 29; Wright Declaration, ¶ 20. Exemption 7(C) has been widely held to apply to the identities of federal, state and local law enforcement personnel mentioned in investigatory *434 files to protect such individuals from the potential harassment that could result from

disclosure. See Lesar, 636 F.2d at 487-88; Johnson v. United States Department of Justice, 739 F.2d 1514, 1518-19 (10th Cir.1984); New England Apple Council, Inc. v. Donovan, 725 F.2d 139, 142 (1st Cir.1984); Nix v. United States, 572 F.2d 998, 1006 (4th Cir.1978).

For all these reasons, the Court concludes that the private privacy interests far outweigh the public interest in disclosure, and the Defendant properly withheld this information under Exemption 7(C).

B. EXEMPTION 7(D)

[15][16] The Defendant withheld 594 pages of records under this Exemption which it asserts contain 1) the identities of private citizens and law enforcement authorities who provided information to the Defendant under assurances of confidentiality, and 2) information provided by confidential sources that may enable identification of those sources. Wright Declaration, ¶ 22; Vermeersch Declaration, ¶ 36. [FN9]

FN9. Law enforcement agencies are "sources" within the meaning of 5 U.S.C. § 552(b)(7)(D). See Shaw v. Federal Bureau of Investigation, 749 F.2d 58, 62; Weisberg v. United States Department of Justice, 745 F.2d 1476, 1492 (D.C.Cir.1984); Lesar, 636 F.2d at 491.

Exemption 7(D) provides protection for investigatory material which "could reasonably be expected to disclose the identity of a confidential source, ... or ... information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). The Defendant has indicated, and the Plaintiff has not contested, that the exchange of confidential information will be jeopardized if such confidentiality were breached, which in turn would cause damage to the agencies' ability to perform their tasks. Vermeersch Declaration, ¶ 39, Wright Declaration, ¶ 23. See Lesar, 636 F.2d at 491. Furthermore, the identity of a source is protected if, as is the case here, the source provides information under an express promise of confidentiality or under circumstances under which such a promise could be inferred. See Schmerler v. FBI, 900 F.2d 333, 337 (D.C.Cir.1990).

Accordingly, the Court concludes that these materials were properly withheld under Exemption 7(D).

C. EXEMPTION 7(F)

[17] The Defendant invokes this Exemption to delete the names of, and information that may be used to identify, third-parties. Wright Declaration, ¶ 24. Exemption 7(F) provides that investigatory information need not be disclosed if it "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The Defendant alleges, and the Plaintiff does not refute, that these third-parties have knowledge about the crime in which the Plaintiff was involved, and that some have requested placement in the Federal Witness Protection Program. Given the Plaintiff's past violent behavior, the Court agrees with the Government that disclosure of the identity, or information enabling identification, of the individuals who assisted the government in its case against the Plaintiff could reasonably endanger their lives or physical safety. Accordingly, the Court finds that this material was properly withheld by the Defendant pursuant to this Exemption.

VI. PUBLIC RECORDS

[18][19][20] Finally, the Plaintiff has requested that the Defendant provide him with copies of 2,340 pages of public court records and to waive the copying fees because he is indigent. Even assuming, arguendo, that these records are subject to FOIA, the Plaintiff is not entitled to a waiver of the copying costs. FOIA provides for a waiver of fees where it is determined that disclosure is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). The requester of the waiver has the "initial burden of identifying the public interest" in the information. National Treasury Employees Union v. Griffin, 811 F.2d 644, 647 (D.C.Cir.1987). The Plaintiff has failed to identify how it is in the public interest for the Defendant to provide him with free copies of documents that are easily accessible and available to everyone *435 else for a fee. [FN10] Accordingly, the Court determines that the Defendant is not required to provide the Plaintiff with copies of these court documents unless the Plaintiff remits the

requisite fees.

FN10. The Court also notes that indigency alone does not constitute adequate grounds for a fee waiver. See Ely v. United States Postal Service, 753 F.2d 163, 165 (D.C.Cir.1985).

VII. CONCLUSION

Upon consideration of the Defendant's Motion for Summary Judgment, the Plaintiff's Cross-Motion for Summary Judgment, and the applicable law, the Court finds that the Defendant is entitled to Judgment against the Plaintiff. The Court shall issue an order of even date herewith consistent with the foregoing Memorandum Opinion.

ORDER

Upon consideration of the Defendant's Motion for Summary Judgment, the Plaintiff's Cross-Motion for Summary Judgment, and the applicable law, the record herein, and for the reasons articulated in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 17th day of August, 1993,

ORDERED that the Defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Plaintiff's Cross-Motion for Summary Judgment shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that all other outstanding motions in the above-captioned case shall be, and are hereby, rendered MOOT; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS CFR

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Current through August 31, 1995; 60 FR 45646

s 16.4 Responses by Components to Requests.

(a) In General. Except as otherwise provided in this section, the component that: (1) First receives a request for a record; and (2) has possession of the requested record is the component ordinarily responsible for responding to the request.

(b) Authority to Grant or Deny Requests. The head of a component, or his designee, is authorized to grant or deny any request for a record of that component.

(c) Initial Action by the Receiving Component. When a component receives a request for a record in its possession, the component shall promptly determine whether another component, or another agency of the Government, is better able to determine: (1) Whether the record is exempt, to any extent, from mandatory disclosure under the FOIA; and (2) whether the record, if exempt to any extent from mandatory disclosure under the FOIA, should nonetheless be released to the requester as a matter of discretion. If the receiving component determines that it is the component or agency best able to determine whether or not to disclose the record in response to the request, then the receiving component shall respond to the request. If the receiving component determines that it is not the component or agency best able to determine whether or not to disclose the record in response to the request, the receiving component shall either:

(i) Respond to the request, after consulting with the component or other agency best able to determine whether or not to disclose the record and with any other component or agency having a substantial interest in the requested record or the information contained therein; or

(ii) Refer the responsibility for responding to the request to the component best able to determine whether or not to disclose the record, or to another agency that generated or originated the record, but only if that other component or agency is subject to the provisions of the FOIA.

Under ordinary circumstances, the component or agency that generated or originated a requested record shall be presumed to be the component or agency best able to determine whether or not to disclose the record in response to the request. However, nothing in this section shall prohibit a component that generated or originated a requested record from referring the responsibility for responding to the request to another component, if the component that generated or originated the requested record determines that the other component has a greater interest in the requested record or the information contained therein.

(d) Law Enforcement Information. Whenever a request is made for a record containing information which relates to an investigation of a possible violation of criminal law or to a criminal law enforcement proceeding and which was generated or originated by another component or agency, the receiving component shall refer the responsibility for responding to the request to that other component or agency; however, such referral shall extend only to the information generated or originated by that other component or agency.

(e) Classified Information. Whenever a request is made for a record containing information which has been classified, or which may be eligible for classification, by another component or agency under the provisions of Executive Order 12356 or any other Executive Order concerning the classification of records, the receiving

component shall refer the responsibility for responding to the request to the component or agency that classified the information or should consider the information for classification. Whenever a record contains information that has been derivatively classified by a component because it contains information classified by another component or agency, the component shall refer the responsibility for responding to the request to the component or agency that classified the underlying information; however, such referral shall extend only to the information classified by the other component or agency.

(f) Notice of Referral. Whenever a component refers all or any part of the responsibility for responding to a request to another component or to another agency, it ordinarily shall notify the requester of the referral and inform the requester of the name and address of each component or agency to which the request has been referred and the portions of the request so referred.

(g) Agreements Regarding Consultations and Referrals. No provision of this section shall preclude formal or informal agreements between components, or between a component and another agency, to eliminate the need for consultations or referrals of requests or classes of requests.

(h) Separate Referrals of Portions of a Request. Portions of a request may be referred separately to one or more components or to one or more other agencies whenever necessary to process the request in accordance with the provisions of this section.

(i) Processing of Requests that Are Not Properly Addressed. A request that is not properly addressed as specified in s 16.3(a) of this subpart shall be forwarded to the FOIA/PA Section, Justice Management Division, which shall forward the request to the appropriate component or components for processing. A request not addressed to the appropriate component will be deemed not to have been received by the Department of Justice until the FOIA/PA Section has forwarded the request to the appropriate component and that component has received the request, or until the request would have been so forwarded and received with the exercise of reasonable diligence by Department personnel. A component receiving an improperly addressed request forwarded by the FOIA/PA Section shall notify the requester of the date on which it received the request.

(j) Date for Determining Responsive Records. In determining records responsive to a request, a component ordinarily will include only those records within the component's possession and control as of the date of its receipt of the request.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT > >

Source: 49 FR 12254, March 29, 1984, unless otherwise noted.

28 C. F. R. s 16.4

28 CFR s 16.4

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Current through August 31, 1995; 60 FR 45646

s 16.5 Form and content of component responses.

(a) Form of Notice Granting a Request. After a component has made a determination to grant a request in whole or in part, the component shall so notify the requester in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record to the requester or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection shall not unreasonably disrupt the operations of the component. The component shall inform the requester in the notice of any fees to be charged in accordance with the provisions of s 16.10 of this subpart.

(b) Form of Notice Denying a Request. A component denying a request in whole or in part shall so notify the requester in writing. The notice must be signed by the head of the component, or his designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the component has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under s 16.8(a) and a description of the requirements of that subsection.

(c) Record Cannot be Located or Has Been Destroyed. If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the component shall so notify the requester in writing.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT > >

Source: 49 FR 12254, March 29, 1984, unless otherwise noted.

28 C. F. R. s 16.5

28 CFR s 16.5

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Current through August 31, 1995; 60 FR 45646

s 16.8 Appeals.

(a) Appeals to the Attorney General. When a request for access to records or for a waiver of fees has been denied in whole or in part, or when a component fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to the Attorney General within 30 days of his receipt of a notice denying his request. An appeal to the Attorney General shall be made in writing and addressed to the Office of Information and Privacy, United States Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530. Both the envelope and the letter of appeal itself must be clearly marked: "Freedom of Information Act Appeal." An appeal not so addressed and marked will be forwarded to the Office of Information and Privacy as soon as it is identified. An appeal that is improperly addressed will be deemed not to have been received by the Department until the Office of Information and Privacy receives the appeal, or would have done so with the exercise of reasonable diligence by Department personnel.

(b) Action on Appeals by the Office of Information and Privacy. Unless the Attorney General otherwise directs, the Director, Office of Information and Privacy, under the supervision of the Assistant Attorney General, Office of Legal Policy, shall act on behalf of the Attorney General on all appeals under this section, except that:

(1) In the case of a denial of a request by the Assistant Attorney General, Office of Legal Policy, the Attorney General or his designee shall act on the appeal, and

(2) A denial of a request by the Attorney General shall constitute the final action of the Department on that request.

(c) Form of Action on Appeal. The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT > >

Source: 49 FR 12254, March 29, 1984, unless otherwise noted.

28 C. F. R. s 16.8

28 CFR s 16.8

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART B--PRODUCTION OR DISCLOSURE IN FEDERAL AND STATE PROCEEDINGS

Current through August 31, 1995; 60 FR 45646

s 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),

(2) Disclosure would violate a specific regulation,

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection,

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

(c) In all cases not involving considerations specified in paragraphs (b)(1)-(b)(6) of this section, the Deputy or Associate Attorney General will authorize disclosure unless, in that person's judgment, after considering paragraph (a) of this section, disclosure is unwarranted. The Deputy or Associate Attorney General will not approve disclosure if the circumstances specified in paragraphs (b)(1)-(b)(3) of this section exist. The Deputy or Associate Attorney General will not approve disclosure if any of the conditions in paragraphs (b)(4)-(b)(6) of this section exist, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. In this regard, if disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, consideration shall be given to:

(1) The seriousness of the violation or crime involved,

(2) The past history or criminal record of the violator or accused,

(3) The importance of the relief sought,

(4) The importance of the legal issues presented,

(5) Other matters brought to the attention of the Deputy or Associate Attorney General.

(d) Assistant Attorneys General, United States attorneys, the Director of the EOUST, United States trustees, and their designees, are authorized to issue instructions to attorneys and to adopt supervisory practices, consistent with this subpart, in order to help foster consistent application of the foregoing standards and the requirements of this subpart.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART B--PRODUCTION OR DISCLOSURE IN FEDERAL AND STATE PROCEEDINGS > >

Source: Order No. 919-80, 45 FR 83210, Dec. 18, 1980, unless otherwise noted.

28 C. F. R. s 16.26

28 CFR s 16.26

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96

INSTA-CITE

CITATION: 999 F.2d 1302

Direct History

1 In re Department of Justice, 950 F.2d 530, 60 USLW 2377 (8th Cir.(Mo.), Dec 02, 1991) (NO. 91-2080, 91-2164), rehearing granted and opinion vacated (Feb 12, 1992) (Additional Negative Indirect History)
On Rehearing
=> 2 **In re Department of Justice,** 999 F.2d 1302, 62 USLW 2105 (8th Cir.(Mo.), Aug 05, 1993) (NO. 91-2080, 91-2164)
Certiorari Denied by
3 Crancer v. Department of Justice, 114 S.Ct. 1186, 127 L.Ed.2d 537, 62 USLW 3571, 62 USLW 3573 (U.S., Feb 28, 1994) (NO. 93-700)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS ALLFEDS
YOUR TERMS AND CONNECTORS QUERY:

326K! /P EXIST! /S RECORD /S REQUEST!

Leona WEBER, Plaintiff-Appellant,
v.
T. R. CONEY, U.S. Marshall, and J. A. "Tony" Canales, U.S. Attorney, etc., Defendants-Appellees.

No. 80-1656
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 9, 1981.

In Freedom of Information Act case, the United States District Court for the Southern District of Texas, Hugh Gibson, J., granted summary judgment in favor of the government, and plaintiff appealed. The Court of Appeals held that: (1) plaintiff did not make the required strong showing of necessity so as to be entitled to a writ of mandamus commanding district judges to vacate a docket entry transferring her case from one division to another; (2) plaintiff was not entitled to a de novo hearing on her complaint; (3) government's failure to answer the complaint within 30 days did not entitle plaintiff to a default judgment; and (4) district court properly granted government's motion for summary judgment, where government submitted affidavits that all the records in its possession had been delivered to plaintiff and plaintiff did not submit any affidavit or other response to the government's affidavits.

Affirmed.

[1] MANDAMUS ⇐ 1
250k1
Mandamus is an extraordinary remedy as it lies only to confine a lower court within its jurisdiction or to compel it to perform ministerial, not discretionary, functions.

[1] MANDAMUS ⇐ 27
250k27
Mandamus is an extraordinary remedy as it lies only to confine a lower court within its jurisdiction or to compel it to perform ministerial, not discretionary, functions.

[2] MANDAMUS ⇐ 168(4)
250k168(4)
Plaintiff in Freedom of Information Act case failed to make the required strong showing of necessity so as to be entitled to a writ of mandamus commanding district judges to vacate docket entry transferring her case from one division to another.

[3] JUDGES ⇐ 51(2)
227k51(2)
In Freedom of Information Act case, plaintiff's motion to disqualify judge, which was filed about one year after the case was assigned to the judge, about four months after the case was transferred to another judge, and three days after the second judge rendered a final judgment, was untimely, moot and frivolous. 28 U.S.C.A. §§ 144, 1391(e)(4), 1404.

[4] FEDERAL COURTS ⇐ 101
170Bk101
District court has wide discretion to determine whether to transfer venue for the convenience of parties and in the interest of justice. 28 U.S.C.A. § 1404.

[5] FEDERAL COURTS ⇐ 92
170Bk92
In Freedom of Information Act case, district court did not abuse its discretion in transferring the case from one division to another within the same district. 5 U.S.C.A § 552(a)(4)(B); 28 U.S.C.A. § 1404.

[6] FEDERAL COURTS ⇐ 95
170Bk95
Plaintiff's voluntary appearance in Freedom of Information Act action waived the defects, if any, as to venue. 5 U.S.C.A. § 552(a)(4)(B); 28 U.S.C.A. § 1404.

[7] RECORDS ⇐ 68
326k68
Formerly 326k67
In a Freedom of Information Act case award of attorney fees is not automatic but is left to the sound discretion of the trial court.

[8] RECORDS ⇐ 68
326k68
Formerly 326k67
Having dismissed plaintiff's Freedom of Information Act action and taxed its costs against her, district court did not abuse its discretion in denying her

claim for attorney fees.

[9] RECORDS ⇐ 63
326k63
Plaintiff was not entitled to de novo hearing on her Freedom of Information Act complaint, where the government denied the **existence** of any **requested records.** 5 U.S.C.A. § 552(a)(4)(B).

[10] FEDERAL CIVIL PROCEDURE ⇐ 2415
170Ak2415
Government's failure to file an answer to Freedom of Information Act complaint within 30 days did not entitle plaintiff to a default judgment, where government sought and obtained an extension of time to answer, after which it filed a motion for summary judgment which was granted. 5 U.S.C.A. § 552(a)(4)(C).

[11] FEDERAL CIVIL PROCEDURE ⇐ 2539
170Ak2539
District court properly granted government's motion for summary judgment in Freedom of Information Act case, where government filed affidavits indicating that all records in its possession had been delivered to plaintiff and plaintiff chose not to submit any affidavit or other response to the government's affidavits. Fed.Rules Civ.Proc. Rule 56(e), 28 U.S.C.A.

***92** Leona Weber, pro se.

J. A. "Tony" Canales, U. S. Atty., Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, RUBIN and RANDALL, Circuit Judges.

PER CURIAM:

Some months ago appellant Weber requested, under the Freedom of Information Act (FOIA), a copy of all records kept by the United States Marshall and the "U.S. Justice Department" at Houston, Texas. Receiving replies that she deemed unsatisfactory, she filed suit, pro se, seeking injunctive relief directing defendants to disclose the requested information. The government's oral motion for an extension of time until January 1, 1979, in which to answer was granted on October 27, 1978. On December 29, 1978, the government filed a motion to dismiss or for summary judgment. After a hearing, the motion was granted. On this appeal, she seeks relief of various kinds. We deal with her claims seriatim.

I. Writ of Mandamus.

In her brief to us, Ms. Weber petitions the court to issue a writ of mandamus commanding District Judges Black and Gibson to vacate a docket entry transferring her case from Houston to the Galveston Division. She contends that Judge Black should be disqualified from hearing her case, that her case was improperly transferred by Judge Black to Judge Gibson's court in Galveston, that Judge Gibson's court lacks subject-matter jurisdiction, and that the judgment does not terminate the action because Judge "Gibson refuse(d) to hear the remaining issues."

[1][2] Mandamus is an extraordinary remedy that lies only to confine a lower court within its jurisdiction or to compel it to perform ministerial, not discretionary, functions. In re Evans, 524 F.2d 1004, 1007 (5th Cir. 1975). We have uniformly declined to issue the writ except upon a strong showing of necessity for its use. Steward v. West, 449 F.2d 324, 325 (5th Cir. 1971). For the reasons given below, such a showing has not been made here.

A. Disqualification of Judge Black.

[3] Ms. Weber's complaint to us that Judge Black should have disqualified himself in the case is wide of the mark in several respects. It is untimely because she filed the motion to disqualify about one year after the case was assigned to Judge Black, about four months after the case was transferred to Judge Gibson, and three days after Judge Gibson rendered a final judgment. See 28 U.S.C. s 144. It is moot and ***93** frivolous because Judge Black did not decide her case.

B. Improper Transfer and Subject-Matter Jurisdiction.

[4][5][6] Next Ms. Weber contends, in essence, that the Gibson court lacked jurisdiction because a venue statute or local rule was violated in assigning

the case there. Neither statute nor rule is jurisdictional. The FOIA places jurisdiction in the judicial district where complainant resides, not to particular courts within that district. 5 U.S.C. s 552(a)(4)(B). Any district court in the Southern District of Texas would have had jurisdiction to hear the complaints and proper venue under 28 U.S.C. s 1391(e)(4) or s 1404. Ms. Weber misconstrues section 1404. That section clearly provides that, for the convenience of parties and in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. Ms. Weber's action might have been brought in the Galveston Division. Moreover, the district court has wide discretion to determine whether to transfer for the convenience of parties and in the interest of justice. Bearden v. United States, 320 F.2d 99, 101 (5th Cir. 1963), cert. denied, 376 U.S. 922, 84 S.Ct. 679, 11 L.Ed.2d 616 (1964). Our review discerns no abuse of discretion. Finally, Ms. Weber's voluntary appearance in the action waives the defects, if any, as to venue. Murphy v. Travelers Insurance Co., 534 F.2d 1155, 1159 (5th Cir. 1976). Although she protested the venue change in general terms when she appeared before the court, she concluded by stating, "I don't really oppose the venue because I would like to have a hearing in this case." She was granted a hearing forthwith.

C. Attorney's Fees.

[7][8] Ms. Weber argues that her claim is still pending because Judge Gibson failed to adjudicate her claim for attorney fees. She is mistaken; these were necessarily denied when the court dismissed her action and taxed its costs against her and when the court denied her motion for a hearing on that express subject and others by order of June 12, 1980. Such an award is not automatic but is left to the sound discretion of the trial court. Chamberlain v. Kurtz, 589 F.2d 827, 842 (5th Cir.), cert. denied, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1979). Ms. Weber had the opportunity to present her claims and did so at the hearing before Judge Gibson and in her reply to defendants' motion for summary judgment. The record neither indicates, nor has Ms. Weber shown, any abuse of discretion.

II. Appellate Issues.

Before us Ms. Weber claims a mandatory right to a de novo hearing, that the government must file an answer to her FOIA complaint, that she is entitled to a default judgment, and that the government was not entitled to summary judgment.

[9] The FOIA provides for a de novo determination on the issue of withholding records. 5 U.S.C. s 552(a)(4)(B). However, that provision presupposes the existence of records, and here the government, by affidavits, denies the existence of any requested records. In these circumstances summary judgment was appropriate, as we discuss below.

The FOIA also provides generally that, notwithstanding any other provision of law, a defendant must serve an answer within 30 days. 5 U.S.C. s 552(a)(4) (C). The key words are "30 days," not "answer." See H.R.Rep.No.93-876 and Conf.Rep.No.93-1200, 93d Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 6267 and 6285. Ms. Weber misunderstands section 552(a)(4)(C).

[10] Nor is Ms. Weber entitled to a default judgment because the government failed to "answer" in 30 days. Under 5 U.S.C. s 552(a)(4)(C), a defendant must answer or otherwise plead within 30 days unless the court otherwise directs for good cause shown. Ms. Weber claims that the court erred in not granting her show-cause order. As pointed out above, an "answer" is not the only response permitted under the FOIA. The government sought and obtained ***94** an extension of time to answer, after which it filed a motion for summary judgment, which was granted. No "answer" was required.

[11] Ms. Weber next complains that the court erred in granting the motion for summary judgment. She contends generally that the court's order has a fatal inconsistency, that she was denied her right to take depositions, that the affidavits were defective, that the court violated Fed.R.Civ.P. 56(c) and (f), that there were fact issues in dispute, and that the hearing was "tainted." These complaints lack merit. The grant of summary judgment was correct because there was no genuine issue of material fact. All of the agencies involved stated, under oath, that all of the records in their possession had been delivered to Ms. Weber. Under Fed.R.Civ.P. 56(e), Ms. Weber may not rest on mere allegations or denials of pleadings; she must, by affidavit or other

appropriate means, set forth specific facts establishing the existence of a genuine issue for trial or at the least showing why she cannot do so. For whatever reasons, Ms. Weber chose not to submit any affidavit or other appropriate response to the government's affidavits. The granting of the motion was proper.

Finally, Ms. Weber, by separate motion, asks that her appeal take precedence on the docket. Under Local Rule 19, a writ of mandamus and a FOIA request are to be given some preference in processing and disposition, and we have sought to act expeditiously.

AFFIRMED.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS ALLFEDS
YOUR TERMS AND CONNECTORS QUERY:

326K! /P "NOT EXIST" /S DOCUMENT RECORD FILE

Jack URBAN, Appellant,
v.
UNITED STATES of America; Kansas Bureau of Investigation, Appellees.

No. 95-2386.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 6, 1995.

Decided Dec. 27, 1995.

Inmate sought results of his polygraph test under Freedom of Information Act (FOIA) from United States Attorney and was informed they did not have records. Inmate commenced action under FOIA. The United States District Court for the District of South Dakota, Richard H. Battey, Chief Judge, dismissed action as moot without requiring service on government. Inmate appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) action was not moot, and (2) United States Attorney's response was inadequate.

Reversed and remanded.

[1] RECORDS ⇦ 63
326k63
In Freedom of Information Act (FOIA) cases, mootness occurs when requested documents have already been produced, and when question is whether requested document exists, or is outside government's possession or control, FOIA action is not moot and dismissal prior to service will almost never be appropriate. 5 U.S.C.A. § 552 et seq.

[2] RECORDS ⇦ 62
326k62
Freedom of Information Act (FOIA) obligates government to produce documents within its possession or control and when government agency claims that it does not possess or control a requested document, agency must show it fully discharged its statutory obligation by conducting a search reasonably calculated to uncover all relevant documents. 5 U.S.C.A. § 552 et seq.

[3] RECORDS ⇦ 62
326k62
Under Freedom of Information Act (FOIA) request by inmate for results of his polygraph test, United States Attorney's affidavit that he did not produce requested documentation because it did **not exist** in office **files** was inadequate answer; Kansas Bureau of Investigation administered test and reported to United States Attorney, test was part of plea agreement with United States Attorney, and inmate's early requests got no response or cryptic brush off and inmate was never told why he was not entitled to **documents.** 5 U.S.C.A. § 552 et seq.

***94** Appellant was not represented by counsel.

Bonnie P. Ulrich, Assistant U.S. Attorney, Sioux Falls, South Dakota, for appellees.

Before FAGG, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

LOKEN, Circuit Judge.

South Dakota inmate Jack Urban appeals the district court's dismissal of his action to enforce a Freedom of Information Act (FOIA) request. The court dismissed Urban's complaint, prior to service, because "[n]onexistent records are impossible to produce." At least some of the requested materials almost certainly exist--the question is ***95** whether they are in the possession or control of the United States Department of Justice. Because the government has not met its burden to demonstrate that it has complied with the statute, see Miller v. United States Dep't of State, 779 F.2d 1378, 1382-83 (8th Cir.1985), we reverse.

Urban took a polygraph test in February 1994 as part of a plea agreement with the United States Attorney for the District of Kansas. The Kansas Bureau of Investigation (KBI) administered the test and reported to the U.S. Attorney that the test results indicated truthful cooperation with the government. In July 1994, Urban informally asked KBI for information and documents relating to the test results. KBI forwarded Urban's request to the U.S. Attorney, who wrote Urban's attorney advising "[t]he materials he requested will not be forthcoming."

Urban then sent a FOIA letter to the U.S. Attorney requesting "the results of my polygraph test" and "the polygrapher's resume." The U.S. Attorney did not answer this or a follow-up letter

but instead forwarded the FOIA request to the Executive Office for the United States Attorneys. That Office responded to Urban that a search of the U.S. Attorney's office "has revealed no records." The Department of Justice Office of Information and Privacy rejected Urban's subsequent appeal on the ground that "appeals can only be taken from denials of access to records which exist and can be located in Department of Justice files." Acting pro se, Urban then commenced this action under FOIA, 5 U.S.C. §§ 552 et seq., which the district court dismissed as moot, without requiring service on the government.

[1][2] "In FOIA cases, mootness occurs when requested documents have already been produced." In re Wade, 969 F.2d 241, 248 (7th Cir.1992). That has not occurred in this case. Instead, the government claims it cannot locate the requested documents. FOIA obligates the government to produce documents within its "possession or control." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-51, 100 S.Ct. 960, 969, 63 L.Ed.2d 267 (1980). When a government agency claims that it does not possess or control a requested document, the agency must show it fully discharged its statutory obligations by "conduct[ing] a search reasonably calculated to uncover all relevant documents." Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C.Cir.1983), followed in Miller, 779 F.2d at 1382. Thus, when the question is whether a requested document exists, or is outside the government's possession or control, an FOIA action is not moot, and dismissal prior to service will almost never be appropriate.

[3] In this case, the actions of KBI strongly suggest that one or more requested documents exist and are within the possession or control of the U.S. Attorney for the District of Kansas. In response to our order to show cause, the responsible Assistant U.S. Attorney submitted an affidavit stating that he "did not produce the requested documentation because it did not exist in the files of the United States Attorney's office." That is an inadequate answer. Urban has now spent nearly eighteen months seeking a copy of seemingly innocuous test results. His early requests got no response or a cryptic brush off. He has never been told why he is not entitled to the documents. And his attempt to invoke FOIA, a statute intended to foster greater access to government records, has instead fostered more paper shuffling and lame excuses.

There may be a legitimate reason why Urban is not entitled to the materials he requests, but none appears in this record. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion, including, if necessary, an evidentiary hearing at which the responsible Assistant U.S. Attorney can testify as to whether the Department of Justice has possession or control of one or more of the requested documents.

END OF DOCUMENT

Charles V. STEPHENSON, Plaintiff-Appellant,
v.
INTERNAL REVENUE SERVICE, Atlanta, Georgia, and John W. Henderson, District Director, IRS Georgia, Defendants-Appellees.

No. 79-2685.

United States Court of Appeals, Fifth Circuit.

Nov. 7, 1980.

Taxpayer who was subject of civil and criminal investigation brought Freedom of Information Act suit seeking release of documents. The United States District Court for the Northern District of Georgia, William C. O'Kelley, rendered summary judgment for Internal Revenue Service, and taxpayer appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) government affidavit describing the withheld documents in fairly detailed but generic terms and claiming that release would interfere with enforcement proceedings was insufficient basis on which to deny taxpayer's motion for detailed justification, itemization and indexing of the documents and summary judgment for the government; (2) where records do not exist, affidavits are probably not only sufficient but possibly the best method of verification; and (3) once it is shown that records and documents are in possession of the governmental agency, more is required and alternative procedures should be used, such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or combinations thereof.

Vacated and remanded with directions.

[1] RECORDS ⇐ 63
326k63
An appellate court has two duties in reviewing determinations under Freedom of Information Act, in that it must determine whether the district court had an adequate factual basis for the decision rendered and whether on such basis the decision reached was clearly erroneous. 5 U.S.C.A. § 552(a)(4)(B).

[2] RECORDS ⇐ 63
326k63
In most situations, blanket objections, mere conclusory allegations or affidavits will not suffice for disposition of Freedom of Information Act claims. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[2] RECORDS ⇐ 65
326k65
In most situations, blanket objections, mere conclusory allegations or affidavits will not suffice for disposition of Freedom of Information Act claims. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[3] RECORDS ⇐ 65
326k65
Affidavit of IRS special agent conducting civil and criminal investigation of taxpayer was an insufficient basis on which to deny taxpayer's motion for a Vaughn index and to find that production of subject documents would interfere with enforcement proceedings, especially as district court was led astray by factual conclusions founded in the affidavit, which described the withheld documents in fairly detailed but generic terms, and although 209 pages were deemed exempt as tax return information of third parties, in fact, 156 pages consisted of checks and deposit slips of third parties possibly exempt, if at all, only under another exemption provision. 5 U.S.C.A. § 552(a), (a)(4)(B), (b)(3), (b)(7)(A, C).

[4] RECORDS ⇐ 63
326k63
In view of disadvantages of an in camera review of documents requested in Freedom of Information Act suit, flexibility in methods of substantiating government claim of exemption is consistent with purposes of the Act and role of the trial court in such actions. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[5] RECORDS ⇐ 66
326k66
Resort to in camera review is discretionary in Freedom of Information Act suits, as is resort to a Vaughn index. 5 U.S.C.A. § 552(a)(4)(B).

[6] RECORDS ⇐ 65
326k65
In Freedom of Information Act suits where it is determined that **records** do exist, the district court must do something more to assure itself of the factual basis and bona fide of the agency's claim of

exemption than rely solely on an affidavit; however, in situations where **records do not exist,** affidavits are probably not only sufficient but possibly the best method of verification. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[7] RECORDS ⇐ 65
326k65
In the area of Freedom of Information Act disclosure of national security or classified information there appears to be a stronger presumption in favor of reliance on agency affidavits, although such affidavits must still meet a number of criteria and be subjected to critical analysis. 5 U.S.C.A. § 552(a)(3), (a)(4)(B).

[8] RECORDS ⇐ 65
326k65
Once it is established that records and documents are in possession of a governmental agency more than filing of an affidavit claiming an exemption under Freedom of Information Act is required; in view of dangers inherent in reliance on an agency affidavit in an investigative context, resort should be had to alternative procedures such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or combinations thereof. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[8] RECORDS ⇐ 66
326k66
Once it is established that records and documents are in possession of a governmental agency more than filing of an affidavit claiming an exemption under Freedom of Information Act is required; in view of dangers inherent in reliance on an agency affidavit in an investigative context, resort should be had to alternative procedures such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or combinations thereof. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

***1141** Scott McLarty, Decatur, Ga., for plaintiff-appellant.

Gilbert E. Andrews, Chief, M. Carr Ferguson, Asst. Atty. Gen., Robert A. Bernstein, Murray S. Horwitz, Tax Div., Dept. of Justice, Washington, D. C., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, HILL and FAY, Circuit Judges.

FAY, Circuit Judge:

Appellant, Charles Stephenson, seeks reversal of the District Court's entry of summary judgment in favor of the Internal Revenue Service (IRS) in appellant's action for release of documents pursuant to the Freedom of Information Act (FOIA) 5 U.S.C. s 552(a) (1978). He also seeks reversal of the District Court's denial of appellant's ***1142** motion for a detailed justification, itemization and indexing of all Internal Revenue Service documents withheld from disclosure to appellant pursuant to claimed exemptions under 5 U.S.C. s 552(b)(3), 7(A), 7(C) (1978). We conclude here that the affidavits submitted by the Service provide an insufficient basis for such determinations. Therefore, the judgment of the trial court must be reversed and remanded.

I.

Appellant is the subject of civil and criminal investigations into his tax liabilities for the years 1975 through 1977. While these ongoing investigations by the Internal Revenue Service have not reached the prosecutorial stage, a substantial file has been developed.[FN1] The Service released 390 pages of documents covered by appellant's request under the Freedom of Information Act, 5 U.S.C. s 552 (1978).[FN2] Exemptions from release were asserted under 5 U.S.C. s 552(b)(3), (7)(A), (7)(C) (1978) [FN3] as to some 313 pages of documents. Appellant then sought injunctive and declaratory relief in District Court.[FN4] The court initially granted appellant's motion under Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) and ordered the filing of a detailed justification and index for the withholding of each document. However, on the Service's motion for reconsideration, supported by an affidavit of the IRS Special Agent conducting the ongoing investigations of appellant,[FN5] the District Court reversed its ***1143** previous decision and denied appellant's motion for a Vaughn index.[FN6] Subsequently, the District Court granted appellee's motion for summary judgment [FN7] and denied appellant's

motion for relief from judgment [FN8] and partial summary judgment. We have jurisdiction for this appeal pursuant to 28 U.S.C. s 1291 (1978).

FN1. The I.R.S. indicated that appellant's file consisted of 703 pages of documents. Brief for appellee at 2.

FN2. 5 U.S.C. s 552 (1978) provides: (a) Each agency shall make available to the public information as follows: (3) Except with respect to the records made available under paragraph (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

FN3. 5 U.S.C. s 552(b) (1978) provides: (b) This section does not apply to matters that are-(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

FN4. 5 U.S.C. s 552(a)(4)(B) (1978) provides: On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

FN5. The affidavit provides in part: 1. I, Richard J. Gutierriz, am a special agent in the Criminal Investigation Division (formerly the Intelligence Division) of the Atlanta District Office of the Internal Revenue Service. 2. My responsibilities as a special agent in the Criminal Investigation Division include investigating the possibility of criminal violations of the Internal Revenue laws and related offenses. 4. In connection with my duties as a special agent, in November 1977, I was assigned the tax investigation of Charles V. Stephenson for the years 1975 and 1976. In May 1978, this investigation was expanded to include the 1977 tax year. The ongoing criminal tax investigation of Charles V. Stephenson is presently being conducted jointly with the assistance of a revenue agent in the Examination Division. 5. The joint investigation of Charles V. Stephenson involves potential criminal liability for possible violations of section 7203 of Title 26, 26 U.S.C. s 7203, involving the failure to file Federal income tax returns for the years 1975, 1976, and 1977. 6. I am familiar with the FOIA request made by Charles v. Stephenson, and with the documents which he has requested. 7. The documents requested by Charles V. Stephenson (those which were generated during the course of the joint investigation) which are presently in issue in this lawsuit consist of (1) memoranda of interviews with third parties, (2) records and information received from third parties relative to financial transactions with Charles V. Stephenson, (3) summonses and other documentary requests made to third parties, (4) internal memoranda requesting review of summonses, (5) internal memoranda which analyze the scope and direction of the investigation and reveal the strengths and weaknesses of the Government's case, such as fraud referral reports and investigative work plans, (6) revenue agent's workpapers, (7) special agent's workpapers, and (8) sworn statements of third parties. 8. I personally reviewed all of the documents requested by Charles V. Stephenson with Becky Brannan of the Disclosure Office.

Based on this review, it was determined that about 390 of the 650 pages of documents could be released without interfering with the joint investigation of Charles V. Stephenson. 9. I determined that the release of the documents referred to in # 7 above would interfere with the joint investigation of Charles V. Stephenson and with any potential criminal prosecution, by revealing the evidence against Charles V. Stephenson and the reliance placed by the Government on that evidence, the names of likely witnesses for the Government should Stephenson ultimately be indicted, the transactions being investigated, the direction of the investigation, and the scope and limits of the Government's investigation. To reveal the identity of third parties and potential witnesses contacted during the course of my investigation could subject these third parties and potential witnesses to harassment. Access to potential evidence could allow plaintiff to construct defenses and tamper with the evidence. 10. In addition to the documents referred to in # 7 above, the investigatory files on Charles V. Stephenson contained certain documents, which are also in issue in this litigation, reflecting the tax affairs of unrelated third parties. These documents consist of the Federal income tax returns (Form 1040) of a third taxpayer, checks and deposit slips reflecting financial information about third parties, and transcripts of account which contain tax information about third parties, including the taxpayer's identity, his social security number, and information about the taxpayer's account such as payments, credits, refunds, extensions filed, collection action and audit activity. Record, vol. I at 46-48.

FN6. The District Court's order denied appellant's motion based upon the exemption from disclosure in 5 U.S.C. s 552(b)(7)(A) (1978) and the Supreme Court's decision in N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). The order only refers to 260 pages of undisclosed documents and does not address any other exemptions under FOIA.

FN7. This motion was also supported by the affidavit of Special Agent Gutierrez. The order of the court found that, based upon this affidavit, 209 pages in question were exempt under 5 U.S.C. s 552(b)(3) (1978) since disclosure would have been prohibited under 26 U.S.C. s 6103(b)(1), (b)(2)(A) (1979). Record, vol. I, at 155-56. This section of the I.R.C., in general, protects tax returns and return information from disclosure to third parties. The order, further found that, based on the same affidavit, the remaining 104 pages are exempt from disclosure pursuant to 5 U.S.C. s 552(b)(7)(A) (1978). Record, vol. I, at 156-58.

FN8. The District Court, because appellant was proceeding pro se, disregarded appellant's improper denomination of his motion under Fed.R.Civ.P. 60(b) and addressed it as a motion for reconsideration.

*1144 II.

[1][2][3] An appellate court has two duties in reviewing determinations under FOIA. [FN9] (1) We must determine whether the district court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached was clearly erroneous. See Church of Scientology v. U.S. Department of Defense, 611 F.2d 738, 742 (9th Cir. 1979). We find that based upon this record the District Court did not have an adequate basis and consequently that the court's factual conclusions and subsequent determinations were clearly erroneous, as admitted in the appellee's brief.[FN10]

FN9. Counsel advise, and it appears, that this is a case of first impression in the Circuit. However, several opinions of this Court have indicated the result we reach in this case, that in most situations blanket objections, mere conclusory allegations or affidavits will not suffice for disposition of FOIA claims. See Moorefield v. United States Secret Service, 611 F.2d 1021, 1023 (5th Cir. 1980); Sladek v. Bensinger, 605 F.2d 899, 907-08 (5th Cir. 1979) (Hill J., concurring in part and dissenting in part); Chamberlain v. Kurtz, 589 F.2d 827, 835 (5th Cir. 1979), cert. denied, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1980); Kent Corp. v. N.L.R.B., 530 F.2d 612, 624 n.30 (5th Cir.), cert. denied, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976).

FN10. We note with appreciation the candor of appellee's counsel in disclosing, in his brief and at oral argument, the erroneous basis for the District Court's decision as to 209 pages of documents held exempt under 5 U.S.C. s 552(b)(3) (1978). Brief for Appellee at 11. This disclosure was consistent

with the high ethical standards expected of counsel as officers of the Court.

FOIA provides that the district court shall determine de novo whether claimed exemptions are applicable.[FN11] The Act also leaves to the court's discretion whether to order an examination of the contents of the agency records at issue, in camera, in making this determination.[FN12] However, the legislative intent for exercise of this discretion is relatively clear.

FN11. See note 4 supra.

FN12. Id.

(t)he court may examine records in camera in making its determination under any of the nine categories of exemptions under section 552(b) of the law ... While in camera examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders in camera inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

S.Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974), reprinted in (1974) U.S.Code Cong. & Admin.News, pp. 6267, 6287-88 (Conference Report).[FN13]

FN13. This language substantially tracks the Supreme Court's opinion in E.P.A. v. Mink, 410 U.S. 73, 93, 93 S.Ct. 827, 839, 35 L.Ed.2d 119 (1973) the result of which, however, was specifically disapproved of in the conference report. In Mink the Supreme Court also noted that selective in camera inspection might be another method by which the District Court could apprise itself of the bona fides of the agency's claim of exemption. Id.

Appellant's contention that the court should order the IRS to submit a detailed index and justification for the withholding of the documents, as well as conduct an in camera review, derives from a line of D.C. Circuit opinions initiated by Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) on appeal from remand, 523 F.2d 1136 (D.C.Cir.1975). The sole support initially offered by the government in Vaughn was a conclusory affidavit of the Director of the Bureau of Personnel Management Evaluation claiming exemption under 5 U.S.C. s 552(a)(3) (1970). 484 F.2d at 824. The use of affidavits created difficult problems of procedure and proof for the Vaughn court since the resolution of most FOIA disputes centers around the factual nature of the information sought and the statutory category asserted in response. Id. The Vaughn court observed that factual characterizations in affidavits may or may not be accurate. Id. at 824. Such concern has been conclusively justified in the present action.

***1145** Of the 209 pages deemed exempt by the District Court as tax return information of third parties under 5 U.S.C. s 552(b)(3) (1978) and 28 U.S.C. s 6103 (1979), Record, vol. I, at 155-56, it was subsequently discovered that, in fact, 156 pages consisted of checks and deposit slips comprising financial information (not related to tax returns) of third parties possibly exempt, if at all, only under 5 U.S.C. s 552(b)(7)(C) (1978). Brief for Appellee at 11. Therefore, the District Court was led astray in its determination by factual conclusions founded in an affidavit which described the withheld documents in fairly detailed but generic terms.[FN14]

FN14. See note 5 supra.

To avoid such a result, and mindful of the disadvantages of in camera review, the Vaughn court articulated an intermediate approach by requiring from the withholding agency an index and detailed justification for their claim. 484 F.2d at 825, 826-28. Subsequent decisions approved of variations on this basic approach such as, index and court examination of sample reports stipulated by both parties to be representative, see, e. g. Vaughn v. Rosen, 523 F.2d at 1139-40, use of detailed justifications alone where indexing would be inappropriate, see, e. g. Pacific Architects & Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C.Cir.1974), and random sample inspection of documents listed and described in an affidavit see, e. g. Ash Grove Cement Co. v. F. T. C., 511 F.2d 815, 816 (D.C.Cir.1975). See also, Lead Industries Association v. OSHA, 610 F.2d 70, 88 (2nd Cir. 1979) (affidavit and index without in camera inspection).

[4][5][6][7][8] Such flexibility is consistent with

the purposes of the Act and the role of the trial court in such actions. Resort to in camera review is discretionary, N. L. R. B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 224, 98 S.Ct. 2311, 2318, 57 L.Ed.2d 159, 167 (1978), as is resort to a Vaughn index. However, as this case clearly demonstrates, in instances where it is determined that records do exist, the District Court must do something more to assure itself of the factual basis and bona fides of the agency's claim of exemption than rely solely upon an affidavit.[FN15] While we are aware of eminent decisions arguably to the contrary,[FN16] we remain unpersuaded. In situations where records do not exist, affidavits are probably not only sufficient but possibly the best method of verification. However, once it is established that records and documents are in the possession of the governmental agency, more is required. The facts of this case amply demonstrate the dangers inherent in reliance upon agency affidavit in an investigative context when alternative procedures such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or ***1146** combinations thereof would more fully provide an accurate basis for decision.

FN15. In the area of FOIA disclosure of national security or classified information there appears to be a stronger presumption in favor of reliance upon agency affidavits. See, e. g. Weissman v. Central Intelligence Agency, 565 F.2d 692, 696-98 (D.C.Cir.1977); Bell v. United States, 563 F.2d 484, 486-87 (1st Cir. 1977). However, such affidavits must still meet a number of criteria and be subjected to critical analysis by the court. See, e. g. Hayden v. National Security Agency, 608 F.2d 1381, 1386-88 (D.C.Cir.1979) (appeal pending); Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 832-33 (D.C.Cir.1979); Church of Scientology v. U. S. Department of Defense, 611 F.2d 738, 742-743 (9th Cir. 1979). See also, Commentary, Freedom of Information: Judicial Review of Executive Security Classifications, 28 U.Fla.L.Rev. 551 (1976). We express no view on this point.

FN16. Appellee contends that Barney v. I. R. S., 618 F.2d 1268 (8th Cir. 1980) is precisely on point upholding a District Court's determination on facts and affidavits indistinguishable from the present case. Id. at 1270-73. However, the clearest point of distinction is that in the instant case the affidavit submitted resulted in a misunderstanding and led the District Court into error. With respect to the decisions of Crooker v. Office of Pardon Attorney, 614 F.2d 825, 828 (2nd Cir. 1980); Cox v. U. S. Department of Justice, 576 F.2d 1302, 1310-12 (8th Cir. 1978); Harvey's Wagon Wheel, Inc. v. N. L. R. B., 550 F.2d 1139, 1141-42 (8th Cir. 1976) in so much as they indicate reliance upon affidavit alone outside the area of national security classifications is adequate, we respectfully disagree. See also Irons v. Bell, 596 F.2d 468, 471, 476 (1st Cir. 1979).

III.

In light of the foregoing, we vacate the summary judgment and remand the case to the District Court with directions to conduct a fuller development of the factual basis for decision consistent with this opinion and its obligations under 5 U.S.C. s 552(a)(4)(B) (1978).

VACATED AND REMANDED.

END OF DOCUMENT

Gary TRIESTMAN, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Defendant.

No. 94 Civ. 5108 (JGK).

United States District Court, S.D. New York.

March 5, 1995.

Claimant desiring to collaterally attack his conviction sought to compel Drug Enforcement Administration (DEA) to disclose whether certain DEA agents had been investigated for perjury, mishandling information, or supplying false evidence. The District Court, Koeltl, J., held that: (1) under Freedom of Information Act (FOIA) exemption, no substantial public interest in disclosure existed to weigh against DEA agents' privacy interests; (2) to the extent claimant sought publicly available information, DEA had no duty under FOIA to compile such information; and (3) to the extent claimant sought publicly available information, DEA offered sufficient proof that no such information existed.

Summary judgment for defendant granted.

[1] RECORDS ⇐ 58
326k58
For Freedom of Information Act (FOIA) purposes, government employees have privacy interest in not having their names disclosed in connection with investigations in which they are or were under scrutiny. 5 U.S.C.A. § 552(b)(7)(C).

[2] RECORDS ⇐ 58
326k58
For Freedom of Information Act (FOIA) purposes, government employees have privacy interests in their employment histories and performance evaluations and strong privacy interest in not being wrongfully associated with criminal activity. 5 U.S.C.A. § 552(b)(7)(C).

[3] RECORDS ⇐ 58
326k58
Personal privacy exemption under Freedom of Information Act (FOIA) applies only if disclosure could reasonably be expected to lead to unwarranted invasion of privacy. 5 U.S.C.A. § 552(b)(7)(C).

[4] RECORDS ⇐ 58
326k58
Question of whether reasonably expected invasion of privacy is warranted under Freedom of Information Act (FOIA) is to be resolved by determining whether the invasion is justified by weightier public interests in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[5] RECORDS ⇐ 58
326k58
Privacy interests of Drug Enforcement Administration (DEA) agents were not outweighed by any public interest so as to justify disclosure of information where the only interest significantly served by disclosure was the personal interest of the party seeking disclosure, who sought information for his own use in collateral challenge to his conviction. 5 U.S.C.A. § 552(b)(7)(C).

[5] RECORDS ⇐ 64
326k64
Privacy interests of Drug Enforcement Administration (DEA) agents were not outweighed by any public interest so as to justify disclosure of information where the only interest significantly served by disclosure was the personal interest of the party seeking disclosure, who sought information for his own use in collateral challenge to his conviction. 5 U.S.C.A. § 552(b)(7)(C).

[6] RECORDS ⇐ 58
326k58
Personnel and medical files exemption under Freedom of Information Act (FOIA) requires balancing of privacy interests against public interests in disclosure. 5 U.S.C.A. § 552(b)(6).

[6] RECORDS ⇐ 64
326k64
Personnel and medical files exemption under Freedom of Information Act (FOIA) requires balancing of privacy interests against public interests in disclosure. 5 U.S.C.A. § 552(b)(6).

[7] RECORDS ⇐ 58
326k58
Personal privacy exemption under Freedom of Information Act (FOIA) is more protective of privacy interests than is personnel and medical files

exemption. 5 U.S.C.A. § 552(b)(6), (b)(7)(C).

[8] RECORDS ⇦ 58
326k58
Purpose for which Freedom of Information Act (FOIA) request is made does not determine whether the invasion of privacy is warranted, although the interests to be served by that purpose may be probative of whether disclosure would serve public interest. 5 U.S.C.A. § 552(b)(7)(C).

[9] RECORDS ⇦ 52
326k52
Finding that no substantial public interest would be served by disclosure of information on Drug Enforcement Administration (DEA) agents pursuant to Freedom of Information Act (FOIA) request by convict seeking to collaterally challenge his conviction was supported by lack of evidence that either DEA itself or the agents in question had engaged in wrongdoing in either convict's case or in others. 5 U.S.C.A. § 552(b)(7)(C).

[10] RECORDS ⇦ 62
326k62
To require agency to collect and produce information that already has been made public would not further the general purpose of the Freedom of Information Act (FOIA), which is to provide the general public with information as to the workings of its government. 5 U.S.C.A. § 552.

[11] RECORDS ⇦ 62
326k62
Information that is available to any generally interested party or concerned citizen is information that is sufficiently available to relieve agency of any duty to produce it pursuant to Freedom of Information Act (FOIA) request. 5 U.S.C.A. § 552.

[12] RECORDS ⇦ 62
326k62
Request made pursuant to Freedom of Information Act (FOIA) for information on particular Drug Enforcement Administration (DEA) agent was premature and was necessarily denied where requesting party's complaint did not mention agent and there was no evidence that requesting party had exhausted administrative procedures with respect to that agent. 5 U.S.C.A. § 552.

[13] RECORDS ⇦ 65
326k65
In case in which requesting party seeks disclosure under Freedom of Information Act (FOIA), government affidavits attesting to thoroughness of agency search of its records and its results are presumptively valid. 5 U.S.C.A. § 552.

[14] FEDERAL CIVIL PROCEDURE ⇦ 2481
170Ak2481
In case in which requesting party seeks disclosure under Freedom of Information Act (FOIA), government affidavits attesting to thoroughness of agency search of its records and its results are adequate to merit grant of summary judgment in government's favor, unless requesting party makes showing of bad faith, based on more than mere speculation, sufficient to impugn the affidavits. 5 U.S.C.A. § 552.

[15] RECORDS ⇦ 65
326k65
Declaration by Drug Enforcement Administration (DEA) paralegal under penalty of perjury that DEA checked its **records** for information requested pursuant to Freedom of Information Act (FOIA) and that it found that none of the DEA agents about whom requesting party asked had been convicted of any wrongdoing, publicly disciplined, or publicly investigated for misconduct, was sufficient evidence that public **documents** sought by requesting party did **not exist.** 5 U.S.C.A. § 552.

***669** Gary Triestman, pro se.

Mary Jo White, U.S. Atty., Beth E. Goldman, Asst. U.S. Atty., S.D. of N.Y., New York City, for defendant.

OPINION & ORDER

KOELTL, District Judge.

Each party has moved the Court for an order granting summary judgment. The complaint seeks information about several Drug Enforcement Administration ("DEA") agents pursuant to the Freedom of Information Act ("FOIA"). Prior to commencement of this action, the plaintiff, Gary Triestman, sought this information by administrative means, beginning in November, 1993. He seeks to know which, if any, of thirteen DEA agents have

been "investigated in any capacity for alleged perjurious statements or mishandling of evidence, or the supplying of false evidence or testimony; and ... the particulars and outcome of those investigations." [FN1] Triestman seeks the information for use in a collateral attack on his conviction. Apparently, his position is that he pleaded guilty to a crime for which he is presently incarcerated, because, among other reasons, DEA agents fabricated evidence.

FN1. Triestman made this request in a letter dated November 1, 1993 to the Department of Justice and in two letters dated December 23, 1993 to the DEA.

On May 25, 1994, the Office of Information and Privacy ("OIP") issued a final denial of Triestman's FOIA request, after his appeal of an initial, undated denial by the DEA. Both denials refused either to acknowledge or to deny the existence of any documents responsive to the request. [FN2] The OIP based its decision on 5 U.S.C. § 552(b)(7)(C), which provides an exemption from disclosure for "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). It is undisputed that Triestman's FOIA request is a request for records or information compiled for law enforcement purposes. The OIP explained that Exemption 7(C) justifies a refusal to respond to the request, because "Lacking an individual's consent, proof of death, official acknowledgement of an investigation, or an overriding public interest, even to acknowledge the existence of such law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy." Letter from Richard L. Huff, Co-Director OIP, to Gary Triestman, May 25, 1994 (upholding DEA's refusal to release information on appeal from the DEA decision).

FN2. In Beck v. U.S. Dep't. of Justice, 997 F.2d 1489 (D.C.Cir.1993), the Court of Appeals for the District of Columbia Circuit upheld the government's refusal to disclose whether any documents existed that were responsive to a request for documents constituting credible evidence that two DEA agents had previously engaged in wrongdoing. The court explained that, "A government employee has at least some privacy interest in his own employment records, an interest that extends to 'not having it known whether those records contain or do not contain' information on wrongdoing, whether that information is favorable or not." Beck, 997 F.2d at 1494 (citation omitted).

[1][2][3][4][5] Government employees have a privacy interest in not having their names disclosed in connection with investigations in which they are or were under scrutiny. See, e.g., Hunt v. FBI, 972 F.2d 286, 288 (9th Cir.1992). They also have privacy interests in their employment histories and performance evaluations and a strong privacy interest in not being wrongfully associated with criminal activity. Stern v. FBI, 737 F.2d 84, 91-92 (D.C.Cir.1984). However, exemption (b)(7)(C) applies only if a disclosure could ***670** reasonably be expected to lead to an unwarranted invasion of privacy. The question of whether a reasonably expected invasion is warranted is to be resolved by determining whether the invasion of privacy is justified by weightier public interests in disclosure. See Massey v. FBI, 3 F.3d 620, 624 (2d Cir.1993) ("The exemption applies only if the invasion of privacy that would result from release of the information outweighs the public interest in disclosure") (citations omitted). No public interest outweighs the privacy interests of the DEA agents in this case. Here, the only interest significantly served by disclosure is the personal interest of the plaintiff, who seeks information for use in a collateral challenge to his conviction.

[6][7][8] In Brown v. FBI, 658 F.2d 71 (2d Cir.1981), the Court of Appeals held that under FOIA Exemption 6, which also requires an evaluation of the public interest in disclosure, [FN3] "[I]t must be remembered that it is the interest of the general public, and not that of the private litigant, that must be considered." Id. at 75 (citation omitted). The Court found that no such public interest is necessarily involved when a person requesting information seeks the information for the purpose of collaterally attacking a criminal conviction: [FN4]

FN3. Exemption 6 also requires a balancing of privacy interests against public interests in disclosure. It protects from disclosure "personnel and medical files and similar files the disclosure of

which would constitute a clearly unwarranted invasion of person privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) is more protective of privacy interests than Exemption 6. See U.S. Dep't. of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 756, 109 S.Ct. 1468, 1473, 103 L.Ed.2d 774 (1989) ("[T]he standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files").

FN4. The purpose for which a FOIA request is made does not determine whether an invasion of privacy is warranted. See U.S. Dep't. of Defense v. FLRA, --- U.S. ----, ----, 114 S.Ct. 1006, 1013, 127 L.Ed.2d 325 (1994). However, the interests to be served by that purpose may be probative of whether disclosure would serve a public interest.

Plaintiff states in his brief that he is pursuing this litigation hoping to obtain evidence sufficient to mount a collateral attack on his kidnapping conviction. That this is plaintiff's primary purpose will not necessarily prevent disclosure if there is a coincidental public purpose sufficient to overcome Ms. Shepardson's privacy interest. The court, however, cannot allow the plaintiff's personal interest to enter into the weighing or balancing process. "The FOIA is not intended to be an administrative discovery statute for the benefit of private parties." Columbia Packing Co. v. U.S. Dept. of Agriculture, 417 F.Supp. 651, 655 (D.Mass.1976).

Brown, 658 F.2d at 75.

[9] In Massey, the Court of Appeals for the Second Circuit held that the FBI had properly withheld information containing agents' names, under exemption (b)(7)(C), because no substantial public interest would have been served by disclosure. In making this determination, the court considered not only the purpose for which Massey sought the information, but also whether the information was probative of the agency's conduct. The court held that the information did not "reveal any significant information concerning the conduct and administration of FBI investigations" or the "agency's own conduct" and that the fact that Massey might be able to use the information in his efforts to overturn his criminal conviction did not give rise to a public interest. Massey, 3 F.3d at 625; see also, U.S. Dep't. of Defense v. FLRA, --- U.S. ----, 114 S.Ct. at 1012 ("[T]he only relevant 'public interest in disclosure' to be weighed in this balance [under the FOIA privacy exemptions] is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government' ") (citation omitted). Triestman has offered no evidence suggesting that either the DEA itself or the agents he has inquired about have engaged in wrongdoing in either his case or in others. This fact supports the conclusion that no substantial public interest would be served by disclosure. See Hunt, 972 F.2d at 288-90 (holding that there is not a strong public interest in "one isolated investigation, ***671** no longer of any interest to anyone other than the party who instigated it," because "[t]he single file sought by Hunt will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common.... The public interest in ensuring the integrity and the reliability of government investigation procedures is greater where there is some evidence of wrongdoing on the part of the government official") (citation omitted); Rojem v. U.S. Dep't. of Justice, 775 F.Supp. 6 (D.D.C.1991) (upholding non-disclosure of FBI information under exemption 7(C), because the information shed no light on the agency's performance of its statutory duties, there was no evidence of wrongdoing, and the fact that the plaintiff sought the information to challenge a conviction for which he received a death sentence was not, under the circumstances, sufficient to create the requisite public interest in disclosure).

In response to the OIP denial of his appeal and to the government's motion for summary judgment, Triestman argues that he now seeks only information responsive to his request that has previously been made public. Recognizing the privacy interests that would be implicated by the disclosure of non-public investigative reports, Triestman explains that his FOIA request should be construed as seeking "any information that was made public about the listed agents in question; i.e., in any proceeding, publication or press release, public statement issuances, legal or administrative case opened, that was available to any generally interested party or concerned citizen of the public." Pl.'s Mem. in

Supp. of Mot. for Summ.J. at 2. Triestman alleges that the disclosure of such information cannot reasonably be expected to constitute an unwarranted invasion of personal privacy.

[10] This was not the scope of Triestman's original request which plainly infringed on personal privacy and which now appears to have been abandoned. Nevertheless, there are additional reasons why the plaintiff's newly narrowed request for public documents under FOIA should be denied. First, to require an agency to collect and produce information that has already been made public would not further the general purpose of FOIA, which is to satisfy the citizens' right to know "what their government is up to." See U.S. Dep't. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481, 103 L.Ed.2d 774 (1989) ("This basic policy of ' "full agency disclosure unless information is exempted under clearly delineated statutory language," ' U.S. Dep't. of Air Force v. Rose, 425 U.S. [352], at 360-361, 96 S.Ct. [1592], at 1599 [48 L.Ed.2d 11] [(1976)] (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), indeed focuses on the citizens' right to be informed about 'what their government is up to' ").

In Freedberg v. U.S. Dep't. of the Navy, 581 F.Supp. 3 (D.D.C.1982), the court held that any information that was contained in the public record of a court-martial need not be produced under FOIA by the Department of the Navy:

> Insofar as documents sought are readily available in the public record, it is "abusive and a dissipation of agency and court resources" to make and process a claim for their disclosure. Crooker v. United States State Department, 628 F.2d 9 (D.C.Cir.1980). Once such documents are open for inspection by the general public, there is no longer any matter in controversy before the Court under FOIA. Misegades & Douglas v. Schuyler, 456 F.2d 255 (4th Cir.1972). Disclosure on that basis must be denied.

Freedberg, 581 F.Supp. at 4. FOIA's purpose is to provide the general public with information as to the workings of its government: "The statute was designed ' "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." ' " U.S. Dep't. of State v. Ray, 502 U.S. 164, 173, 112 S.Ct. 541, 547, 116 L.Ed.2d 526 (1991). FOIA does not obligate an agency to serve as a research service for persons seeking information that is readily available to the public.

[11] In some cases, there may be a question as to what form of prior disclosure is sufficient to make information readily available to the public. In Freedberg and in the cases the court relied on, Crooker and Misegades, the information sought by the plaintiffs ***672** was readily available to them. In this case, the plaintiff's own characterization of the information that he seeks demonstrates that he seeks only information that is well within any definition of "public availability." The plaintiff describes the type of information that he seeks as "any information that was made public about the listed agents in question; i.e., in any proceeding, publication or press release, public statement issuances, legal or administrative case opened, that was available to any generally interested party or concerned citizen of the public." Pl.'s Mem. in Supp. of Mot. for Summ.J. at 2. Information that is available to any generally interested party or concerned citizen is information that is sufficiently available to relieve an agency of any duty to produce it under FOIA.

[12][13][14] Even if FOIA required agencies to search for, collect, and produce publicly available information, summary judgment for the government would still be appropriate in this case, because the government has provided sufficient proof that it has in fact searched for such documents and that there are no publicly available agency documents relating to investigations of the DEA agents [FN5] for allegedly making perjurious statements, mishandling evidence, or supplying false evidence or testimony. In a case in which the plaintiff seeks disclosure under FOIA, government affidavits attesting to the thoroughness of an agency search of its records and its results are presumptively valid. In Carney v. U.S. Dep't. of Justice, 19 F.3d 807 (2d Cir.1994), the Court of Appeals for the Second Circuit held that on a motion by the government for summary judgment, if the government's affidavits are adequate on their face to merit judgment in the government's favor, summary judgment should be denied and the plaintiff permitted discovery only if the plaintiff makes a showing of bad faith sufficient to impugn the affidavits. Carney, 19 F.3d at 812. Such a showing must be based on more than mere speculation. Id. at 813. In Carney, the court of

appeals upheld the district court's grant of summary judgment for the Department of Justice, finding that:

> FN5. The government has also shown that there are no publicly available responsive documents with respect to DEA agent Donald Abrahms. In his memoranda of law in support of his motion for summary judgment, Triestman requested that agent Abrahms be added to his FOIA request. The complaint does not mention agent Abrahms and there is no evidence that Triestman has exhausted administrative procedures with respect to him. The request for records relating to Abrahms must be denied for that reason. In addition, the request must be denied because the plaintiff seeks the same public documents which are not producible under FOIA and because the government has demonstrated a good faith and futile search for such documents.

> [T]he declarations are reasonably detailed and reveal that each of the DOJ subdivisions undertook a diligent search for documents responsive to Carney's requests. With respect to the withheld documents, the declarants describe the documents or classes of documents withheld and explain why they fall within an applicable exemption....
> An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search. See Maynard [v. Central Intelligence Agency], 986 F.2d [547] at 560 [(1st Cir.1993)]; SafeCard [Services, Inc. v. Securities and Exchange Commission], 926 F.2d [1197] at 1201 [(D.C.Cir.1991)]. The DOJ's submissions thus were proper.

Carney, 19 F.3d at 813-14; see also, Doherty v. U.S. Dep't. of Justice, 775 F.2d 49, 53 (2nd Cir.1985) (holding that, "The Government's affidavits, under the circumstances of this case, provide an adequate factual basis to support its claims of exemption and thus, the District Court did not err in granting summary judgment without undertaking an in camera review of the documents").

[15] In this case, the Government has submitted a declaration by a DEA Paralegal Specialist, under the penalties of perjury, which declares that the DEA has checked its records and found that none of the individuals about whom the plaintiff requests information has been convicted of any wrongdoing, publicly disciplined or publicly investigated for any misconduct. In the circumstances ***673** of this case, this is sufficient evidence that the public documents sought by the plaintiff do not exist.

In an effort to claim any victory, the plaintiff does not contest the adequacy of the government's representation. Rather, the plaintiff has cross moved for a declaratory judgment in his favor contending that the government has "effectively conceded to Plaintiff's complaint and provided him with the FOIA materials he has requested and that he is entitled to by law." The government conceded to no such position and represents that it has not provided him with any materials. The plaintiff is not entitled to a declaratory judgment. The government contended--correctly--that the plaintiff was not entitled to disclosure of the records he sought, either private or public, and when he limited his request to public records it argued--correctly again--that he was not entitled to such records under FOIA, but that in any event they did not exist.

For the foregoing reasons, the Court grants the defendant's motion for summary judgment. In this case, no substantial public interest in disclosure exists to be weighed under FOIA Exemption 7(C) against the privacy interests of the individual DEA agents. To the extent the plaintiff's FOIA request seeks information that is publicly available and arguably does not implicate the privacy interests of the agents, summary judgment for the defendant is appropriate, because there is no duty under FOIA to compile such information and, in addition, because the defendant has offered sufficient proof that no such information exists. The plaintiff's request for a declaratory judgment is denied.

SO ORDERED.

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Michael RAY, etc., et al., Plaintiffs,
v.
UNITED STATES DEPT. OF JUSTICE, et al., Defendants.

No. 86-2430-CIV.

United States District Court,
S.D. Florida.

March 3, 1989.

On Motion to Compel Release of Unredacted Documents April 13, 1989.

Plaintiffs sought information, under Freedom of Information Act, from government agencies on Haitian nationals who had been returned to Haiti. The District Court, Dyer, Senior Circuit Judge, sitting by designation, held that: (1) plaintiffs failed to rebut agency's evidence that certain documents did not exist, and (2) agency was required to supply redacted information contained in documents forwarded to plaintiffs. On motion to compel, the court held that agency waived claimed exemptions that were not raised earlier.

Ordered accordingly.

[1] RECORDS ⇐ 65
326k65
Plaintiffs requesting information under Freedom of Information Act failed to rebut government agency's evidence that it conducted proper and adequate search for **documents** and that **documents** requested did **not exist.** 5 U.S.C.A. § 552.

[2] RECORDS ⇐ 65
326k65
Where Freedom of Information Act request triggers claim of exemption under Act, burden is on government agency to demonstrate basis for nondisclosure. 5 U.S.C.A. § 552.

[3] RECORDS ⇐ 65
326k65
There is presumption, under Freedom of Information Act, that documents held by government agency are subject to disclosure.

[4] RECORDS ⇐ 62
326k62
Government agency faced with request under Freedom of Information Act cannot withhold material based on conclusory allegations of possible harm; it must show by specific, detailed proof that disclosure would defeat, rather than further, purposes of Act. 5 U.S.C.A. § 552.

[5] RECORDS ⇐ 58
326k58
Under Freedom of Information Act, plaintiffs were entitled to receive from State Department names of Haitian nationals who had been returned to Haiti and were not mistreated, despite State Department's invasion of privacy concerns; public interest in safe relocation of returned Haitians outweighed de minimis invasion of privacy that would result. 5 U.S.C.A. § 552.

[5] RECORDS ⇐ 64
326k64
Under Freedom of Information Act, plaintiffs were entitled to receive from State Department names of Haitian nationals who had been returned to Haiti and were not mistreated, despite State Department's invasion of privacy concerns; public interest in safe relocation of returned Haitians outweighed de minimis invasion of privacy that would result. 5 U.S.C.A. § 552.

[6] RECORDS ⇐ 63
326k63
Government agency waived claimed exemptions to plaintiffs' Freedom of Information Act request by raising exemptions after court order requiring disclosure of the redacted information. 5 U.S.C.A. § 552.

***503** Michael D. Ray and Neil D. Kolner, Miami, Fla., for plaintiffs.

Carole A. Jeandheur, Washington, D.C., and Dexter A. Lee, Miami, Fla., for defendants.

MEMORANDUM ORDER ON PENDING MOTIONS

DYER, Senior Circuit Judge, sitting by designation.

THIS CAUSE was heard by the Court on various pending motions filed by the parties, and the Court hereby enters this Order pursuant to its rulings in

open court on March 1, 1989.

I

This case is brought pursuant to the Freedom of Information Act, 5 U.S.C. sec. 552 (FOIA), under which plaintiffs seek from the Immigration and Naturalization Service (INS), the Executive Office for Immigration Review (EOIR) and the United States Department of State (State Dept.) disclosure of (1) an alleged list of 600 Haitians who had been returned to Haiti and not mistreated after their arrival; and (2) investigative trip reports made by INS investigators who have visited Haiti.

Several searches conducted by each agency yielded responses that no records were found which fit the FOIA request made by plaintiffs. Subsequently, the State Dept. located and turned over to the plaintiffs twenty-five (25) responsive documents. Of these, seventeen documents were redacted to exclude the names of the Haitian individuals contained therein. The State Dept. claimed that release of the excised information could result in an invasion of privacy and, accordingly, asserted an exemption under the Freedom of Information Act ("FOIA"), 5 USC sec 552(b)(6). [FN1] At all times, however, each agency has maintained that there exists no list of 600 Haitians returned to Haiti.

FN1. 5 U.S.C. sec. 552(b)(6) provides an exemption from disclosure for matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

II

There are two issues confronting the Court. The first issue concerns disclosure ***504** requirements when an agency's asserts that its search uncovers no documents which satisfy an FOIA request. The second issue focuses on disclosure requirements when an agency claims that information excised from the released documents is exempt under the invasion of privacy exemption of sec. 552(b)(6).

A. Documents Claimed Not to Exist

The underlying principle in FOIA cases is that the requestor must show that an agency improperly withheld records. Kissinger v. Reporter's Comm. for Freedom of the Press, 445 U.S. 136, 150, 100 S.Ct. 960, 968, 63 L.Ed.2d 267 (1980). With respect to records that are claimed not to exist, affidavits are permissible and "possibly the best method of verification." Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir.1980). An affidavit satisfies the "good faith" requirements of adequacy and completeness when it specifically documents the scope and methods undertaken for search and sets out the basis for the withholding of information. See Friedman v. F.B.I., 605 F.Supp. 306, 316 (N.D.Ga.1981). Once the agency demonstrates that its search was reasonable, the burden shifts to the requestor to rebut that evidence. Miller v. U.S. Dept. of State, 779 F.2d 1378, 1383 (8th Cir.1985).

[1] In this instance, the INS has responded that it did not conduct investigatory trips to Haiti nor have, in its possession, investigative reports. It has also maintained, by its answer, that the list of six hundred Haitians does not exists. The record indicates that there was a proper and adequate search, as demonstrated by the affidavits of the FOIA personnel. The record fails to disclose that any documents have been improperly withheld of that they, indeed, exist. On the record, that principle has not been rebutted by the plaintiffs. In addition, the record indicates there have been no requests directed to EOIR, and, therefore, there is no issue before the Court in connection with that party.

B. Documents Edited & Released by the State Department

[2] Where a FOIA request triggers a claim of exemption under the Act, the burden is on the government agency to demonstrate the basis for nondisclosure. Thus, contrary to the agency's assertion, a justiciable issue remains to be decided, and that is the propriety of the State Dept.'s claim of exemption under sec. 552(b)(6), because "the District Court must do something more to assure itself of the factual basis and bona fides of the agency's claim of exemption than rely solely upon an affidavit." Stephenson v. IRS, 629 F.2d 1140 (5th Cir.1980).

[3][4] There is a presumption, under the FOIA, that documents held by a government agency are subject to disclosure. Currie v. IRS, 704 F.2d 523, 530 (11th Cir.1983). An agency cannot withhold

material based on conclusory allegations of possible harm; it must show by specific, detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA. See Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 260 (D.C.Cir.1977). In determining whether the disclosure constitutes a clearly unwarranted invasion of personal privacy, [FN2] the Court must "employ a balancing test, weighing an individual's right to privacy against the public right to disclosure of government information." Cochran v. United States, 770 F.2d 949, 955 (11th Cir.1985).

FN2. Under sec. 552(b)(6), the requested files must be "personnel", "medical", or "similar files". Because plaintiffs did not challenge this classification, the Court assumes that the names of returned Haitians are sufficiently personal in nature to satisfy the "similar file" requirement.

The degree of the invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical; it must be more than a mere possibility. Dept. of Air Force v. Rose, 425 U.S. 352, 380 n. 19, 96 S.Ct. 1592, 1608 n. 19, 48 L.Ed.2d 11 (1976). Moreover, an agency's promise of confidentiality to the submitter of information was found insufficient to defend against disclosure. Robles v. E.P.A., 484 F.2d 843, 846 (4th Cir.1973).

***505** [5] As to the public interest involved in this case, this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians.

Any invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation. The promise of confidentiality by the State Dept. is only one factor to be considered and, in this case, is not determinative of the outcome. Thus, weighing the public interest against the private interest, the balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal.

III

For these reasons, it is hereby

ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of INS and EOIR with respect to the FOIA information requests explained or shown to be non-existent. It is

FURTHER ORDERED AND ADJUDGED that the State Department is required, within fifteen days from this Court's ruling in open court, to supply the redacted information contained in the seventeen documents. Final judgment as to the State Department is withheld until this time period has expired and a showing has been made to the Court that the names have been furnished to the plaintiffs, and, if they have not, then the Court will take further appropriate action forthwith. [FN3]

FN3. The remaining pending motions in this case are DENIED without prejudice. Plaintiffs' request for this Court to enjoin INS deportation proceedings is also DENIED. This Court has no authority to enjoin those proceedings under the FOIA or the Administrative Procedure Act, Title 5 U.S.C. sec. 704-706.

DONE AND ORDERED.

ON MOTION TO COMPEL RELEASE OF UNREDACTED DOCUMENTS

THIS CAUSE having come before the Court, and the Court having heard argument of counsel on April 12, 1989, and considered the same, it is hereby

ORDERED AND ADJUDGED that plaintiffs' motion for pro hac vice appearance of Neil D. Kolner, Esq. is GRANTED and it is

[6] FURTHER ORDERED AND ADJUDGED that defendants' motion to alter or amend is DENIED. After weighing the public interest in disclosure against the claim of exemption pursuant to 5 U.S.C. 552(b)(6), this Court Ordered the STATE DEPARTMENT on March 2, 1989 to produce to plaintiffs, no later than March 16, 1989 as originally requested in plaintiff's June 15, 1985 Freedom of Information Act Request, unredacted copies of all documents in defendant's possession which satisfy plaintiff's request. Defendants did not comply but instead raised new arguments which the Court finds are wholly unfounded. Rather than exhibit due diligence the government has been

neglectful in this matter by failing to raise these exemptions at the outset of this litigation. Consequently, the government has waived entitlement to those claims by invoking these belated exemptions after this Court's order requiring disclosure of the redacted information. See, e.g., Senate of the Commonwealth of Puerto Rico v. Dept. of Justice, 823 F.2d 574, 580 (D.C.Cir.1987); Ryan v. Dept. of Justice, 617 F.2d 781, 782 (D.C.Cir.1980); Jordan v. Dept. of Justice, 591 F.2d 753 (D.C.Cir.1978) (en banc); Cotner v. U.S. Parole Comm., 747 F.2d 1016, 1018 (5th Cir.1984); Fendler v. Parole Comm., 774 F.2d 975, 978 (9th Cir.1985); American Broadcasting Co. v. U.S.I.A., 599 F.Supp. 765, 768 (D.D.C.1984); Donovan v. F.B.I., 633 F.Supp. 35 (S.D.N.Y.1986). The government has failed to point to any set of facts that would make this an "exceptional" case such that the waiver doctrine should not apply. See Jordan 591 F.2d at 780. Indeed, by its own admission at oral argument, the government agreed its motion contains nothing more than "new material." Thus, in its prior Order this Court did not overlook any basis in the record which would require a different conclusion. The government has only attempted ***506** to "play cat and mouse by withholding its most powerful canon until after the district court has decided the case and then springing it on surprised opponents and the judge." Senate of the Commonwealth, 823 F.2d at 580, quoting Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710, 722 (D.C.Cir.1973). For this reason, it is therefore

FURTHER ORDERED AND ADJUDGED that the STATE DEPARTMENT shall release the unredacted documents to plaintiffs no later than ten (10) days from this Court's oral ruling on April 12, 1989.

DONE AND ORDERED.

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In re DEPARTMENT OF JUSTICE, Petitioner.
Barbara Ann CRANCER, Appellee,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Appellant.

Nos. 91-2080, 91-2164.

United States Court of Appeals,
Eighth Circuit.

Submitted May 11, 1992.

Decided Aug. 5, 1993.

Freedom of Information Act (FOIA) suit was brought. The United States District Court for the Eastern District of Missouri, Stephen Nathaniel Limbaugh, J., required government to provide Vaughn index covering each document sought. Appeal was taken. The Court of Appeals, 950 F.2d 530, affirmed. En banc rehearing was granted. The Court of Appeals, Wollman, Circuit Judge, held that Vaughn index could not be required.

Writ of mandamus issued, orders vacated, and case remanded.

McMillian, Circuit Judge, dissented and filed opinion joined by Arnold, Chief Judge.

[1] FEDERAL COURTS ⚿ 524
170Bk524
Court of Appeals had jurisdiction under All Writs Act to decide whether district court committed usurpation of power by directing Department of Justice to produce Vaughn index when invoking Freedom of Information Act (FOIA) exemption for law enforcement records; if district court lacked authority, writ would be proper remedy, and issue of availability of writ was intertwined with merits of the interlocutory matter. 5 U.S.C.A. § 552(b)(7)(A); 28 U.S.C.A. § 1651(b).

[2] RECORDS ⚿ 50
326k50
Consistent with policy of broad disclosure under Freedom of Information Act (FOIA), government is required to release all requested information upon demand of any number of public. 5 U.S.C.A. § 552.

[3] RECORDS ⚿ 62
326k62
Once information is requested under Freedom of Information Act (FOIA), government must provide the information, unless it determines that specific exemption applies. 5 U.S.C.A. § 552.

[4] RECORDS ⚿ 62
326k62
Vaughn index could not be required for law enforcement records allegedly exempt from disclosure under Freedom of Information Act (FOIA); thus, district court should not have required government, after identifying each document, to provide detailed justification statement covering each refusal to release agency records or portions. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⚿ 65
326k65
Government need not produce fact-specific and document-specific Vaughn index in order to satisfy burden of establishing application of Freedom of Information Act (FOIA) exemption for law enforcement records; contents of requested documents are irrelevant, and court must focus on particular categories of documents and likelihood that release of documents in those categories could reasonably be expected to threaten enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[6] RECORDS ⚿ 65
326k65
To satisfy burden with regard to Freedom of Information Act (FOIA) exemption for law enforcement records, government must define functional categories of documents, conduct document-by-document review to assign documents to proper categories, and explain to court how release of each category would interfere with enforcement proceeding. 5 U.S.C.A. § 552(b)(7)(A).

[7] RECORDS ⚿ 65
326k65
If generic index submitted by government is not sufficient to sustain Freedom of Information Act (FOIA) exemption for law enforcement records, then district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with

enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[8] RECORDS ⇐ 66
326k66
District court may examine disputed documents in camera to make firsthand determination of application of Freedom of Information Act (FOIA) exemption for law enforcement records if categories submitted by government remain too general after district court requests more specific, distinct categories. 5 U.S.C.A. § 552(b)(7)(A).

[9] RECORDS ⇐ 63
326k63
While district court may not order Vaughn index as aid to review of claim for exemption under Freedom of Information Act (FOIA) exemption for law enforcement records, court must satisfy itself that requested documents have been properly withheld. 5 U.S.C.A. § 552(b)(7)(A).

***1304** Scott R. McIntosh, Washington, DC, argued (Stuart M. Gerson, Stephen B. Higgins, Leonard Schaitman and Scott R. McIntosh, on the petition for rehearing), for appellant.

Richard E. Greenberg, Clayton, MO, argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

In In re Department of Justice, 950 F.2d 530 (8th Cir.1991) (Crancer I), a panel of this court upheld the district court's order requiring the government to provide a Vaughn [FN1] index after the government had invoked Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1988). We granted the government's suggestion for rehearing en banc and vacated the panel's decision. We now issue a writ of mandamus, vacate the challenged order, and remand the case to the district court for further proceedings.

FN1. See Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

I.

In 1987, Barbara Ann Crancer filed a Freedom of Information Act (FOIA) request with the Department of Justice. Crancer sought the release of certain information uncovered during the investigation conducted by the Federal Bureau of Investigation into the disappearance of her father, Jimmy Hoffa, the former president of the International Brotherhood of Teamsters. The FBI's investigation has resulted in the accumulation of more than 13,800 pages of records relating to Hoffa's disappearance.

The Department denied Crancer's request on the basis of Exemption 7(A), contending that the Hoffa FBI file contains "records or information compiled for law enforcement purposes," the release of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

After exhausting her administrative remedies, Crancer brought suit to compel the Department to provide her with the documents she had requested. During the pendency of her suit, Crancer filed a second, broader request seeking any and all materials relating to the FBI's investigation into Hoffa's disappearance. After this request was administratively denied by the Department, also on the basis of Exemption 7(A), Crancer amended her complaint to include her second request.

The Department moved for summary judgment on the basis of the claimed exemption. The district court ordered the Department to provide Crancer with a Vaughn index so that she could effectively oppose the government's pending motion. The court's order required the Department to produce an "itemized, indexed inventory of every agency record or portion thereof responsive to plaintiff's FOIA request," together with a "detailed justification statement covering each refusal to release [an] agency record[ ] or portions thereof." D.Ct. Order of July 27, 1990, at 1. The Department asked the court to reconsider its order directing the production of the Vaughn index. This request was denied. The Department then requested that the district court modify its earlier order and allow the Department to provide a categorical description of the documents contained in the Hoffa FBI file. The Department submitted a list of nine categories of documents and

an affidavit describing the potential interference with enforcement proceedings that would result if it were required to compile a Vaughn index. The district court denied this request and ordered the Department to submit the Vaughn index to a magistrate judge for in camera review.

In lieu of submitting a Vaughn index, the Department asked the magistrate judge to review the actual documents in camera. The magistrate judge denied this request, but extended the time period in which the Vaughn index was to be submitted. The Department then asked the district court to ***1305** reconsider the magistrate judge's order or, in the alternative, to certify the matter for interlocutory appeal. These requests were also denied.

The Department then sought relief from this court, asserting jurisdiction under the collateral order doctrine, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), or the All Writs Act, 28 U.S.C. § 1651(b).

In Crancer I, the panel asserted jurisdiction under the All Writs Act and upheld the district court's order requiring the preparation of a Vaughn index. The panel first determined that the Department could not be required to provide a specific factual showing and explanation describing why each document is exempt. It went on to hold, however, that the Department could be required to make a specific factual showing to demonstrate why each document belongs in a certain category, along with an explanation describing why the category itself is exempt from disclosure.

II.

[1] We first examine whether, and the basis upon which, we have jurisdiction to hear this case.

We possess discretionary writ-issuing authority under the All Writs Act, 28 U.S.C. § 1651(b). As noted by the panel in Crancer I, mandamus is "available only in those exceptional circumstances amounting to a judicial usurpation of power." In re Ford Motor Co., 751 F.2d 274, 275 (8th Cir.1984).

The panel determined that:

> [The Department's] argument is a novel one and has not been directly addressed by any court. If [the Department] is correct in its contention that the district court lacked authority to order a Vaughn index, then a writ would be the proper remedy. Because the issue of whether the writ is available is intertwined with the merits of this interlocutory matter, we must decide whether the district court had authority to require a Vaughn-type index in these circumstances.

Crancer I, 950 F.2d at 532 (citation omitted). We agree with the panel's analysis and believe that this case presents a unique situation. Thus, we conclude that we have jurisdiction to decide the question whether the district court's order directing the Department to produce a Vaughn index in the face of the Department's invocation of Exemption 7(A) constituted a judicial usurpation of power.

III.

[2] "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). Consistent with this policy of broad disclosure, the government is required to release all requested information upon the demand of any member of the public. Id. at 221, 98 S.Ct. at 2316; see also Curran v. Department of Justice, 813 F.2d 473 (1st Cir.1987); Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987). Congress fashioned certain explicit exemptions from disclosure, however, in order to preserve vital government policies and, in some cases, to protect individuals. See 5 U.S.C. § 552(b)(1)-)9; see also Robbins Tire, 437 U.S. at 220-21, 98 S.Ct. at 2316 ("Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests.").

[3] Once information is requested under FOIA, therefore, the government must provide the information unless it determines that a specific exemption applies. Likewise, the government bears the burden of demonstrating that the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). The district court must determine de novo whether the government has satisfied its burden. Id.

In the face of a claimed statutory exemption, district courts have sometimes required the

government to provide a Vaughn index. "This indexing procedure is perceived as necessary to permit the district court and the requesting party to evaluate the [government's] decision to withhold records and to ensure its compliance with the mandates of the FOIA." Barney v. IRS, 618 F.2d 1268, 1272 (8th Cir.1980) (per curiam).

***1306** A Vaughn index provides a specific factual description of each document sought by the FOIA requester. Specifically, such an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. Crancer I, 950 F.2d at 533. "For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided." Id.; see also Barney, 618 F.2d at 1272.

[4] Exemption 7(A) of FOIA provides that the act "does not apply to matters that are--* * * (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A). The government contends that the courts have interpreted this exemption differently from other FOIA exemptions, with the result that a district court may not order the production of a Vaughn index when Exemption 7(A) is invoked.

In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), the Supreme Court addressed the burden that the government must bear when asserting Exemption 7(A). In that case, the FOIA requester, an employer, sought from the National Labor Relations Board all statements made by potential witnesses prior to a Board hearing on the employer's unfair labor practices. Id. at 216, 98 S.Ct. at 2314. On appeal, the employer argued that the district court had erred by not requiring the government to make an individualized showing that each withheld document fit within the limits of Exemption 7(A). The Supreme Court rejected this argument, interpreting Exemption 7(A) of FOIA to require the government to prove that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324.

In support of its ruling, the Supreme Court noted that:

> [t]here is a readily apparent difference between [Exemption 7(A)] and [Exemptions 7(B)-(D)]. The latter [exemptions] refer to particular cases ... and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since [Exemption 7(A)] speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

437 U.S. at 223-24, 98 S.Ct. at 2318. The Court then examined Exemption 7's legislative history, which appeared to confirm the Court's observation regarding the distinguishing characteristic of Exemption 7(A). Id. at 224-34, 98 S.Ct. at 2318. The Court further noted that had Congress intended that "the Government in each case show a particularized risk to its individual 'enforcement proceedin[g],' " it could have done so. Id. at 234, 98 S.Ct. at 2323.

The Court also addressed Congress's 1974 amendment of Exemption 7(A). This amendment was designed "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Id. at 236, 98 S.Ct. at 2324. The Court's discussion of President Ford's veto of the 1974 amendment and the subsequent congressional override is instructive for our present analysis. The President was concerned that the 1974 amendment to Exemption 7(A) "would require the Government to 'prove ...--separately for each paragraph of each document--that disclosure "would" cause' a specific harm" to enforcement proceedings. Id. at 235, 98 S.Ct. at 2323 (citation omitted). Congressional supporters of the amendment termed the President's interpretation of the amendment " 'ludicrous,' " stating that the " 'burden is substantially less than we would be led to believe by the President's message.' " Id. (citation omitted). [FN2]

> FN2. For further discussion of the legislative history of the 1974 amendment to Exemption 7(A), see Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 626, 102 S.Ct. 2054, 2061, 72 L.Ed.2d 376 (1982); Campbell v. Department of

Health and Human Serv., 682 F.2d 256, 261-63 (D.C.Cir.1982).

The Court concluded that although the 1974 amendment to Exemption 7(A) was designed ***1307** to eliminate blanket exemptions for records found in investigatory files, Congress did not intend that generic determinations of those materials entitled to Exemption 7(A) protection could never be made. Rather, the government must demonstrate, and courts must determine, whether "disclosure of particular kinds of investigatory records ... would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. In other words, Congress intended that certain types or categories of investigatory records be withheld under Exemption 7(A) because disclosure of documents within those categories generally would interfere with enforcement proceedings.

With this understanding, post-Robbins Tire courts have made these determinations generically, category-of-document by category-of-document. In Barney v. IRS, for example, we were confronted with the question whether, in the wake of Robbins Tire, the government was required to provide a Vaughn index after the government invoked Exemption 7(A). 618 F.2d 1268 (8th Cir.1980) (per curiam). We held that "[t]o sustain its burden of showing documents were properly withheld under exemption 7(A) the government had to establish only that they were investigatory records compiled for law enforcement purposes and that production would interfere with pending enforcement proceedings." Id. at 1272-73. The Barney court bolstered its conclusion by emphasizing that "[u]nder exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." Id. at 1273 (citing Robbins Tire, 437 U.S. at 234-35, 98 S.Ct. at 2323).

Congress amended Exemption 7 in 1986 to lessen the burden on the government in establishing the application of Exemption 7(A). Freedom of Information Reform Act of 1986 (FIRA), Pub.L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986). Whereas under the 1974 version of Exemption 7(A), the government bore the burden of showing that the production of the requested law enforcement records "would interfere with enforcement proceedings," under the 1986 version the government need only show that the production of law enforcement records or information "could reasonably be expected to interfere with law enforcement proceedings."

In 1989, the Supreme Court revisited the government's burden under Exemption 7, this time focusing on the use of categorical determinations under Exemption 7(C), which covers documents whose production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) ("Reporters Committee "). In Reporters Committee, a group of journalists requested that the FBI disclose an individual's computerized criminal history file, known colloquially as the person's "rap sheet." The Supreme Court held that the production of rap sheets "as a categorical matter" could reasonably be expected to constitute an unwarranted invasion of a citizen's privacy. Id. at 780, 109 S.Ct. at 1485.

The Court discussed its earlier approval of a categorical approach to Exemption 7(A) in Robbins Tire. The Court noted that it had based its ruling in Robbins Tire on the perception that Exemption 7(A)'s reference to the plural "enforcement proceedings" supported a categorical approach when 7(A) was invoked, in contrast to the singular references in the other subsections of Exemption 7, which seemed to suggest a case-by-case balancing. Finding that "[j]ust as one can ask whether a particular rap sheet is a 'law enforcement record' that meets the requirements of [Exemption 7(C)], so too can one ask whether rap sheets in general ... are 'law enforcement records' that meet the stated criteria," the Court concluded that its approval of a categorical approach for Exemption 7(A) applied with equal force to the other subsections in Exemption 7. Id. at 779, 109 S.Ct. at 1485. Because the Court found that the disclosure of computerized compilations of an individual's criminal history could always be expected to constitute an invasion of an individual's privacy, it held that rap sheets as a category are exempted from disclosure under FOIA. Id. at 780, 109 S.Ct. at 1485.

The Court also supported its holding that a

categorical approach was appropriate for Exemption 7(C) as well as 7(A) by pointing to ***1308** the 1986 amendment. The Court stated that the amended 7(C), which like 7(A) had changed from the more stringent "would" to the more flexible "could reasonably be expected to," was enacted "to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." Id. at 777 n. 22, 109 S.Ct. at 1484 n. 22. The Court further noted that the amendment was designed to "replace a focus on the effect of a particular disclosure 'with a standard of reasonableness ... based on an objective test.' " Id. This reasonableness standard, the Court concluded, "amply supports a categorical approach to the balance of private and public interests in Exemption 7(C)." Id. The Court's conclusion concerning the effect of the amendment applies with equal force to Exemption 7(A), given the Court's conclusion that all of the Exemption 7 subsections should be interpreted similarly with respect to the use of categorical justifications.

Recently, the Court further explained its categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). Seeking to support a claim that the government had failed to disclose exculpatory evidence in his earlier criminal case, Landano sought all of the FBI files connected with the police officer's murder for which Landano had been convicted. After releasing a portion of its files, the FBI withheld certain documents on the grounds that they were exempt under Exemption 7(D), which applies to law enforcement records or information whose production "could reasonably be expected to disclose the identity of a confidential source." The district court largely rejected the government's categorical explanations and held that the FBI had to articulate "case-specific reasons for non-disclosure" of all information other than records pertaining to regular FBI informants. Id., --- U.S. at ----, 113 S.Ct. at 2018. The Court of Appeals for the Third Circuit affirmed, holding that the government had to provide detailed explanations relating to each alleged confidential source in order to justify nondisclosure under Exemption 7(D). Id., ---U.S. at ----, 113 S.Ct. at 2019.

The Supreme Court reversed and remanded. The Court first rejected the government's argument that it is entitled to a presumption under FOIA that all FBI sources are confidential and that any records relating to FBI sources should be presumptively exempt from disclosure. The Court noted that the government's proposed presumption was not rebuttable, as argued by the government, but amounted to an irrebuttable presumption or blanket exemption that found no support in the language or legislative history of Exemption 7(D). Id., --- U.S. at ----, 113 S.Ct. at 2023.

The Court, however, did not agree with the Third Circuit's requirement that the government must provide a detailed justification relating to each alleged confidential source. To the contrary, the Court stated that the government could point to categories of documents, the circumstances surrounding which would support the inference that the sources to whom they pertained were confidential. Id., --- U.S. at ----, 113 S.Ct. at 2023. For example, the Court suggested that "paid informants normally expect their cooperation with the FBI to be kept confidential," implying that the government need only present a category of documents relating to paid informants, whose production could reasonably be expected to disclose the informant's identity, in order to justify nondisclosure under Exemption 7(D). Id. As a second example, the Court opined that eyewitnesses to a gang-related murder could also probably be presumed to be confidential. Id. The Court concluded that such a generic, categorical approach best articulated Congress's intent "to provide ' " 'workable' rules" ' of FOIA disclosure." Id. (citing Reporters Committee, 489 U.S. at 779, 109 S.Ct. at 1485).

Thus, we conclude that the Supreme Court has consistently interpreted Exemption 7 of FOIA (specifically so far subsections 7(A), 7(C), and 7(D)) to permit the government to proceed on a categorical basis in order to justify nondisclosure under one of Exemption 7's subsections. See Landano, --- U.S. at ---- - ----, 113 S.Ct. at 2023-24; Reporters Committee, 489 U.S. at 779-80, 109 S.Ct. at 1485; Robbins Tire, 437 U.S. at 241-43, 98 S.Ct. at 2326-27. The Court's interpretation ***1309** of Exemption 7 and Congress's intent in enacting it has been strengthened by the 1986 amendment, which provided for greater flexibility and lessened the government's burden. See Reporters Committee, 489 U.S. at 777 n. 22, 109 S.Ct. at 1484 n. 22.

Our interpretation of Exemption 7(A) in Barney mirrors the Supreme Court's interpretation. Moreover, consistent with the teachings of Robbins Tire, our analysis in Barney is in accord with the principle that " 'the inherent nature of the requested documents is irrelevant to the question of exemption.' " Curran, 813 F.2d at 474 (quoting Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987)). This interpretation is consistent with decisions from other circuits. See, e.g., Lewis v. IRS, 823 F.2d 375, 378 (9th Cir.1987); Curran, 813 F.2d at 475; Church of Scientology of Calif. v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986); Campbell, 682 F.2d at 265. [FN3]

> FN3. The panel attempted to distinguish these cases on the ground that the appellate courts were reviewing district court decisions that had found Vaughn indices not to be required. Crancer I, 950 F.2d at 534. We find this reasoning unpersuasive. Whatever the procedural posture, the Supreme Court has made clear that the government does not have to provide fact-specific information with respect to each document to justify its claim that Exemption 7(A) applies. As demonstrated, the actual contents of the documents are not relevant when the propriety of Exemption 7(A) is in dispute. See Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2323. Rather, the government may meet its burden by showing how disclosure of each category of documents would likely interfere with the investigation. Id.

The District of Columbia Circuit, which originally developed the Vaughn index, has succinctly explained the relationship between Exemption 7(A), as interpreted by Robbins Tire, and the use of Vaughn indices:

> [w]hen ... a claimed FOIA exemption consists of a generic exclusion [such as Exemption 7(A)], dependent upon the category of records rather than the subject matter which each individual record contains, resort to a Vaughn index is futile. Thus, in NLRB v. Robbins Tire & Rubber Co., [citation omitted], the Supreme Court upheld, without any provision of a Vaughn index, the Labor Board's refusal to provide under FOIA witness statements obtained in the investigation of pending unfair labor practice proceedings. A Vaughn index would have served no purpose since ... [Exemption 7(A)] did not require a showing that each individual document would produce such interference, but could rather be applied generically, to classes of records such as witness statements.

Church of Scientology, 792 F.2d at 152 (Scalia, J.).

In light of the above discussion, the district court's order for a Vaughn index in the present case appends an additional requirement to Exemption 7(A) that exceeds the bounds of the statute as interpreted by the Supreme Court and this court. The district court's order required the government, after identifying each document, to provide a "detailed justification statement covering each refusal to release said agency records or portions thereof." D.Ct. Order of July 27, 1990, at 1. This goes beyond the categorical explanations that the Supreme Court in Robbins Tire held to be sufficient to justify nondisclosure under Exemption 7(A).

[5] In sum, the government bears the burden of establishing that Exemption 7(A) applies. And under Robbins Tire, Exemption 7(A) does not require that the government produce a fact-specific, document-specific, Vaughn index in order to satisfy that burden. The contents of the requested documents are irrelevant. It is the particular categories of documents, and the likelihood that the release of documents within those categories could reasonably be expected to threaten enforcement proceedings, on which the court must focus. The district court, therefore, acted beyond the scope of its authority when it ordered the Department to produce a Vaughn index.

IV.

[6] "Although generic determinations are permitted, and the government need not justify its 7(A) refusal on a document-by-document basis, there must nevertheless be some minimally sufficient showing." Curran, 813 F.2d at 475. To satisfy its burden with regard to Exemption 7(A), the government must define functional categories of documents; ***1310** it must conduct a document-by-document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings. [FN4] See Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986).

> FN4. We express no opinion as to whether the

> categorical index submitted by the Department in this case satisfies the Bevis paradigm. The proceeding below was, for all intents and purposes, focused only on whether the district court could order a Vaughn index. On remand, the Department should submit its categorical index and affidavits in accordance with the principles set forth in this opinion.

[7] If the generic index submitted by the government is not sufficient to sustain the 7(A) exemption, then the district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with enforcement proceedings. See Campbell, 682 F.2d at 265. Indeed, this is what the court ordered in Bevis, 801 F.2d at 1390. "The chief characteristic of an acceptable taxonomy should be functionality--that is, the classification should be clear enough to permit a court to ascertain 'how each .. category of documents, if disclosed, would interfere with the investigation.' " Curran, 813 F.2d at 475 (citing Campbell, 682 F.2d at 265).

[8] If the categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination. 5 U.S.C. § 552(a)(4)(B); Lewis, 823 F.2d at 378; see also Cleary v. FBI, 811 F.2d 421, 423 (8th Cir.1987) (in camera examination in 7(C) and (D) exemption case); Parton v. United States Dep't of Justice, 727 F.2d 774 (8th Cir.1984); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir.1978).

In Dickerson v. Department of Justice, 992 F.2d 1426 (6th Cir.1993), the plaintiff sought the release of information from the Hoffa FBI file and requested a Vaughn index. The district court accepted the government's categorical index, examined certain documents in camera, and granted summary judgment to the government on the basis of Exemption 7(A). The court stated that it was "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422 (E.D.Mich. July 31, 1991).

On appeal, the Court of Appeals for the Sixth Circuit reviewed the file that had been submitted to the district court and concluded that the district court had not abused its discretion in ruling that there was no need to go beyond the documents that the FBI had submitted. Dickerson, 992 F.2d at 1431-32. The court of appeals also held that the district court was correct in finding that the FBI's investigation remains active and that it was directed toward the institution of criminal proceedings. Id. at 1432. Further, the Sixth Circuit held that the district court was correct "in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution." Id. at 1433.

[9] In the present case, the district court was apparently of the belief that the Department was not asserting Exemption 7(A) in good faith or that it had not individually reviewed the requested documents to place them in their functional categories. While the district court may not order a Vaughn index as an aid to its review, it still must satisfy itself that the requested documents have been properly withheld. The Department's failure to demonstrate that the sought-after documents relate to an ongoing investigation or could reasonably be expected to interfere with future law enforcement proceedings will carry with it the loss of the 7(A) exemption. In that regard, we note that although the Sixth Circuit's affirmative holding on that issue in Dickerson will not be binding on the district court on remand, that holding does give credence to the Department's assertion of the 7(A) exemption in the present case.

In summary, Congress enacted Exemption 7(A) to prohibit interference in an ongoing criminal investigation. The Supreme Court's decision in Robbins Tire to allow generic category-by-category classifications in Exemption 7(A) cases, rather than detailed fact- ***1311** specific explanations on a document-by-document basis, serves an important interest: "[p]rovision of the detail which a satisfactory Vaughn Index entails would itself probably breach the dike." Curran, 813 F.2d at 475. "Withal, a tightrope must be walked [in Exemption 7(A) cases]: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag." Id. In short, we will not allow the cure, Exemption 7(A), to "become the carrier of the disease." Id.

The writ of mandamus prayed for is issued. The

orders directing the production of a Vaughn index are vacated, and the case is remanded to the district court for further proceedings consistent with this opinion.

McMILLIAN, Circuit Judge, with whom RICHARD S. ARNOLD, Chief Judge, joins, dissenting.

"Free people are, of necessity, informed; uninformed people can never be free." Sen. Judiciary Comm., Freedom of Information, 88th Cong., 1st Sess. 3 (1963) (remarks of Sen. Edward Long).

As discussed below, although I agree with much of the analysis in the majority opinion, I do not agree that the district court exceeded the scope of its authority when it ordered the Department of Justice (hereinafter the government) to prepare a Vaughn index of FBIHQ file 9-60052, the FBI's investigatory file concerning the investigation into the disappearance and presumed murder of Teamsters president Jimmy Hoffa in July 1975. Accordingly, I would deny the petition for writ of mandamus.

COLLATERAL ORDER

First, I do not agree that we have appellate jurisdiction to review the government's appeal, No. 91-2164. As discussed below, the term "Vaughn index" is derived from Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), and a Vaughn index is typically a detailed affidavit which "permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information." Id., 484 F.2d at 826. In my view, the district court order in the present case requiring the preparation of a Vaughn index was essentially a discovery order in this FOIA litigation. Discovery orders are "generally not appealable as collateral orders even when they are attacked as burdensome." Hinton v. Department of Justice, 844 F.2d 126, 131 (3d Cir.1988). The Vaughn index is not an end in itself; by definition, the Vaughn index does not itself disclose anything of substance. "[A] Vaughn index does not accord a requester any of the substantive relief [the requester] seeks.... Rather, the [Vaughn] index is a tool for determining the requester's substantive rights [under FOIA]." Id. at 130.

It is true that "[the Freedom of Information Act (FOIA)] was not intended to supplement or displace rules of discovery." John Doe Agency v. John Doe Corp., 493 U.S. 146, 153, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989). However, the present case involves only the FOIA requests themselves. It is a discrete civil action. The FOIA is not being used here as a discovery tool to supplement or displace discovery in connection with other litigation, for example, other criminal or civil proceedings. In discovery proceedings the issue is whether the information sought is relevant and necessary; however, in FOIA litigation the only issue is whether the agency has properly withheld the information sought under one of the specific statutory exemptions. See, e.g., North v. Walsh, 279 U.S.App.D.C. 373, 881 F.2d 1088, 1095 (1989) (FOIA request seeking documents from Office of Independent Counsel concerning on-going criminal investigation of plaintiff).

I also do not agree that the district court order is appealable under the final collateral order exception. Hinton v. Department of Justice, 844 F.2d at 131. Collateral orders are appealable if (1) the order conclusively decides the disputed issue, (2) the issue is entirely distinct from the merits of the case, and (3) the order would be effectively unreviewable if the appeal were postponed until the issuance of a final order. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). At this point in the present case, the district court has only ordered the preparation of a Vaughn index and has yet to ***1312** conclusively decide the merits of the government's claim of exemption under Exemption 7(A). The district court agreed to consider the Vaughn index in camera; the district court has not even decided whether or not to disclose the Vaughn index itself to the public or counsel for plaintiff. As noted above, the preparation of a Vaughn index "does not accord a requester any of the substantive relief [he or she] seeks." Id. at 130. The substantive relief the requester wants is access to the government's records, not the preparation of or access to the Vaughn index of those records. The preparation of a Vaughn index is only a preliminary or preparatory step. As was noted by the panel majority opinion,

the present case

> is unique because it is not a review of a district court's order that documents be disclosed, nor is it a review of a district court's decision that documents are exempt from disclosure. [The present] case asks us to determine what a district court may do while deciding whether documents are or are not exempt from disclosure.

950 F.2d at 533.

MANDAMUS

In the present case the government does not argue the district court abused its discretion in ordering a Vaughn index; the government argues the district court lacked the authority to order a Vaughn index. The government has thus presented the issue in terms of the power or authority of the district court. The government argues that Exemption 7(A) is different from other FOIA exemptions and that the district court can never require the preparation of a Vaughn index when the government agency invokes Exemption 7(A). As noted by the panel majority opinion, this is a novel argument that squarely challenges the authority of the district court to act. 950 F.2d at 532. Because the government has presented its argument in terms of the district court's authority to act, and not in terms of whether or not the district court abused its discretion, I agree that, under these unique circumstances, we have jurisdiction to review the district court order by petition for writ of mandamus.

THE VAUGHN INDEX

A healthy distrust of government, and a corresponding suspicion of government secrecy, is the underlying premise of FOIA. FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978) (Robbins). FOIA's "general philosophy [is] 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Department of Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976), citing S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). " 'Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information,' and therefore provided the 'specific exemptions under which disclosure could be refused.' " John Doe Agency v. John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475, citing FBI v. Abramson, 456 U.S. 615, 621, 102 S.Ct. 2054, 2059, 72 L.Ed.2d 376 (1982). The statutory exemptions are to be narrowly construed, Department of Air Force v. Rose, 425 U.S. at 361, 96 S.Ct. at 1599, the district courts review the claim of exemptions de novo, and the burden of justifying nondisclosure, that is, the burden of establishing that the information requested is protected from disclosure by a specific exemption, is on the agency. See 5 U.S.C. § 552(a)(4)(B).

As noted by the panel majority opinion, the district court's responsibility to review de novo the government's claimed exemptions is complicated by the fact that "ordinarily a government agency, and not the court, has access to the documents in question." 950 F.2d at 533. "The party requesting the disclosure must rely upon his [or her] adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding ***1313** agency's arguments." Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992). This is the precise difficulty at the heart of the present case and it is also what precipitated the invention of the Vaughn index.

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure....
>
> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation.

Vaughn v. Rosen, 484 F.2d at 823-24. Thus, in FOIA litigation, the plaintiff, the party seeking disclosure, is placed in the awkward and frustrating position of speculating about the likely contents of documents that it has never seen.

In Vaughn v. Rosen the plaintiff was a law professor doing research on the Civil Service Commission. The professor sought disclosure of the evaluations of certain government agencies' personnel management programs and certain other special reports of the Bureau of Personnel Management. The government claimed that the documents contained information of a personal nature about the government agency employees and that disclosure would constitute an invasion of the employees' personal privacy. The court of appeals noted that the plaintiff's lack of knowledge necessarily meant that he quite literally did not know, and therefore could not inform the court, whether or not the government's factual characterization of the documents as containing information of a personal nature was accurate. Id., 484 F.2d at 824. The court of appeals observed that the plaintiff's lack of knowledge not only hampered his ability to litigate in the district court (he was essentially limited to arguing that the exemption is very narrow and that the general nature of the documents sought made it unlikely that they contained personal information), but

> [t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, ... and hence the typical process of dispute resolution is impossible....
> The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to [FOIA]. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously, an appellate court is even less suited to making this inquiry than is a trial court.

Id., 484 F.2d at 824-25. The FOIA requester in the present case is in the same position as the law professor in Vaughn v. Rosen.

The Vaughn v. Rosen court concluded that, contrary to the intent of Congress, FOIA "actually encourage[d] the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed." Id., 484 F.2d at 826. Not only did FOIA contain "no inherent incentives that would affirmatively spur government agencies to disclose information," id., but "since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, ... [FOIA] encourage[d] agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information." ***1314** Id. These concerns compelled the Vaughn v. Rosen court to develop what has become known as the Vaughn index in order to "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." Id.

> As noted by the panel majority opinion,
> [t]here is no prescribed form for a Vaughn index; any form is acceptable as long as the affidavits provided by the government assist the court's efforts to decide the issues at hand. Regardless of form, however, certain components are integral parts of any Vaughn index. Specifically, Vaughn indices usually communicate descriptions of each and every document contained in the file, including a general description of each document's contents and general facts about their creation (such as date, time, and place). For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

950 F.2d at 533 (citations omitted). "Specificity is the defining requirement of the Vaughn index and affidavit; affidavits cannot support summary judgment [upholding the government's claimed

exemption] if they are 'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.' " King v. United States Department of Justice, 265 U.S.App.D.C. 62, 830 F.2d 210, 219 (1987) (footnotes omitted). "To accept an inadequately supported exemption claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a de novo review.' " Id. Whether the government's affidavit or affidavits constitute an adequate Vaughn index is a question of law reviewed de novo. Wiener v. FBI, 943 F.2d at 978, citing Binion v. United States Department of Justice, 695 F.2d 1189, 1193 (9th Cir.1983).

Preparation of the Vaughn index does more than require the government agency to review and classify the documents in question. The resulting Vaughn index is more than a litigation tool that the FOIA requester can use to challenge the government's withholding of those documents. It is important to remember that requiring the government agency to prepare a Vaughn index

> forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he [or she] can present his [or her] case to the trial court.

Lykins v. Department of Justice, 233 U.S.App.D.C. 349, 725 F.2d 1455, 1463 (1984). "The index thus functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." Wiener v. FBI, 943 F.2d at 977-78; see also Davis v. CIA, 711 F.2d 858, 861 (8th Cir.1983), cert. denied, 465 U.S. 1035, 104 S.Ct. 1307, 79 L.Ed.2d 705 (1984).

ROBBINS DECISION

As has already been discussed, Exemption 7(A) is the law enforcement exemption and provides that disclosure is not required of "matters that are ... investigatory records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In the present case the government argues the district court lacked the authority to require the preparation of a Vaughn index because a Vaughn index is not required when Exemption 7(A) is invoked, citing Robbins, 437 U.S. at 223-24, 234-36, 98 S.Ct. at 2317-18, 2323. In Robbins the FOIA plaintiff was an employer seeking disclosure of witness statements prior to an unfair labor practice hearing. Following a contested representation election, the regional director of the NLRB filed an unfair labor practice charge against the employer for pre-election actions. A hearing was scheduled. Prior to the hearing, the employer sought disclosure of all potential witnesses' statements collected by the NLRB during its investigation. The regional director denied the request on the ground that the witness statements were exempt from disclosure under several FOIA exemptions, ***1315** in particular Exemption 7(A). The employer appealed to the NLRB General Counsel. However, before the expiration of FOIA's 20-day response period, 5 U.S.C. § 552(a)(4)(B), the employer filed a FOIA action in federal district court, seeking disclosure of the witness statements and an injunction against holding the hearing until the documents had been disclosed. The NLRB argued that witness statements were exempt from disclosure under Exemption 7(A) because their production would interfere with an enforcement proceeding, the pending unfair labor practice hearing. The district court disagreed and ordered the NLRB to produce the witness statements.

The issue whether Exemption 7(A) was generic, or categorical, or case-specific emerged on appeal. The court of appeals rejected the NLRB's categorical or generic approach and concluded that the 1974 legislative history demonstrated that Exemption 7(A) was available only after a specific evidentiary showing of the possibility of actual interference in an individual case. Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 728 (5th Cir.1977). The court of appeals rejected the NLRB's arguments that the premature revelation of its case through the production of the witness statements before the hearing was the kind of interference that would justify nondisclosure and that pre-hearing production of witness statements would discourage potential witnesses from making statements at all. Id. at 729-31. The court of appeals acknowledged that the possibility of "interference" in the form of witness intimidation by the employer during the period between disclosure

of the witness statements to the employer and the hearing, but held that the NLRB had failed to demonstrate that the witness statements were exempt because it had not introduced any evidence that witness intimidation was likely in this particular case. Id. at 732. But see, e.g., Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir.) (holding statements of employees and union representatives obtained in NLRB investigation exempt from disclosure under Exemption 7(A) until completion of administrative and judicial proceedings), cert. denied, 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976).

The Supreme Court reversed. The Court endorsed the generic, or categorical, interpretation of Exemption 7(A) and held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing." 437 U.S. at 236, 98 S.Ct. at 2324. First, the Court noted that the language of the exemption, specifically the plural reference to "enforcement proceedings," suggested that "certain generic determinations" might be made under Exemption 7(A). Id. at 224, 98 S.Ct. at 2318. The Court concluded that the early legislative history supported this interpretation, id. at 225-26, 98 S.Ct. at 2318-19 (referring to Sen. Humphrey's concerns in 1966 about the need to protect statements of agency witnesses from disclosure prior to agency proceedings, specifically witnesses in unfair labor practice proceedings), as well as the reported decisions until 1974. Id. at 226, 98 S.Ct. at 2319 (citing cases). The Court also noted that the legislative history of the 1974 amendment of Exemption 7 showed "[t]hat the 1974 Congress did not mean to undercut the intent of the 1966 Congress with respect to Senator Humphrey's concern about interference with pending NLRB enforcement proceedings." Id. at 232, 98 S.Ct. at 2322; see id. at 226-32, 98 S.Ct. at 2319-22 (noting background of 1974 amendment, particularly Congressional disapproval of several D.C.Cir. decisions upholding "blanket exemptions" for all government records contained in investigatory files that had been compiled for law enforcement purposes; 1974 amendment changed scope of exemption from "files" to "records" and enumerated specific purposes and objectives of exemption).

The Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of law enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. The Court agreed that "[t]he most obvious risk of interference with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony ***1316** or not testify at all." Id. at 239, 98 S.Ct. at 2325. In addition, prehearing disclosure of witnesses' statements "would disturb the existing balance of relations in unfair labor practice proceedings," id. at 236, 98 S.Ct. at 2324, especially since, "[h]istorically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case." Id. The Court also noted that the use of FOIA as the mechanism for providing a litigant with earlier and greater access to the agency's case than the litigant would otherwise have was likely to cause substantial delays in the administrative process and thus interfere with enforcement proceedings. Id. at 237-38, 98 S.Ct. at 2324. [FN5]

FN5. As noted by the majority opinion, at 1307 supra, the Supreme Court recently affirmed the Robbins categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, ----, ---- - ----, 113 S.Ct. 2014, 2021, 2023-24, 124 L.Ed.2d 84 (1993) (rejecting blanket exemption for "all" FBI sources as confidential for purposes of Exemption 7(D); however, "more narrowly defined circumstances" may support inference of confidentiality, for example, generic category of paid informants). See also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (holding "rap sheets" constituted generic category of law enforcement records which could reasonably be expected to constitute an unwarranted invasion of privacy within meaning of Exemption 7(C)). I do not dispute the continued validity of the Robbins categorical approach. What is in dispute in the present case is whether, as a threshold matter, we know enough about the nature of the records in question to review the accuracy of the government's

> classification of the records into generic categories. I submit that we do not.

APPLICATION OF EXEMPTION 7(A)

I do not think Robbins supports the government's argument in the present case. As noted by the panel majority opinion, after Robbins endorsed the generic, or categorical, application of Exemption 7(A), many courts of appeals

> altered their views on the need for a Vaughn index when Exemption 7(A) is involved. The rationale underlying these post-Robbins decisions has been that a Vaughn index is unnecessary because the government is permitted to demonstrate interference based on categories of documents and need not demonstrate interference with enforcement proceedings on a document-by-document basis. E.g., Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986) (Scalia, J.); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir.1980) (per curiam). Moreover, in each of these cases, the appellate court was reviewing a district court's decision not to require a Vaughn index when the government had already provided adequate descriptions of the documents sought, as well as adequate explanations as to how the particular types of documents at issue could interfere with law enforcement proceedings.
>
> At no time, however, has an appellate court suggested that Robbins alters the district court's statutory obligation to review the claimed exemption's applicability. Robbins does not allow for exemption merely because documents appear in a law enforcement agency's file. When an agency relies upon Robbins and offers categorical justifications for exemption under Exemption 7(A), the agency must still review each document individually.... The district court is well within its authority to verify that the agency has actually examined and properly categorized each document. It may accomplish this task by requiring an affidavit that describes, on a document-by-document basis, the documents in the file, the categories into which each document is placed, and a description of how disclosure of each category of documents might interfere with enforcement proceedings. Robbins merely prevents a district court from ordering a document-by-document explanation as to how each document will interfere with enforcement proceedings. In other words, though the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis, it can require the government to justify its chosen categorization on a document-by-document basis. 950 F.2d at 533-34 (parenthetical omitted from Barney citation; citations omitted; footnote omitted).

In Robbins it was not disputed that the documents in question were in fact witness ***1317** statements. Nor was it disputed in Robbins that, at least in general, disclosure of witness statements prior to the unfair labor practice proceeding could interfere with that proceeding. What was disputed was whether the agency could rely on that generality or whether the agency had to make a specific factual showing that disclosure of those particular witness statements would interfere with that particular proceeding. Similarly, in Barney v. IRS, there was no dispute about the categorization of the documents in question; the district court and this court were "satisfied that the government's affidavits adequately described the documents, the categories to which they belonged, and the possible harms of disclosure." 950 F.2d at 534, citing 618 F.2d at 1272-73 (witness statements, documentary evidence, IRS agent's work papers, internal agency memoranda). See Curran v. Department of Justice, 813 F.2d 473, 476 (1st Cir.1987) (apparent from agency affidavit that agency conducted individualized, document-by-document search, subdivided records into types and then into functional categories).

The same cannot be said in the present case. Here, the parties disputed not only the nature of the individual documents, but also the type of category used by the government, as well as the appropriate categorization or placement of the documents into particular categories. This basic lack of agreement about the nature and categorization of the documents distinguishes the present case from Robbins and Barney.

In the present case, the district court required preparation of a Vaughn index, and in response the government filed several public affidavits or declarations and a document which it captioned a "categorical index." The district court was clearly not satisfied with the government's response. As noted by the penal majority opinion, "[t]he district court's dissatisfaction [with the government's

response was] understandable given the government's blanket assertion that all 13,800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages." Id. at 535; cf. Wiener v. FBI, 943 F.2d at 978 (noting the FBI's use of "boilerplate" explanations drawn from a "master" FOIA response). Furthermore, the district court believed that the FOIA requester had raised serious questions about the validity of the government's search and categorization of the documents. Id. Compare Curran v. Department of Justice, 813 F.2d at 476 (district court found no reason to impugn good faith of agency). The district court also concluded that it needed additional information "about each document, not only to verify that the government has fulfilled its obligation to examine each document, but also to enable it to understand or challenge the categories created by the government." 950 F.2d at 535.

By requiring the preparation of a Vaughn index in the present case, the district court was attempting to develop an adequate record. Only the government knows what is in the Hoffa file; the FOIA requester and the district court do not know, much less this court. As noted above, the record indicates only that the file consists of at least 13,800 pages in 70 volumes; the file is almost certainly larger now. Some of these pages are public source material which the government has already made available to the FOIA requester. According to the categorical index, which consists of a total of five double-spaced pages, each and every page falls within one of nine categories, the disclosure of which could reasonably be expected to interfere with law enforcement proceedings. The district court's dissatisfaction with the categorical index was directed more at the procedural and substantive accuracy of the government's classification of individual pages than at the categories identified by the government. (The majority opinion expresses no opinion on the sufficiency of the Baker affidavit and the categorical index. See supra at 1309 n. 4 supra.) In any event, as noted by the panel majority opinion, the district court's concern about whether all the documents are described by the government's categories cannot be resolved merely by requiring more specific or more detailed categories. 950 F.2d at 535.

In my view, assuming for purposes of analysis that the government's categories are sufficiently specific, the district court acted within its authority in requiring the government to verify that it had actually examined and accurately categorized each document. ***1318** Indeed, it was its duty to do so. King v. United States Department of Justice, 830 F.2d at 219 (acceptance of inadequately supported exemption claim "would constitute abandonment of the trial court's obligation under FOIA to conduct a de novo review"). The district court did not know (and we do not know) whether the government's categorization of the documents was correct or, for that matter, whether the government had examined each document individually. The district court decided that, without a Vaughn index, it could not verify whether there was a correlation between the documents and the categories. Because all the documents necessarily fall into exempt categories, unless the district court can verify that each document has been examined and accurately categorized, the Robbins categories will become "no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendments of FOIA." Bevis v. Department of State, 255 U.S.App.D.C. 347, 801 F.2d 1386, 1389 (1986), citing Robbins, 437 U.S. at 236, 98 S.Ct. at 2324.

As noted by the panel majority opinion, preparation of a Vaughn index in the present case does not require the government to demonstrate document-by-document how disclosure of each document could reasonably be expected to interfere with pending law enforcement proceedings. 950 F.2d at 535. Like the district court and the panel majority, I accept the category-by-category approach. What I do not accept is the government's conclusory assertions that each and every document in the Hoffa file falls within one of its nine categories. In other words, what is disputed, and what the district court sought to verify by requiring the preparation of a Vaughn index, is whether the government's categorization of each document is accurate. Without such a record, the FOIA requester cannot test the government's claim of exemption, the district court cannot conduct the required de novo review of the government's decision not to disclose (without undertaking the arduous task of actually reviewing the documents itself), and this court cannot conduct a meaningful review of the district court's decision.

It should be noted that the district court could decide to modify its order requiring the government to prepare a Vaughn index for the entire Hoffa file. In the proceedings before the district court, the government argued that preparation of a Vaughn index for the entire Hoffa file would be inordinately time-consuming and would necessarily divert scarce resources from other law enforcement activities. The district court could require the government to prepare a Vaughn index for a representative sample of the documents in the Hoffa file. "Representative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved." Bonner v. United States Department of State, 289 U.S.App.D.C. 56, 928 F.2d 1148, 1151 (1991); accord The Washington Post v. United States Department of Defense, 766 F.Supp. 1, 15 (D.D.C.1991).

Alternatively, the district court could decide to conduct an in camera review of a representative sample of the documents in the Hoffa file. In camera review is discretionary. Robbins, 437 U.S. at 224, 98 S.Ct. at 2318. Limited in camera review might be particularly helpful in the present case. "[A] finding of bad faith or contrary evidence is not a prerequisite to in camera review; a trial judge may order such an inspection 'on the basis of an uneasiness, on a doubt [the judge] wants satisfied before [taking] responsibility for a de novo determination.' " Meeropol v. Meese, 252 U.S.App.D.C. 381, 790 F.2d 942, 958 (1986), citing Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187, 1195 (1978). One district judge and one appellate panel have examined in camera a selection made by the government of the documents contained in the Hoffa file and concluded that those documents established that the criminal investigation into Hoffa's disappearance is active and continuing and that production of those records could reasonably be expected to interfere with enforcement proceedings. Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422, slip op. at 5-6 (E.D.Mich. July 31, 1991), aff'd, 992 F.2d 1426 (6th Cir.1993).

For the reasons set forth above, I would hold the district court has the authority to require the government to prepare a Vaughn index even when Exemption 7(A) is invoked ***1319** and would deny the government's application for writ of mandamus.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 12/06/96

INSTA-CITE

CITATION: 999 F.2d 1302

Direct History

1 In re Department of Justice, 950 F.2d 530, 60 USLW 2377 (8th Cir.(Mo.), Dec 02, 1991) (NO. 91-2080, 91-2164), rehearing granted and opinion vacated (Feb 12, 1992) (Additional Negative Indirect History)
On Rehearing
=> 2 **In re Department of Justice,** 999 F.2d 1302, 62 USLW 2105 (8th Cir.(Mo.), Aug 05, 1993) (NO. 91-2080, 91-2164)
Certiorari Denied by
3 Crancer v. Department of Justice, 510 U.S. 1163, 114 S.Ct. 1186, 127 L.Ed.2d 537, 62 USLW 3571, 62 USLW 3573 (U.S., Feb 28, 1994) (NO. 93-700)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 12/06/96
THE CURRENT DATABASE IS ALLFEDS
YOUR TERMS AND CONNECTORS QUERY:

DICKERSON & HOFFA

Brian DICKERSON, Plaintiff-Appellant,
v.
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 92-1458.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 19, 1993.

Decided April 30, 1993.

Newspaper editor requested, pursuant to Freedom of Information Act (FOIA), release of record on investigation conducted by Federal Bureau of Investigation (FBI) into disappearance more than 15 years earlier of former union official. After FBI denied request, editor brought suit to compel Department of Justice to produce records. The United States District Court for the Eastern District of Michigan, George LaPlata, J., denied relief, and editor appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that: (1) Vaughn index was not required, and (2) records came within FOIA exemption for records compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.

Affirmed.

Beckwith, District Judge, sitting by designation, delivered separate concurring opinion.

Batchelder, Circuit Judge, delivered separate dissenting opinion.

[1] RECORDS ⇐ 65
326k65
"Vaughn index" is document-by-document index, specially prepared for litigation purposes, in which agency describes contents of its records and reasons why each of the disputed items is claimed to be exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552.

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

[2] RECORDS ⇐ 60
326k60
Law enforcement records cannot reasonably be expected to interfere with enforcement proceedings, for purposes of Freedom of Information Act (FOIA) exemption, unless there is at least reasonable chance that enforcement proceeding will occur. 5 U.S.C.A. § 552(b)(7)(A).

[3] RECORDS ⇐ 65
326k65
District court did not have to require Federal Bureau of Investigation (FBI) to compile Vaughn index of FBI file relating to disappearance of former union official more than 15 years earlier before concluding that records relating to disappearance were within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings, based upon affidavits of several FBI officials and its in-camera review of FBI file documents assembled for purpose of briefing one of the affiants on status of investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇐ 65
326k65
In connection with dispute over whether records come within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes, valuable time should not normally have to be spent on preparation and analysis of Vaughn index insofar as question to be resolved is whether actual enforcement proceedings are still being contemplated; as practical matter, affidavits by people with knowledge of and responsibility for investigation usually ought to suffice. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇐ 60
326k60
Federal Bureau of Investigation (FBI) records relating to disappearance of former union official more than 15 years earlier were exempt from disclosure under Freedom of Information Act (FOIA) as records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings; FBI made sufficient showing that investigation of disappearance remained active and that production of record could reasonably be expected to interfere with future prosecution. 5 U.S.C.A. §

552(b)(7)(A).

[6] RECORDS ⇦ 67
326k67
On appellate record it did not appear that prospects for finding any "reasonably segregable" nonpublic portions of Federal Bureau of Investigation (FBI) files relating to disappearance of union official more than 15 years earlier that could properly be made public were such as to justify remand. 5 U.S.C.A. § 552(b).

***1427** Herschel P. Fink (argued and briefed), Michael A. Gruskin (briefed), Steven M. Ribiat, Honigman, Miller, Schwartz & Cohn, Detroit, MI, for plaintiff-appellant.

L. Michael Wicks, Asst. U.S. Atty., Detroit, MI, Stephen G. Harvey, Leonard Schaitman, U.S. Dept. of Justice, Appellate Staff, Civil Div., Scott R. McIntosh (argued and briefed), U.S. Dept. of Justice, Appellate Div., Washington, DC, for defendant-appellee.

Before: NELSON and BATCHELDER, Circuit Judges; and BECKWITH, District Judge. [FN*]

FN* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

DAVID A. NELSON, Circuit Judge.

Pursuant to the Freedom of Information Act--a statute which, subject to certain exceptions, makes federal government records available to anyone who asks for them--plaintiff Brian Dickerson requested the release of records on an investigation conducted by the Federal Bureau of Investigation into the disappearance of Jimmy Hoffa, former president of the Teamsters Union.

Citing 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings," the government denied the request. Mr. Dickerson brought suit in the Eastern District of Michigan to compel the Department of Justice to produce the records. The district court (La Plata, J.) ultimately decided that production was not required.

In making its decision the district court focused on the question whether a "concrete prospective law enforcement proceeding" [FN1] could still be discerned--i.e., whether there was still a reasonable chance that someone would be prosecuted in connection with Mr. Hoffa's disappearance. Based on affidavits of several FBI officials and an in camera review of FBI file documents assembled for the purpose of briefing one of the affiants on the status of the investigation, the district court found that "the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." The court further found that disclosure of the requested documents could reasonably be expected to interfere with such proceedings. The court made these findings without having required the government to provide a document-by-document analysis of the files.

FN1. The phrase originated with Senator Hart, a supporter of Freedom of Information Act amendments adopted in 1974. See 120 Cong.Rec. 17033 (1974), quoted in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232, 98 S.Ct. 2311, 2322, 57 L.Ed.2d 159 (1978).

The issues presented on appeal are (1) whether the district court abused its discretion in not insisting on a full document-by-document analysis and in limiting its in camera review to the briefing materials; (2) whether the district court dealt correctly with the factual side of the case; and (3) whether the district court ought to have found that at least some non-public portions of the investigatory files were not protected ***1428** from disclosure. Resolving each of these issues in favor of the government, we shall affirm the judgment of the district court.

I

Jimmy Hoffa disappeared in Detroit, Michigan, on July 30, 1975. It is widely believed that he was abducted and killed. Mr. Hoffa's disappearance led to an FBI investigation that has not, to date, resulted in any criminal proceedings being brought.

The investigation is documented in two large files, one maintained in the FBI's field office in Detroit

and the other at FBI headquarters in Washington. At the time with which we are concerned in this proceeding the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes.

On July 25, 1989, counsel for the Detroit Free Press, a newspaper that employs plaintiff Dickerson in an editorial capacity, sent sweeping Freedom of Information Act requests on the Hoffa investigation to Justice Department and FBI officials in Detroit and Washington. When the requests were denied, Mr. Dickerson sued the Department of Justice under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly. This section of the statute, which places the burden of sustaining non-disclosure on the government, directs the court to determine the matter de novo. It also provides that the court "may examine the ... agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in [5 U.S.C. § 552(b)]...."

The Department of Justice filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserting that no documents had been improperly withheld. Both parties subsequently moved for summary judgment.

The plaintiff's summary judgment motion was accompanied by newspaper articles referring to a statement by Kenneth P. Walton, a retired head of the FBI's Detroit field office, to the effect that although he knew who had murdered Jimmy Hoffa, there would never be a prosecution because of the government's unwillingness to disclose confidential sources. The Justice Department filing was accompanied by "declarations," or affidavits, in which two FBI headquarters officials, Angus B. Llewellyn and Jim E. Moody, attested that the Hoffa investigation was still pending.

The Llewellyn declaration went on to give a general description of the contents of the investigatory files, categorizing the records by source or function. The declaration also sought to explain why law enforcement records contained in the files were exempt from production not only under subsection (7)(A) of 5 U.S.C. § 552(b), but also under subsection (7)(C) (exempting such records if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy"); subsection (7)(D) (exempting them if they "could reasonably be expected to disclose the identity of a confidential source"); and subsection (7)(E) (exempting them if they "would disclose techniques and procedures for law enforcement investigations or prosecutions ... if such disclosure could reasonably be expected to risk circumvention of the law").

The Moody declaration focused on the (7)(A) exemption. The declaration explained, among other things, that

> "The files responsive to plaintiff's [Freedom of Information Act] request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation."

The Moody declaration stated that the FBI was continuing its efforts to develop information for use in criminal proceedings, and the declaration sought to show why production of ***1429** the records could reasonably be expected to interfere with such proceedings.

In January of 1991 the district court denied both of the motions for summary judgment on the ground that there was a material issue of fact concerning the prospect of future enforcement proceedings. The Justice Department moved for reconsideration, supporting its motion with a declaration executed by William M. Baker, the Assistant Director of the FBI in charge of the agency's Criminal Investigation Division.

Mr. Baker declared under penalty of perjury that it was his responsibility to determine whether the investigation into the Hoffa disappearance should be pursued; that in his judgment the investigation warranted the continuing efforts of the FBI; that he had allocated continued FBI resources to the investigation; that he believed "that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted;" and that public

disclosure of the information in the Hoffa file could reasonably be expected, for reasons specified in the declaration, to interfere with enforcement proceedings against those responsible for the disappearance. Mr. Baker further declared that the statement attributed to the former field office head "did not reflect and does not reflect official FBI policy."

[1] In response to the motion for reconsideration plaintiff Dickerson filed a reply brief stating that Mr. Baker's declaration was essentially identical to one he had filed in a Freedom of Information Act suit brought in a federal district court in Missouri by Mr. Hoffa's daughter, Barbara Crancer. The brief pointed out that the declaration had not dissuaded the district court in Missouri from ordering the government to submit a Vaughn index on the smaller of the two Hoffa files, [FN2] and it noted that FBI Director William Sessions had testified before a Senate Subcommittee that it is "doubtful" that the government will ever have sufficient evidence to bring to trial those responsible for Mr. Hoffa's disappearance. [FN3]

FN2. A "Vaughn index," which takes its name from a technique developed in Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure. See Osborn v. Internal Revenue Service, 754 F.2d 195, 196 (6th Cir.1985), and the cases there cited, for a statement of the criteria such an index must meet. The requirement for a Vaughn index in Mrs. Crancer's case was subsequently upheld by a divided three judge panel of the Court of Appeals for the Eighth Circuit, see In re Department of Justice, 950 F.2d 530 (8th Cir.1991), but the panel decision has been vacated in connection with the granting of a rehearing en banc. See Order at 950 F.2d 538. As of this writing the en banc court has not announced its decision.

FN3. The Justice Department later submitted an official transcript of the subcommittee hearing showing that Director Sessions had declined to comment on the likelihood of indictments being obtained, and that it was Oliver B. Revell, Executive Assistant Director-Investigations, and not Director Sessions, who made the "doubtful" comment.

Plaintiff Dickerson's reply brief further advised the court that the Missouri proceedings had disclosed the existence of two categories of documents that might quickly reveal the status of the Hoffa investigation: documents containing the results of high level strategy conferences, with synopses of the investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. The plaintiff's brief suggested that the court conduct an in camera review of all documents in these two categories. Since the Missouri court had already ordered the Justice Department to prepare a Vaughn index on the 68-volume file from FBI headquarters in Washington, plaintiff Dickerson suggested that the Department should be ordered to produce a copy of that index as well.

In the meantime, plaintiff Dickerson had served notice of the depositions of FBI Director Sessions and declarants Llewellyn, Moody and Baker, and the Justice Department had moved for a stay of discovery. The motion was referred to a magistrate judge, who conducted two telephone conferences on the matter.

In the course of the first conference the Justice Department indicated a willingness to go through the headquarters file and segregate, ***1430** for in camera review by the court, all documents in the two categories singled out by the plaintiff. Government counsel later confirmed with declarant Moody, Chief of the FBI's Organized Crime Unit, that such documents had not yet been physically segregated. Mr. Moody disclosed to counsel, however, and counsel disclosed at the second telephone conference with the magistrate judge, that Moody already had a file of documents, culled from the field office records in Detroit, that contained an update on the Hoffa investigation. This file had recently been assembled on Mr. Moody's own initiative to prepare him to testify if he should be ordered to give his deposition. The Moody file had not been put together with the idea of turning it over to the court for in camera review, counsel explained, but the government offered to make it available to the court for that purpose, along with all documents in the two categories specified by the plaintiff.

The magistrate judge expressed an interest in keeping the scope of any in camera review manageable, and counsel for plaintiff Dickerson agreed that the district judge would be more likely to undertake such a review if the quantity of materials were not excessive. The telephone conference led to an order in which the magistrate judge directed that the Moody file be sent to Michigan for possible in camera inspection by District Judge La Plata. The plaintiff's request to depose the four FBI officials was deferred in the meantime.

Judge La Plata concluded that with the addition of Assistant Director Baker's declaration, the declarations alone might be sufficient. In view of the testimony before the Senate subcommittee, however, and in view of the length of time that had elapsed since Mr. Hoffa's disappearance, Judge La Plata elected to review the Moody file (consisting of some 335 pages) in its entirety.

Having completed a careful and thorough review of the Moody file in camera, the court expressed itself as "satisfied beyond any doubt" that the investigation was active, that it was continuing, and that it was directed toward the institution of criminal proceedings. Because the court likewise found that disclosure of the documents sought by plaintiff Dickerson and his newspaper could reasonably be expected to interfere with enforcement proceedings, the court entered summary judgment in favor of the Department of Justice. A subsequent motion for reconsideration was denied, and this appeal followed.

II

[2] Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings," it has been suggested, unless there is at least "a reasonable chance that an enforcement proceeding will occur...." Nevas v. Dept. of Justice, 789 F.Supp. 445, 448 (D.D.C.1992). [FN4] We agree, and we turn first to the procedure followed by the district court in preparing itself to determine the likelihood that enforcement proceedings might still occur in the Hoffa case. (The court's determination of the likelihood that disclosure of the requested documents might interfere with any such proceedings also has a procedural aspect, and we shall touch on this at the same time.)

FN4. Even where exemption (7)(A) has become inapplicable, however, records compiled in the course of the investigation may still be exempt if production could be expected to constitute an unwarranted invasion of personal privacy or disclose the identity of a confidential source, or if production would disclose law enforcement techniques and procedures that could be expected to risk circumvention of the law in other cases. See 5 U.S.C. § 552(b)(7)(C), (D), and (E). In the case at bar the district court made no determination as to the applicability of these sections, and we shall confine our analysis to exemption (7)(A).

[3] Although requested to follow the lead of the district court in Missouri in ordering the compilation of a Vaughn index on the FBI headquarters file, Judge La Plata did not do so. Plaintiff Dickerson maintains that the court committed reversible error in granting the government's summary judgment motion without having had the benefit of such an index.

Depending on the nature of the case, the use of a Vaughn index may have obvious advantages from the perspective of one or another of the litigants or from the perspective of the courts. See, for example, Ingle v. ***1431** Dept. of Justice, 698 F.2d 259 (6th Cir.1983), where we indicated that a Vaughn index makes the playing field more nearly level for the party seeking disclosure, facilitates effective appellate review, and may obviate any need for the courts to review documents in camera. In the context of a case that did not involve exemption (7)(A), we have said that a Vaughn index should be obtained in "most" Freedom of Information Act cases. Osborn v. Internal Revenue Service, 754 F.2d 195, 197 (6th Cir.1985).

As we subsequently explained in a Vaughn decision of our own, however, Osborn created no hard and fast rule with respect to Vaughn indices as such. Vaughn v. United States, 936 F.2d 862, 867 (6th Cir.1991). The government must provide sufficient information in sufficient detail to enable the court "to make a reasoned, independent assessment of the claim of exemption," but no particular method of doing so is mandated; "[a] court's primary focus must be on the substance, rather than the form, of the information supplied by

the government to justify withholding requested information." Id. The Supreme Court has consistently taken what it terms "a practical approach" to Freedom of Information Act matters, see John Doe Agency v. John Doe Corp., 493 U.S. 146, 157, 110 S.Ct. 471, 477, 107 L.Ed.2d 462 (1989), and this circuit tries to do the same.

Where exemption (7)(A) is concerned, as a practical matter, it is often feasible for the courts to make "generic determinations" about interference with enforcement proceedings. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 98 S.Ct. 2311, 2317-18, 57 L.Ed.2d 159 (1978). [FN5] In many (7)(A) cases, at least, affidavits of the sort presented by the government here would seem to provide an adequate basis for making such determinations.

> FN5. The plaintiff in Robbins Tire was seeking disclosure of witness statements taken by the National Labor Relations Board. The plaintiff contended that such statements could be withheld under exemption (7)(A) only upon a showing of a particularized risk of interference with a particular enforcement proceeding. The Supreme Court rejected the contention that no "generic determinations" of likely interference could ever be made, concluding instead that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2324. When Robbins Tire was decided, exemption (7)(A) required a showing that disclosure "would" interfere with enforcement proceedings. Congress subsequently amended the statute by dropping the word "would" and replacing it with the current formula, which protects law enforcement records to the extent that disclosure "could reasonably be expected to interfere...." (Emphasis supplied.) See Pub.L. 99-570, § 1802(a) (1986). This statutory change strengthens the conclusion reached by the Supreme Court in Robbins Tire, of course.

[4] The case at bar may be somewhat unusual in that here the district court was initially uncertain whether an actual enforcement proceeding was still being contemplated and whether the "purpose and point" of the investigation that generated the records in question had "expired." See Robbins Tire, 437 U.S. at 232, 98 S.Ct. at 2322, referring to legislative history indicating that "with the passage of time, ... when the investigation is all over and the purpose and point of it has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure." But insofar as the question to be resolved by the courts is whether actual enforcement proceedings are still being contemplated, it does not seem to us that valuable time should normally have to be spent on the preparation and analysis of a Vaughn index. As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.

Here the district court believed that the government's affidavits might be sufficient standing alone to support a finding on whether the point and purpose of the investigation had expired, but the court nonetheless felt the need for a reality check of some kind. The Moody file seemed like a sensible place to start, and we think it was clearly within the court's discretion to begin there. If the Moody file had turned out not to be helpful, the court could obviously have moved on to an in camera inspection of the two groups of ***1432** documents that both parties had suggested the court might wish to examine. After reviewing all of the documents in the Moody file, however, the court concluded that there was no need to go further. We too have reviewed the Moody file in its entirety, and we see no abuse of discretion in the district court's decision on this score.

Plaintiff Dickerson argues that the decision to review only documents "hand-picked" by the government deprived him of the benefits of the adversary process. But the materials in the Moody file were selected, as we have seen, for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it in camera. The idea of a court review of the Moody file in isolation originated with the magistrate judge, not with the government. The review process was necessarily non-adversarial, to be sure, but the process would have been equally non-adversarial if the documents under review had included the additional materials the government had said it was willing to turn over to the court.

The approach developed by the magistrate judge was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents in camera than he would have wanted to see. This approach makes sense to us. The adversaries could and did present arguments on the sufficiency of the affidavits that formed the government's main line of defense, [FN6] and review of any documents in camera might well have been deemed superfluous; we think it was reasonable for the magistrate judge to offer Judge La Plata the documents that had already been segregated, and we think it was reasonable for Judge La Plata to decide, after reviewing them, that he had seen all he needed to see in order to make a proper decision.

FN6. Plaintiff Dickerson complains about the failure of the district court to hear oral argument, but each side had ample opportunity to present its case through briefs. In addition, of course, there were two telephone conferences with the magistrate judge.

III

A

[5] The district court was correct, we believe, in its finding on the likelihood of a criminal prosecution being brought.

It is clear, as we read the record, that the Hoffa investigation remains active. In the judgment of Assistant Director Baker--the person whose responsibility it is to determine whether the investigation should still be pursued, and, if so, what FBI resources should be devoted to it--the investigation warrants the FBI's continued efforts to bring to trial those responsible for Mr. Hoffa's disappearance.

Mr. Baker has allocated continued FBI resources to the Hoffa investigation, according to his declaration, and the declaration says that the investigation "is ongoing and still absorbs FBI management and field agent resources on a regular basis." The documents in the Moody file are consistent with Mr. Baker's representation that the Hoffa investigation remains active.

The fact that the investigation is continuing does not mean that a prosecution will definitely be brought, of course, but the Baker declaration says that FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. "[W]ith the passage of time," Mr. Baker continues, "persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." Attesting to a "belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted," Mr. Baker says that he "would not knowingly permit scarce FBI resources to be devoted to a futile investigation."

FBI retiree Walton and Executive Assistant Director Revell may consider it doubtful whether anyone will ever be brought to trial in the Hoffa case, and they may be right. Neither of them is responsible for deciding whether it is worthwhile to continue the investigation, however, and the official who does have that responsibility--Assistant Director Baker--obviously believes that there is still a reasonable prospect of a prosecution being brought. No court is likely to be able to match Mr. Baker's expertise on that kind ***1433** of question, and, like the district court, we are disposed to defer to his judgment.

B

The district court was also correct, we believe, in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution.

In some contexts, the Supreme Court has said, the most obvious risk of interference with enforcement proceedings is that witnesses will be coerced or intimidated into changing their testimony or not testifying at all. Robbins Tire, 437 U.S. at 239, 98 S.Ct. at 2325. The declarations of Messrs. Llewellyn and Moody both demonstrate that witness intimidation is a genuine concern in the Hoffa investigation--an investigation that the FBI has designated a "Racketeering Influenced and Corrupt Organization-La Cosa Nostra Labor Racketeering Investigation." If the perpetrators of the crime knew what investigative leads the FBI is pursuing, who the prime suspects are, and the nature of the evidence gathered to date, as one of the affidavits explains, they "could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi...."

In organized crime investigations such as this one, moreover, it has been the experience of declarant Moody, the chief of the Organized Crime Section of the FBI's Criminal Investigation Division, that informants can provide information critical to the successful conclusion of the investigation. Public disclosure of the Hoffa investigation files, Mr. Moody has declared, would discourage such individuals from coming forward.

Another important issue, particularly in homicide cases, has to do with the corroboration of evidence. Verification of statements given by future witnesses becomes harder, Mr. Moody has indicated, where the factual information developed in the investigation has entered the public domain.

In addition, the record before us shows that the Hoffa files contain information regarding other pending and prospective criminal proceedings. The prospect of interference with such enforcement proceedings is not without significance.

Although the government has the burden of showing that production of the records could reasonably be expected to interfere with enforcement proceedings, the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is. See Robbins Tire, 437 U.S. at 224, 98 S.Ct. at 2318. Having regard to the important public interest that exemption (7)(A) was designed to protect, having regard to the fact that the language of the exemption has been broadened by Congress to protect records that "could" be expected to interfere, as opposed to records that "would" interfere, and having regard to the obvious risks that public disclosure of these active investigation files would entail, we agree with the district court that the burden with respect to interference has been met in this case.

IV

[6] The Llewellyn declaration characterizes the documents in the Hoffa investigation files as follows:

"Documents setting forth leads to be conducted.
Documents containing information received from confidential informants.
Information and documents provided by local law enforcement.
Interviews of third parties and cooperating witnesses.
Public source information such as newspaper clippings and press releases.
Public and sealed court documents.
Laboratory reports setting forth results of examinations.
Polygraph worksheets and reports."

To the extent that public source information and public judicial materials are included in the files, the government has agreed to make the relevant documents available to plaintiff Dickerson. All that is in controversy here is the non-public portions of the files.

Plaintiff Dickerson candidly acknowledges, in a footnote toward the end of his principal brief, that it is open to the government to justify the assertion of a (7)(A) exemption on a "category-of-document" basis rather than ***1434** by proceeding document by document. He points out, however, that there is no blanket exemption for investigatory files as such, and he argues that we should at least remand the case with instructions that the government be required to segregate and produce all nonexempt material. In support of this suggestion he quotes the last sentence of 5 U.S.C. § 552(b), which says that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

It is doubtless true that by deleting large portions of the information contained in the Hoffa files, the government could render whatever was left useless to any law-breaker. (And useless to plaintiff Dickerson and his newspaper, we might add.) But the words "reasonably segregable" must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned. On the record before us we do not believe that the prospects for finding any "reasonably segregable" non-public portions of the Hoffa files that could properly be made public are such as to justify the remand that plaintiff Dickerson seeks.

The judgment of the district court is AFFIRMED.

BECKWITH, District Judge, concurring.

I.

I concur with Judge Nelson's results and his reasoning. I write separately, because I am convinced that more compelling grounds exist for exempting the Department of Justice's Hoffa file than that which was the basis of the district court's decision.

In the Llewellyn declaration, the Department of Justice cited at least three exemptions from the Freedom of Information Act in addition to exemption 7(A) of 5 U.S.C. § 522(b). The first such exemption is 7(C), the exemption for information, the disclosure of which "could reasonably be expected to be an unwanted invasion of personal privacy." The second is exemption 7(D) for information that "could reasonably be expected to disclose the identity of a confidential source." The third such exemption is 7(E), the exemption for information that "would disclose techniques and procedures for law enforcement investigations or prosecutions ... [when] such disclosure could reasonably be expected to risk circumvention of the law."

Apparently, the trial court considered each of the cited exemptions. Nevertheless, that court rested its decision entirely on exemption 7(A), concluding that the Department of Justice was engaged in an ongoing investigation directed toward the potential institution of criminal proceedings. Judge Nelson has properly confined his analysis to a review of the trial court's decision based upon exemption 7(A). I agree that the contents of the Moody file sufficiently support the trial court's conclusion that the contents of the Hoffa file are exempt under 7(A). The question is a close one, however, as is illustrated by the dissent.

My review of the Moody file suggests that each of the four exemptions discussed above supports the nondisclosure of some or all of the documents in the Hoffa file. Had the district court based its decision on all four exemptions, the correctness of the decision would have been beyond question and our review would have been much simpler.

II.

My review of the Moody file further suggests that the various exemptions are so intertwined, overlapping, and inextricable that virtually nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, confidential source identity, various individuals' privacy, and law enforcement investigative techniques. For this reason, the trial court could not have ordered a Vaughn index without risking inadvertent release of exempt and sensitive information.

There being no constitutional outline for the manner in which a trial court must approach its analysis of a government claim of exemption from the Freedom of Information Act, it cannot be said that the trial court in this instance failed to independently, adequately, and objectively assess the validity of the government's claim. The trial court was ***1435** under no obligation to follow Plaintiff's proffered procedure when another effective option was available. For that reason, I cannot agree with the dissent's criticism of the trial court's failure to order the production of an index.

BATCHELDER, Circuit Judge, dissenting.

I.

Over the past seventeen years, the Department of Justice has compiled a file of nearly four hundred volumes of documents on the disappearance of Jimmy Hoffa, a man, and a mystery, surely needing no introduction. Appellant Brian Dickerson, who happens to be editor of a major Detroit newspaper, has exercised the privilege Congress has given the public to request access to the documents in this file. While granting this privilege, Congress has also recognized that good government, in some circumstances, requires secrecy. Nonetheless, it has placed the burden of showing the need for secrecy on government agencies wishing to protect certain documents from public scrutiny. Since I believe the Government has fallen woefully short in carrying its burden, I dissent.

II.

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " Vaughn v. United States, 936 F.2d 862, 865 (6th Cir.1991) (quoting Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772, 109 S.Ct. 1468, 1481,

103 L.Ed.2d 774 (1989)); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 151, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973)). The Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978)). It requires " 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Vaughn, 936 F.2d at 865 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976)). The exemptions are to be "narrowly construed." Id. " '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. Vaughn, 936 F.2d at 866 (citing Department of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989)).

A. Existence of an ongoing law enforcement proceeding.

In reviewing a District Court's decision under the FOIA, the Court of Appeals must "determine first whether the District Court had an adequate factual basis for its decision, and second, decide whether upon that basis the court's decision was clearly erroneous." Vaughn, 936 F.2d at 866 (citing Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir.1983)). I agree with the majority that the record shows that the FBI has continued to pursue the Hoffa disappearance investigation and that officials believe that eventual prosecution is not out of the question. William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division, who apparently has the authority to decide whether to continue the investigation, made a sworn declaration to that effect, and that is good enough to establish the existence of "a concrete prospective law enforcement proceeding."

***1436** B. Interference with an ongoing law enforcement proceeding.

While the existence of such an ongoing proceeding is necessary to a finding of exemption under § 522(b)(7)(A), Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986), [FN1] showing that such a proceeding indeed exists does not serve to exempt the entire file on the proceeding. Id. The Government also must prove that the documents, if released, could interfere with enforcement proceedings. Here, the Government essentially did nothing more than assure the reviewing court that all 400 volumes on Hoffa relate to their enforcement efforts, and recite (using language remarkably similar to statutory and case language) the harms that will result from any disclosure save for press clippings. It has not met its further burden of proof.

> FN1. To restate, § 522(b)(7)(A) exempts "investigatory records compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." The earlier version of this provision exempted such records where production "would" interfere with enforcement. See North v. Walsh, 881 F.2d 1088, 1098 n. 14 (D.C.Cir.1989) ("This change 'relieves the agency of the burden of proving to a certainty' that disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting Reporters Committee for Freedom of the Press v. Department of Justice, 816 F.2d 730 (D.C.Cir.), modified on reh'g, 831 F.2d 1124 (1987), rev'd on other grounds, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). The Congress has lessened the Government's burden, but the causal connection between specific documents and potential interference still must be established; the statute still does not permit "blanket assertions" such as the Government has made here.

FOIA cases seem to pit citizen suspicion against

government defensiveness. The fact that one side knows the entire truth and the other must guess at it (as, indeed, must the judge) requires adherence to procedures meant to inform the court as to the nature of government documents without revealing their actual contents, and to retain as much fairness in the adversary proceeding as possible given the imbalance of information. See Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992) (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (" 'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.' ").

The majority places great emphasis on the "public interest that exemption 7(A) was designed to protect" and the "obvious risks that public disclosure of these ... files would entail." I do not quarrel with the majority's observation that the release of documents containing, for example, the names of witnesses and informants might well lead to witness intimidation and destruction of evidence by those implicated in an ongoing investigation. Indeed, in enforcement exemption cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy." Campbell v. Department of Health & Human Services, 682 F.2d 256 (D.C.Cir.1982).

However, I believe the majority understates the Government's burden of showing that specific documents in its possession contain sensitive information. The majority admits that "the mere fact that the burden of justifying nondisclosure rests with the government does not illuminate the question of how heavy the burden is," and notes that Congress "broadened" exemption 7(A) from covering only records which "would" be expected to interfere with enforcement proceedings to those records which "could" be expected to interfere. While I recognize that Congress loosened up the standard somewhat from the seemingly unprovable "would interfere" standard to the more reasonable "could interfere," I certainly do not believe that in amending the statute Congress changed the underlying premise of the Act, that " 'disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). Permitting the Government to satisfy its burden by simply assuring the court that all of the requested papers in a giant, seventeen year old file relate in some way to an ongoing investigation, as I think happened here, potentially robs the Act of all effectiveness in attaining this objective.

***1437** This Circuit has recognized that the focus of a FOIA case is the contents of the documents requested, not the purpose for which the Government possesses them. The Act grants disclosure exemptions for documents containing information which would most likely harm an ongoing investigation in a specific way if made public. Thus,

> a court must have sufficiently detailed information regarding the contents of withheld documents along with reasoning for the application of specific FOIA exemptions to enable the court to make an independent assessment of both the contents of the documents in issue and the applicability of any asserted exemptions.

Vaughn, 936 F.2d at 869. The court may not grant " 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Robbins Tire & Rubber Co., 437 U.S. at 236, 98 S.Ct. at 2324. The Government "must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation." Campbell, 682 F.2d at 265 (emphasis added). The trial court has considerable discretion as to what procedures it uses to decide whether certain documents are exempt from disclosure, but whatever procedure the court chooses must suffice to produce enough evidence on which to rule, and to produce a record an appeals court can consult to review the decision. Vaughn, 936 F.2d at 869.

Reading the majority opinion may leave one with the distinct impression that we really have no idea what information lurks in the massive Hoffa file. That impression would be correct. The record presented us does not allow this court to make the requisite independent assessment of whether each document or category of documents would interfere with the Government's enforcement efforts. Obviously, the Government need not produce each and every document for the judge to decide whether its contents merit exemption from release. The Government's submissions may describe the

documents by categorizing them according to their content and nature, Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986); the indexing and categorizing of documents, particularly where the requested documents are voluminous, is preferred to in chambers inspections, Vaughn, 936 F.2d at 866. While courts have smiled on the use of Vaughn indices in sorting out large volumes of documents, and in their discretion sometimes ordered such indices produced, so long as the Government provides sufficiently specific and detailed information to permit the court to make a reasoned determination, "no particular method ... is mandated." Id. at 867.

Just because the Act does not mandate a particular method does not mean that any method will do. The Llewellyn declaration, which the majority believes adequately provides a categorization of the documents in the file, falls short in two respects. First, categories such as "information and documents provided by local law enforcement" and "public and sealed court documents" are not "sufficiently distinct to allow a court to determine, as to each category, whether the specific claimed exemption(s) are properly applied." Vaughn, 936 F.2d at 868. The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' " Bevis, 801 F.2d at 1389 (quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C.Cir.1986)).

Second, even though a few of Mr. Llewellyn's categories, such as "documents containing information from confidential informants," more appropriately describe materials that fit the exemption, I do not believe the Government's task ends there with respect to showing that the documents it seeks to keep secret fit in those clearly exempt categories. A category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide "adequate detail and justification" to satisfy the claimed exemption. Id. at 869. While our decision in Vaughn is careful not to prescribe specific methods, I think our opinion in that case, which affirmed the exemptions claimed there, describes considerably more effort on the part of the affiant than we see here. The affiant in Vaughn did assign the documents to rather general categories, but she

***1438** also indicated, by page number, which of the 1,000+ documents were included in each of the categories. For each of the categories, [the affiant] then discusses the legal grounds and exemptions upon which the government relies in withholding the specific documents contained within each category. Attached to her affidavit is an exhibit which summarizes, by document page number, the exemption(s) relied on for withholding each of the 1,000+ pages.

Vaughn, 936 F.2d at 868 (emphasis added). This passage, it seems to me, illustrates the rule that the Government must demonstrate that the contents of identifiable documents actually fit the exemption claimed. The record here does not allow us to see how this fit has been made. For example, while the Government has told us that the Hoffa file contains informant interviews, which comes as no surprise, it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing any of them could harm the ongoing investigation. [FN2] See Bevis, 801 F.2d at 1389 ("[T]he FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

> FN2. A word on the "Moody file." Our decision in Vaughn makes it clear that in camera review of documents is not favored, particularly where the Government chooses to proceed using categories of documents, rather than presenting all the documents it seeks to exempt to the reviewing court. See Vaughn, 936 F.2d at 868-69. The Government admits that the documents in this file were compiled to help Agent Moody prepare his affidavit, and does not suggest that the documents somehow represent others in the Hoffa file. Allowing us to peek at a few documents from the Hoffa file does nothing to prove that the rest of the file is exempt.

Our decision in Vaughn, following fairly straightforward Supreme Court precedent, requires that the Government make a choice in arguing for exemption from FOIA disclosure. It may present the court with a highly detailed Vaughn index, it may create more general exempt categories and then show how each document fits into them, or it may

haul the entire file into chambers for hands-on review by the judge; the last of these, as I have explained, we have strongly discouraged. By holding in this case that the Government has met its burden of showing the entire Hoffa file to be exempt under § 522(b)(7)(A), the majority leaves FOIA law in this Circuit with the worst of all worlds. The Government has defined several general categories of documents, not all of them properly exempt, and then handed the court an admittedly nonrepresentative packet of secret documents to inspect in chambers. Neither effort sufficed to show how each and every document in the Hoffa file fits the proffered statutory exemption; the two methods taken together do not add up to a proper or sufficient showing. I am at a loss to reconcile the majority's opinion either with our Vaughn decision or with the Supreme Court's teachings on FOIA law.

C. Segregability of portions of the file.

I also disagree with the majority's conclusion that the Government has adequately shown that none of the Hoffa file, save for "public" documents such as newspaper clippings, is "reasonably segregable" under § 522(b). This provision requires the Government to release "any materials that do not properly fall within a legitimately withheld category." Bevis, 801 F.2d at 1390. Since I do not think the Government adequately showed what the Hoffa file contains, I certainly do not think it adequately demonstrated that none of this immense file falls outside of the statutory exemptions, as the statute itself requires. The Act does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the caselaw indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress's priorities. Neither, might I add, is it our place to judge whether the material a citizen requests from the Government is "useless."

***1439** III.

It is difficult to ignore the fact that the documents Mr. Dickerson has requested may contain the secrets to Jimmy Hoffa's disappearance. One may be predisposed in favor of government secrecy or against, or may approve or disapprove of investigative reporting by the media. However, in enacting FOIA, Congress has chosen to value government disclosure over government convenience and economy, and chosen not to favor or disfavor certain persons or their reasons for asking the Government to disclose documents. Here, a private citizen has made a specific request. Congress has placed a heavy burden on the government agency wishing to keep the requested documents secret, and that burden has not been met. While it may well be that the Hoffa file should remain a secret, I do not believe that the Government has yet proven why. I dissent.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 12/06/96

INSTA-CITE

CITATION: 992 F.2d 1426

Direct History

1 Dickerson v. Department of Justice, 1991 WL 337422
(E.D.Mich., Jul 31, 1991) (NO. CIV. A.90-CV-60045AA)
Reconsideration Denied by
2 Dickerson v. Department of Justice, 1992 WL 112229
(E.D.Mich., Mar 16, 1992) (NO. C.A. 90-CV-60045-AA)
AND Judgment Affirmed by
=> 3 **Dickerson v. Department of Justice,** 992 F.2d 1426, 61 USLW 2698
(6th Cir.(Mich.), Apr 30, 1993) (NO. 92-1458), rehearing denied
(Aug 03, 1993)
Certiorari Denied by
4 Dickerson v. Department of Justice, 510 U.S. 1109, 114 S.Ct. 1049,
127 L.Ed.2d 372, 62 USLW 3541, 62 USLW 3550 (U.S., Feb 22, 1994)
(NO. 93-678)

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1118139-JASO,ERIC

DATE AND TIME PRINTING STARTED:	12/06/96	10:49:51 am (Central)
DATE AND TIME PRINTING ENDED:	12/06/96	10:51:08 am (Central)
OFFLINE TRANSMISSION TIME:		00:01:17
NUMBER OF REQUESTS IN GROUP:	4	
NUMBER OF LINES CHARGED:	2021	

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FEDERAL LAW
RESEARCH

ERIC JASO
ATTORNEY WORK PRODUCT

2 U.S.C. § 441(b)

stat of lims
18 USC 3282
5 yrs.

reg: 11 CFR § 114.2

2 USC § 441b – lim 5 yrs
§ 437g – penalties (subsec(d))

pr → Barker 530 F2d 181 (8th 1975) → not a lesser incl. offense of 18 USC § 656.

Cort v Ash 422 US 66 (1975)
if state law permits corp contrib to state elections, s/h on notice → no recourse under Fed law (pvt rt of action case)

pr → US v Clifford 409 FS 1070 (DCNY 1976)

→ def: "nat'l bank" (?) 12 USC § 221

→ search 18 USC 610 /nat'l bank / contrib

Ark Stat 23-34-107 – misappl. of funds.

~~Jodie Myers~~ FINCEN (703) 905 3520
→ Chief Counsel.
Steve Kroll → § 221

Nat'l bank – chartered by Comptroller of Currency.
bank corp

Fraud – DOJ John Arterberry

code of federal regulations

Federal Elections

11

Revised as of January 1, 1995

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pital stock, or a local, national, ternational labor organization

xpressly provides for "members" articles and by-laws;
Expressly solicits members; and
Expressly acknowledges the ac- ice of membership, such as by g a membership card or inclusion iembership newsletter list.
Members means all persons who irrently satisfying the require- for membership in a membership ation, affirmatively accept the ership association's invitation to e a member, and either:
Have some significant financial iment to the membership asso- n, such as a significant invest- or ownership stake (but *not* mere- payment of dues);
Are required to pay on a regular a specific amount of dues that is ermined by the association and titled to vote directly either for ast one member who has fully ipatory and voting rights on the t governing body of the member- ssociation, or for those who se- t least one member of those on ighest governing body of the ership association; or
Are entitled to vote directly for those on the highest governing of the membership association.
Notwithstanding the requirements agraph (e)(2)(ii) of this section, ommission may determine, on a y case basis, that persons seeking considered members of a member- ssociation for purposes of this n have a significant organiza- and financial attachment to the ation under circumstances that ; precisely meet the requirements general rule. For example, stu- nembers who pay a lower amount es while in school or long term paying members who qualify for ne membership status with little dues obligation may be consid- members if they retain voting in the association.
Notwithstanding the requirements agraphs (e)(2) (i) through (iii) of ection, members of a local union nsidered to be members of any al or international union of the local, union is a part and of

any federation with which the local, national, or a international union is affiliated.

(f) *Method of facilitating the making of contributions* means the manner in which the contributions are received or collected such as, but not limited to, payroll deduction or checkoff systems, other periodic payment plans, or return envelopes enclosed in a solicitation request.

(g) *Method of soliciting voluntary contributions* means the manner in which the solicitation is undertaken including, but not limited to, mailings, oral requests for contributions, and hand distribution of pamphlets.

(h) *Stockholder* means a person who has a vested beneficial interest in stock, has the power to direct how that stock shall be voted, if it is voting stock, and has the right to receive dividends.

(i) *Voluntary contributions* are contributions which have been obtained by the separate segregated fund of a corporation or labor organization in a manner which is in compliance with §114.5(a) and which is in accordance with other provisions of the Act.

(2 U.S.C. 431(8)(B)(iii), 432(c)(3). 438(a)(8), 441b; 2 U.S.C. 441b, 437d(a)(8))

[41 FR 35955, Aug. 25, 1976, as amended at 44 FR 63045, Nov. 1. 1979; 45 FR 15125, Mar. 7, 1980; 45 FR 21210, Apr. 1, 1980; 48 FR 50508, Nov. 2, 1983; 57 FR 1640, Jan. 15, 1992; 58 FR 45775, Aug. 30, 1993; 59 FR 33615, June 29, 1994]

§114.2 Prohibitions on contributions and expenditures.

(a) National banks, or corporations organized by authority of any law of Congress, are prohibited from making a contribution or expenditure, as defined in §114.1(a), in connection with election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by this part, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of this part apply to the activities of a national bank or corporation organized by any law of Congress in connection with both State and Federal elections.

(b) Any corporation whatever or any labor organization is prohibited from making a contribution or expenditure, as defined in §114.1(a) in connection with any Federal election.

(c) A candidate, political committee, or other person is prohibited from knowingly accepting or receiving any contribution prohibited by this section.

(d) No officer or director of any corporation or any national bank, and no officer of any labor organization shall consent to any contribution or expenditure by the corporation, national bank, or labor organization prohibited by this section.

[41 FR 35955, Aug. 25, 1976]

§114.3 Disbursements for communications in connection with a Federal election to restricted class.

(a) *General.* (1) A corporation may make communications including partisan communications to its stockholders and executive or administrative personnel and their families on any subject. A labor organization may make communications including partisan communications to its members and executive or administrative personnel and their families on any subject. Corporations and labor organizations may also make the nonpartisan communications permitted under 11 CFR 114.4 to their restricted class or any part of that class. No corporation or labor organization may make contributions or expenditures for partisan communications to the general public in connection with a federal election and no national bank or corporation organized by authority of any law of Congress may make contributions or expenditures for partisan communications to the general public in connection with any election to any political office including any State or local office.

(2) An incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock may communicate with its members and executive or administrative personnel, and their families, as permitted in 11 CFR 114.3 (a)(1) and (c), and shall re-

UNITED STATES CODE ANNOTATED
TITLE 2. THE CONGRESS
CHAPTER 14--FEDERAL ELECTION CAMPAIGNS
SUBCHAPTER I--DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

Current through P.L. 104-8, approved 4-17-95

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 791 (h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful--

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at

the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful--

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

CREDIT(S)

1985 Main Volume

(Pub.L. 92-225, Title III, § 316, formerly § 321, as added Pub.L. 94-283, Title I, § 112(2), May 11, 1976, 90 Stat. 490, renumbered and amended Pub.L. 96-187, Title I, §§ 105(5), 112(d), Jan. 8, 1980, 93 Stat. 1354,

1366.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

1980 Amendment

Subsec. (b) (4) (B). Pub.L. 96-187, § 112(d), substituted "It" for "it".

Effective Date of 1980 Amendment

Amendment by Pub.L. 96-187 effective Jan. 8, 1980, see section 301(a) of Pub.L. 96-187, set out as an Effective Date of 1980 Amendment note under section 431 of this title.

Legislative History

For legislative history and purpose of Pub.L. 94-293, see 1976 U.S.Code Cong. and Adm.News, p. 929. See, also, Pub.L. 96-187, 1979 U.S.Code Cong. and Adm.News, p. 2860.

CROSS REFERENCES

Contributions by government contractors, see 2 USCA § 441c.

Name of separate segregated fund established pursuant to this section to include name of connected organization, see 2 USCA § 432.

Penalties for violation of this section, see 2 USCA § 437g.

Statement of organization of separate segregated fund, see 2 USCA § 433.

FEDERAL PRACTICE AND PROCEDURE

Applicability of ripeness doctrine to particular action, see Wright, Miller & Cooper: Jurisdiction § 3532.

CODE OF FEDERAL REGULATIONS

Contributions and expenditures, limitations and prohibitions upon, see 11 CFR 110.1 et seq.

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1. Constitutionality

Section of Federal Election Campaign Act prohibiting direct expenditure of corporate funds in connection with any election violated First Amendment as applied to nonprofit corporation which published newsletter urging readers to vote "pro-life" in upcoming primary election; corporation was formed for express purpose of promoting political ideas, had no shareholders or other persons with claim on its assets or earnings, and was not established by business corporation or labor union and did not accept contributions from such entities. Federal Election Com'n v. Massachusetts Citizens for Life, Inc., Mass. 1986, 107 S.Ct. 616, 479 U.S. 238, 93 L.Ed.2d 539.

This section limiting a noncapital stock corporation to soliciting "members" to contribute to a separate and segregated political campaign fund did not violate U.S.C.A. Const.Amend. 1 and restriction was justified by governmental purpose of insuring that substantial aggregations of wealth amassed by corporations were not converted to political "war chests" which could be used to incur political debts from legislators aided by those contributions and protecting individuals who paid money for purposes other than campaign support from having that money used to support candidates whom they might oppose, notwithstanding that this section restricts solicitation of corporations without great financial resources as well as the more fortunately situated. Federal Election Com'n v. National Right to Work Committee, Dist.Col.1982, 103 S.Ct. 552, 459 U.S. 197, 74 L.Ed.2d 364, on remand 716 F.2d 1401, 230 U.S.App.D.C. 283.

This section which authorized union political action committees to solicit members but which authorized corporate committees to solicit career employees in addition to shareholders did not violate equal protection in that this section bore substantial relation to important governmental interest in applying federal election laws evenhandedly to labor unions and corporations by recognizing that executive and administrative corporate employees share with stockholders stake in corporation's well-being and by taking into account structural differences of corporations and labor unions. International Ass'n of Machinists and Aerospace Workers v. Federal Election Commission, 1982, 678 F.2d 1092, 220 U.S.App.D.C. 45, affirmed 103 S.Ct. 335, 459 U.S. 983, 74 L.Ed.2d 379.

Person subject to Commission subpoena for investigation of allegations that national bank made loans, or permitted overdrafts, in connection with election and out of ordinary course of business would be allowed to attack constitutionality of provision of this section barring such contributions only insofar as this chapter prohibited such loans and overdrafts and would not be allowed to apply overbreadth doctrine to attack the rest of this chapter. Federal Election Commission v. Lance, C.A.Ga.1981, 635 F.2d 1132, appeal dismissed, certiorari denied 101 S.Ct. 3151, 453 U.S. 917, 69 L.Ed.2d 999.

Provision of subsec. (b) (4) (D) of this section permitting trade association or its segregated political fund to solicit contributions from stockholders and executives and administrative personnel of its member corporations and their families provided that the solicitation has been approved by member corporation and member corporation has not approved solicitation by any other trade association for the same calendar year did not deprive trade associations and political action committees of liberty without due process. Bread Political Action Committee v. Federal Election Commission, C.A.Ill.1980, 635 F.2d 621, reversed on other grounds 102 S.Ct. 1235, 455 U.S. 577, 71 L.Ed.2d 432, on remand 678 F.2d 46.

This section did not violate U.S.C.A. Const. Amends. 1, 5, or 9. Republican Nat. Committee v. Federal Election Commission, C.A.N.Y.1980, 616 F.2d 1, affirmed 100 S.Ct. 1639, 445 U.S. 955, 64 L.Ed.2d 231.

Provision of subsec. (b) (4) of this section restricting solicitation by nonstock corporations to members was not overbroad and did not infringe nonstock corporation's rights of free speech or association, inasmuch as government had a compelling interest in protecting integrity of federal elections justifying such limitation. Federal Election Commission v. National Right to Work Committee, D.C.D.C.1980, 501 F.Supp. 422, reversed 665 F.2d 371, 214 U.S.App.D.C. 215, reversed 103 S.Ct. 552.

2. Construction

Strict standards of definiteness had to be applied to former section 610 of Title 18 because the free dissemination of ideas might be inhibited thereunder. U.S. v. Chestnut, D.C.N.Y.1975, 394 F.Supp. 581.

If a strict construction was to be given to former section 610 of Title 18 making it unlawful for labor organization to make contribution or expenditure in connection with certain elections, it was not the degree of activity but the type of activity which would determine whether or not an expenditure had been made. U.S. v. Construction & General Laborers Local Union No. 264, D.C.Mo.1951, 101 F.Supp. 869.

3. Construction with other laws

Union member's claim for future injunctive relief under section 501 of Title 29 governing fiduciary responsibility of union officers was subject to the primary jurisdiction of the Federal Election Commission insofar as it was premised on former section 610 of Title 18, now this section. Gabauer v. Woodcock, C.A.Mo.1979, 594 F.2d 662, certiorari denied 100 S.Ct. 80, 444 U.S. 841, 62 L.Ed.2d 52.

Violation of former section 610 of Title 18 pertaining to political contributions by national banks was not a lesser included offense of a violation of section 656 of Title 18 pertaining to the willful misapplication of funds by a national bank officer. U.S. v. Barket, C.A.Mo.1975, 530 F.2d 181, certiorari denied 97 S.Ct. 308, 429 U.S. 917, 50 L.Ed.2d 282.

Former section 610 of Title 18, which prohibited corporate expenditures in campaigns for federal office and which stated that phrase "contribution or expenditure" should include any direct or indirect payment to any candidate, campaign committee, or political party or organization, supplemented rather than replaced the definition of section 591 of Title 18 of prohibited expenditures to require a partisan purpose. Ash v. Cort, C.A.Pa.1974, 496 F.2d 416, reversed on other grounds 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

Section 501 of Title 29 which prohibits unlawful conversion of union funds did not duplicate former section 610 of Title 18 prohibiting contribution of labor union funds to the campaign of candidates for federal office with respect to campaign contributions as section 501 of Title 29 punishes union officers who "consent to" political contributions while former section 610 of Title 18 punished an officer who "abstracts or converts" union funds to use in federal political campaign. U.S. v. Boyle, 1973, 482 F.2d 755, 157 U.S.App.D.C. 166, certiorari denied 94 S.Ct. 593, 414 U.S. 1076, 38 L.Ed.2d 483.

4. Purpose

The evil at which Congress had struck in former section 610 of Title 18 was use of corporate or union funds to influence public at large (as distinguished, for instance, from union membership) to vote for particular candidate or particular party. U.S. v. International Union United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO), Mich.1957, 77 S.Ct. 529, 352 U.S. 567, 1 L.Ed.2d 563, rehearing denied 77 S.Ct. 808, 353 U.S. 943, 1 L.Ed.2d 763.

Intent of former section 610 of Title 18 was to permit expenditures from separate, segregated funds if the contributions to it were voluntary and to prohibit expenditures from a union's general treasury. U.S. v. Boyle, 1973, 482 F.2d 755, 157 U.S.App.D.C. 166, certiorari denied 94 S.Ct. 593, 414 U.S. 1076, 38 L.Ed.2d 483.

Under former section 610 of Title 18 prohibiting any corporation or labor organization from making a contribution or expenditure in connection with any election for federal office, Congress intended to insure against officers proceeding in such matters without obtaining the consent of shareholders by forbidding all such expenditures. U.S. v. Lewis Food Co., C.A.Cal.1966, 366 F.2d 710.

Given the nature of free speech, the absolute prohibition of corporate contributions, as enunciated in former

section 610 of Title 18, constitutes the least drastic means to achieve the congressional goal of protecting the integrity of the political process. Federal Election Commission v. Weinsten, D.C.N.Y.1978, 462 F.Supp. 243.

Interests reflected in former section 610 of Title 18 were to destroy the influence over elections which corporations exercised through financial contributions and to prevent corporate officers from using corporate funds for contributions to political parties without the consent of the stockholders. Miller v. American Tel. & Tel. Co., D.C.Pa.1975, 394 F.Supp. 58, affirmed 530 F.2d 964.

Purpose of former section 610 of Title 18, which proscribed any expenditure or contribution by a corporation or labor organization to a candidate, campaign committee, political party or organization in connection with any federal election, was to assure a popularly elected government for all the people in the United States and its main concern was to eliminate the effect of aggregated wealth on federal elections. Ash v. Cort, D.C.Pa.1972, 350 F.Supp. 227, affirmed 471 F.2d 811.

Purpose of former section 610 of Title 18 prohibiting labor unions from making political contributions was to prevent corruptive influences on elective process and to prevent use of general union funds to support ideas and candidates opposed by even slightest minority of union membership. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

Goals of regulating campaign financing in accordance with due process should be to promote an informed electorate, to insure that elected officials are responsive to needs of majority who elected them and, as far as possible, to prevent elected office from becoming exclusive prize of influential or rich. U.S. v. First Nat. Bank of Cincinnati, D.C.Ohio 1971, 329 F.Supp. 1251.

Purpose of former section 610 of Title 18 prohibiting corporations and labor unions from making political contributions was to prevent corporations and labor unions from controlling elections, and to protect union members from having union officials endorse candidates or attempt to influence voters which might be contrary to wishes of individual members. U.S. v. Anchorage Central Labor Council, D.C.Alaska 1961, 193 F.Supp. 504.

In enacting former section 610 of Title 18 making it unlawful for labor organization to make contribution or expenditure in connection with certain elections, Congress did not intend that an uncertain, insignificant amount should be considered as an expenditure and used as a basis for a criminal prosecution, and did not intend to deprive labor organization from making expenditures, if necessary, in connection with registration of voters. U.S. v. Construction & General Laborers Local Union No. 264, D.C.Mo.1951, 101 F.Supp. 869.

5. Retroactive effect

Even if provision of former section 610 of Title 18 prohibiting financing of establishment administration, and solicitation of contributions for voluntary political funds from general union monies was impliedly repealed by 1972 amendment, prosecution begun before amendment would not abate in view of section 109 of Title 1. Pipefitters Local Union No. 562 v. U.S., Mo.1972, 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

Federal Election Commission's enforcement powers are not prospective only, but are retroactively applicable. Federal Election Commission v. Lance, C.A.Ga.1980, 617 F.2d 365, supplemented 635 F.2d 1132, appeal dismissed, certiorari denied 101 S.Ct. 3151, 453 U.S. 917, 69 L.Ed.2d 999.

The insertion in former section 610 of Title 18 of definition of the phrase "contribution or expenditure" to supplement definitions of "contribution" and "expenditure" did not make illegal conduct which had prior to 1972 amendments been legal. U.S. v. Chestnut, D.C.N.Y.1975, 394 F.Supp. 581.

6. State regulation or control

West's RCWA 41.04.230 which did not authorize state budget director to permit voluntary payroll deductions

for employees for purpose of making direct contribution to political action committee of employees' labor associations was not in conflict with and therefore preempted by provisions of this chapter as this chapter affected federal elections only and as there was nothing in this chapter that required employer to establish payroll deduction plan for its own employees. Washington Ed. Ass'n v. Smith, 1981, 638 P.2d 77, 96 Wash.2d 601.

7. Power of Congress

Congress may legitimately regulate federal campaign financing. U.S. v. Boyle, 1973, 482 F.2d 755, 157 U.S.App.D.C. 166, certiorari denied 94 S.Ct. 593, 414 U.S. 1076, 38 L.Ed.2d 483.

Congress has constitutional power to prohibit contributions to be made by certain corporations in connection with any election at which, among others, representatives in Congress are to be voted for. U.S. v. Brewers' Ass'n, D.C.Pa.1916, 239 F. 163.

8. Duty of courts

Judiciary will not second guess a legislative determination as to need for prophylactic measures where corruption of election process is the evil feared and differing structures and purposes of different entities may require different forms of regulation of campaign financing in order to protect integrity of the electoral process. Federal Election Com'n v. National Right to Work Committee, Dist.Col.1982, 103 S.Ct. 552, 459 U.S. 197, 74 L.Ed.2d 364, on remand 716 F.2d 1401, 230 U.S.App.D.C. 283.

8A. Rules and regulations

Regulation of the Federal Election Commission (FEC) permitting corporations to prepare and distribute voter guides only if they are nonpartisan and do not engage in issue advocacy did not fall within statutory authority of section of the Federal Election Campaign Act (FECA) prohibiting corporations from using general treasury funds to make contributions or expenditures in connection with any federal election, as statute only prohibits an expenditure which constitutes "express advocacy." Faucher v. Federal Election Com'n, C.A.1 (Me.) 1991, 928 F.2d 468, certiorari denied 112 S.Ct. 79, 502 U.S. 820, 116 L.Ed.2d 52 .

Federal Election Commission (FEC) regulation prohibiting corporations from making any expenditures to publish voter guides went beyond FEC's power by focusing on issue advocacy; only express advocacy for election or defeat of identifiable candidate or candidates would be constitutionally within statutory prohibition against corporate expenditures to select candidates. Faucher v. Federal Election Com'n, D.Me.1990, 743 F.Supp. 64, affirmed 928 F.2d 468, certiorari denied 112 S.Ct. 79, 116 L.Ed.2d 52.

9. Separate and expenditure defined

Term "separate" in 1972 amendment of former section 610 of Title 18 relating to political contributions by corporations and unions was synonymous with "segregated"; term "threat" included creation of appearance of intent to inflict injury even without design to carry it out; and "dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment" included contributions effectively assessed even if not actually required for employment or union membership. Pipefitters Local Union No. 562 v. U.S., Mo.1972, 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

"Expenditure" within provision of former section 251 of this title prohibiting election contributions and expenditures was not a word of art, had no definitely defined meaning and applicability of word to prohibition of particular acts had to be determined from circumstances surrounding its employment. U.S. v. Congress of Industrial Organizations, 1948, 68 S.Ct. 1349, 335 U.S. 106, 92 L.Ed. 1849.

10. Contribution or expenditures within section

Nonprofit corporation's regular publication of newsletter did not entitle it to press exemption under Federal Election Campaign Act for its publication of "special edition" which urged readers to vote "pro-life" in upcoming primary election; "special edition" was not published through facilities of regular newsletter, was distributed to group 20 times size of newsletter's normal audience, and did not contain volume and issue number identifying it as one in continuing series of issues. Federal Election Com'n v. Massachusetts Citizens for Life, Inc., Mass. 1986, 107 S.Ct. 616, 479 U.S. 238, 93 L.Ed.2d 539.

1972 amendment to former section 610 of Title 18 relating to political contributions by corporations and unions permitted union officials to establish, administer, and solicit contributions for political fund, provided fund was separate and segregated and that contributions and expenditures not be financed through physical force, job discrimination, or financial reprisal or threat thereof, or through dues, fees, or other monies required as condition of membership in labor organization or as condition of employment. Pipefitters Local Union No. 562 v. U.S., Mo.1972, 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

Corporation's multicandidate political action committee made expenditures for "political purposes" and complied with Federal Election Campaign Act when it contributed to candidates facing weak or absent opposition, contributed without regard to candidates' attitudes towards business, contributed to opposing candidates, contributed to election winners, and supported incumbents. Stern v. Federal Election Com'n, C.A.D.C.1990, 921 F.2d 296.

Determination of Federal Election Commission that senior citizens' picnic sponsored by congressman was nonpolitical event, so that corporate donations to event were not illegal, was not arbitrary or capricious in view of fact that no campaign contributions were solicited or accepted at event and that literature was not distributed. Orloski v. Federal Election Com'n, 1986, 795 F.2d 156, 254 U.S.App.D.C. 111.

Reverse checkoff procedure used in conjunction with payroll deduction plan to obtain contributions to political action committee established by State Education Association amply protected rights of dissenters and met jurisprudence test of voluntariness of contributions where membership in Association was not prerequisite to employment in public education system, Association member could check off to indicate that he or she did not agree to make contribution or could ask for refund of contribution and nothing in record indicated that dissenting Association members were subject to any recriminations within Association. Kentucky Educators Public Affairs Council v. Kentucky Registry of Election Finance, C.A.Ky.1982, 677 F.2d 1125.

Under this chapter, no part of monies of a union's segregated political fund should be comingled with regular dues money, even temporarily. American Federation of Labor and Congress of Indus. Organizations (AFL-CIO) v. Federal Election Commission, 1980, 628 F.2d 97, 202 U.S.App.D.C. 97, certiorari denied 101 S.Ct. 397, 449 U.S. 982, 66 L.Ed.2d 244.

The expenditure by a small labor organization of $111.14 to pay cost of political advertisement in daily newspaper of general circulation and of $32.50 to pay cost of political radio broadcast over commercial radio station advocating rejection of a candidate for Republican nomination for President and his defeat in Presidential election if nominated and rejection of six incumbent Congressmen as candidates for reelection and their defeat in Congressional election if nominated did not violate former section 610 of Title 18. U.S. v. Painters Local Union No. 481, C.A.Conn.1949, 172 F.2d 854.

Payment by corporation to associated political campaign fund was not reimbursement of solicitation expenses but rather was illegal contribution in violation of Federal Election Campaign Act where reimbursement was made more than 30 days after solicitation expenses were incurred, even though corporation claimed it had simply changed its mind and for fiscal reasons wanted to have campaign fund bear cost of solicitation as it originally had; motivation for making payment could not render payment lawful where it was untimely. Federal Election Com'n v. NRA Political Victory Fund, D.D.C.1991, 778 F.Supp. 62.

Membership solicitation letters mailed by women's rights group on issues of pay inequality, abortion, and equal

rights did not represent express advocacy of election of particular candidates, and use of corporate funds in connection with those mailings thus did not violate Federal Election Campaign Act; letters could be regarded as discussions of public issues that by their nature invoked the names of certain politicians and did not provide explicit directives to vote against those politicians. Federal Election Com'n v. National Organization for Women, D.D.C.1989, 713 F.Supp. 428.

Essence of whether contribution to political fund is actually or effectively required for union membership in violation of this chapter is whether method of solicitation for fund is calculated to result in knowing free-choice donations; "knowing free-choice" donation means act intentionally taken and not the result of inaction when confronted with an obstacle. Federal Election Commission v. National Ed. Ass'n, D.C.D.C.1978, 457 F.Supp. 1102.

A corporation's payment to Senator's advertising firm of $12,000 for one month's services to Senator's campaign constituted a "contribution" to Senator's campaign notwithstanding contention that the term "contribution" as defined in former section 610 of Title 18 did not include the term "payment". U.S. v. Chestnut, D.C.N.Y.1975, 394 F.Supp. 581.

Labor unions' contributions or expenditures of money in connection with political campaigns must be from voluntarily financed segregated union funds. Evans v. American Federation of Television and Radio Artists, D.C.N.Y.1973, 354 F.Supp. 823, reversed on other grounds 496 F.2d 305, certiorari denied 95 S.Ct. 688, 419 U.S. 1093, 42 L.Ed.2d 687, rehearing denied 95 S.Ct. 1342.

Where corporation expended its general funds to pay for advertisement to communicate to public its views as to honest campaigns and elections, and its views as to a statement made by an unnamed candidate for election aimed at community of which it was a part, without advocating election of any particular person or party, payment for advertisement did not constitute an "expenditure" within former section 610 of Title 18 proscribing any expenditure or contribution by a corporation or labor organization to a candidate, campaign committee, political party or organization in connection with any federal election. Ash v. Cort, D.C.Pa.1972, 350 F.Supp. 227, affirmed, 471 F.2d 811.

Although former section 610 of Title 18 prohibiting labor unions from making political contributions did not expressly preclude indirect contributions from general funds of union, legislative history of said section clearly indicated that Congress wished to prohibit any type of use of general union funds for designated purposes of said section, and this would include both a direct and/or an indirect contribution or expenditure. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

Expenditures do not violate prohibition on corporate campaign contribution if officers of corporation do not use corporation's funds to endorse candidates or attempt to influence voters which may be contrary to wishes of individual stockholder or if funds used are not general funds but funds voluntarily provided by stockholders or are general funds so used with consent of stockholders. U.S. v. Lewis Food Co., D.C.Cal.1964, 236 F.Supp. 849.

Labor union's payments to three employees, two of whom were regularly on payroll of union, one for a long period of time, and who devoted a considerable portion of their time to political activities, some of which activities, such as registration of voters and taking voters to polls, were for general benefit of those who were candidates and some of which were devoted exclusively to political interests of one candidate for Congress were not "expenditures" and "contributions" within former section 610 of Title 18 making it unlawful for labor organization to make "expenditure" or "contribution" in connection with certain elections. U.S. v. Construction & General Laborers Local Union No. 264, D.C.Mo.1951, 101 F.Supp. 869.

11. Membership organization

The 267,000 individuals solicited by nonprofit, noncapital stock corporation to contribute to corporation's segregated political campaign fund were not "members" within meaning of this section where, although

membership cards were sent to those who either contributed or responded to questionaire, the solicitation letters made no reference to members, members played no part in operation or administration of the corporation, there was no indication that the asserted members exercised control over expenditure of their contributions and articles of incorporation and other publicly filed documents explicitly disclaimed existence of members. Federal Election Com'n v. National Right to Work Committee, Dist.Col.1982, 103 S.Ct. 552, 459 U.S. 197, 74 L.Ed.2d 364, on remand 716 F.2d 1401, 230 U.S.App.D.C. 283.

The term "members" in subsec. (b) (4) (C) of this section, creating exception to subsec. (b) (4) (A) of this section, declaring it unlawful for a corporation, or separate segregated fund established by corporation, to solicit contributions to such a fund from any person other than its shareholders and their families and its executives or other administrative personnel and their families, necessarily includes those individuals solicited by the National Right to Work Committee, a nonprofit corporation without capital stock that was formed to educate the public on and to advocate volunteer unionism. National Right to Work Committee, Inc. v. Federal Election Commission, 1981, 665 F.2d 371, 214 U.S.App.D.C. 215, reversed 103 S.Ct. 552, 459 U.S. 197, 74 L.Ed.2d 364, on remand 716 F.2d 1401, 230 U.S.App.D.C. 283.

State medical association was not embraced by phrase "membership organizations" in subsec. (b) (2) (c) of this section so as to fall within exemption for unlimited administrative support, the "membership organizations" language being only intended to rescue organizations that would otherwise fall within blanket prohibition of any election activity. California Medical Ass'n v. Federal Election Commission, C.A.Cal.1980, 641 F.2d 619, affirmed 101 S.Ct. 2712, 453 U.S. 182, 69 L.Ed.2d 567.

As used in membership exception to general prohibition of this section against corporate and union spending in connection with federal elections, allowing membership organizations, cooperatives, and corporations without capital stock to solicit their members, term "member" encompasses persons who have interests and rights in an organization similar to those of a shareholder in a corporation and a union member in a labor organization and the term at least denotes a formal relationship in which a person, whether specifically described as a member or not, has specified rights and obligations vis-a-vis an organization. Federal Election Commission v. National Right to Work Committee, D.C.D.C.1980, 501 F.Supp. 422, reversed 665 F.2d 371, 214 U.S.App.D.C. 215, reversed 103 S.Ct. 552, 459 U.S. 197, 74 L.Ed.2d 364, on remand 716 F.2d 1401, 230 U.S.App.D.C. 283.

12. Judicial elections

Former section 610 of Title 18 making it unlawful for any national bank to make a contribution in connection with any election to any political office was applicable to contributions to judicial elections. U.S. v. Clifford, D.C.N.Y.1976, 409 F.Supp. 1070.

13. State elections

If state law permits corporation to use corporate funds as contributions in state elections, shareholders are on notice that the funds may be so used and have no recourse under any federal provision. Cort v. Ash, Pa.1975, 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

Former section 610 of Title 18 making it unlawful for any national bank to make a contribution in connection with any election to any political office was applicable to state elections. U.S. v. Clifford, D.C.N.Y.1976, 409 F.Supp. 1070.

Assessment by local union of radio artists to oppose initiative measure appearing on ballot in state election did not violate former section 251 of this title, since such section could not interfere with state elections. De Mille v. American Federation of Radio Artists, Los Angeles Local, Cal.App.1946, 175 P.2d 851.

14. Intent

To prove a violation of former section 610 of Title 18 prohibiting political campaign contributions by national banks in making postelection contributions, there had to be proof of an intent to influence the election. U.S. v. Clifford, D.C.N.Y.1976, 409 F.Supp. 1070.

15. Offenses

Nonprofit corporation's publication and distribution of newsletter urging readers to vote "pro-life" in upcoming primary election was "express advocacy" subject to Federal Election Campaign Act's prohibition of direct expenditure of corporate funds in connection with any election; newsletter identified and provided photographs of specific "pro-life" candidates. Federal Election Com'n v. Massachusetts Citizens for Life, Inc., Mass. 1986, 107 S.Ct. 616, 479 U.S. 238, 93 L.Ed.2d 539.

Labor organization's use of union dues to sponsor commercial television broadcast designed to influence election to select certain candidates for Congress would be violative of former section 610 of Title 18. U.S. v. International Union United Auto, Aircraft and Agr. Implement Workers of America (UAW-CIO), Mich.1957, 77 S.Ct. 529, 352 U.S. 567, 1 L.Ed.2d 563, rehearing denied 77 S.Ct. 808, 353 U.S. 943, 1 L.Ed.2d 763.

Provision of former section 251 of this title making it unlawful for any corporation or labor organization to make a contribution or expenditure in connection with certain elections did not forbid publication, by corporations and unions, in regular course of conducting their affairs, of trade or union periodicals published regularly for members, stockholders or customers, expressing views on candidates or proposed measures in regular course of publication. U.S. v. Congress of Industrial Organizations, 1948, 68 S.Ct. 1349, 335 U.S. 106, 92 L.Ed. 1849.

Under section of the Federal Election Campaign Act (FECA) prohibiting corporations from using general treasury funds to make contributions or expenditures in connection with any federal election, the Federal Election Commission (FEC) does not have the authority to restrict issue advocacy; rather, the FEC may only restrict express advocacy. Faucher v. Federal Election Com'n, C.A.1 (Me.) 1991, 928 F.2d 468, certiorari denied 112 S.Ct. 79, 116 L.Ed.2d 52.

Though certain solicitations by nonprofit, noncapital stock corporation of persons for contributions to separate segregated political fund that it sponsored violated restrictions of this chapter on contributions or expenditures by corporations in connection with federal elections, those violations were not made in "defiance" or "knowing, conscious, and deliberate flaunting" of this chapter so as to warrant penalty assessment and requirement of refund by the corporation of funds solicited. National Right to Work Committee, Inc. v. Federal Election Com'n, 1983, 716 F.2d 1401, 230 U.S.App.D.C. 283.

Mere failure of corporation to collect debt owed by a national committee of political party for communication services provided by corporation at party convention would not violate prohibition of former section 610 of Title 18 against corporate campaign spending. Miller v. American Tel. & Tel. Co., C.A.Pa.1974, 507 F.2d 759, on remand 394 F.Supp. 58.

Fact that no candidate or party was named in corporation's ad and pamphlet did not place them outside scope of prohibition of former section 610 of Title 18 against corporate expenditures in campaigns for federal office. Ash v. Cort, C.A.Pa.1974, 496 F.2d 416, reversed on other grounds 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

Essential elements constituting violation of former section 610 of Title 18 prohibiting labor organizations from making contributions and expenditures to candidates for federal offices were (1) contribution or expenditure, (2) by a labor organization, (3) for purpose of active electioneering (4) in connection with an election for named federal offices. U.S. v. Pipefitters Local Union No. 562, C.A.Mo.1970, 434 F.2d 1116, adhered to 434 F.2d 1127, reversed in part, vacated in part on other grounds 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

Where all members of labor organization having same pay scale paid same dues and political fund was established by members authorizing allocations from their dues to the fund, expenditures out of fund for political

purposes would violate former section 610 of Title 18 prohibiting utilization, for political purposes, of moneys secured by dues required as condition of membership in union. Barber v. Gibbons, D.C.Mo.1973, 367 F.Supp. 1102.

Corporation's advertisements employing rating system to show percentage of each incumbent officer's "votes cast in favor of constitutional principles" did not violate prohibition of former section 610 of Title 18 on corporate campaign contributions. U.S. v. Lewis Food Co., D.C.Cal.1964, 236 F.Supp. 849.

16. Persons liable

Indictment and conviction of labor union was not a condition precedent to indictment and conviction of its officers under former section 610 of Title 18 prohibiting labor unions from making political contributions, and indictment against individual defendants charging conspiratorial and substantive violations of said section was not defective by reason of fact that labor union had not previously been indicted and convicted. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

17. Persons protected

Former section 610 of Title 18 was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and protection of ordinary stockholders was at best a secondary concern. Cort v. Ash, Pa.1975, 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

Shareholders are within class for whose protection prohibition of former section 610 of Title 18 against corporate political contributions was enacted. Miller v. American Tel. & Tel. Co., C.A.Pa.1974, 507 F.2d 759, on remand 394 F.Supp. 58.

18. Certification of constitutional questions

While there exists a serious question concerning the constitutionality under U.S.C.A. Const. Amend. 1 of the Federal Corrupt Practices Act, former section 241 et seq. of this title, the instant panel did not have jurisdiction to resolve that issue but was obliged, under section 437h(a) of this title, to "* * * certify all questions of constitutionality of this Act [this chapter] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc". Federal Election Commission v. Lance, C.A.Ga.1980, 617 F.2d 365, supplemented 635 F.2d 1132, appeal dismissed, certiorari denied 101 S.Ct. 3151, 453 U.S. 917, 69 L.Ed.2d 999.

19. Private right of action

Private cause of action by stockholder to secure derivative damage relief was not available under former section 610 of Title 18, but rather was available, if at all, under state law governing corporations. Cort v. Ash, Pa.1975, 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

Stockholders did not have private right of action against corporate directors to recover direct damages for alleged violations by the directors of former section 610 of Title 18. Miller v. American Tel. & Tel. Co., D.C.Pa.1975, 394 F.Supp. 58, affirmed 530 F.2d 964.

Former section 610 of Title 18 relating to political contributions by labor union did not authorize private right of action. McNamara v. Johnston, D.C.Ill.1973, 360 F.Supp. 517, certiorari denied 96 S.Ct. 1506, 425 U.S. 911, 47 L.Ed.2d 761, affirmed 522 F.2d 1157.

Penal sanctions provided for in former section 610 of Title 18, which proscribed any expenditure or contribution by a corporation or labor organization to a candidate, campaign committee, political party or organization in connection with any federal election, were exclusive, and no private cause of action was implied.

Ash v. Cort, D.C.Pa.1972, 350 F.Supp. 227, affirmed 471 F.2d 811.

20. Persons entitled to maintain action

Individual union members, who alleged that they suffered relative diminution in their political voices as direct result of discriminatory imbalance alleged to have resulted from enactment of this section which would likely be redressed by declaring this section unconstitutional, and individual stockholders, who alleged that use of corporate assets to establish and support corporate political action committees impinged upon their constitutional freedoms and would be eliminated by declaring this section unconstitutional, had standing to raise their U.S.C.A. Const.Amends. 1 and 5 challenges to this section. International Ass'n of Machinists and Aerospace Workers v. Federal Election Commission, 1982, 678 F.2d 1092, 220 U.S.App.D.C. 45, affirmed 103 S.Ct. 335, 459 U.S. 983, 74 L.Ed.2d 379.

Plaintiff, who alleged, economic injury as a stockholder whose interest in corporation was worth less than it would be had defendant directors not caused challenged expenditures to be made, and further injury as a citizen and voter whose ability to secure a responsive federal government had been lessened, had standing to maintain action for an injunction and damages based on alleged violation of prohibition of former section 610 of Title 18 against corporate expenditures in campaigns for federal office. Ash v. Cort, C.A.Pa.1974, 496 F.2d 416, reversed on other grounds 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

Nonprofit membership corporation that accepted contributions from business corporations did not have standing to challenge Federal Election Campaign Act section that prohibited express advocacy by corporation for election or defeat of identifiable candidates; without explicit policy against contributions from corporations, risk would remain that nonprofit corporation would serve as conduit for direct spending by corporations. Faucher v. Federal Election Com'n, D.Me.1990, 743 F.Supp. 64, affirmed 928 F.2d 468, certiorari denied 112 S.Ct. 79, 502 U.S. 820, 116 L.Ed.2d 52.

21. Justiciability

Actions for declaratory and injunctive relief alleging that this chapter violated rights guaranteed by U.S.C.A. Const.Amends. 1 and 5 by restricting solicitation of contributions to, and by, certain corporate and trade association political action committees or separate segregated funds, were nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter and, hence, were properly dismissed where, there was no enforcement threat or even certainty that parties would ever be at odds about interpretation of restriction where prohibition against solicitation activities, advisory opinions could be obtained from the Federal Election Commission and where there was no urgency of decision that outweighed the inadvisability of premature constitutional adjudication. Martin Tractor Co. v. Federal Election Commission, 1980, 627 F.2d 375, 200 U.S.App.D.C. 322, certiorari denied 101 S.Ct. 360, 449 U.S. 954, 66 L.Ed.2d 218.

Even if stockholders, who brought action against directors of corporation based on violations of prohibition of former section 610 of Title 18 against corporate expenditures in campaigns for federal office, had no live claim for injunctive relief after election, the dispute over damages rendered controversy justiciable. Ash v. Cort, C.A.Pa.1974, 496 F.2d 416, reversed on other grounds 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

22. Ripeness doctrine

Challenge to constitutionality of provision of this section on ground that it violated ex post facto clause was not ripe for review where it was not clear that no violations of this chapter in fact occurred after its enactment and it was not clear that criminal penalties would be sought against complainant. Federal Election Commission v. Lance, C.A.Ga.1981, 635 F.2d 1132, appeal dismissed, certiorari denied 101 S.Ct. 3151, 453 U.S. 917, 67 L.Ed.2d 999.

Action seeking declaratory judgment that committee on political education could make in-kind contributions to

federal candidates using goods and services purchased at fair market value from organization with payments made in advance or within commercially reasonable period of time was not ripe for adjudication where Federal Election Commission had not been given opportunity to reconsider its decision that contributions amounted to illegal corporate contributions. Sierra Club v. Federal Election Com'n, D.C.D.C.1984, 593 F.Supp. 166.

23. Exhaustion of remedies

Citizen of stockholder objecting to alleged violations in future elections of former section 610 of Title 18 had to pursue statutory remedy of a complaint to the Federal Election Commission, under section 437d of this title, and invoke its authority to request the Attorney General to seek injunctive relief. Cort v. Ash, Pa.1975, 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

Action seeking declaratory judgment that committee on political education could make in-kind contributions to federal candidates using goods and services purchased at fair market value from organization with payments made in advance or within commercially reasonable period of time was barred by plaintiffs' failure to exhaust administrative remedies where plaintiffs did not seek reconsideration of Federal Elections Commission advisory opinion finding that methods proposed by plaintiffs would constitute illegal corporate contribution or demonstrate that reconsideration would be futile. Sierra Club v. Federal Election Com'n, D.C.D.C.1984, 593 F.Supp. 166.

24. Jurisdiction

Statutory remedy before Federal Election Commission was intended to govern all allegations of improper contributions in federal elections and the federal courts did not have jurisdiction of action by local union members to enjoin union officers from making contributions in alleged violation of former section 610 of Title 18. McNamara v. Johnston, C.A.Ill.1975, 522 F.2d 1157, certiorari denied 96 S.Ct. 1506, 425 U.S. 911, 47 L.Ed.2d 761.

United States district court had no jurisdiction to review executive decision to bring indictment against individual defendant charging violation of former section 610 of Title 18 prohibiting labor unions from making political contributions, but district court would decline jurisdiction even if it was present, where exercising jurisdiction would not only frustrate will of Congress in enacting said section but would also open up a Pandora's box in connection with administration of justice and proper enforcement of criminal laws. U.S. v. Boyle, D.C.D.C.1971, 338 F.Supp. 1025, motion denied 331 F.Supp. 1181.

25. Venue

In prosecution for knowingly causing another to accept or receive an illegal corporate campaign contribution, venue was proper in Southern District of New York, where recipient of check for illegal contribution deposited check in bank in that District, notwithstanding contention that venue was improper in that District because all defendant's conduct in causing acceptance or receipt of contribution was performed by him in Minnesota. U.S. v. Chestnut, D.C.N.Y.1975, 399 F.Supp. 1292, affirmed 533 F.2d 40, certiorari denied 97 S.Ct. 88, 429 U.S. 829, 50 L.Ed.2d 93.

26. Grand jury proceedings

Indictment charging substantive and conspiratorial violations of former section 610 of Title 18 prohibiting labor union from making political contributions was not subject to dismissal on ground of presence of an unauthorized person in grand jury room, where neither in memorandum of points and authorities in support of motion to dismiss nor at hearing on motion was any evidence produced substantiating claim. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

27. Indictment

Indictment alleging contribution or expenditure from general treasury of union or corporation in connection with federal election states offense. Pipefitters Local Union No. 562 v. U.S., Mo.1972, 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

Indictment charging publication by labor union with union funds of weekly periodical which, in issue of certain date contained statement by union president urging that union members vote for certain candidate for Congress, and charging distribution of the particular issue in regular course to those accustomed to receive copies of the periodical, did not allege a violation of former section 251 of this title. U.S. v. Congress of Industrial Organizations, 1948, 68 S.Ct. 1349, 335 U.S. 106, 92 L.Ed. 1849.

Failure of indictment charging violation of former section 610 of Title 18 prohibiting labor organizations from making contributions and expenditures to candidates for federal offices to allege that payments to political and education fund established by labor union were involuntary was not fatal, since voluntariness would not be controlling on proof of gist of indictment that money in fund was in truth and in fact money belonging to labor union; however, issue of voluntariness, along with intention of donors as to ownership and control of fund, was relevant and material on issue of whether fund was property of union. U.S. v. Pipefitters Local Union No. 562, C.A.Mo.1970, 434 F.2d 1116, adhered to 434 F.2d 1127, reversed in part, vacated in part on other grounds 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

Allegation in indictment that corporation made an "expenditure" in connection with election necessarily inferred an allegation that general corporate funds were used, and, entry of plea of not guilty, gave rise to question of fact as to source of corporate funds. U.S. v. Lewis Food Co., C.A.Cal.1966, 366 F.2d 710.

An indictment against corporations for conspiracy to make unlawful campaign contributions, need not allege that offense with the particularity of an indictment directly charging it as an offense. U.S. v. U.S. Brewers' Ass'n, D.C.Pa.1916, 239 F. 163.

Indictment which alleged that United States Senator's campaign manager, arranged payment by corporation of $12,000 to Senator's advertising firm in payment of one month's services to Senator's campaign was sufficient to state an offense against campaign manager for causing advertising firm to do that which, if done directly by him, would have constituted acceptance of illegal corporate campaign contribution. U.S. v. Chestnut, D.C.N.Y.1975, 394 F.Supp. 581.

Indictment charging conspiracy to violate former section 610 of Title 18 prohibiting labor unions from making political contributions was not subject to dismissal on ground that it charged three distinct conspiracies, therefore making it duplicitous, where indictment charged a continuing conspiracy. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

Indictment charging that defendant corporation had made unlawful expenditures in connection with primary election was insufficient for failure to disclose whether expenditures violated wishes of a stockholder. U.S. v. Lewis Food Co., D.C.Cal.1964, 236 F.Supp. 849.

28. Bill of particulars

Defendant, charged with violation of former section 610 of Title 18 relating to expenditures by national bank in connection with an election, and with misapplication of funds by bank officer or employee, was entitled to a bill of particulars fully and fairly advising him of the details of the government's charges, in order that he might properly prepare whatever defense he might have under the circumstances, in order to avoid prejudicial surprise at trial. U.S. v. Barket, D.C.Mo.1974, 380 F.Supp. 1018.

29. Intervention

Even if union were able to allege a sufficient interest to warrant its intervention of right in corporation's action

against the Federal Election Commission challenging corporate campaign contribution provision of this section, its claim for intervention of right would also fail because its interest was adequately represented by the Commission. Athens Lumber Co., Inc. v. Federal Election Com'n, C.A.Ga.1982, 690 F.2d 1364.

30. Double jeopardy

Following acquittal of corporate defendant on charge of making political contributions in violation of former section 610 of Title 18 [now covered by this section], appeal by the Government was precluded as violative of double jeopardy clause of U.S.C.A. Const. Amend. 5. U.S. v. Security Nat. Bank, C.A.N.Y.1976, 546 F.2d 492, certiorari denied 97 S.Ct. 1591, 430 U.S. 950, 51 L.Ed.2d 799.

President of international union was not placed twice in jeopardy by reason of conviction of having consented to unlawful contribution of labor union funds to the campaigns of candidates for federal office, unlawful conversion of union funds for purpose of making such contribution, and conspiracy to commit such offenses. U.S. v. Boyle, 1973, 482 F.2d 755, 157 U.S.App.D.C. 166, certiorari denied 94 S.Ct. 593, 414 U.S. 1076, 38 L.Ed.2d 483.

Fact that substantive counts were in part based on allegations underlying conspiracy charge in prosecution charging violation of former section 610 of Title 18 prohibiting labor unions from making political contributions did not constitute a violation of defendants' right under U.S.C.A. Const.Amend. 5 against being placed in double jeopardy. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

31. Limitations

Where indictment charging conspiratorial and substantive violations of former section 610 of Title 18 prohibiting labor unions from making political contributions indicated that last overt act occurred on or about June 10, 1969, indictment was founded well within the five-year period of limitation and was not barred. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

32. Speedy trial

Fact that five-year statute of limitations applicable to defendant's alleged illegal bank loan to political organizations was not due to expire until 13 months after indictment was filed did not foreclose defendant from asserting prejudice from preindictment delay. U.S. v. Barket, C.A.Mo.1976, 530 F.2d 189.

Where indictment which charged conspiratorial and substantive violations of former section 610 of Title 18 prohibiting labor unions from making political contributions and which was returned on Mar. 2, 1971 was superseded by a subsequent indictment which was returned on Oct. 4, 1971, and where only delay in case was caused by necessity of getting a transcript prepared from motions, hearings for which were held in September of 1971, in order to argue supplemental motions filed with respect to new indictment, case was proceeding in an orderly manner and defendants were not denied their constitutional rights to a speedy trial and due process. U.S. v. Boyle, D.C.D.C.1972, 338 F.Supp. 1028.

33. Motion to dismiss

In prosecution of corporation for making illegal campaign contributions and of corporate officer for consenting to same, factual issues concerning various alleged payments and possible illegal transfers between corporation and officer were part of general issue to be resolved only at trial, not on motions, such as motions to dismiss supported by affidavit that checks from corporation cleared bank more than five years prior to filing of information, five years being the limitation period. U.S. v. Andreas, D.C.Minn.1974, 374 F.Supp. 402.

34. Discovery and inspection

Government responses in prosecution of union and union officials for alleged violations of former section 610

of Title 18 to pretrial disclosure orders failed to comply with orders, in that composition of special political action fund was not disclosed, circumstances of contributions to fund were not disclosed, and alleged overt acts were not disclosed, warranting dismissal of indictment. U.S. v. Seafarers Intern. Union of North America, D.C.N.Y.1972, 343 F.Supp. 779.

Subpoena duces tecum issued against government prosecutors for production of such evidence in their possession as was being used in prosecutions of defendants for violation of former section 610 of Title 18 prohibiting labor unions from making political contributions would be quashed, notwithstanding proffer of defendant establishing possibility that those who accepted or received alleged contributions were not being prosecuted, since proof of a violation by one who receives a contribution is of a wholly different character from that required to establish a violation by a donor, and defendants did not make a clear showing of relevance and materiality as required. U.S. v. Boyle, D.C.D.C.1971, 338 F.Supp. 1025, motion denied 331 F.Supp. 1181.

35. Summary judgment

In action by stockholder against directors of corporation based on alleged violation of prohibition of former section 610 of Title 18 against corporate expenditures in campaigns for federal office, material factual issue existed as to whether corporation's ad and pamphlet were nonpartisan, thus precluding summary judgment. Ash v. Cort, C.A.Pa.1974, 496 F.2d 416, reversed on other grounds 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

36. Presumptions

If "voluntary" and "involuntary" union funds are commingled and then a portion is expended for political purposes, it will be presumed that expenditures from commingled funds consisted of proportionate shares of the different types of money and it is irrelevant that the government show the source of all funds contributed to political campaigns if a substantial, or huge, portion of money in the funds was "involuntary" at the time of the contribution. U.S. v. Boyle, 1973, 482 F.2d 755, 157 U.S.App.D.C. 166, certiorari denied 94 S.Ct. 593, 414 U.S. 1076, 38 L.Ed.2d 483.

37. Burden of proof

Stockholders who brought derivative action against communications corporation and certain of its directors for failure to collect debt owed by national committee of political party for communication services provided at party's convention, and who alleged that failure to collect the debt was in violation of prohibition of former section 610 of Title 18 against corporate campaign spending, had burden of establishing nexus between alleged gift and a federal election. Miller v. American Tel. & Tel. Co., C.A.Pa.1974, 507 F.2d 759, on remand 394 F.Supp. 58.

In order to obtain conviction under former section 610 of Title 18, the government had to prove beyond reasonable doubt that a labor organization made a contribution or expenditure in connection with the specified federal election for purpose of active electioneering and that the defendant union officer consented to the making of the contribution. U.S. v. Boyle, 1973, 482 F.2d 755, 157 U.S.App.D.C. 166, certiorari denied 94 S.Ct. 593, 414 U.S. 1076, 38 L.Ed.2d 483.

38. Admissibility of evidence

In prosecution for knowingly causing another to accept or receive illegal corporate campaign contribution, proof of similar acts on defendant's part in accepting three other contributions was admissible as tending to show pattern of conduct on issues of knowledge and intent at time of events charged in indictment. U.S. v. Chestnut, D.C.N.Y.1975, 399 F.Supp. 1292, affirmed 533 F.2d 40, certiorari denied 97 S.Ct. 88, 429 U.S. 829, 50 L.Ed.2d 93.

39. Weight and sufficiency of evidence

Evidence in prosecution for having consented to unlawful contribution of labor union funds to campaigns of candidates for federal office was sufficient to establish that president of international union knew and approved of practice of having checks on union account made out to cash, deposited in personal accounts of members and contributions then made with personal checks and that president knew and approved of efforts to conceal source of the funds. U.S. v. Boyle, 1973, 482 F.2d 755, 157 U.S.App.D.C. 166, certiorari denied 94 S.Ct. 593, 414 U.S. 1076, 38 L.Ed.2d 483.

Evidence was sufficient to sustain conviction of causing another to accept or receive illegal corporate campaign contribution. U.S. v. Chestnut, D.C.N.Y.1975, 399 F.Supp. 1292, affirmed 533 F.2d 40, certiorari denied 97 S.Ct. 88, 429 U.S. 829, 50 L.Ed.2d 93.

In prosecution against union and its president and its secretary for contribution or expenditure of union funds in behalf of candidate for election to Congress, evidence was insufficient to show that expenditure was made by union on behalf of candidate in respect to purchase of gasoline and repair of automobiles. U.S. v. Construction & General Laborers Local Union No. 264, D.C.Mo.1951, 101 F.Supp. 869.

40. Questions for jury

Indictment alleging violation of prohibition of former section 610 of Title 18 against corporate campaign contributions by corporation's advertisements employing rating system to show percentage of each incumbent officer's "votes cast in favor of constitutional principles" was not dismissible as matter of law on ground that expenditures in question were not for an activity which constituted active electioneering, and indictment and advertisements presented jury question as to whether advertisements went beyond permissible bounds in that they were designed to influence public at large to vote for or against particular candidates. U.S. v. Lewis Food Co., C.A.Cal.1966, 366 F.2d 710.

41. Moot questions

Where basis of election controversy remains after the election and where the dispute is likely to reoccur, the case will not be found moot, even where prospective relief alone is sought. Ash v. Cort, C.A.Pa.1974, 496 F.2d 416, reversed on other grounds 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

42. Instructions

Jury should have been instructed in prosecution of union and its officers for conspiring to violate former section 610 of Title 18 prohibiting union from making contribution or expenditure in connection with federal election with respect to issue of voluntariness of payments to fund, and giving instructions permitting jury to convict without finding that donations to fund had been actual or effective dues or assessments was plain error. Pipefitters Local Union No. 562 v. U.S., Mo.1972, 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

43. Damages

There was no indication in legislative history of former section 610 of Title 18 which suggested a congressional intent to vest in corporate shareholders a federal right to damages for violation of said section. Cort v. Ash, Pa.1975, 95 S.Ct. 2080, 422 U.S. 66, 45 L.Ed.2d 26.

44. Injunction

Finding in stockholder's suit, brought on behalf of himself and of corporation, that plaintiff would not be irreparably harmed by denial of his request for preliminary injunction to enjoin corporation from furnishing funds for the publication and dissemination of a speech made by the corporation's president was not clearly erroneous despite contention that such publication and dissemination violated former section 610 of Title 18. Ash v. Cort, C.A.Pa.1973, 471 F.2d 811.

Injunction prohibiting corporation from repeating violation of Federal Election Campaign Act was appropriate where corporation maintained in open court that they had not violated federal election laws and refused to promise that they would not repeat transaction. Federal Election Com'n v. NRA Political Victory Fund, D.D.C.1991, 778 F.Supp. 62.

In action brought by the Federal Election Commission charging a corporation and its chief executive officer with violations of former section 610 of Title 18, plaintiff's demand for injunctive relief was not subject to dismissal. Federal Election Commission v. Weinsten, D.C.N.Y.1978, 462 F.Supp. 243.

Where suit against corporation for direct damages for violation of former section 610 of Title 18 was dismissed because no private right of action existed for direct damages and because plaintiff stockholders failed to satisfy jurisdictional amount requirement, additional claim for injunctive relief could not be maintained under the doctrine of pendent jurisdiction. Miller v. American Tel. & Tel. Co., D.C.Pa.1975, 394 F.Supp. 58, affirmed 530 F.2d 964.

45. Disbarment or suspension from practice

Engaging in covert, deceitful activities on behalf of reelection of President of United States, designed to sow confusion among candidates of opposing party, and convictions of conspiracy and distributing political campaign material not containing name of distributing person or organization warrants suspension for two years, probation for three subsequent years and passing professional responsibility examination. Segretti v. State Bar, Cal.1976, 544 P.2d 929, 126 Cal.Rptr. 793.

46. Scope of review

Evidence was required to be viewed in light most favorable to the government on appeal from conviction of labor union and officers for conspiring to violate former section 610 of Title 18 prohibiting labor organizations from making contributions and expenditures to candidates for federal office. U.S. v. Pipefitters Local Union No. 562, C.A.Mo.1970, 434 F.2d 1116, adhered to 434 F.2d 1127, reversed in part, vacated in part on other grounds 92 S.Ct. 2247, 407 U.S. 385, 33 L.Ed.2d 11.

47. Issues reviewable

Appellant would be allowed to challenge constitutionality of provision of this section despite his failure to do so in district court proceedings for enforcement of Commission subpoena. Federal Election Commission v. Lance, C.A.Ga.1981, 635 F.2d 1132, appeal dismissed, certiorari denied 101 S.Ct. 3151, 453 U.S. 917, 69 L.Ed.2d 999.

On appeal from dismissal of stockholders' derivative action against corporation and certain of its directors for failure to collect debt owed corporation by national committee of political party for communication services furnished by the corporation, direct federal cause of action would not be implied in favor of stockholders against directors for alleged violation of prohibition of former section 610 of Title 18 against corporate campaign spending and section 202(a) of Title 47 where federal law count was not included in complaint and there was no indication that question had ever been presented to district court. Miller v. American Tel. & Tel. Co., C.A.Pa.1974, 507 F.2d 759, on remand 394 F.Supp. 58.

2 U.S.C.A. § 441b

2 USCA § 441b

END OF DOCUMENT

The UNITED STATES
v.
Patrick J. CLIFFORD et al.

No. 75--CR--654.

United States District Court,
E.D. New York.

March 3, 1976.

In prosecution arising out of an alleged conspiracy to cause a national bank to make illegal campaign contributions, defendants moved for dismissal of various counts of the indictment. The District Court, Costantino, J., held that statute making it unlawful for any national bank to make a contribution in connection with any election to any political office does not infringe First Amendment rights as applied to national banks; that statute applies to state judicial elections and applies to postelection contributions when made for the purpose of influencing the election; and that statute prohibiting any false statements in any matter within the jurisdiction of any federal department or agency applies to oral unsworn statements even when the defendant has not initiated the investigation.

Motions denied.

[1] CONSTITUTIONAL LAW ⚷ 82(8)
92k82(8)
Formerly 92k82
Statute prohibiting political contributions or expenditures by national banks, corporations or labor organizations does not infringe First Amendment rights insofar as applied to national banks. 18 U.S.C.A. § 610; U.S.C.A.Const. Amend. 1.

[1] ELECTIONS ⚷ 311
144k311
Statute prohibiting political contributions or expenditures by national banks, corporations or labor organizations does not infringe First Amendment rights insofar as applied to national banks. 18 U.S.C.A. § 610; U.S.C.A.Const. Amend. 1.

[2] BANKS AND BANKING ⚷ 233
52k233
Congress may exercise plenary regulatory powers over national banks.

[3] CRIMINAL LAW ⚷ 13.1(2.5)
110k13.1(2.5)
Formerly 110k13.1(2)
Statute making it unlawful for any national bank to make a contribution in connection with any election to any political office is not unconstitutionally vague. 18 U.S.C.A. § 610.

[4] CRIMINAL LAW ⚷ 1078
110k1078
Statute providing that district court shall certify all questions of constitutionality of statute prohibiting political contributions by national banks was not applicable to criminal prosecution for violation of the latter statute. 18 U.S.C.A. § 610; Federal Election Campaign Act of 1971, § 315, 2 U.S.C.A. § 437h.

[5] ELECTIONS ⚷ 317.2
144k317.2
Formerly 144k317.1, 144k317
Statute making it unlawful for any national bank to make a contribution in connection with any election to any political office is applicable to state elections. 18 U.S.C.A. § 610.

[6] ELECTIONS ⚷ 317.2
144k317.2
Formerly 144k317.1, 144k317
Statute making it unlawful for any national bank to make a contribution in connection with any election to any political office is applicable to contributions to judicial elections. 18 U.S.C.A. § 610.

[7] ELECTIONS ⚷ 311
144k311
In prosecution for violation of statute making it unlawful for any national bank to make a contribution in connection with any election to any political office, court would interpret the statute in light of its language and purpose. 18 U.S.C.A. § 610.

[8] COURTS ⚷ 89
106k89
Even if no prosecutions had ever been instituted for judicial contributions under statute making it unlawful for any national bank to make a contribution in connection with any election to any political office, the interpretation of the statute by

various United States attorneys would not be binding on court in prosecution for violation of the statute. 18 U.S.C.A. § 610.

[9] ELECTIONS ⚿ 311
144k311
Ambiguity in statute prohibiting political campaign contributions by national banks would be resolved in favor of lenity. 18 U.S.C.A. § 610.

[10] ELECTIONS ⚿ 329
144k329
To prove a violation of statute prohibiting political campaign contributions by national banks in making postelection contributions, there must be proof of an intent to influence the election. 18 U.S.C.A. § 610.

[11] FRAUD ⚿ 68.10(3)
184k68.10(3)
Statute prohibiting the making of false statements in any matter within the jurisdiction of any federal department or agency was applicable to oral unsworn statements made to a bank examiner even if defendants had not initiated the investigation. 18 U.S.C.A. § 1001.

[12] INDICTMENT AND INFORMATION ⚿ 144.2
210k144.2
Defendants' motions to dismiss counts of complaint charging conspiracy to cause national bank to make illegal campaign contributions, wherein one defendant alleged that he was not an active member of the conspiracy at the time of the contributions charged and codefendant claimed undue delay in prosecution, would be denied without prejudice. 18 U.S.C.A. § 610.

***1071** David G. Trager, U.S. Atty., E.D.N.Y., Thomas R. Pattison, Edward R. Korman, Robert F. Katzberg, Asst. U.S. Attys., Brooklyn, N.Y., for the U.S.

Orans, Elsen & Polstein, new York City, for defendant Patrick Clifford; Gary P. Naftalis, Gary H. Greenberg, New York City, of counsel.

Joseph W. Ryan, Jr., Mineola, N.Y., for defendant Frank Powell.

Irving A. Cohn, Mineola, N.Y., for defendant David J. Dowd.

Lord, Day & Lord, New York City, for defendant Security National Bank; Eugene F. Bannigan, John W. Castles, III, New York City, of counsel.

MEMORANDUM AND ORDER

COSTANTINO, District Judge.

The 22 count indictment in this case arises out of an alleged conspiracy to cause the Security National Bank to make illegal campaign contributions from 1966--1974. 18 U.S.C. §§ 610, 659, 1001.

Defendants have made various procedural motions. Since this court finds those motions to be without merit, they are denied.

Defendants have also moved for dismissal of various counts of the indictment on numerous grounds. Among the issues raised are (1) the constitutionality of § 610, (2) the applicability of § 610 to state elections, (3) the applicability of § 610 to judicial elections, (4) the applicability of § 610 to post-election contributions, and (5) the applicability of § 1001 to oral unsworn statements made to a bank examiner.

1. The Constitutionality of 18 U.S.C. § 610

Defendants argue that § 610 is an unconstitutional burden on freedom of speech in light of the recent Supreme Court opinion, Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 ($75--436, Jan. 30, 1976). In that decision, the Supreme Court held that the expenditure provisions of portions of the Federal Election Campaign Act violated the First Amendment.

***1072** [1][2] Buckley v. Valeo is distinguishable from the case at bar, however. The prohibitions of § 610 insofar as they apply to this case are specifically directed to national banks. Since Congress has chartered national banks it seems clear that Congress may exercise plenary regulatory powers over such institutions. It is concluded that § 610 insofar as it relates to contributions is a valid exercise of this power and does not infringe defendants' First Amendment rights.

Since the government has indicated at oral argument that its proof will be directed solely to the issue of contributions, this court need not decide

whether the § 610 prohibition on expenditures by national banks is unconstitutional in light of Buckley v. Valeo.

Defendants have also argued that § 610 is unconstitutionally vague. The standard for determining whether a penal statute is unconstitutionally vague was enunciated in Connally v. Gen'l Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1925):

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. (citations omitted)

[3] Having examined the statute in light of these standards, this court concludes that § 610 is not unconstitutionally vague.

[4] This court has given careful consideration to defendant Dowd's argument that the question of constitutionality should be certified to the U.S. Court of Appeals for the 2d Circuit pursuant to 2 U.S.C. § 437h. [FN1] A review of the language of that section and its legislative history has convinced this court, however, that the provisions of the section are not applicable to the case at bar. The Joint Explanatory Statement of the Committee on Conference, for this section states:

> FN1. 2 U.S.C. § 437h provides as follows: (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18. The district court immediately shall certify all questions of constitutionality of this Act or of section 608, 610, 611, 613, 614, 615, 616, or 617 of Title 18 to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

> Conference substitute
> The conference substitute generally follows the House amendment and makes it clear that these special judicial review provisions are available only for actions directed at determining the constitutionality of provisions of the Act and of provisions of title 18, United States Code, related to the activities regulated by the Act.
> 1974 U.S.Code Cong. & Admin.News, p. 5664

The case at bar was not directed at determining the constitutionality of the Act. Rather this is a criminal action; the constitutional attack was raised by way of motion. There is no need for the expedited review provision of § 437h in a criminal action, since review may be had on appeal. Declaratory judgments regulate prospective actions; this criminal case deals with actions already taken. Accordingly, there is no reason for certifying the question to the Court of Appeals.

2. The Applicability of § 610 to state elections

[5] Defendants contend that § 610 should apply only to contributions made ***1073** in connection with federal elections and not to state elections. They cite Ash v. Cort, 3 Cir., 496 F.2d 416, rev'd on other grounds, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) for the proposition that the definitions contained in 18 U.S.C. § 591 limit the scope of s 610. Ash v. Cort was a civil case dealing with corporate contributions. The prohibitions against national banks in § 610 is different from the prohibition against other corporations in the same section, and the definitions in § 591 only apply 'except as otherwise specifically provided.' The language of § 610 applicable to the case at bar clearly provides otherwise: 'It is unlawful for any national bank . . . to make a contribution or expenditure in connection with any election to any political office . . .' (emphasis added). This language is even more significant in light of the more limited language used in the part of the section dealing with corporations in general:

> . . . or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or

> Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . ..

The conclusion that the part of the section relating to national banks was meant to apply to all elections--state as well as federal--is further reinforced by reference to the legislative history. See S.Rep. No. 3056, 59 Cong. 1st Sess. p. 2:

> The effect of this provision is to make it unlawful for any corporation, (organized by authority of any laws of Congress), no matter what its character may be, to make a contribution 'in connection with any election to any political office' without regard to whether the election be national, State, county, township, or municipal. The congress has the undoubted right thus to restrict and regulate corporations of its own creation.

3. The Applicability of § 610 to judicial elections

[6] In arguing that § 610 should not be applied to contributions to judicial elections, defendants rely on two arguments: (1) the alleged failure in the past to prosecute for contributions to judicial elections and (2) a perceived distinction between judicial and political elections. These arguments are without merit.

[7] Assuming arguendo that no prosecution has ever been instituted for contributions to judicial office, this court must nevertheless interpret § 610 in light of its language and purpose. Defendants' argument apparently proceeds as follows: (1) no prosecutions have ever been instituted for judicial contributions, (2) there must have been occasions when the various United States Attorneys' offices were aware of bank contributions to judicial campaigns, (3) therefore, by failing to prosecute, the government indicated its belief that judicial campaigns were insulated from the section's prohibitions.

[8] Only two things need be said about this argument. First, this court is not prepared to speculate as to the reasons for the absence of similar prosecutions. Second, even if this court were able to discern the interpretation of this section by various United States Attorneys in the past, that interpretation would not be binding under the circumstances present here.

Defendants rely on Rosenthal v. Harwood, 35 N.Y.2d 469, 363 N.Y.S.2d 937, 323 N.E.2d 179 (1974) for the proposition that a distinction exists between political and judicial campaigns. To the extent that such a distinction is present in Rosenthal, however, it is based on the need to insulate judicial elections, more than any other election, from corruption or the appearance of corruption. The Court specifically held that 'public policy . . . mandates that insofar as practicable both selection for an performance ***1074** in judicial office shall be free from political manipulation.' 363 N.Y.S.2d at 943, 323 N.E.2d at 183. It seems clear that this rationale requires, rather than precludes, application of § 610 to judicial elections.

In Buckley v. Valeo, supra, 424 U.S. at p. 26, 96 S.Ct. at p. 638, 46 L.Ed.2d at p. 692, the Supreme Court recognized that the primary purpose of the Federal Election Campaign Act was 'to limit the actuality and appearance of corruption . . ..' These public policy considerations clearly mandate that the words of the section--'any election to any political office'--be given their plain meaning. Accordingly, it is concluded that s 610 does apply to contributions made to judicial campaigns.

4. Applicability of § 610 to post election contributions

Defendant Clifford argues that Count 15 of the indictment must be dismissed because it alleges a contribution made after the election. Defendant contends that to establish a violation of § 610 some sort of 'active electioneering' must be proved, see, e.g., U.S. v. Boyle, 157 U.S.App.D.C. 166, 482 F.2d 755 (1973), cert. denied, 414 U.S. 1076, 94 S.Ct. 593, 38 L.Ed.2d 483 (1973). The government has argued that the exclusion of postelection contributions from the language of § 610 would 'create a loophole so wide that it would consume the entire statute.'

[9][10] There appears to be merit to both propositions; the wording of the statute, at the time of the contribution was ambiguous. [FN2] This court must resolve the ambiguity in favor of lenity. Rewis v. U.S., 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493, 496 (1971); Bell v. U.S.,

349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905, 910 (1955). It is therefore concluded that to prove a violation of s 610, under the circumstances of this case, an intent to influence the election must be proved. Cf. Miller v. American Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974); U.S. v. Lewis Food Co., 366 F.2d 710 (9th Cir. 1966).

> FN2. It is probable, although this court need not decide the issue, that by amending the last paragraph of § 610 in 1972, Congress has closed any loophole that existed.

This court, however, cannot conclude as a matter of law that the post-election contribution alleged in Count 15 was not made for the purpose of influencing the election. Resolution of that issue is within the province of a jury after hearing all the facts and circumstances surrounding the contribution. Accordingly, the motion to dismiss Count 15 is denied at this time.

5. The Applicability of 18 U.S.C. § 1001 to oral unsworn statements made to a Bank Examiner

[11] Counts 21 and 22 of the indictment charge defendant Clifford with making false statements in a matter within the jurisdiction of the Office of the Comptroller of the Currency in violation of 18 U.S.C. § 1001. Clifford argues that § 1001 does not apply to oral unsworn statements when the defendant has not initiated the investigation, citing U.S. v. Bedore, 455 F.2d 1109 (9th Cir. 1972).

The United States Court of Appeals for the Second Circuit, however, has construed § 1001 in very broad terms. See U.S. v. McCue, 301 F.2d 452 (2d Cir. 1962); U.S. v. Adler, 380 F.2d 917 (2d Cir. 1967). In McCue a conviction under § 1001 was upheld despite the fact that the investigation was not initiated by the defendant. In Adler the court noted that the word 'statement' as it appears in the statute has been interpreted to include oral statements not under oath. 380 F.2d at 922.

The 'exculpatory--no' cases are not applicable to the facts of this case. Accordingly the motion to dismiss Counts 21 and 22 is denied.

6. Powell's Motion to Dismiss

[12] Defendant Powell moves to dismiss Counts 3, 5, 9, 17 and 19 on the ***1075** ground that, as a matter of law, he was not an active member of the conspiracy at the time the contributions charged in those counts were made. This motion is denied without prejudice. See Pinkerton v. U.S., 328 U.S. 640, 646, 66 S.Ct. 1180, 1183, 90 L.Ed. 1489, 1496 (1945). Hyde v. U.S., 225 U.S. 347, 369, 32 S.Ct.

793, 803, 56 L.Ed. 1114, 1127 (1912). 7. Clifford's Motion to dismiss because of undue delay in prosecution

This court cannot decide at this time whether or not there was prejudicial delay, for, as the brief on behalf of Mr. Clifford states, there 'may well be substantial' prejudice. (emphasis added) Rather than speculate as to whether there may or may not be prejudice during trial this court denies the motion without prejudice.

Accordingly, defendants' motions to dismiss are denied. Defendants' motions to strike 'surplusage' and to sever various counts of the indictment are also denied.

So ordered.

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CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 05/23/95
THE CURRENT DATABASE IS AR-ST-ANN

ARKANSAS CODE OF 1987 ANNOTATED
TITLE 23. PUBLIC UTILITIES AND REGULATED INDUSTRIES
SUBTITLE 2. FINANCIAL INSTITUTIONS AND SECURITIES
CHAPTER 34. MISCELLANEOUS VIOLATIONS OF BANKING LAWS

Current through Act 70 of the 1994 Second Extraordinary Session

23-34-107 Embezzlement, misuse of funds, etc., by officer, director, etc.

(a) The following persons shall be guilty of a felony:

(1) Any officer, director, agent, or employee of any bank or trust company who:

(A) Embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the bank or trust company; or

(B) Without authority from the directors of the bank or trust company issues or puts forth any certificate of deposit; draws any order or bill of exchange; makes any acceptance; or assigns any note, bond, draft, bill or exchange, mortgage, judgment, or decree; or

(C) Makes any false entry in any book, report, or statement of the bank or trust company with the intent in any case to injure or defraud the bank or trust company, or any company, body politic or corporate, or any individual person or to deceive any officer of the bank or trust company, or the Bank Commissioner, or any agent or examiner appointed to examine the affairs of the bank or trust company, or the State Banking Board;

(2) Every receiver or liquidating agent of a bank or trust company who, with like intent to defraud or injure, shall embezzle, abstract, purloin, or willfully misapply any of the moneys, funds, or assets of his trust;

(3) Every agent, attorney, employee, or assistant of any receiver or liquidating agent of any bank or trust company who, with like intent to defraud or injure, shall embezzle, abstract, purloin, or willfully misapply any of the moneys, funds, or assets of the trust of the receiver or liquidating agent; and

(4) Every person who, with like intent, shall aid or abet any officer, director, receiver, liquidating agent, employee, agent, attorney, or receiver in any violation of this section.

(b) Upon conviction, the person shall be fined in any sum not more than five thousand dollars ($5,000) or shall be imprisoned in the Arkansas penitentiary for not more than five (5) years, or both.

History. Acts 1933, No. 60, § 10; Pope's Dig., § 693; A.S.A. 1947, § 67-706.

CASE NOTES

Cited: Donaghey v. Wasson, 190 Ark. 1123, 82 S.W.2d 856 (1935).

A.C.A. § 23-34-107

AR ST § 23-34-107

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DATE AND TIME PRINTING STARTED:	05/23/95	03:05:46 pm (Central)
DATE AND TIME PRINTING ENDED:	05/23/95	03:11:01 pm (Central)
OFFLINE TRANSMISSION TIME:		00:05:15
NUMBER OF REQUESTS IN GROUP:	4	
NUMBER OF LINES CHARGED:	3254	

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UNITED STATES of America, Appellee,
v.
Alexander J. BARKET, Appellant.
Alexander J. BARKET, Petitioner,
v.
The Honorable John W. OLIVER, United States District Judge, and United States of America, Respondents.

Nos. 75--1568, 75--1569.

United States Court of Appeals,
Eighth Circuit.

Submitted Nov. 14, 1975.

Decided Dec. 9, 1975.
Rehearing and Rehearing En Banc Denied Feb. 9, 1976.
Rehearing Denied in No. 1568

Order denying motion to dismiss affirmed; petition for writ of mandamus denied.

Stephenson, Circuit Judge, filed a concurring and dissenting opinion.

[1] CRIMINAL LAW ⚖ 1023(8)
110k1023(8)
Ordinarily, absent compelling reasons, an interlocutory order, such as an order denying a motion to dismiss an indictment, is nonappealable; but where the appellant in good faith contends that another trial is barred by former jeopardy, the general rule does not apply, and the denial of the motion to dismiss is deemed appealable as a collateral order, within the "Cohen" doctrine. 28 U.S.C.A. § 1291.

[2] CRIMINAL LAW ⚖ 1023(3)
110k1023(3)
An appealable collateral order (1) must be a final determination of a claim of right separable from, and collateral to, rights asserted in the action, (2) must be too important to be denied review, in the sense that it presents a serious and unsettled question, and (3) its review cannot, in the nature of the question that it presents, await final judgment because when that time comes it will be too late effectively to review the order and rights conferred will have been lost, probably irreparably. 28 U.S.C.A. § 1291.

[3] CRIMINAL LAW ⚖ 1023(8)
110k1023(8)
Since order denying motion to dismiss was trial court's final determination of defendant's double jeopardy claim, since it was separable from the merits of the case, since, being a question of constitutional right, it was too important to be denied review, and since review of the claim could not await final judgment for the reason that defendant would lose his claimed right to be free from a second trial, the order was appealable. 28 U.S.C.A. § 1291.

[4] DOUBLE JEOPARDY ⚖ 6
135Hk6
Formerly 110k161
Double jeopardy prohibition is meant to spare a once jeopardized defendant not only a subsequent conviction but also a subsequent trial.

[5] DOUBLE JEOPARDY ⚖ 136
135Hk136
Formerly 110k196
Two statutes charge the same offense, for double jeopardy purposes, if the violation of each statute is proved by the same evidence.

[6] BANKS AND BANKING ⚖ 256(3)
52k256(3)
Conviction of a bank officer under statute pertaining to the misapplication of national bank funds requires proof that the officer wilfully misapplied funds for the benefit of himself or another person, for the purpose of defrauding or injuring the bank; in contrast, a conviction under statute pertaining to political contributions by a national bank requires proof that the defendant consented to the contribution or expenditure of the bank's funds in connection with an election, and no purpose to defraud or injure the bank is required. 18 U.S.C.A. §§ 610, 656.

[7] BANKS AND BANKING ⚖ 256(3)
52k256(3)
Statute pertaining to the willful misapplication of national bank funds is meant to protect the funds of banks with a federal relationship, whereas statute pertaining to political contributions by national banks has for one of its purposes the protection of the electoral process from the influence of corporate and union funds. 18 U.S.C.A. §§ 610, 656.

[8] DOUBLE JEOPARDY ⇦ 139.1
135Hk139.1
Formerly 110k196
National bank officer's acquittal on indictment's second count, charging a violation of willful misapplication statute, did not bar prosecution of him on first count, charging a violation of political contribution statute, since violations of the two statutes must be proved by different evidence and the two counts therefore charged different offenses. 18 U.S.C.A. §§ 610, 656.

[9] INDICTMENT AND INFORMATION ⇦ 189(1)
210k189(1)
One offense is a lesser included offense of another only if, in order to commit the greater offense, it is necessary to commit the lesser.

[10] INDICTMENT AND INFORMATION ⇦ 191(.5)
210k191(.5)
Formerly 210k191
Violation of statute pertaining to political contributions by national banks is not a lesser included offense of a violation of statute pertaining to the willful misapplication of funds by a national bank officer. 18 U.S.C.A. §§ 610, 656.

[11] DOUBLE JEOPARDY ⇦ 1
135Hk1
Formerly 110k161
Where an issue of ultimate fact has been determined by a final judgment in a criminal case, to relitigate the issue in a subsequent trial for a different offense would violate the double jeopardy prohibition.

[12] JUDGMENT ⇦ 951(1)
228k951(1)
Defendant has the burden, in any "Ashe v. Swenson" case, of showing that the verdict or findings of the court in prior case necessarily foreclosed an issue essential to the subsequent prosecution.

[13] JUDGMENT ⇦ 751
228k751
Despite defendant's claim, predicated on the collateral estoppel principle of "Ashe v. Swenson," that the trial judge, in commenting on the weight of the Government's evidence at the time defendant was acquitted on indictment's second count, decided certain factual issues in defendant's favor which were crucial to a prosecution on the indictment's remaining first count, an examination of the record established that none of the statements unambiguously foreclosed issues essential to the first count.

***183** Thomas C. Walsh, St. Louis, Mo., for appellant.

Anthony Nugent, U.S. Asst. Atty., Kansas City, Mo., for appellee.

Before MATTHES, Senior Circuit Judge, LAY and STEPHENSON, Circuit Judges.

MATTHES, Senior Circuit Judge.

Alexander J. Barket has appealed from the order of the district court[FN*] denying his motion to dismiss Count I of a two-count indictment (our Appeal No. 75--1568). Alternatively, Barket filed a petition for writ of mandamus in this court (No. 75--1569) to compel the district court to dismiss Count I and discharge appellant. The appeal and petition for mandamus have been consolidated for briefing, argument, and opinion.

FN* The Honorable John W. Oliver.

Count I of the indictment charged that appellant, an officer of Civic Plaza National Bank, Kansas City, Missouri, consented to the expenditure of the bank's moneys in connection with the 1968 presidential election, in violation of 18 U.S.C. s 610.[FN1]

FN1. In pertinent part s 610 provides: It is unlawful for any national bank, * * * to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, * * * (A)nd every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Before proceeding to an examination of the merits of the issues presented, a resume of the history of this case in the district court will serve to explain why this litigation is before us.

The two-count indictment was filed on May 9, 1974.[FN2] Count I charged that appellant ***184** violated 18 U.S.C. s 610 by consenting to the contribution of $7,500 of Civic Plaza's money in connection with the 1968 election for presidential and vice presidential electors. Count II charged that, in violation of 18 U.S.C. s 656, appellant knowingly and without authorization misapplied $9,144 of the bank's funds by paying the money to Rudolph Zatezalo, for the purpose of making an unlawful political contribution.[FN3]

FN2. The original indictment in this action was filed on October 11, 1973. The first two counts charged appellant and the bank with the violations alleged here. The third count charged appellant with violating 18 U.S.C. s 1005. This indictment was dismissed on appellant's motion on November 23, 1973. The present indictment was subsequently filed, naming appellant alone as defendant. A separate information against the bank was also filed, but was dismissed by the trial court.

FN3. In pertinent part s 656 provides: Whoever, being an officer, director, * * * or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, * * * embezzeles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both * * *.

Both counts were based on the same transactions: an alleged payment of $9,144 from the bank to Zatezalo, as a bonus salary, and a contribution by Zatezalo of $7,500 to the presidential campaign of then Vice President Hubert Humphrey. [FN4] The government's theory is that appellant approved this payment to Zatezalo, without proper authorization, and so violated both s 656, by misapplying the bank's funds, and s 610 by consenting to an expenditure of bank funds for a presidential election.

FN4. The difference between the amount purportedly paid to Zatezalo ($9,144) and the amount of the alleged contribution ($7,500) apparently represented Zatezalo's increased income tax liability resulting from his receipt of the 'bonus.'

At a conference on January 28, 1975, the court ordered that the two counts be tried separately. It is unclear at whose instance this order was made.[FN5]

FN5. The court's memorandum of this conference reads: 'The government elected to try the s 656 counts in the two cases.' The government asserts that the court compelled it to sever the counts for trial, on motion of appellant.

In any event, after waiver of a jury trial, the case proceeded on Count II alone, the s 656 misapplication charge. At the close of the evidence, the trial judge granted appellant's motion for judgment of acquittal. In granting the motion, he discussed at length the strength of the government's evidence. Particularly, he said:

> The greatest difficulty, it seems to me, is proof and evidence to support any sort of finding that whatever the defendant may have done, he did for the purpose as alleged by the government 'to injure and defraud his bank' * * *.
>
> It is my judgment, and I find, that there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an 'illegal' political contribution.

The court then entered a 'not guilty' verdict.

Count I of the indictment, the s 610 charge, remained pending. Thereafter, appellant moved to dismiss this count on several grounds. He asserted first that to try him on Count I would violate the fifth amendment's proscription of double jeopardy, because the offense charged in Count I is identical to the offense charged in Count II. In his motion to dismiss appellant relied in part at least on Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) to support this double jeopardy claim.[FN6] He asserted also that Count I fails to state an offense, and that s 610 is unconstitutional.

FN6. On appeal, appellant has receded from any claim that Ashe v. Swenson involves pure double jeopardy. He recognizes that Ashe dealt with collateral estoppel, and incorporated that doctrine

into the double jeopardy clause of the fifth amendment.

The court denied appellant's motion to dismiss Count I and this appeal followed. ***185** In denying the motion, the judge filed a written memorandum and order in which he stated inter alia:

In connection with the Section 656 charge contained in Count II of the indictment, the government was obligated to establish beyond reasonable doubt that the defendant, with intent to injure and defraud the bank of which he was an officer and director, willfully and knowingly misapplied $9,144.00 for the purpose of making an unlawful political contribution. The Section 610 charge alleged in Count I does not require proof of any factual data essential to a Section 656 conviction under Count II. The charge in Count I requires that the government prove beyond reasonable doubt that the defendant 'consented' to a $7,500 contribution made by the bank in violation of Section 610. That is an entirely different charge than Count II which alleged that the defendant had made an unidentified unlawful political contribution with money which he had converted from funds formerly owned by the bank.

Initially, we consider the question whether the order complained of is a 'final decision' appealable under 28 U.S.C. s 1291.

The parties disagree on this vital question. The appellant relies on Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and cases cited below from four courts of appeals in support of his contention that even though the order denying the motion to dismiss is collateral in nature, it should be treated as final and appealable. The government argues that the order does not fall within the ambit of the Cohen doctrine and submits that the four cases relied upon by the appellant the distinguishable. The government argues also that the double jeopardy and collateral estoppel issues can be determined after another trial and entry of a final judgment under 28 U.S.C. s 1291.

[1] Ordinarily, absent compelling reasons, an interlocutory order, such as an order denying a motion to dismiss an indictment, is non-appealable. Cohen v. Beneficial Industrial Loan Corp., supra; Snodgrass v. United States, 326 F.2d 409 (8th Cir. 1964). However, where, as here, the appellant in good faith contends that another trial is barred by former jeopardy, this general rule does not apply. Rather, denial of the motion to dismiss is deemed appealable as a collateral order, within the doctrine of Cohen v. Beneficial Industrial Loan Corp., supra. United States v. DeSilvio, 520 F.2d 247 (3d Cir. 1975); United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975); United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972); see also Thomas v. Beasley, 491 F.2d 507 (6th Cir. 1974); contra, United States v. Bailey, 512 F.2d 833 (5th Cir. 1975).[FN7]

FN7. We agree with the government that the factual contexts of the cases relied upon by appellant are dissimilar from the circumstances here. But central to all of the cases was a double jeopardy plea and, more importantly, whether that issue could be tested and determined on an appeal from an interlocutory judgment such as an appeal from a denial of a motion to dismiss.

[2] The denial of the motion to dismiss in this case has all the characteristics of a collateral order. These characteritics are enumerated by Professor Moore:

(1) (T)he order must be a final determination of a claim of right 'separable from, and collateral to,' rights asserted in the action;

(2) it must be 'too important to be denied review,' in the sense that it 'presents a serious and unsettled question'; and

(3) its review cannot, in the nature of the question that it presents, await final judgment because 'when that time comes, it will be too late effectively to review the * * * order and rights conferred * * * will have been lost, probably irreparably.'

***186** 9 J. Moore, Federal Practice P110.10, quoted in Roach v. Churchman, 457 F.2d 1101 (8th Cir. 1972).

[3] The order denying the motion to dismiss here is the trial court's final determination of appellant's double jeopardy claim. It is separable from the merits of the case. See United States v. Lansdown, supra, 460 F.2d at 171. As a question of constitutional right, it is too important to be denied review. Id.

[4] Most importantly, review of the double

jeopardy claim cannot await final judgment. The double jeopardy prohibition is meant to spare a once-jeopardized defendant not only a subsequent conviction, but also a subsequent trial. It is designed to prevent the government from 'subjected (a defendant) to embarrassment, expense and orderal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' Green v. United States, 355 U.S. 184, 187--88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); Accord United States v. Lansdown, supra, 460 F.2d at 171; United States v. Brown, 481 F.2d 1035, 1041 (8th Cir. 1973); see also Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

If this appeal is not heard now, appellant will lose his claimed right to be free from a second trial.[FN8] Review thus cannot await final judgment. We hold that the order is appealable, and in so holding, we emphasize that our conclusion is limited to double jeopardy cases.

> FN8. It makes no difference for appealability purposes, of course, whether appellant wins or loses on the merits. See, e.g., United States v. DeSilvio, supra (finding that order similar to the one here is appealable, and holding for appellee on merits).

Also, the other grounds for dismissal of the indictment advanced by appellant (failure to charge an offense and the unconstitutionality of s 610) can be heard, if necessary, on appeal from final judgment in the event there is another trial and conviction. Accordingly, we do not consider them now. We limit our consideration to appellant's double jeopardy and collateral estoppel claims.

And because we find the order appealable, we need not consider whether mandamus is appropriate.

Appellant in fact makes two separate double jeopardy arguments. First, he contends that the s 610 violation charged in Count I and the s 656 violation charged in Count II are the 'same offense,' so that his acquittal for the latter bars prosecution for the former. Secondly, he argues that the second prosecution is barred by the 'collateral estoppel' rule of Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). We consider each argument in turn.

[5] Two statutes charge the same offense, for double jeopardy purposes, if the violation of each statute is proved by the same evidence. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 40, 76 L.Ed. 520 (1932); Kistner v. United States, 332 F.2d 978, 980 (8th Cir. 1964).

[6] Conviction of a bank officer under 18 U.S.C. s 656 requires proof that the officer wilfully misapplied funds for the benefit of himself or another person, for the purpose of defrauding or injuring the bank. This purpose to defraud or injure the bank is an important element of a s 656 offense. See United States v. Giordano, 489 F.2d 327, 330 (2d Cir. 1973).

Conviction under s 610, in contrast, requires proof that the defendant consented to the contribution or expenditure of the bank's funds in connection with an election. No purpose to defraud or injure the bank is required.

[7] There is a fundamental difference in purpose between the two statutes. The misapplication statute, s 656, is meant to protect the funds of banks with a federal relationship. '(C)ourts have generally held that the gist of the offense of willful misapplication is the conversion of funds of a federally insured ***187** bank by one connected in some capacity with the bank either to his own use or to the use of a third person, with the intent to injure or defraud the bank.' United States v. Wilson, 500 F.2d 715, 720 (5th Cir. 1974). The political contribution statute, s 610, in contrast, has for one of its purposes the protection of the electoral process from the influence of corporate and union funds. See United States v. Auto Workers, 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1952).

[8] Because of these different purposes, the two offenses contain different elements. As noted, s 656 requires a purpose to injure or defraud the bank; s 610 requires consent to a political contribution. Violations of the two statutes must be proved by different evidence. Therefore, the two counts here charge different offenses.[FN9] See United States v. Blockburger, supra.

> FN9. Appellant makes much of the government's assertion that it will introduce at trial on Count I the

> same evidence used at the trial of Count II. The question before us is not, however, what evidence is to be used at trial. Rather, the question is what evidence is required to convict under the two statutes.

Appellant in reality is arguing not that the offenses are identical, but that the s 610 violation is a lesser included offense of the s 656 violation.

[9][10] One offense is a lesser included offense of another only if, in order to commit the greater offense, it is necessary to commit the lesser. See United States v. Eisenberg, 469 F.2d 156, 162 (8th Cir. 1972), cert. denied, 410 U.S. 992, 93 S.Ct. 1515, 36 L.Ed.2d 190 (1973). Manifestly, there are many ways to misapply funds, in violation of s 656, without consenting to a political contribution in violation of s 610. It is thus possible to commit the greater offense without committing the lesser, and the lesser included offense doctrine is inapplicable.

The two counts, then, do not charge the same offense. Nor is the offense charged in Count I a lesser included offense of the offense charged in Count II. This aspect of the double jeopardy prohibition is thus inapplicable, and appellant's point is without merit.

[11] Appellant's second argument is based, not on pure double jeopardy, but on the 'collateral estoppel' principle of Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The Supreme Court there held that, where an issue of ultimate fact has been determined by a final judgment in a criminal case, to relitigate the issue in a subsequent trial for a different offense violates the double jeopardy prohibition. Appellant contends that the trial judge, in commenting on the weight of the government's evidence, decided certain factual issues in appellant's favor which would be crucial to a prosecution on Count I.

The statement referred to were made from the bench at the close of the evidence at the trial on Count II.[FN10] They lack the clarity which could be found in written findings of fact. It is therefore difficult to determine what factual issues the trial judge intended to resolve by the statements.

> FN10. Appellant did not request formal findings of fact, and none were made. See Fed.R.Crim.P. 23(c). The 'findings' referred to here were oral comments made in the disposition of the motion for judgment of acquittal. Because none forecloses an issue essential to Count I, it is not necessary to consider whether 'findings' of this kind can bring the Ashe v. Swenson rule into play.

As shown above, in ruling on the motion to dismiss which is now before us, the trial judge found that his disposition of Count II had not foreclosed any issues essential to the trial of Count I. We are not bound by this finding. Rather, we must make our own examination of the record, to see what factual issues were resolved in connection with the motion for judgment of acquittal, and which of these issues, if any, would be material to a s 610 prosecution. We note first that the one issue on which the trial court ***188** unquestionably found a failure of proof is not essential to a s 610 proceeding. The court ruled that the government had failed to prove that appellant acted for the purpose of injuring and defrauding his bank. As observed, this is not an element of the s 610 offense, so that this finding does not preclude conviction under that statute.

Appellant relies on certain other 'findings' of the trial court to support his Ashe v. Swenson claim. He points, first, to the trial court's assertion that the evidence did not support a finding that appellant acted 'wilfully.' It is not at all clear what the trial judge meant by his use of the word 'wilful.' He might have meant to say that appellant did not act for the specific purpose of violating s 656, or to assert again that appellant did not act to injure the bank. If so, this 'finding' of lack of wilfulness is irrelevant to the s 610 charge.

Similarly, the court found that 'there was an equal failure of proof on the part of the government that the purpose of the defendant's action was the making of an 'illegal' political contribution.' This comment was made in the midst of a discussion of the requirement that a s 656 misapplication necessarily involve a conversion. The court emphasized the word 'illegal.' It might well have meant to say, not that the government failed to prove the political contribution, but that it failed to prove that the contribution resulted from an unauthorized, i.e., 'illegal,' conversion of bank funds. Conviction under s 610 does not require that the contribution of bank funds be unauthorized. If

the sentence quoted is given this meaning, prosecution under s 610 remains possible.

Appellant asserts, finally, that the court found that the government failed to prove that appellant was 'tied' to the contribution in question. The record shows that the court did not in fact so find. Although it indicated that there was 'some difficulty' in tying the alleged contribution to appellant in light of certain documentary evidence, it did not expressly rule on the question. In the absence of a clearer declaration by the trial judge, we cannot say that the issue of appellant's participation in the contribution was resolved.

[12][13] In any Ashe v. Swenson case, the burden is on the defendant to show that the verdict or the findings of the court in the prior case necessarily foreclosed an issue essential to the subsequent prosecution. See United States v. Gugliaro, 501 F.2d 68, 70 (2d Cir. 1974). Appellant has not sustained this burden here. None of the statements referred to by appellant unambiguously forecloses issues essential to Count I.

Appellant has thus not shown that the prosecution of Count I is barred by the trial court's disposition of Count II, either under traditional double jeopardy standards or under the rule of Ashe v. Swenson. The trial court therefore did not err in denying the motion to dismiss.

The government has indicated that it will present at the trial of Count I the same evidence it produced at the trial of Count II. We assume that the trial court will provide both parties the opportunity to present additional evidence if they choose to do so.

The petition for writ of mandamus is denied. The order of the district court denying appellant's motion to dismiss is affirmed.

STEPHENSON, Circuit Judge (concurring and dissenting).

Assuming arguendo that the order of the district court denying appellant's motion to dismiss Count I is an appealable order I concur with parts II and III of the majority opinion.

However, I respectfully dissent from part I of the majority opinion because it is my view that the order denying dismissal of Count I is not a final decision appealable under 28 U.S.C. s 1291. I am in accord with the views expressed in United States v. Bailey, 512 F.2d 833 (5th Cir. 1975). Cf. United States v. Nixon, 418 U.S. 683, 690--92, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

I would deny the petition for writ of mandamus for the reason that exceptional ***189** circumstances justifying invocation of this extraordinary remedy do not exist. Will v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967).

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 05/23/95
THE CURRENT DATABASE IS DCT

UNITED STATES CODE ANNOTATED
TITLE 2. THE CONGRESS
CHAPTER 14--FEDERAL ELECTION CAMPAIGNS
SUBCHAPTER I--DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

Current through P.L. 104-8, approved 4-17-95

§ 437g. Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4) (A) (i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6) (A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent

the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4) (A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4) (A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4) (A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4) (A), the Commission may institute a civil action for relief under paragraph (6) (A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4) (A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(10) Repealed. Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357.

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports

Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a) (2) (A) (iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a) (2) (A) (i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a) (7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a) (4) (A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether--

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a) (4) (A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

CREDIT(S)

1985 Main Volume

(Pub.L. 92-225, Title III, § 309, formerly § 314, as added Pub.L. 93-443, Title II, § 208(a), Oct. 15, 1974, 88 Stat. 1284, renumbered § 313 and amended Pub.L. 94-283, Title I, §§ 105, 109, May 11, 1976, 90 Stat. 481, 483, renumbered § 309 and amended Pub.L. 96-187, Title I, §§ 105(4), 108, Jan. 8, 1980, 93 Stat. 1354, 1358; Pub.L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

References in Text

This Act, referred to in subsecs. (a) and (d), means the Federal Election Campaign Act of 1971, as amended, as defined by section 431 of this title.

Prior Provisions

Provisions similar to those comprising subsec. (a) of this section were contained in section 308(d) of Pub.L. 92-225, Title III, Feb. 7, 1972, 86 Stat. 18 (section 438(d) of this title) prior to amendment of section 308 of Pub.L. 92-225 by Pub.L. 93-443.

1984 Amendment

Subsec. (a)(10). Pub.L. 98-620 struck out par. (10) which had provided that any action brought under subsec. (a) be advanced on the docket of the court in which filed, and put ahead of the other actions (other than other actions brought under this subsection or under section 437h of this title).

1980 Amendment

Pub.L. 96-187, § 108, substantially reworked the provisions of this section in order to facilitate the Commission's more expeditious handling of complaints, and the implementation of enforcement proceedings.

1976 Amendment

Subsec. (a). Pub.L. 94-283, § 109, generally reworked the provisions of subsec. (a) to reflect the enactment of sections 441a to 441j of this title and the repeal of sections 608 and 610 to 617 of Title 18 and to update the operations of the Commission.

Subsec. (b). Pub.L. 94-283, § 109, reenacted subsec. (b) without change.

Subsec. (c). Pub.L. 94-283, § 109, added subsec. (c).

Effective Date of 1984 Amendment

Amendment by Pub.L. 98-620 not to apply to cases pending on Nov. 8, 1984, see section 403 of Pub.L. 98-620, set out as a note under section 1657 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1980 Amendment

Amendment by Pub.L. 96-187 effective Jan. 8, 1980, see section 301(a) of Pub.L. 96-187, set out as an Effective Date of 1980 Amendment note under section 431 of this title.

Effective Date

Section effective Jan. 1, 1975, see section 410(a) of Pub.L. 93-443 set out as an Effective Date of 1974 Amendment note under section 431 of this title.

Legislative History

For legislative history and purpose of Pub.L. 93-443, see 1974 U.S.Code Cong. and Adm.News, p. 5587. See, also, Pub.L. 94-283, 1976 U.S.Code Cong. and Adm.News, p. 929; Pub.L. 96-187, 1979 U.S.Code Cong. and Adm.News, p. 2860; Pub.L. 98-620, 1984 U.S.Code Cong. and Adm.News, p. 5708.

CROSS REFERENCES

Defense of civil action brought under this section, power of Commission, see 2 USCA § 437d.

WEST'S FEDERAL FORMS

Contempt proceedings, Civil, see § 5651 et seq. Criminal, see § 7761 et seq.

Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.

Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.

Sentence and fine, see § 7531 et seq.

CODE OF FEDERAL REGULATIONS

Access to Public Disclosure Division documents, see 11 CFR 5.1 et seq.

Compliance procedure, see 11 CFR 111.1 et seq.

LAW REVIEW COMMENTARIES

Political campaign contributions by foreign nationals in Florida elections. Donna M. Ballman, 65 Fla.B.J. 31 (March 1991).

Regulating newsletters under Federal Elections Laws and the First Amendment. Martin Boles, 40 Ark.L.Rev. 79 (1987).

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1. Constitutionality

Those provisions of this section, prior to the 1976 amendment of this section by Pub.L. 94-283, which vested in the Federal Election Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights violated the appointments clause of the Constitution, U.S.C.A. Const. Art. 2, § 2, cl. 2; such functions may be discharged only by persons who are officers of the United States within the meaning of the clause. Buckley v. Valeo, Dist.Col.1976, 96 S.Ct. 612, 424 U.S. 1, 46 L.Ed.2d 659, motion granted 96 S.Ct. 1153, 424 U.S. 936, 47 L.Ed.2d 727, on remand 532 F.2d 187, 174 U.S.App.D.C. 300.

Federal Election Commission's petition to enforce administrative subpoena requiring defendant to appear for a deposition and produce certain documents relative to an investigation of possible illegal contributions by two national banks to defendant's 1974 Georgia gubernatorial campaign was not barred by the ex post facto and due process clauses of the Constitution, since the proscription which the banks and defendant's campaign committee were suspected of violating has been in effect since 1907, since the statutory penalties for violation of this section are civil, not quasi-criminal in nature, and since it could not be assumed that any future Commission proceeding against the subjects of the investigation would necessarily depend solely on transactions that occurred before the 1976 enactment of the Federal Corrupt Practices Act, former section 241 et seq. of this title. Federal Election Commission v. Lance, C.A.Ga.1980, 617 F.2d 365, supplemented 635 F.2d 1132, appeal dismissed, certiorari denied 101 S.Ct. 3151, 453 U.S. 917, 69 L.Ed.2d 999.

While former section 610 of Title 18 made no provision for civil damages, whereas this section now empowers the court to "impose a civil penalty" in an appropriate "civil action," such penalties are not "quasi criminal" in nature and thus are not barred by the Constitution's ex post facto clause, U.S.C.A. Const. Art. 1, § 9, cl. 3, for pre-1976 misconduct. Federal Election Commission v. Weinsten, D.C.N.Y.1978, 462 F.Supp. 243.

2. Construction with other laws

Findings concerning violations of federal election laws are governed by this section, while Commission's authority to make repayment determinations is derived from section 9007(b) of Title 26. Reagan-Bush Committee v. Federal Election Commission, D.C.D.C.1981, 525 F.Supp. 1330.

3. Mandatory nature of section

Use of word "may" in this section did not make provisions of this section permissible rather than mandatory, where Congress, which was concerned with remedy, provided for an exclusive civil remedy vested in Federal Election Commission, and then created one carefully limited exception, which provided for a "blend of administrative and judicial enforcement powers" and became available to complainant only when Commission had failed to obey directive of district court of District of Columbia. Walther v. Baucus, D.C.Mont.1979, 467 F.Supp. 93.

4. Discretion of Commission

Issue of whether a particular charge merits an investigation by the Federal Election Commission is a sensitive and complex matter calling for an evaluation of the credibility of the allegation, the nature of threat posed by offense, the resources available to agency, and numerous other factors: Congress has entrusted such matter to the discretion of the Commission and instructed the courts to interfere only when the Commission's actions are

contrary to law. In re Federal Election Campaign Act Litigation, D.C.D.C.1979, 474 F.Supp. 1044.

5. Discretion of Attorney General

That upon request by the Federal Election Commission the Attorney General on behalf of the United States shall institute a civil action for relief does not establish that Congress intended to eliminate the discretion that has traditionally vested in the Attorney General. Buckley v. Valeo, 1975, 519 F.2d 821, 171 U.S.App.D.C. 172, affirmed in part, reversed in part on other grounds 96 S.Ct. 612, 424 U.S. 1, 46 L.Ed.2d 659.

6. Authority of Attorney General

Requirement of determination of probable cause by Federal Election Commission prior to directly referring matter without conciliation proceedings to the Attorney General does not in any manner curtail power of Attorney General to investigate and prosecute criminal violations of this chapter. U.S. v. Tonry, D.C.La.1977, 433 F.Supp. 620.

7. Conciliation agreement

Federal Election Commission's (FEC's) conciliation agreement with national political committee did not deal with regulation counting contribution against individual's per candidate limit and committee's per candidate limit if committee exercises direction and control over choice of candidate, and, thus, Commission could bring action alleging violation of regulation, even though agreement discussed Commission's settlement of the "matter" and in some contexts referred to entire series of transactions or occurrences raised by filed complaint as "matter." Federal Election Com'n v. National Republican Senatorial Committee, C.A.D.C.1992, 966 F.2d 1471.

Fact that conciliation agreement may be admitted to negate criminal intent or ameliorate sentence in a prosecution under this chapter did not require that persons violating this chapter be given opportunity to enter into conciliation agreement before criminal prosecution could be initiated, in view of provision of this section that if Commission finds probable cause to believe knowing and wilful violation has occurred, Commission may refer apparent violation to Attorney General without regard to requirement that Commission attempt conciliation. U.S. v. International Union of Operating Engineers, Local 701, C.A.Or.1979, 638 F.2d 1161, certiorari denied 100 S.Ct. 1026, 444 U.S. 1077, 62 L.Ed.2d 760.

8. Press entities

This chapter calls for a two step process when a substantial complaint is received alleging a violation of this chapter by a press entity; in first stage, until and unless press exemption is found inapplicable, Commission is barred from investigating substance of the complaint, but is permitted to investigate the two questions on which the exemption turns: whether press entity is owned by a political party or candidate and whether press entity was acting as a press entity in making distribution complained of; if Commission makes a finding of probable cause that press exemption did not apply to the circumstances, then and only then would investigation be permitted into whether a substantive violation had occurred. Reader's Digest Ass'n, Inc. v. Federal Election Commission, D.C.N.Y.1981, 509 F.Supp. 1210.

9. Prerequisites for investigation

Mere "official curiosity" will not suffice as basis for Commission investigation, since investigations may begin only if individual first files a signed, sworn, notarized complaint with Commission and Commission's duty thereafter is expeditiously to conduct confidential investigation of complaint. Federal Election Commission v. Machinists Non-Partisan Political League, 1981, 655 F.2d 380, 210 U.S.App.D.C. 267, certiorari denied 102 S.Ct. 397, 454 U.S. 897, 70 L.Ed.2d 213.

All that is required before seeking a subpoena under the Federal Election Campaign Act is that inquiry was

proper, information sought is reasonably relevant to matter involved, and information requested be within broad scope of investigations once there had been finding of reason to believe a violation has occurred. Federal Election Com'n v. Citizens for Freeman, D.C.Md.1985, 602 F.Supp. 1250, appeal dismissed 767 F.2d 911.

10. Knowledge and willfulness

Where there was no evidence of any "knowing, conscious and deliberate flaunting" of this chapter by union in connection with its segregation of funds that could be used for direct contributions to candidates for federal elective office and those that were used for communications with union members and for nonpartisan voter registration, union considered itself to be in compliance with this chapter and routinely reported its interfund transfers to the very agency charged with enforcement of this chapter, and no decision had addressed issue whether transfers could be made from union's education fund to political contributions committee, union's violations of this chapter were not "knowing and willful" as required by subsec. (a) (6) (C) of this section upon which imposition of civil penalty against it was based. American Federation of Labor and Congress of Indus. Organizations (AFL-CIO) v. Federal Election Commission, 1980, 628 F.2d 97, 202 U.S.App.D.C. 97, certiorari denied 101 S.Ct. 397, 449 U.S. 982, 66 L.Ed.2d 244.

Despite fact that organization of professional educators violated this chapter by using "reverse check-off" system of collecting political contributions from its members, civil penalty was unwarranted, where violation was not in the nature of intentional disregard of rights of dissenting members through coercion, threats, and reprisals but was indirect infringement of those rights through excessive zeal in trying to have more efficient collection system and where expenses organization would incur in making refunds in accordance with court order would be sufficient penalty without adding fine to it. Federal Election Commission v. National Ed. Ass'n, D.C.D.C.1978, 457 F.Supp. 1102.

10A. Immunity

Associate general counsel for Federal Election Commission in charge of general counsel's enforcement section, whose responsibilities included ensuring consistent application of law in the enforcement area, was acting within outer perimeter of his official duties, and thus, was entitled to absolute immunity from liability for alleged assault and battery on paralegal specialist assigned to the enforcement section when the assistant general counsel tried to physically wrench confidential logbook from the paralegal, who, although he had authority to review contents of the logbook, was photocopying sheets from the logbook to gather evidence to controvert insubordination charges against him. Edwards v. Gross, D.D.C.1986, 633 F.Supp. 267.

11. Jurisdiction

Federal Election Commission is agency of United States government empowered with exclusive and primary jurisdiction with respect to administration, interpretation and civil enforcement of Federal Election Campaign Act of 1971, §§ 301 et seq., 306(b)(1), 307(a), 309, as amended, 2 U.S.C.A. §§ 431 et seq., 437c(b)(1), 437d(a), 437g. Federal Election Com'n v. American Intern. Demographic Services, Inc., E.D.Va.1986, 629 F.Supp. 317.

Federal Election Commission's dismissal of complaint alleging that political action committees made illegal contributions to a campaign for primary election for nomination to a congressional seat, solely based on general counsel's first report, which urged dismissal based upon a misinterpretation of the facts, was arbitrary and capricious and thus contrary to law, in that there was undisputed evidence that case involved violation of at least $2,500, and more likely $3,600. Antosh v. Federal Election Com'n, D.C.D.C.1984, 599 F.Supp. 850.

Where Commission provided defendants with notice of investigation and alleged violations involving certain expenditures, including full description of factual and legal basis for allegations, and defendants received and had fair opportunity to review and respond to Commission's findings, and yet did not express willingness to negotiate by repeatedly refusing to concede liability and respond on merits to Commission's proposals, Commission acted

in good faith in its initiation of suit and, thus, district court had subject-matter jurisdiction over portion of action alleging violations of this chapter. Federal Election Com'n v. National Rifle Ass'n of America, D.C.D.C.1983, 553 F.Supp. 1331.

This section permitting a person aggrieved by failure of Commission to act on a complaint within 90 days of filing to challenge that failure within 60 days of 90-day period should not be read as requiring final action on all cases within that period but should be read as being jurisdictional in nature and as giving district court power after such time to decide whether failure of agency to act is contrary to law, that is, whether it is arbitrary and capricious. Common Cause v. Federal Election Commission, D.C.D.C.1980, 489 F.Supp. 738.

District court was without subject matter jurisdiction to entertain plaintiff's suit seeking enforcement of federal election laws, since primary enforcement of election laws is entrusted by section 437c of this title to Federal Election Commission, and this chapter did not permit private citizens to bring direct suits against alleged violators of the laws. In re Federal Election Campaign Act Litigation, D.C.D.C.1979, 474 F.Supp. 1051.

Where, in case in which plaintiff claimed that congressman and his election committee received excessive contributions from labor organizations for congressman's 1978 senatorial campaign in violation of this section, complaint did not allege that there had been compliance with this section and, while plaintiff's complaint was dismissed by Federal Election Commission, and while a petition for review was filed in district court for District of Columbia, there had been no decision by such court, federal district court was without jurisdiction. Walther v. Baucus, D.C.Mont.1979, 467 F.Supp. 93.

12. Complaint

Federal Elections Commission complaint launching FECA investigation was adequate even though it did not identify by name the person or entity, unknown to complainant, that was alleged to have committed identified violation of Federal Election Campaign Act and did not present complete factual and legal account of alleged violation. Federal Election Com'n v. Franklin, E.D.Va.1989, 718 F.Supp. 1272, affirmed in part, vacated in part on other grounds 902 F.2d 3.

Complaint which alleged that contributions from OPE, the political arm of the AFL-CIO and individual political action committees of various unions which exceeded a total of $5,000 were contributions made by political action committees controlled by the same group of persons, thus making the contributions excessive, which alleged that various candidates had knowingly received those assertedly illegal contributions, and which alleged that Commission had not conducted an investigation stated a claim under the provision of this section permitting private parties to bring civil actions when the Commission fails to act. Walther v. Federal Election Commission, D.C.D.C.1979, 468 F.Supp. 1235.

13. Summary proceedings

Questions of the coverage of this chapter were inappropriate in summary proceeding to enforce the Federal Election Commission's subpoena for the Florida for Kennedy Committee documents. Federal Election Commission v. Florida for Kennedy Committee, D.C.Fla.1980, 492 F.Supp. 587.

14. Disclosure

Provision of subsec. (a) (4) (B) (i) of this section that "no information derived, in connection with any conciliation attempt by the Commission * * * may be made public" did not apply to materials supplied to the Commission before the conciliation process began. Federal Election Commission v. Illinois Medical Political Action Committee, D.C.Ill.1980, 503 F.Supp. 45.

14A. Investigations

Breach of confidentiality requirement for Federal Election Commission investigations, which resulted from one Commission employee reporting to media about credit card irregularities of presidential primary campaign, did not demonstrate bad faith on part of Commission in its investigation. Spannaus v. Federal Election Com'n, S.D.N.Y.1986, 641 F.Supp. 1520, affirmed 816 F.2d 670.

Federal Election Commission is authorized to institute investigations of possible violations of Federal Election Campaign Act of 1971, § 301 et seq., as amended, 2 U.S.C.A. § 431 et seq. Federal Election Com'n v. American Intern. Demographic Services, Inc., E.D.Va.1986, 629 F.Supp. 317.

15. Discovery

Registered voter, contending that Commission acted contrary to law in dismissing complaints containing allegations of illegal campaign contributions by various unions to members of Congress, was not entitled to require unions to appear as third parties and to be deposed in respect to contributions, where acts of unions were neither relevant nor likely to lead to relevant information in that sole issue in case concerned decision of Commission to dismiss complaints against unions, and depositions involved unwarranted intrusion into political activities of unions that might well occur or otherwise interfere with their legitimate political activity in violation of U.S.C.A. Const. Amend. 1. Walther v. Federal Election Commission, D.C.D.C.1979, 82 F.R.D. 200.

16. Exhaustion of remedies

Exhaustion of administrative remedy under this chapter was not prerequisite to indictments under this chapter, even if administrative remedy applied to alleged violations occurring in 1974 prior to effective date of amendments providing for administrative remedy. U.S. v. International Union of Operating Engineers, Local 701, C.A.Or.1979, 638 F.2d 1161, certiorari denied 100 S.Ct. 1026, 444 U.S. 1077, 62 L.Ed.2d 760.

17. Declaratory judgment and injunction

Violator did not demonstrate sort of extraordinary intransigence and hostility toward the Federal Election Commission and the Federal Election Campaign Act which would support inference that he would remain likely to violate Act for remainder of his life and, thus, permanent injunctive relief was not justified, but rather injunction should have been limited to reasonable duration. Federal Election Com'n v. Furgatch, C.A.9 (Cal.) 1989, 869 F.2d 1256.

Injunction against political committees and their treasurer, prohibiting them from future violations of conciliation agreements entered into with Federal Election Commission, was appropriate, given that defendants had failed to act diligently in the past, did not face complex litigation, and presented possibility that they could commit further violations. Federal Election Com'n v. Committee of 100 Democrats, D.D.C.1993, 844 F.Supp. 1.

Nonprofit membership corporation's challenge to application of Federal Election Commission (FEC) regulation to corporation's proposed voter guide was not yet ripe for declaratory or injunctive relief to prevent enforcement action against 1990 voter guide where advisory opinion obtained from FEC dealt with corporation's 1988 voter guide, it was possible that minor changes in wording in proposed publication could preclude necessity for enforcement action, cost of voter guides would not exceed amount that triggered Attorney General's enforcement role, and it was possible that there would be no complaints and that FEC would find no violation in revised guides. Faucher v. Federal Election Com'n, D.Me.1990, 743 F.Supp. 64, affirmed 928 F.2d 468, certiorari denied 112 S.Ct. 79, 502 U.S. 820, 116 L.Ed.2d 52.

So long as Commission was investigating limited question whether in disseminating videotape of a computer reenactment of Senator Kennedy's accident at Chappaquidick, magazine publisher was acting in context of distribution of a news story through its facilities or whether it was acting in a manner unrelated to its publishing functions, so as to determine whether press exemption in this chapter was applicable, there was no basis to grant

injunction sought by magazine publisher to enjoin Commission from proceeding with its investigation, in that press exemption in this chapter would not protect publisher if its dissemination of the tape had nothing to do with its press function as a magazine publisher. Reader's Digest Ass'n, Inc. v. Federal Election Commission, D.C.N.Y.1981, 509 F.Supp. 1210.

Injunctive relief against violations of spending limitations of this chapter was not warranted in that it was not shown that defendants did not act in good faith to attempt to cure violations, both parties acknowledged complexity of issues and facial ambiguity of at least some of the statutory provisions in question, and there was no indication that an injunction would be necessary in order to insure future compliance with contribution limits. Federal Election Commission v. California Medical Ass'n, D.C.Cal.1980, 502 F.Supp. 196.

In action seeking declaratory and injunctive relief against the Commission, alleging that it had failed to act timely on plaintiff's June 1978 complaint, charging that certain medical organizations had made financial contributions to candidates for federally elected office in excess of the $5,000 statutory limit, and to otherwise perform its statutory obligations, the carefully qualified conditions under which certain commission materials were being made available to plaintiffs did not make them public within the meaning of this chapter. Common Cause v. Federal Election Commission, D.C.D.C.1979, 83 F.R.D. 410.

18. Civil penalty

District court could assess $25,000 civil penalty for violations of Federal Election Campaign Act, though that assessment was essentially statutory maximum for expenditures involved in violation under circumstances, in view of evidence of absence of good faith, injury to public, violator's ability to pay, and necessity of vindicating authority of the Federal Election Commission; district court was free to conclude that absence of good-faith efforts by violator to undo or cure his violations was indicative of need for larger penalty to defer future wrongdoing and of need to vindicate FEC's authority, and serious nature of violations gave rise to presumption of serious public harm. Federal Election Com'n v. Furgatch, C.A.9 (Cal.) 1989, 869 F.2d 1256.

Federal Election Commission was entitled to penalty of $1,000 for violation of conciliation agreement by political committee and its treasurer; committee and treasurer were well aware of their obligation to file disclosure reports under the law and pursuant to conciliation agreement, yet they failed to do so. Federal Election Com'n v. Committee of 100 Democrats, D.D.C.1993, 844 F.Supp. 1.

Corporation which made illegal campaign contribution would be subject to penalty measured by costs incurred by Federal Election Commission in investigating prosecuting action, where record did not indicate the corporation was chronic violator of campaign finance law which needed stiff punishment. Federal Election Com'n v. NRA Political Victory Fund, D.D.C.1991, 778 F.Supp. 62.

Fine of $3,500 and injunction were appropriate remedy upon determination that mailing list company and its founder used Federal Election Commission tapes containing names of potential contributors to political organizations for commercial purposes in violation of Federal Election Campaign Act of 1971, § 311(a)(4), as amended, 2 U.S.C.A. § 438(a)(4). Federal Election Com'n v. American Intern. Demographic Services, Inc., E.D.Va.1986, 629 F.Supp. 317.

Civil and criminal contempt citations were not imposed upon congressman's political committee or its treasurer for failure to obey default judgment directing them to file all outstanding reports required by Federal Election Campaign Act and to pay a civil penalty of $5,000, where treasurer, following entry of rule to show cause, filed all required reports and paid part of fine and proposed a schedule for the remainder, there were no underlying campaign financing improprieties or previously hidden misconduct, compliance came at great personal cost to treasurer, and treasurer's failings flowed largely from fact that he was unsophisticated in the ways of reporting under the Act. Federal Election Com'n v. Gus Savage for Congress '82 Committee, D.C.Ill.1985, 606 F.Supp. 541.

A civil penalty of $5,000 was reasonable and appropriate and would be imposed on each defendant for exceeding contribution limit of this chapter given complex constitutional and statutory questions surrounding case. Federal Election Commission v. California Medical Ass'n, D.C.Cal.1980, 502 F.Supp. 196.

19. Review by district court--Generally

Federal Election Commission's dismissal of Federal Election Campaign Act complaint due to deadlock in voting was judicially reviewable where FEC's General Counsel had recommended, due to Commission precedent, that Commission find "reason to believe" that violation had occurred and pursue complaint. Democratic Congressional Campaign Committee v. Federal Election Com'n, 1987, 831 F.2d 1131, 265 U.S.App.D.C. 372.

In reviewing decision of Federal Election Commission on issue of whether or not to investigate a sworn complaint alleging violations of the election laws, court must test Commission's decision according to standards commonly applied to judicial review of administrative decisions requiring reversal of agency action which is either arbitrary or capricious; sensitive nature of Commission's decision calls for judicial deference to the expertise of the agency which Congress has empowered to enforce the election laws. In re Federal Election Campaign Act Litigation, D.C.D.C.1979, 474 F.Supp. 1044.

20. ---- Arbitrary and capricious

Federal Election Commission's dismissal of portion of complaint alleging that political committee violated its contribution limits and reporting obligations when it treated contributions received as result of a mass-mailing as "earmarked" was arbitrary and capricious; candidates who ultimately received contributions were not "clearly identified" in the mailings and political committee exercised some "direction or control" over contributions at issue. Common Cause v. Federal Election Com'n, D.D.C.1990, 729 F.Supp. 148.

Factors which the court may consider in determining whether a failure of the Commission to act on a complaint is arbitrary and capricious include the credibility of the allegation, the nature of the threat posed, the resources available to the agency, and the information available to it, as well as the novelty of the issues involved. Common Cause v. Federal Election Commission, D.C.D.C.1980, 489 F.Supp. 738.

Federal Election Commission was not arbitrary or capricious in its decision not to investigate complaint alleging that certain political action committees were subject to same control and should have been regarded as one political committee for purpose of statutory $5,000 contribution limitation since complaint referred Commission to wrong statute, complaint did not state that any of candidates or their committees knowingly accepted donations from separate political action committees which were subject to the same control and did not present evidence that accused parties possessed knowledge of the illicit control, and since complaint, even when it stated valid charge, did so only in the most conclusory fashion. In re Federal Election Campaign Act Litigation, D.C.D.C.1979, 474 F.Supp. 1044.

21. ---- Contrary to law

In determining whether Commission's interpretation of section 441a of this title was contrary to law, task for court is not to interpret such provision as it thinks best, but rather a narrower inquiry into whether Commission's construction is sufficiently reasonable to be accepted by reviewing court; to satisfy this standard it is not necessary for court to find that agency's construction was the only reasonable one or even the reading the court would have reached if question had initially arisen in judicial proceeding. Federal Election Commission v. Democratic Senatorial Campaign Committee, Dist.Col.1981, 102 S.Ct. 38, 454 U.S. 27, 70 L.Ed.2d 23.

Federal Election Commission's decision is contrary to law if FEC has dismissed complaint as result of impermissible interpretation of law or if dismissal under permissible interpretation of law was arbitrary or capricious or abuse of discretion. Orloski v. Federal Election Com'n, 1986, 795 F.2d 156, 254 U.S.App.D.C. 111.

Judicial review of Federal Election Commission's decision not to investigate a complaint is deferential; court is to reverse agency only if agency's decision is contrary to law. Democratic Senatorial Campaign Committee v. Federal Election Com'n, D.D.C.1990, 745 F.Supp. 742.

Commissioners' statement of reasons for preventing, by voting to deadlock, Federal Election Commission action on complaint that candidate and political action committee violated Federal Election Campaign Act was "sufficiently reasonable"; statement of reasons cited, inter alia, unequivocal denials by candidate and political action committee that they had collaborated in such fashion as to deprive political action committee's financial support of candidacy of its character as "independent expenditures," and disagreement with advisory opinion which served as basis for General Counsel's determining that political action committee's providing preaddressed envelopes in which contributions could be directly mailed to candidate and verified by "pledge card" was in-kind contribution. Stark v. Federal Election Com'n, D.D.C.1988, 683 F.Supp. 836.

Given extreme sensitivity of political expression and electoral process, failure of Federal Election Commission to pursue congressman's complaint expeditiously at all times in its handling of complaint weighed in favor of determination that delay in acting on complaint on or before eve of next congressional election was contrary to law. Rose v. Federal Election Com'n, D.C.D.C.1984, 608 F.Supp. 1.

Conduct of investigation by Commission into complaints of alleged violations of this chapter by an association and several of its state political action committees, and conciliation agreements which Commission entered into with association and its committees, were not contrary to law where, though time consumed by investigation was of an inordinate length, agreements resolved all but arguably one of the violations alleged by statutorily preferred method. Common Cause v. Federal Election Commission, D.C.D.C.1980, 489 F.Supp. 738.

21A. ---- Limitations

Sixty-day period for filing petition for review of Federal Election Commission decision to dismiss administrative complaint filed by treasurer of election campaign began to run on date of dismissal, rather than on later date on which treasurer actually received notice of dismissal. Spannaus v. Federal Election Com'n, C.A.D.C.1993, 990 F.2d 643.

Sixty-day limitations period for filing petitions for review of Federal Election Commission orders is jurisdictional and unalterable and cannot be circumvented by procedural devices; in particular, party who has failed to file for review within prescribed limitations period cannot obtain new filing period by simple expedient of filing new request for the same agency action. National Rifle Ass'n of America v. Federal Election Com'n, 1988, 854 F.2d 1330, 272 U.S.App.D.C. 121.

The 60-day period for seeking review of decision of Federal Election Commission dismissing an administrative complaint was not measured with reference to date on which Commission unanimously voted to accept conciliation agreements and close the file but, rather, from date on which the Commission approved the agreements and they became effective. Antosh v. Federal Election Com'n, D.C.D.C.1985, 613 F.Supp. 729.

22. Appellate review

District court's exercise of its discretionary authority in imposition of civil penalties under this chapter must be guided by sound legal principles and is subject to appellate review. American Federation of Labor and Congress of Indus. Organizations (AFL-CIO) v. Federal Election Commission, 1980, 628 F.2d 97, 202 U.S.App.D.C. 97, certiorari denied 101 S.Ct. 397, 449 U.S. 982, 66 L.Ed.2d 244.

23. Expeditious handling of complaint

The Federal Election Commission's handling of congressman's administrative complaint charging violations of the Federal Election Campaign Act and its position in congressman's subsequent litigation to compel FEC action

were substantially justified and, therefore, FEC was not liable to congressman under the Equal Access to Justice Act, notwithstanding district court's granting summary judgment in favor of congressman on merits; FEC's attention to congressman's complaint was prompt and sustained, and FEC had no practical alternative to defending against congressman's suit to compel action due to congressman's advancing incorrect interpretation of FECA. Federal Election Com'n v. Rose, 1986, 806 F.2d 1081, 256 U.S.App.D.C. 395.

Federal Election Commission did not comply with statutory indication of speed with which it was required to act on congressman's complaint alleging unlawful practices during 1982 congressional campaign where Commission consumed approximately 172 days before it filed statement that it had "reason to believe" that violations had occurred and Commission allowed discovery to delay 1982 congressional election matter until it was competing with new 1984 election priorities. Rose v. Federal Election Com'n, D.C.D.C.1984, 608 F.Supp. 1.

24. Time of filing

Federal Election Commission's interpretation of statute [Federal Election Campaign Act of 1971, § 309(a)(8)(B), as amended, 2 U.S.C.A. § 437g(a)(8)(B)] which measures period of filing petition for judicial review of Commission's dismissal of administrative complaint from "date of the dismissal," a procedural rather than substantive provision, deserved no special deference from district court. Common Cause v. Federal Election Com'n, D.D.C.1985, 630 F.Supp. 508.

25. Persons entitled to maintain action

Citizen who lived, worked and voted in Oklahoma lacked standing to contest failure of Federal Election Commission to act favorably upon his administrative complaint of political fund-raising improprieties in connection with reelection campaign of United States senator from Arizona. Antosh v. Federal Election Com'n, D.D.C.1986, 631 F.Supp. 596.

25A. Persons liable

Treasurer of political committees, as party to conciliation agreements settling violations of Federal Election Campaign Act, was personally liable for violation of such agreements. Federal Election Com'n v. Committee of 100 Democrats, D.D.C.1993, 844 F.Supp. 1.

26. Notice and opportunity for hearing

Federal Election Commission's determination that there had been no violation of Federal Election Campaign Act by corporate donations to picnic sponsored by congressman was not procedurally defective because of failure of FEC to give challenger opportunity to reply to challenged candidate's response to challenger's allegations. Orloski v. Federal Election Com'n, 1986, 795 F.2d 156, 254 U.S.App.D.C. 111.

Federal Elections Commission's inability to directly notify unknown respondent did not divest Commission of subject matter jurisdiction over investigation of Federal Election Campaign Act violation alleged in complaint on which Commission made reason to believe determination; Commission invited notice and opportunity to respond through attorney/private investigator hired by respondent, and there was no showing or suggestion of bad faith on part of Commission in launching investigation. Federal Election Com'n v. Franklin, E.D.Va.1989, 718 F.Supp. 1272, affirmed in part, vacated in part on other grounds 902 F.2d 3.

27. Sufficiency of notice

Letter by Federal Election Commission, which was sent to campaign committee for presidential primary and treasurer, which set forth sections of Federal Election Campaign Act and Presidential Primary Matching Payment Account Act that allegedly were violated, and which contained summary of factual allegations, satisfied

Commission's obligation to notify campaign committee and treasurer regarding investigation of campaign. Spannaus v. Federal Election Com'n, S.D.N.Y.1986, 641 F.Supp. 1520, affirmed 816 F.2d 670.

28. Time of notice

Federal Election Commission was not required to notify campaign committee of presidential primary candidate that it sent questionnaires to some contributors to campaign committee, but was required to notify candidate only after Commission had made finding that there was reason to believe in existence of violation of Federal Election Campaign Act. Spannaus v. Federal Election Com'n, S.D.N.Y.1986, 641 F.Supp. 1520, affirmed 816 F.2d 670.

29. Remand

District court should have remanded, rather than deciding on merits, Federal Election Campaign Act complaint which Federal Election Commission dismissed in spite of FEC's General Counsel's contrary recommendation; while FEC was sending "conflicting messages" and appeared to be acting with an uneven hand when it dismissed complaint without explanation while leaving undisturbed apparently contradictory precedent, the Commission was entitled to a further opportunity to set its precedent in order so that it, and not a court of review, would serve as primary decision maker. Democratic Congressional Campaign Committee v. Federal Election Com'n, C.A.D.C.1987, 831 F.2d 1131.

2 U.S.C.A. § 437g

2 USCA § 437g

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DATE AND TIME PRINTING STARTED:	05/23/95	10:45:09 am (Central)
DATE AND TIME PRINTING ENDED:	05/23/95	10:46:35 am (Central)
OFFLINE TRANSMISSION TIME:		00:01:26
NUMBER OF REQUESTS IN GROUP:	1	
NUMBER OF LINES CHARGED:	928	

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18 USC § 20 (e)(1) hist

PART E—RECEIPT OF STOLEN BANK PROPERTY

1. In general and present Federal law

This Part of title XI is designed to remedy a flaw in current 18 U.S.C. 2113(c). That statute punishes whoever receives, possesses, conceals, sells, or disposes of any property "knowing the same to have been taken from a bank, credit union, or any savings and loan association" in violation of the preceding subsection which proscribes theft from such financial institutions. The problem is that, in requiring knowledge that the property was taken "from a bank" or other federally insured institution, the section is unduly generous to wrongdoers. It does not permit a successful prosecution in cases in which the proof is overwhelming that the defendant acted culpably in that he possessed property he knew had been stolen but where no evidence exists to show that he knew it had been stolen "from a bank". Normally, it should not be necessary to prove scienter as to what is essentially a jurisdictional fact—here, that the property was stolen from a bank; and the inclusion of this gratuitous element in section 2113(c) has occasionally resulted in the unwarranted exoneration of the knowing receivers of stolen property.[1]

2. Provisions of the bill, as reported

Part E rewrites 18 U.S.C. 2113(c) making only one substantive change. In place of the existing requirement of knowledge that property was taken "from a bank", the bill requires only proof of knowledge that the property "has been stolen". Thus, it closes the loophole under which certain knowing receivers of property stolen from a bank have escaped conviction.

[1] See, e.g., *United States* v. *Kaplan*, 586 F.2d 980 (2d Cir. 1978); *United States* v. *Tavoularis*, 515 F.2d 1070 (2d Cir. 1975).

PART F—BANK BRIBERY

1. In general

This part revises and modernizes the statutory law dealing with bribery of bank officers. Sections 215 and 216 of title 18 presently cover the receipt of commissions or gifts by bank employees for procuring loans, but they are inadequate, unduly complex, and obsolete in many respects. For example, these sections do not reach bribery of employees of federally insured credit unions, or member banks of the Federal Home Loan Bank System, such as savings and loan associations, or of bank holding companies. The bill combines existing sections 215 and 216 to bring up to date the list of covered institutions and to make other improvements, including the prohibition of indirect as well as direct payments and an increase in applicable penalties. The proposal was contained in S. 1630, the Criminal Code reform bill approved by the committee last Congress,[1] and derives from legislation introduced a decade ago.[2]

2. Present Federal law

As noted, the commercial bribery aspects of Federal regulation of the banking industry are currently covered in 18 U.S.C. 215 and 216.

Under 18 U.S.C. 215, the officers, employees, and agents of banks the deposits of which are insured by the Federal Deposit Insurance Corporation, as well as certain other specified financial institutions,[3] are prohibited from stipulating for, receiving, or agreeing to receive anything of value from any person, firm, or corporation "for procuring or endeavoring to procure," for the giver or for anyone else, "any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by" any such bank or financial institution. The penalty is imprisonment for up to one year.

Significantly, this statute does not reach the bribe offeror, but only the recipient of the bribe, although the offering party can be punished by means of the aiding and abetting or conspiracy statutes. This statute has been held to punish receipt of a gift for procuring a loan even though the loan was completed before the gift or fee was received.[4] Because of the inclusion of the term "stipulates for," it has also been construed to proscribe the action of a bank officer who stipulated that a commission for obtaining loan from the bank be paid to a third party. The court found that Con-

[1] See S. Rept. No. 97-307, pp. 796-797.
[2] H.R. 6531 and S. 1428, 93rd Cong., 1st Sess. (1973).
[3] The other specified institutions are a "Federal intermediate credit bank" and a National Agricultural Credit Corporation.
[4] See *Ryan* v. *United States*, 278 F.2d 836 (9th Cir. 1960).

gress' purpose under this statute was to protect the deposits of Federally insured banks by preventing unsound and improvident loans to be made from such banks and that it was thus immaterial who received the commission.[5]

18 U.S.C. 216 is a somewhat broader statute that reaches payments made to employees and officials of Federal land bank institutions and small business investment companies. It punishes by up to one year in prison whoever, being an employee or official of the type described above, "is a beneficiary of or receives any fee * * * or other consideration for or in connection with any transaction or business of such association or bank, other than the usual salary or director's fee paid to such officer—or employee for services rendered." This statute also penalizes whoever causes or procures a Federal land bank institution or small business investment company to charge or receive any consideration not specifically authorized.

Experience under this statutory scheme has led to the conclusion that the above laws are inadequate and obsolete because they neither cover all of the individuals or institutions that should be covered nor all of the activities that should be illegal. As a result the Committee has endorsed the instant legislation that would combine 18 U.S.C. 215 and 216 into a single statute, punishing both bribe offerors or givers and bribe recipients, and expanding the institutions covered to include every financial institution the transactions of which the Federal Government has a substantial interest in protecting against undue influence by bribery (e.g., in addition to those presently covered under 18 U.S.C. 215 and 216, any member of the Federal Home Loan Bank System and any Federal Home Loan Bank; any institution the deposits of which are insured by the Federal Savings and Loan Insurance Corporation; any credit union the deposits of which are insured under the Federal Credit Union Act of 1934, as amended, etc.).

3. Provisions of the bill, as reported

Part F rewrites 18 U.S.C. 215 and repeals 18 U.S.C. 216. New section 215(a) is recast broadly to prohibit whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value, for himself or any other person other than such financial institution, from any person for or in connection with any transaction or business of such financial institution. The phrase "in connection with any transaction," etc. adopts the comprehensive style of current 18 U.S.C. 216 rather than the narrower method used in present 18 U.S.C. 215 to list the specific kinds of transactions reached. Also, the new section clearly proscribes the receipt of anything of value for a third person, thus carrying forward the interpretation in the *Lane* case, *supra*. Subsection (c) defines the terms "financial institution," "bank holding company" and "savings and loan holding company" to include all the types of federal financial institutions as to which there exists a strong federal interest to safeguard the transactions against undue

[5] See *United States* v. *Lane*, 464 F.2d 593 (8th Cir.), cert. denied, 409 U.S. 876 (1972).

influence by bribery. Subsection (b) proscribes activities of the same scope as subsection (a), but with respect to the bribe offeror or giver rather than the bribe taker or solicitor. Subsection (d), like present 18 U.S.C. 216, includes an explicit exemption for payments by the financial institution of the usual salary or director's fee paid to an officer, director, employee, agent, or attorney thereof, or for a reasonable fee paid by the financial institution to such persons for services rendered.

The penalty for a violation of subsection (a) or (b) is up to five years in prison and a fine of $5,000 or three times the value of the bribe offered, asked, given, received, or agreed to be given or received, whichever is greater, except that if such value is $100 or less the offense is punishable by up to one year in prison and a $1,000 fine. This grading has the effect generally of increasing the level of the kind of offenses now covered by 18 U.S.C. 215 and 216 from a misdemeanor to a felony. The Committee considers this increase justified in recognition of the strong Federal interest in deterring such crimes as they affect the banking industry and in view of the seriously culpable nature of the conduct involved. Notably, violations of other analogous statutes, such as 41 U.S.C. 54 proscribing commercial bribery with regard to government contractors, carry felony penalties. An exception from felony treatment is, however, provided for an offense where the bribe is relatively insignificant in amount and thus is less likely to have affected the recipient's conduct.

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PART G—BANK FRAUD

1. In general and present Federal law

The offense of bank fraud in this part is designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured.

Recent Supreme Court decisions have underscored the fact that serious gaps now exist in Federal jurisdiction over frauds against banks and other credit institutions which are organized or operating under Federal law or whose deposits are federally insured. Clearly, there is a strong Federal interest in protecting the financial integrity of these institutions, and the legislation in this part would assure a basis for Federal prosecution of those who victimize these banks through fraudulent schemes.

The need for Federal jurisdiction over crimes committed against federally insured and controlled financial institutions has been recognized by the Congress in its passage of statutes specifically reaching crimes of embezzlement, robbery, larceny, burglary, and false statement directed at these banks. However, there is presently no similar statute generally proscribing bank fraud. As a result, Federal prosecutions of these frauds may now be pursued only if the circumstances of a particular fraud are such that the elements of some other Federal offense are met. Thus, whether Federal inter-

ests may be properly vindicated through prosecution turns on whether the fraudulent activity constitutes a crime under some other bank statutes, such as those governing larceny or false statement (18 U.S.C. 2113 and 1014), or whether the fradulent scheme involves a use of the mails or telecommunications that would permit prosecution under the mail or wire fraud statutes (18 U.S.C. 1341 and 1343).

This approach of prosecuting bank fraud under statutes not specifically designed to reach this criminal conduct is necessarily problematic. Nonetheless, for some time the Department of Justice had considerable success in using such statutes. The most useful of these was the mail fraud offense, for not only had the statute been held to reach a wide range of fraudulent activity, but also its jurisdictional element—use of the mails—could generally be satisfied in bank fraud cases because the collection procedures of victim banks ordinarily entailed use of the mails. In 1974, however, the utility of the mail fraud statute was notably diminished by the Supreme Court decisions in *United States* v. *Maze.*[1] In *Maze,* the Court held that proof that use of the mails occurred in or was caused by a fradulent scheme was insufficient for conviction under the mail fraud statute. Instead, proof that use of the mails played a significant

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part in bringing the scheme to fruition would be required. In addition to the problems of proof posed by the *Maze* decision, banks' increasing use of private courier services for collection purposes in lieu of the mails has further limited the instances in which the mail fraud statute may be used to prosecute bank fraud.

The use of other Federal statutes to attack bank fraud as an alternative to prosecution under the mail fraud offense has also been circumscribed by recent court decisions. By virtue of the Supreme Court's decision last year in *Williams* v. *United States,*[2] the bank false statement offense, 18 U.S.C. 1014, may no longer be applied to address one of the most pervasive forms of bank fraud, check-kiting. In *Williams,* the Court concluded this form of fraud did not fall within the scope of 18 U.S.C. 1014 because a check did not constitute a "statement" within the meaning of the statute. As a result of this decision, the Committee has been advised by the Justice Department that it has been necessary to cease prosecution of numerous pending check-kiting cases. Similarly, there appears to be an absence of coverage with respect to some types of fraud in the general bank theft statute, 18 U.S.C. 2113. Although the Supreme Court recently held that section 2113 is not limited to common law larceny and reaches also certain offenses involving the obtaining of property from banks by false pretenses,[3] the Court noted that, by its clear terms, section 2113 "does not apply to a case of false pretenses in which there is not a taking and carrying away" of the property. These various gaps in existing statutes, as well as the lack of a unitary provision aimed directly at the problem of bank fraud, in the Committee's view create a plain need for

[1] 414 U.S. 395 (1974).
[2] 102 S. Ct. 2088 (1982).
[3] *Bell* v. *United States,* — U.S. — (decided June 13, 1983).

enactment of the general bank fraud statute set forth in this part of title XI.

2. Provisions of the bill, as reported

Part G would create a new section 1344 of title 18, United States Code. Subsection (a) prohibits whoever knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a federally chartered or insured financial institution, or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises. The penalty for a violation is imprisonment of up to five years and a fine of $10,000.

The proposed bank fraud statute is modeled on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity. Like these existing fraud statutes, the proposed bank fraud offense proscribes the conduct of executing or attempting to execute "a scheme or artifice to defraud" or to take the property of another "by means of false or fraudulent pretenses, representations, or promises." While the basis for Federal jurisdiction in these existing general fraud statutes is the use of the mails or wire communications, in the proposed offense, jurisdiction is based on the fact that the victim of the offense is a federally controlled or insured institution defined

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as a "federally chartered or insured financial institution" in subsection (b) of the proposal. This term is defined to include all financial institutions whose deposits or accounts are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, Federal home loan banks or member banks of the Federal home loan bank system, and any banks or other financial institutions organized or operating under the laws of the United States.

Since the use of bogus or "shell" offshore banks has increasingly become a means of perpetrating major frauds on domestic banks and the considerable delay in collections between domestic and foreign banks makes manipulation of foreign financial transactions an attractive mode of defrauding banks within the United States, it is intended that there exist extraterritorial jurisdiction over the offense. This means that even if the conduct constituting the offense occurs outside the United States, once the offender is present within the country, he may nonetheless be subject to Federal prosecution.

In sum, the scope of present Federal statutes is not sufficient to assure effective prosecution of the range of fraudulent crimes commonly committed today against federally controlled or insured financial institutions. The legislative proposal contained in this part would meet the need for a statutory basis for asserting Federal jurisdiction over such offenses and would thereby better assure the integrity of the Federal banking system.

that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than 5 years, or both.

"(2) Whoever, being an officer of a financial institution, directly or indirectly notifies—

"(A) a customer of that financial institution whose records are sought by a grand jury subpoena; or

"(B) any other person named in that subpoena;

about the existence or contents of that subpoena or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than one year, or both.

"(3) As used in this subsection—

"(A) the term 'an officer of a financial institution' means an officer, director, partner, employee, agent, or attorney of or for a financial institution; and

"(B) the term 'subpoena for records' means a Federal grand jury subpoena for customer records that has been served relating to a violation of, or a conspiracy to violate—

"(i) section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344; or

"(ii) section 1341 or 1343 affecting a financial institution.".

(d) CONFORMING TERMINOLOGY IN BANK ROBBERY SECTION.—Section 2113 of title 18, United States Code, is amended—

(1) in subsection (f), by striking "any bank the deposits of which" and inserting "any institution the deposits of which";

(2) by adding before the period at the end of subsection (h) ", and any 'Federal credit union' as defined in section 2 of the Federal Credit Union Act"; and

(3) by striking subsection (g) and redesignating subsection (h) as subsection (g).

(e) CREATION OF GENERAL DEFINITION OF FINANCIAL INSTITUTION FOR TITLE 18.—

(1) IN GENERAL.—Subsection (b) of section 215 of title 18, United States Code, is transferred to the end of chapter 1 of such title.

(2) UPDATING AND TECHNICAL AMENDMENTS.—Such subsection (b), as so transferred, is amended—

(A) by inserting at the beginning the following section heading:

"§ 20. Financial institution defined"

(B) by striking "(b)";

(C) by striking "this section" and inserting "this title";

(D) so that paragraph (1) reads as follows:

"(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);";

(E) by striking paragraphs (2) and (8);

(F) so that paragraph (5) reads as follows:

"(5) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;";

(G) so that paragraph (7) reads as follows:

"(7) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act.";

and

(H) by redesignating paragraphs (3), (4), (5), (6), and (7) (as amended by this paragraph) as paragraphs (2), (3), (4), (5), and (6), respectively.

(3) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 18, United States Code, is amended by adding at the end the following new item:

"20. Financial institution defined.".

SEC. 963. CIVIL AND CRIMINAL FORFEITURE.

(a) CIVIL FORFEITURE.—Section 981(a)(1) of title 18, United States Code, is amended by adding at the end the following:

Real property.

"(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344 of this title.".

(b) TRANSFER OF PROPERTY UNDER CIVIL FORFEITURE.—Section 981(e) of title 18, United States Code, is amended—

(1) in the matter before paragraph (1), by striking out "determine to—" and inserting in lieu thereof "determine—";

(2) by striking out paragraphs (1) and (2) and inserting in lieu thereof the following:

"(1) to any other Federal agency;

"(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

"(3) in the case of property referred to in subsection (a)(1)(C) (if the affected financial institution is in receivership or liquidation), to any Federal financial institution regulatory agency—

"(A) to reimburse the agency for payments to claimants or creditors of the institution; and

"(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

"(4) in the case of property referred to in subsection (a)(1)(C) (if the affected financial institution is not in receivership or liquidation), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding; or

"(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property."; and

(3) by adding at the end the following new sentence: "The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.".

(c) CRIMINAL FORFEITURE.—Section 982 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by inserting "(1)" after "(a)"; and

(B) by adding at the end the following:

"(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial

imprisonment for 5 years and a $10,000 fine, although 18 U.S.C. 3571 authorizes the court to impose a fine higher than $5,000.[11]

Section 961(k)(2) makes technical and conforming changes. Section 961(l)(1) adds a new section (3293) to chapter 213 of title 18 of the U.S. Code to provide a 10-year statute of limitations for banking offenses. The present statute of limitations period is five years.[12] New section 3293 applies the ten year statute of limitations to (1) a violation of 18 U.S.C. 215 (financial institution bribery), 656 and 657 (financial institution misapplication and embezzlement), 1005 and 1006 (false entries in reports on financial institutions), 1007 (fraud on deposit insurers), 1014 (false statement or overvaluation), and 1344 (financial institution fraud); (2) a violation of 18 U.S.C. 1341 or 1343 (mail and wire fraud) if the violation affects a financial institution; and (3) a conspiracy to violate any of these sections. Section 962(l)(2) makes necessary conforming changes. Section 961(l)(3) provides that the 10-year period applies to all offenses committed before the enactment of this legislation, as long as the five year statute has not already expired.

Section 961(m) amends 28 U.S.C. 994(p) and section 21 of the Sentencing Act of 1987, which authorize the United States Sentencing Commission to promulgate and amend sentencing guidelines. Section 961(m)(1) directs the Sentencing Commission to assign to a serious banking related offense an offense level of at least 24. Section 961(m)(2) provides that section 961 applies to violations or a conspiracy to violate 18 U.S.C. 215 (financial institution bribery), 656 and 657 (financial institution misapplication and embezzlement), 1005 and 1006 (false entries in reports on financial institutions), 1007 (fraud on deposit insurers), 1014 (false statement or overvaluation), 1341 or 1343 (mail and wire fraud if the violation affects a financial institution), and 1344 (financial institution fraud) where such offense substantially jeopardizes the safety and soundness of a financial institution. Section 961(m)(3) provides that the requirements of section 961 shall expire on December 31, 1993.

SEC. 962. MISCELLANEOUS REVISIONS TO TITLE 18.

Section 962 makes miscellaneous amendments to title 18 of the U. S. Code. Section 962(a) amends title 18 to replace the term "Federal Home Loan Bank Board" with the term "Office of Thrift Supervision".

Section 962(b)(1) broadens 18 U.S.C. 212, which deals with offers of loans or gratuities to bank examiners, to cover financial institutions and the Office of Thrift Supervision examiners, as well as "banks". Section 962(b)(2) expands 18 U.S.C. 213, which deals with acceptance of loans or gratuities by bank examiners, to include financial institutions other than banks. Section 962(b)(3) repeals 18 U.S.C. 1009. Section 962(b)(4), (5), and (6) and section 962(c) make technical and clerical amendments.

Section 962(d) amends 18 U.S.C. 1510, which deals with obstructing a criminal investigation. Section 962(d) expands 18 U.S.C. 1510, to make it an offense for an officer, director, partner, employee, or attorney of a financial institution knowingly to notify certain per-

[11] See n.2 *supra*.
[12] See n.2 *supra*.

sons that a grand jury has subpoenaed the records of a customer, in connection with the investigation of the possible banking offenses listed in 951(c). The persons to whom disclosure is prohibited are (1) the customer whose records are sought, or (2) a target of the grand jury investigation. The maximum penalty is 5 years imprisonment and a fine under title 18 of the United States Code.[13]

Section 962(e) makes conforming amendments to 18 U.S.C. 2113. Section 962(f) makes technical amendments to 18 U.S.C. 215 and makes the definition of "financial institution" set forth in 18 U.S.C. 215(b) applicable to all of title 18, by moving the definition into a separate section (20) of title 18 of the United States Code.

SEC. 963. CIVIL AND CRIMINAL FORFEITURE.

Section 963 provides for civil and criminal forfeiture in connection with title 18 offenses affecting financial institutions. Section 963(a) amends 18 U.S.C. 981, which deals with civil forfeiture. Section 963(a)(1) provides for civil forfeiture for (1) a violation of 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1014, or 1344; (2) a violation of 18 U.S.C. 1341 or 1343 affecting a financial institution; and (3) conspiracy to violate any of the above sections. Section 963(a)(2) makes necessary conforming changes and authorizes the Attorney General to sell any forfeited property which is not required to be destroyed or is not harmful. Section 963(a)(2) also adds a new provision establishing a priority for the disposition of proceeds that have been civilly forfeited. First, proceeds are used to reimburse out-of-pocket expenses incurred for seizure and forfeiture by the Federal banking agency regulating the financial institution. Second, proceeds go to the Department of Justice to reimburse its out-of-pocket expenses for seizure and forfeiture. Third, if the affected financial institution is in receivership or liquidation, proceeds go to a Federal banking agency regulating the institution, to reimburse the agency for (i) payments to claimants or creditors or (ii) losses suffered by that agency's insurance fund as a result of the receivership or liquidation. Fourth, if the affected financial institution is not in receivership or liquidation, the proceeds go to the General Fund of the Treasury or, upon the order of the appropriate Federal bank regulatory agency, to the affected financial institution as restitution. Amounts received by the financial institution shall be set off against amounts later recovered by the institution as compensatory damages in a State or Federal proceeding.

Section 963(b) amends 18 U.S.C. 982, which deals with criminal forfeiture. Section 963(b)(1) authorizes criminal forfeiture for (1) a violation of 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1014, or 1344; (2) a violation of 18 U.S.C. 1341 or 1343 affecting a financial institution; and (3) a conspiracy to violate any of those sections. Section 963(b)(2) provides that property forfeited for these violations shall be disposed of in accordance with the Comprehensive Drug Abuse Prevention and Control Act of 1970 (12 U.S.C. 853).

[13] Under 18 U.S.C. 3571, the court can impose a fine (1) for an organization, of up to the greater of $500,000 or twice the amount gained or the loss inflicted by the offense for an organization; (2) for an individual, up to the greater of $250,000 or twice the amount gained or the loss inflicted by the offense.

BANK BRIBERY AMENDMENTS ACT OF 1985

For Legislative History of Act see Report for P.L. 99–370 in Legislative History Section, post.

An Act to amend title 18, United States Code, with respect to certain bribery and related offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Bank Bribery Amendments Act of 1985.
18 USC 201 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Bank Bribery Amendments Act of 1985".

SEC. 2. CHAPTER 11 AMENDMENT.

Section 215 of title 18, United States Code, is amended to read as follows:

"§ 215. Receipt of commissions or gifts for procuring loans

Law enforcement and crime.

"(a) Whoever—

"(1) corruptly gives, offers, or promises anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution; or

"(2) as an officer, director, employee, agent, or attorney of a financial institution, corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution;

shall be fined not more than $5,000 or three times the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted, whichever is greater, or imprisoned not more than five years, or both, but if the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted does not exceed $100, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) As used in this section, the term 'financial institution' means—

"(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

"(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

"(3) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

"(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

"(5) a Federal land bank, Federal intermediate credit bank, bank for cooperatives, production credit association, and Federal land bank association;

"(6) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

"(7) a bank holding company as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841); or

"(8) a savings and loan holding company as defined in section 408 of the National Housing Act (12 U.S.C. 1730a).

"(c) This section shall not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

"(d) Federal agencies with responsibility for regulating a financial institution shall jointly establish such guidelines as are appropriate to assist an officer, director, employee, agent, or attorney of a financial institution to comply with this section. Such agencies shall make such guidelines available to the public.".

Public information.

18 USC 215 note.

SEC. 3. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 30 days after the date of the enactment of this Act.

Approved August 4, 1986.

LEGISLATIVE HISTORY—H.R. 3511:

HOUSE REPORTS: No. 99-335 (Comm. on the Judiciary).
CONGRESSIONAL RECORD:
Vol. 131 (1985): Oct. 29, considered and passed House.
Vol. 132 (1986): Feb. 4, considered and passed Senate, amended.
Apr. 22, House concurred in Senate amendments, in another with an amendment.
June 24, Senate concurred in House amendment with an amendment.
June 26, House concurred in Senate amendment.

PUBLIC LAW 98-473 [H.J.Res. 648]; October 12, 1984

CONTINUING APPROPRIATIONS, 1985—COMPREHENSIVE CRIME CONTROL ACT OF 1984

For Legislative History of Act, see p. 3182

Joint Resolution making continuing appropriations for the fiscal year 1985, and for other purposes.

TITLE I

That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1985, and for other purposes, namely:

Agriculture, rural development appropriations.

SEC. 101. (a) Such sums as may be necessary for programs, projects, or activities provided for in the Agriculture, Rural Development and Related Agencies Appropriation Act, 1985 (H.R. 5743), to the extent and in the manner provided for in the conference report and joint explanatory statement of the Committee of Conference (House Report Numbered 98-1071), filed in the House of Representatives on September 25, 1984, as if such Act had been enacted into law.

D.C. appropriations.

(b) Such sums as may be necessary for programs, projects, or activities provided for in the District of Columbia Appropriation Act, 1985 (H.R. 5899), to the extent and in the manner provided for in the conference report and joint explanatory statement of the Committee of Conference (House Report Numbered 98-1088), filed in the House of Representatives on September 26, 1984, as if such Act had been enacted into law.

Post, p. 1838.

(c) Such amounts as may be necessary for programs, projects or activities provided for in the Department of the Interior and Related Agencies Appropriations Act, 1985, at a rate of operations and to the extent and in the manner provided as follows, to be effective as if it had been enacted into law as the regular appropriation Act:

"(1) the term 'counterfeited' means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

"(2) the term 'forged' means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

"(3) the term 'security' means—

"(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693(c)), money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property; 15 USC 1693n.

"(B) an instrument evidencing ownership of goods, wares, or merchandise;

"(C) any other written instrument commonly known as a security;

"(D) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or

"(E) a blank form of any of the foregoing;

"(4) the term 'organization' means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association or persons which operates in or the activities of which affect interstate or foreign commerce; and

"(5) the term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.".

(b) The analysis at the beginning of chapter 25 of title 18 is amended by adding after the item relating to section 509 the following:

"510. Securities of the State and private entities.".

Part E—Receipt of Stolen Bank Property

Sec. 1106. Subsection (c) of section 2113 of title 18 is amended to read as follows:

"(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.".

Part F—Bank Bribery

Sec. 1107. (a) Section 215 of title 18 is amended to read as follows:

"(a) Whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, except as provided by law, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value, for himself or for any other person or entity, other than such financial institution, from any person or entity for or in connection with any transaction or business of such financial institution; or

"(b) Whoever, except as provided by law, directly or indirectly, gives, offers, or promises anything of value to any officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, or offers or promises any such officer, director, employee, agent, or attorney to give anything of value to any person or entity, other than such financial institution, for or in connection with any transaction or business of such financial institution, shall be fined not more than $5,000 or three times the value of anything offered, asked, given, received, or agreed to be given or received, whichever is greater, or imprisoned not more than five years, or both; but if the value of anything offered, asked, given, received, or agreed to be given or received does not exceed $100, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(c) As used in this section—

"(1) 'financial institution' means—

"(A) any bank the deposits of which are insured by the Federal Deposit Insurance Corporation;

"(B) any member, as defined in section 2 of the Federal Home Loan Bank Act, as amended, of the Federal Home Loan Bank System and any Federal Home Loan Bank;

12 USC 1422.

"(C) any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;

"(D) any credit union the accounts of which are insured by the Administrator of the National Credit Union Administration;

"(E) any Federal land bank, Federal land bank association, Federal intermediate credit bank, production credit association, bank for cooperatives; and

"(F) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); and

"(2) 'bank holding company' or 'savings and loan holding company' means any person, corporation, partnership, business trust, association or similar organization which controls a financial institution in such a manner as to be a bank holding company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956 (12 U.S.C. 1841) or the Savings and Loan Holding Company Amendments of 1967 (12 U.S.C. 1730a).

12 USC 1841 note.
12 USC 1701 note.

"(d) This section shall not apply to the payment by a financial institution of the usual salary or director's fee paid to an officer, director, employee, agent, or attorney thereof, or to a reasonable fee paid by such financial institution to such officer, director, employee, agent, or attorney for services rendered to such financial institution.".

Repeal.
18 USC 216.

(b) Section 216 of title 18 is repealed, and the section analysis of chapter 11 for section 216 be amended to read:

"216. Repealed.".

PART G—BANK FRAUD

SEC. 1108. (a) Chapter 63 of title 18 of the United States Code is amended by adding a new section as follows:

"§ 1344. Bank fraud 18 USC 1344.

"(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—

"(1) to defraud a federally chartered or insured financial institution; or

"(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

"(b) As used in this section, the term 'federally chartered or insured financial institution' means—

"(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

"(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

"(3) a credit union with accounts insured by the National Credit Union Administration Board;

"(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

"(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.".

(b) The analysis for chapter 63 of title 18 of the United States Code is amended by adding at the end thereof the following:

"1344. Bank fraud.".

PART H—POSSESSION OF CONTRABAND IN PRISON

SEC. 1109. (a) Section 1791 of title 18, United States Code is amended to read as follows:

"§ 1791. Providing or possessing contraband in prison

"(a) OFFENSE.—A person commits an offense if, in violation of a statute, or a regulation, rule, or order issued pursuant thereto—

"(1) he provides, or attempts to provide, to an inmate of a Federal penal or correctional facility—

"(A) a firearm or destructive device;

"(B) any other weapon or object that may be used as a weapon or as a means of facilitating escape;

"(C) a narcotic drug as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802);

"(D) a controlled substance, other than a narcotic drug, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or an alcoholic beverage;

"(E) United States currency; or

18 USC §657 research.

24

8th Cir jury instr - embezzlement (18 USC §659 A) (?)

COURT'S INSTRUCTION NO. _____

The crime of embezzlement of bank funds, as charged in Count ^C of the indictment, has five essential elements, which are:

One, the defendant was ^C;

Two, the defendant embezzled the funds of the bank;

Three, the amount so embezzled was more than $100.00;

Four, the defendant did so with the intent to defraud the bank; and

Five, the bank was insured by the FDIC.

"Embezzlement" means the voluntary and intentional taking, or conversion to one's own use, of the property of another, which property came into the defendant's possession lawfully, by virtue of some office, employment, or position of trust which the defendant held. "Misapplication" means the unauthorized, or unjustifiable or wrongful use of a bank's funds. Misapplication includes the wrongful taking or use of money of the bank by a bank officer or employee for his own benefit or for the use and benefit of some other person.

To act with "intent to injure" means to act with intent to cause pecuniary loss. To act with "intent to defraud" means to act with intent to deceive or cheat, for the purpose of causing a financial loss to someone else or bringing about a financial gain to defendant or another.

^C

8CCA NO. 6.18.659A

MSAPP1.0
bank funds
(cases)

person "connected to" inst. shd be construed broadly.

UNITED STATES of America, Plaintiff-Appellee,
v.
Don C. DAVIS, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Daniel M. BURKE, Defendant-Appellant.

Nos. 89-8051, 89-8052, 90-8057, 90-8058.

United States Court of Appeals,
Tenth Circuit.

Jan. 22, 1992.

Defendants were convicted in the United States District Court for the District of Wyoming, Alan B. Johnson, J., of various bank fraud offenses, and they appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) one defendant's death pending appeal required dismissal of his appeal and remand to District Court with instructions to dismiss underlying indictment; (2) agency relationship existed between defendant and bank, as required to support conviction for misapplying federally insured funds and making false entries in bank books and records; (3) superseding indictment did not impermissibly amend charges in original indictment; (4) defendant could be convicted of misapplication of bank funds based on his alleged failure to disclose self-dealing in connection with bank's investment in various securities; (5) defendant could be convicted for misapplying bank funds used to purchase subordinated debentures in bank holding companies; and (6) federal agencies acted within their supervisory capacities in securing and exchanging information concerning defendant's activities.

Affirmed in part, dismissed in part, and remanded.

[1] CRIMINAL LAW ⇐ 1070
110k1070
Defendant's death pending appeal required dismissal of appeal and remand to district court with instructions to vacate judgment and dismiss underlying indictment.

[1] CRIMINAL LAW ⇐ 1192
110k1192
Defendant's death pending appeal required dismissal of appeal and remand to district court with instructions to vacate judgment and dismiss underlying indictment.

[2] CRIMINAL LAW ⇐ 1104(3)
110k1104(3)
Pages of transcript should be numbered in single series of consecutive page numbers for each proceeding, regardless of number of days involved.

[3] BANKS AND BANKING ⇐ 509.10
52k509.10
Agency relationship existed between defendant and bank, as required to support conviction for misapplying federally insured funds and making false entries in bank books and records or unlawful receipt of benefits; defendant often

attended board meetings, providing financial advice to bank's board and its president, and, with codefendant, was able to acquire control of majority of bank's shares. 18 U.S.C.A. §§ 657, 1006.

[3] BANKS AND BANKING ⇐ 509.15
52k509.15
Agency relationship existed between defendant and bank, as required to support conviction for misapplying federally insured funds and making false entries in bank books and records or unlawful receipt of benefits; defendant often attended board meetings, providing financial advice to bank's board and its president, and, with codefendant, was able to acquire control of majority of bank's shares. 18 U.S.C.A. §§ 657, 1006.

[4] BANKS AND BANKING ⇐ 509.10
52k509.10
Bank customer may be convicted as aider and abetter under criminal statutes prohibiting misapplication of federally insured funds and making false entries in bank books and records or unlawful receipt of benefits when principal, an officer, agent, employee or other person connected in any capacity of trust with the institution, is found guilty of the offense. 18 U.S.C.A. §§ 657, 1006.

[4] BANKS AND BANKING ⇐ 509.15
52k509.15
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with the institution, is found guilty of the offense. 18 U.S.C.A. §§ 657, 1006.

[5] BANKS AND BANKING ⚿ 509.10
52k509.10
Those who serve federally insured institution, whether in employment context or in some other position of trust, are "connected with" that institution under statute prohibiting misapplication of federally insured funds or making false entries in bank books and records or unlawful receipt of benefits. 18 U.S.C.A. §§ 657, 1006.

[5] BANKS AND BANKING ⚿ 509.15
52k509.15
Those who serve federally insured institution, whether in employment context or in some other position of trust, are "connected with" that institution under statute prohibiting misapplication of federally insured funds or making false entries in bank books and records or unlawful receipt of benefits. 18 U.S.C.A. §§ 657, 1006.

[6] BANKS AND BANKING ⚿ 509.10
52k509.10
For purposes of statute prohibiting misapplication of federally insured funds and making false entries in bank books and records or unlawful receipt of benefits, connection with federally protected institution may result from control through stock ownership, or control through power to extend credit; such direct control, however, is not essential to finding that defendant is connected with institution. 18 U.S.C.A. §§ 657, 1006.

[6] BANKS AND BANKING ⚿ 509.15
52k509.15
For purposes of statute prohibiting misapplication of federally insured funds and making false entries in bank books and records or unlawful receipt of benefits, connection with federally protected institution may result from control through stock ownership, or control through power to extend credit; such direct control, however, is not essential to finding that defendant is connected with institution. 18 U.S.C.A. §§ 657, 1006.

[7] BANKS AND BANKING ⚿ 509.15
52k509.15
Statute prohibiting misapplication of federally insured funds does not require Government to prove that defendant performed ministerial task of disbursement. 18 U.S.C.A. § 657.

[8] CRIMINAL LAW ⚿ 159
110k159
Superseding indictment did not impermissibly amend charges in an original indictment charging defendant with wire fraud, so as to cause superseding indictment to be barred by limitations; while defendant claimed that superseding indictment changed entire theory of criminal liability from scheme to transfer $20 million for benefit of defendants to scheme to obtain control of three financial institutions, conspiracy count in original indictment covered not only defendant's control activities, but also transactions involving acquisition of controlling interest. 18 U.S.C.A. §§ 1001, 1005, 1006, 1014, 3282.

[9] CRIMINAL LAW ⚿ 157
110k157
Date of original indictment tolls limitations period as to charges alleged.

[10] CRIMINAL LAW ⚿ 159
110k159
Superseding indictment filed while first indictment is validly pending is not barred by statute of limitations unless it broadens or substantially amends charges in first indictment.

[11] INDICTMENT AND INFORMATION ⚿ 15(1)
210k15(1)
If allegations and charges contained in superseding indictment are substantially the same as those contained in original indictment, sufficient notice is presumed.

[12] INDICTMENT AND INFORMATION ⚿ 15(1)
210k15(1)
Indictment is not amended impermissibly by superseding indictment which names greater or lesser number of defendants as coconspirators or contains slightly different mix of closely related statutory violations as objects of conspiracy, provided essential nature of conspiracy alleged in first indictment remains the same.

[13] CRIMINAL LAW ⚿ 835
110k835
Defendant's "theory of the defense" instructions

were properly rejected by trial court in bank fraud prosecution, where instructions were essentially summaries of the evidence in light most favorable to defense, marshaled facts supporting defendant's version of events, and would have precluded jury from finding elements of various charged offenses.

[14] CRIMINAL LAW ⇐ 772(6)
110k772(6)
Defendant is entitled to correct instructions on defenses supported by sufficient evidence for jury to find in defendant's favor.

[14] CRIMINAL LAW ⇐ 814(8)
110k814(8)
Defendant is entitled to correct instructions on defenses supported by sufficient evidence for jury to find in defendant's favor.

[15] CRIMINAL LAW ⇐ 769
110k769
District judge has substantial discretion in formulating jury instruction; Court of Appeals' review is confined to determining whether instructions as a whole sufficiently cover issues presented by evidence and constitute correct statements of the law.

[15] CRIMINAL LAW ⇐ 822(1)
110k822(1)
District judge has substantial discretion in formulating jury instruction; Court of Appeals' review is confined to determining whether instructions as a whole sufficiently cover issues presented by evidence and constitute correct statements of the law.

[16] CRIMINAL LAW ⇐ 822(1)
110k822(1)
Jury instructions are considered as a whole; particular jury instruction is not to be read in isolation.

[17] BANKS AND BANKING ⇐ 509.15
52k509.15
Defendant, as agent of bank, could be convicted of misapplication of bank funds based on his alleged failure to disclose self-dealing in connection with bank's investment in various securities, even if money invested by bank was used by recipient corporations in way promised to bank. 18 U.S.C.A. § 657.

[18] BANKS AND BANKING ⇐ 509.15
52k509.15
Misapplication of bank funds may occur when officer, director, employee or other person subject to misapplication statute knowingly lends money to sham borrower or causes all or part of loan to be made for his or her own benefit while concealing his or her interest from bank. 18 U.S.C.A. § 657.

[19] BANKS AND BANKING ⇐ 509.15
52k509.15
When person within ambit of statute prohibiting misapplication of bank funds receives material benefits of loans without disclosing this fact, misapplication has occurred. 18 U.S.C.A. § 657.

[20] BANKS AND BANKING ⇐ 509.15
52k509.15
Trier of fact is not restricted solely to immediate transferee of bank funds when determining whether misapplication has occurred. 18 U.S.C.A. § 657.

[21] BANKS AND BANKING ⇐ 509.15
52k509.15
Defendant, as agent of bank, could be convicted of misapplying bank funds used to purchase subordinated debentures in bank holding companies, where holding companies spent portion of funds to acquire option in corporation which allegedly paid substantial sums to defendant. 18 U.S.C.A. §§ 656, 657.

[22] BANKS AND BANKING ⇐ 509.15
52k509.15
Bank's decision to purchase securities in amounts which exceeded legitimate use of those funds constituted misapplication of bank funds. 18 U.S.C.A. § 657.

[23] BANKS AND BANKING ⇐ 509.15
52k509.15
In determining whether statute prohibiting misapplication of bank funds has been violated, Court of Appeals looks at substance of transactions, even if multiple entities are involved. 18 U.S.C.A. § 657.

[24] BANKS AND BANKING ⇐ 509.20
52k509.20
Defendant could be convicted of overvaluing security by submitting false appraisal report to bank in connection with loan, although bank did not

receive report until after one year after loan was made and note matured; bank sought appraisal as condition of initiation and continuation of loan, and Government was not required to prove that bank actually relied upon the appraisal. 18 U.S.C.A. § 1014.

[25] BANKS AND BANKING ⚿ 509.10
52k509.10
Defendant could be convicted of making false entry in bank records based on his meeting with member of board of directors which allegedly caused member to make false entries in bank minutes at subsequent directors' meeting; it was sufficient that defendant knowingly "set into motion" or knowingly participated in events which would necessarily cause false entries to be made. 18 U.S.C.A. §§ 1005, 1006.

[26] BANKS AND BANKING ⚿ 235
52k235
Federal Reserve Board (FRB), Federal Home Loan Bank Board (FHLBB) and Office of Controller of Currency (OCC) acted within their supervisory capacities in securing and exchanging information concerning defendant's activities with respect to bank holding companies and individual banks, so that Right to Financial Privacy Act did not apply to information disclosed by those agencies concerning defendant's bank transactions in connection with criminal investigation. Financial Institutions Regulatory and Interest Rate Control Act of 1978, §§ 1101-1122, 12 U.S.C.A. §§ 3401-3422.

[26] BANKS AND BANKING ⚿ 353
52k353
Federal Reserve Board (FRB), Federal Home Loan Bank Board (FHLBB) and Office of Controller of Currency (OCC) acted within their supervisory capacities in securing and exchanging information concerning defendant's activities with respect to bank holding companies and individual banks, so that Right to Financial Privacy Act did not apply to information disclosed by those agencies concerning defendant's bank transactions in connection with criminal investigation. Financial Institutions Regulatory and Interest Rate Control Act of 1978, §§ 1101-1122, 12 U.S.C.A. §§ 3401-3422.

[26] BANKS AND BANKING ⚿ 451
52k451
Federal Reserve Board (FRB), Federal Home Loan Bank Board (FHLBB) and Office of Controller of Currency (OCC) acted within their supervisory capacities in securing and exchanging information concerning defendant's activities with respect to bank holding companies and individual banks, so that Right to Financial Privacy Act did not apply to information disclosed by those agencies concerning defendant's bank transactions in connection with criminal investigation. Financial Institutions Regulatory and Interest Rate Control Act of 1978, §§ 1101-1122, 12 U.S.C.A. §§ 3401-3422.

[27] CRIMINAL LAW ⚿ 394.1(2)
110k394.1(2)
Even had Right to Financial Privacy Act been violated in connection with disclosure of various government agencies concerning defendant's bank transactions, suppression was not available remedy, nor was dismissal of indictment. Financial Institutions Regulatory and Interest Rate Control Act of 1978, § 1117(d), 12 U.S.C.A. § 3417(d).

[27] INDICTMENT AND INFORMATION ⚿ 144.1(1)
210k144.1(1)
Even had Right to Financial Privacy Act been violated in connection with disclosure of various government agencies concerning defendant's bank transactions, suppression was not available remedy, nor was dismissal of indictment. Financial Institutions Regulatory and Interest Rate Control Act of 1978, § 1117(d), 12 U.S.C.A. § 3417(d).

[28] CRIMINAL LAW ⚿ 412.2(2)
110k412.2(2)
Defendant's meeting with Federal Reserve Board (FRB) agents to discuss financial problems of two bank holding companies was not custodial interrogation for Miranda purposes, although FRB had sent criminal referral to United States attorney two days earlier identifying several insiders of holding companies as targets. U.S.C.A. Const.Amend. 5.

[29] BANKS AND BANKING ⚿ 235
52k235
Government agency charged with bank oversight may develop information in civil matters which may be relevant in potential criminal prosecution.

[30] CRIMINAL LAW ⚿ 986.4(1)
110k986.4(1)

Rule giving attorney for Government equivalent opportunity to speak to court at sentencing did not preclude Government's filing of written sentencing memorandum. Fed.Rules Cr.Proc.Rule 32(a)(1), 18 U.S.C.A.

[31] CRIMINAL LAW ⇐ 986.4(1)
110k986.4(1)
Only if Government's sentencing memorandum is incorporated expressly into presentence report and defendant objects to material contained in memorandum is compliance with rule governing objections to presentence report necessary. Fed.Rules Cr.Proc.Rule 32(c)(3)(D), 18 U.S.C.A.

[32] MANDAMUS ⇐ 61
250k61
Defense counsel was not entitled to writ of mandamus requiring district court to process his interim vouchers for payment of fees and expenses pursuant to Criminal Justice Act, where counsel had not complied with rule requiring filing of separate petition and proof of service on respondent judge, as well as other parties. 18 U.S.C.A. §§ 3006A, 3006A(d)(4); F.R.A.P.Rule 21(a), 28 U.S.C.A.; 28 U.S.C.A. §§ 1291, 1651(a).

[33] CRIMINAL LAW ⇐ 1023(1)
110k1023(1)
Fee determinations by district judge pursuant to Criminal Justice Act are administrative in character and do not constitute final appealable orders within meaning of statute governing jurisdiction of Court of Appeals. 18 U.S.C.A. § 3006A; 28 U.S.C.A. § 1291.

[34] MANDAMUS ⇐ 61
250k61
Court of Appeals could consider defense counsel's request for writ of mandamus requiring district court to process his interim vouchers for payment of fees

and expenses pursuant to Criminal Justice Act. 18 U.S.C.A. § 3006A; 28 U.S.C.A. § 1651(a).

***1485** Todd L. Vriesman (John A. Sbarbaro with him on the brief) of Kirkland & Ellis, Denver, Colo., for defendant-appellant Don C. Davis.

E. James Burke and Rhonda S. Woodard, of Burke, Woodard & Bishop, P.C., Cheyenne, Wyo., for defendant-appellant Daniel M. Burke.

Francis Leland Pico, Asst. U.S. Atty. (Richard A. Stacy, U.S. Atty., & David A. Kubichek with him on the brief), Cheyenne, Wyo., for plaintiff-appellee.

***1486** Before ANDERSON, BALDOCK and EBEL, Circuit Judges.

BALDOCK, Circuit Judge.

This case involves the theft of federally insured deposits through a series of complicated financial transactions involving collusion, deception, self-dealing and conflict of interest. Defendants Don C. Davis and Daniel M. Burke diverted or misapplied millions of dollars at the expense of several banks and savings and loan institutions, and ultimately the United States treasury. [FN1] The fraud required false representations to, and the concealing of important information from, bank examiners, bank directors and bank officers.

> FN1. Defendant John Edmiston was charged in a single count, pled guilty and testified against Davis and Burke. Edmiston was the president of First National Bank of Evanston (FNBE), owned an interest in the bank through the holding company, and served on the bank's board of directors.

By superseding indictment, both defendants were charged with one count of conspiracy to commit offenses against and to defraud the United States (count 1), 18 U.S.C. § 371; nine counts of wire fraud (counts 2-10), 18 U.S.C. § 1343; five counts of misapplying federally insured funds (counts 11-14, 16), 18 U.S.C. § 657; three counts of making false entries in bank books and records or unlawful receipt of benefits (counts 15, 20 & 21), 18 U.S.C. § 1006. Davis also was charged in two counts of overvaluing security and making false statements (counts 18 & 19), 18 U.S.C. § 1014. After a ten-week trial in which the trial judge displayed consummate patience, the jury convicted Davis on fourteen counts including the conspiracy count (count 1), five counts of wire fraud (counts 3-6, 9), four counts of misapplying federally insured funds (counts 11-13, 16), two counts of aiding and abetting false entries (counts 15 & 21), one count of aiding and abetting in the unlawful receipt of benefits (count 20), and one count of overvaluing security (count 18). The jury convicted Burke on eleven counts, including the conspiracy count (count

1), three counts of wire fraud (counts 4-6), four counts of misapplying federally insured funds (counts 11, 12, 14 & 16) two counts of making false entries (count 15 & 21) and one count of unlawfully receiving benefits (count 20). The district court, for these pre-Sentencing Guidelines offenses, sentenced Davis to six years imprisonment and Burke to four years. These appeals followed.

[1] After submission of these appeals, we affirmed the imposition of civil monetary penalties against defendants based on violations of cease and desist orders of the Federal Reserve Board. Burke v. Board of Governors, 940 F.2d 1360 (10th Cir.1991). Burke died on December 6, 1991. Thereafter, the government filed a suggestion of death. Burke's counsel, on behalf of the family, opposed dismissal, seeking an appellate decision on the merits. We respect the wishes of the family, but the law provides a more advantageous resolution: "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception." See Durham v. United States, 401 U.S. 481, 483, 91 S.Ct. 858, 860, 28 L.Ed.2d 200 (1971) (per curiam) (footnote omitted), overruled on other grounds, Dove v. United States, 423 U.S. 325, 96 S.Ct. 579, 46 L.Ed.2d 531 (1976) (per curiam) (eliminating Durham rule for petitions for certiorari, but not for appeals of right). See also United States v. Williams, 874 F.2d 968, 970 (5th Cir.1989); United States v. Schumann, 861 F.2d 1234, 1236 (11th Cir.1988); United States v. Mollica, 849 F.2d 723, 725-26 (2d Cir.1988); United States v. Littlefield, 594 F.2d 682, 683 (8th Cir.1979); United States v. Bechtel, 547 F.2d 1379, 1380 (9th Cir.1977). Accordingly, as to Burke, we shall dismiss his appeal and remand the criminal judgment against him to the district court with instructions to vacate the judgment and dismiss the underlying indictment. See Id.

I.

The government's case involved five transactions. We briefly outline these ***1487** transactions before reaching the merits of Davis's appeal.

A. Acquisition of FNBE

The first transaction involved the acquisition of the First National Bank of Evanston, Wyoming (FNBE) by EVCO, Inc., a bank holding company, by a group of investors. Defendants Burke, Davis and Edmiston, see supra n. 1, first sought to acquire FNBE in 1982. All were well connected with other federally insured financial institutions. Davis was a major stockholder, board chairman and president of the Stockgrower's State Bank Company (SSBC), the bank holding company which owned Stockgrower's State Bank (SSB). Likewise, Edmiston was a stockholder and board member of SSBC. Burke was a board member of Guaranty Federal Bank (GFB).

Ultimately, the Federal Reserve Bank approved a $10 million acquisition of FNBE by a different investor group (the Burke group) with no more than a 3:1 debt-to-equity ratio ($7.5 million of debt) and no involvement of Davis and coinvestor Robert L. Anderson. Based on a series of false representations by Davis and Burke, however, the acquisition was financed for $12.5 million by Omaha National Bank, SSB, GFB and Provident Federal Bank. With the assistance of Burke, Davis directed the wire transfer of over $2 million for uses unrelated to the acquisition of FNBE. A total of $3.1 million of the acquisition funding was diverted to Davis and Anderson.

B. GFB Purchase of Bank Holding Company Securities

GFB, and its wholly owned subsidiary Powder River Service Corp. (PRSC), purchased $1.5 million in subordinated debentures and $1 million in preferred stock issued by EVCO and another bank holding company, SSBC. Burke and Davis exercised control of GFB as part of a group which had majority stock ownership. While Burke served as a director, Davis frequently gave financial advice to the board and attended several GFB board meetings. Burke and Davis were instrumental in persuading GFB's president, Tom Hogan, to purchase these securities. See X Tr. 60. The proceeds were to enable EVCO and SSBC to activate Wyoming Financial Services (WFS), a recently formed corporation. In reality, WFS served as a conduit to funnel approximately $701,000 to Davis and $54,000 to Burke. See XII Tr. 100-11.

C. Elkhorn Land Deal

[2] In May 1984, a limited partnership, in which PRSC had an 84% interest, purchased land owned

by the Elkhorn Land and Livestock Company. Burke and Davis persuaded the GFB Board to fund PRSC's participation in the amount of $1.65 million, with the understanding that the proceeds would be used to pay existing indebtedness on the land. Only $1.15 million was used for that purpose; Davis received the remaining $500,000 as a secret commission. Several months later, Burke and Davis had GFB's attorney prepare a "clarifying" minute entry indicating that the commission had been authorized by the GFB board when, in fact, it had not. See Pl. ex. 914; VIII R.S. 19. Although Burke abstained from the vote on the amendment, he and Davis took steps leading to its preparation. GFB executive vice-president Mike Brown approved the amendment only because he did not want to be fired. XXXII Tr. 31. [FN2]

FN2. Our resolution of these appeals has been delayed substantially because the transcript consists of over one-hundred volumes in an order which does not allow for ready reference or chronological review. For example, the testimony of various witnesses is contained out of order in supplemental volumes. We note that the pages of a transcript should be numbered in a single series of consecutive page numbers for each proceeding, regardless of the number of days involved. Given the magnitude of this trial, all pages should have been numbered consecutively for the entire multiple-volume transcript and we so direct for the future. See VI Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures-Court Reporters' Manual ch. XVIII, pt. k(2) (example set 2) (Oct. 91).

D. Dakota Minerals Deal

Burke and Davis agreed to purchase stock in Dakota Minerals, Inc. (Dakota) and initially secure a $1.75 million loan for Dakota. ***1488** Dakota would pay a future fee of $4 million and grant stock options to Burke and Davis for their assistance in securing additional financing. At a GFB board meeting in June 1984, Burke and Davis advocated a $1.75 million loan to Dakota and Burke voted in favor of it, all without mention of their personal interest in the loan. The agreement between Davis, Burke and Dakota, though partially performed, was never executed. Davis and Burke expressed apprehension about signing the agreement when bank examiners were examining GFB.

E. GFB Loan to Tired Iron, Inc.

The final transaction concerned GFB's $650,000 loan to Tired Iron, a company owned by Davis. Davis agreed to provide an itemized list of collateral (aircraft parts, supplies and tools) with a value of $893,000 to secure the note. Pl. ex. 739, 747 & 751. Almost a year later, Davis provided the list which appraised the collateral at $1.45 million. Pl. ex. 752. The appraisal was done by Jay Johnson at the request and direction of Davis. Johnson had seen the parts one or two years previously, but did not inspect the inventory at the time he provided his estimate of a retail value of $1.45 million. The evidence tended to show that the parts were worth a maximum of $425,000 at retail and $170,000 at wholesale; a more realistic figure was $50,000 to $60,000, given a quick sale. Pl. ex. 754; XXXIII Tr. 42-110.

II.

[3] Defendant Davis first argues that his convictions under 18 U.S.C. § 657 and § 1006 are invalid because the trial evidence did not establish an essential element of those offenses, namely that Davis was an officer, agent or employee of a federally insured institution. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Under § 657, it is unlawful for a person who is "an officer, agent or employee of or connected in any capacity with" an insured institution to willfully misapply funds belonging to the institution. Likewise, under § 1006, it is unlawful for "an officer, agent or employee of or connected in any capacity with" an insured institution to make any false entry into its books, or, with intent to defraud the institution, to participate in or receive any money or other benefits through any transaction or act of the institution. [FN3]

FN3. We note that the parallel statute, 18 U.S.C. § 1005 (pertaining to national banks), does not contain the class limitation contained in §§ 656, 657 and 1006. See United States v. Edick, 432 F.2d 350, 352 (4th Cir.1970).

Davis was not an officer or employee of GFB, and he argues that no evidence indicates that he acted as an agent of GFB. He points to cross-examination of Tom Hogan, president of GFB, and Art Volk, board chairman of GFB, wherein these witnesses responded that Davis was not an agent of GFB. Merely because Davis had not been designated as an agent of GFB does not preclude a trier of fact from determining that an agency relationship existed based upon conduct. As important, the government was required to prove only that Davis was a person "connected in any capacity with" an insured financial institution for purposes of §§ 657 and 1006. [FN4]

FN4. Davis cites the district court's order granting bail pending appeal for the proposition that the district court "conceded that the factual predicate for liability under the statutes was lacking" when it indicated that Davis was neither an employee or officer or an agent of GFB. See Davis's Brief at 26 (citing VI R. doc. 431 at 18). Not so. The district court determined that Davis acquired GFB stock for himself and for nominees and served as a financial consultant to GFB. From these operative facts and its prescient view of the broad construction we would afford §§ 657 and 1006, the district court reasoned that Davis was indeed "connected in any capacity with" an insured financial institution.

[4] During the period alleged in the superseding indictment, Burke was a director of GFB and Davis often attended board meetings, providing financial advice to the ***1489** GFB board and its president. See XXXII Tr. 37; III S.R. 11; VIII S.R. 119, 122. Burke and Davis were able to acquire control of a majority of GFB shares and, hence, controlled the GFB board. [FN5] See, e.g., XXIII Tr. 17. Although Davis argues that he was not a financial consultant to GFB, the testimony of Tom Hogan, the former president of GFB, certainly indicates otherwise. See, e.g., VII R.S. 34; VIII R.S. 21, 62-64, 83-84, 119; IX R.S. 10, 66. A consulting contract or agreement was not required. One cannot read this transcript in its entirety and fail to develop a definite and firm conviction that Burke and Davis were tireless in their self-dealing when it came to influencing bank transactions. [FN6]

FN5. Davis contends that he owned only 1.6% (4,600) of GFB shares. See Davis's Brief at 18 n. 15 & Reply Brief at 7. This conveniently ignores the GFB shares he purchased through nominees. Moreover, we look to Davis's effective control over the board given his alliance with Burke and other shareholders. When GFB was converted from a mutual company to a stock owned bank, Burke and Davis caused the number of directors on the GFB board to be reduced from twelve to five (one of whom was Burke), and made clear to remaining directors that it was their way or the highway.

FN6. Davis's implication that he was a mere customer of GFB (and therefore not liable under §§ 657 and 1007) is flatly contradicted by the record. Moreover, we note that a bank customer may be convicted as an aider and abetter under these statutes when the principal (an officer, agent, employee or other person connected in any capacity of trust with the institution) is found guilty of the offense. See United States v. Giordano, 489 F.2d 327, 330 (2d Cir.1973); United States v. Tornabene, 222 F.2d 875, 878 (3d Cir.1955). We note that the jury did indeed convict Davis of aiding and abetting Burke on some of the counts.

Davis contends, however, that only "officers, agents, or employees" who are "connected in any capacity with" an insured financial institution may be found liable under §§ 657 and 1006. According to Davis, "[t]he statutes apply only to officers, agents or employees, but allow those persons to be officers, agents or employees of [the institution] or, alternatively, officers, agents or employees connected in any capacity to [the institution]." Davis's Brief at 20. Davis further contends that § 657 requires the government to prove that a defendant had direct access to bank funds as an insider and used his position to victimize the bank.

Davis's construction of these statutes is too narrow. It would require us to strike out the following italicized words: "Whoever, being an officer, agent or employee of or connected in any capacity with...." 18 U.S.C. §§ 657, 1006. While the class of persons coming within the statutes is limited by a relationship of trust, and in the case of § 657, direct or indirect access to bank assets, these statutes are not limited solely to bank officers, agents or employees. Moreover, if the trier of fact determines that a principal within the class has committed bank fraud, a person outside the class such as a bank customer may be held liable as an aider and abetter. United States v. Cooper, 464

F.2d 648, 649-50 (10th Cir.1972), cert. denied, 409 U.S. 1107, 93 S.Ct. 902, 34 L.Ed.2d 688 (1973); United States v. Tornabene, 222 F.2d 875, 877-78 (3rd Cir.1955).

We recently decided that the person "connected in any capacity with" language of § 657 should be given a "broad interpretation" in accordance with congressional intent of protection of federally insured institutions against fraud. In United States v. Ratchford, 942 F.2d 702 (10th Cir.1991), we held that a property manager who diverted funds from an apartment complex owned by two savings and loan associations was sufficiently connected to federally insured institutions to support conviction under § 657. Id. at 705.

> As president and owner of the managing company, defendant was aware of the savings and loans' ownership of the complex and that his ultimate responsibility was to these owners. It was in this position of trust that he diverted funds he knew belonged to these institutions to his own personal use.

Id. at 704. Although "each case is fact specific," id. at 705, several cases support the government's position that either (1) a stockholder who exerts control or (2) a financial adviser of a federally protected institution ***1490** may be within reach of these statutes. Both persons occupy "position[s] of trust." See Id. at 704.

[5][6] In United States v. Prater, 805 F.2d 1441 (11th Cir.1986) (cited in Ratchford) the president of a real estate subsidiary wholly owned by an S & L was "connected with" the S & L under §§ 657 and 1006. Id. at 1446. The president of the real estate subsidiary had the power to initiate loans and the S & L board relied upon him for accurate recommendations concerning loans. Id. Those who serve a federally insured institution, whether in an employment context or in some other position of trust, are "connected with" that institution under §§ 657 and 1006. See id.; United States v. Rice, 645 F.2d 691, 693 (9th Cir.) (consultant retained by S & L to originate loans was "connected with" S & L under § 1006, notwithstanding he had no right to approve loans), cert. denied, 454 U.S. 862, 102 S.Ct. 318, 70 L.Ed.2d 160 (1981); United States v. Edick, 432 F.2d 350, 352 (4th Cir.1970) (employee of bank service corporation was connected with bank under § 656; "[i]t was because of his intimate relation to the bank's business and its records, in a position of trust, that he was able to divert its funds and make false entries in its records"). A connection with a federally protected institution may result from control through stock ownership, or control through the power to extend credit. Such direct control, however, is not essential to a finding that a defendant is connected with the institution. United States v. Payne, 750 F.2d 844, 855 (11th Cir.1985).

Garrett v. United States, 396 F.2d 489 (5th Cir.), cert. denied, 393 U.S. 952, 89 S.Ct. 374, 21 L.Ed.2d 364 (1968), presented circumstances analogous to the present case. In Garrett, controlling stockholders of a bank were charged with misapplication of national bank funds in connection with the purchase of mortgages by the bank. See 18 U.S.C. § 656 (proscribing willful misapplication of national bank funds by "[w]ho[m]ever, being an officer, director, agent or employee of, or connected in any capacity with ... [the financial institution]"). The bank paid face value for the mortgages; the seller then paid a large commission to a nonbank corporation owned by the defendants. The funds were deposited into a corporate bank account and immediately disbursed to the defendants by a series of checks. Defendants argued that because they were not officers, directors, agents or employees of the bank, they were not within the reach of the statute. The Fifth Circuit disagreed after examining the connection between the defendants and the bank. Defendants and their nominees obtained control of a majority of shares of the bank and arranged for the election of employees and associates to constitute a majority on the bank board. As controlling stockholders, defendants had a fiduciary duty not only to minority stockholders, but also to the bank. Id. at 491. Defendants participated in arranging the transactions resulting in their indictment. The court concluded that the "fact of ownership ... together with the activity ... in furtherance of control demonstrates a connection with the bank within the meaning of the statute." Id. at 491. The purpose of the statute is to protect and preserve bank assets. Id.

[7] On this point, no significant difference exists between the statutes in this case and the bank statute in Garrett. As noted, Burke and Davis exercised control of GFB and were active in the affairs of GFB. Davis's assertion to the contrary is not in accord with the evidence when viewed in the light

most favorable to the government. See Davis's Reply Brief at 5. Davis further contends that he lacked direct access to funds, but § 657 does not require the government to prove that Davis performed the ministerial task of disbursement.

III.

[8] Davis next argues that wire fraud counts 2-10, occurring in March and April, 1983, were time-barred because the superseding indictment was not returned until August 18, 1988, outside the five year limitation period. See 18 U.S.C. § 3282. Although the original indictment in this case was returned within the limitation period ***1491** (November 13, 1987), Davis contends that the superseding indictment impermissibly broadened or substantially amended these charges.

[9][10][11] The date of the original indictment tolls the limitations period as to charges alleged. See United States v. Jones, 816 F.2d 1483, 1487 (10th Cir.1987). A superseding indictment filed while the first indictment is validly pending is not barred by the statute of limitations unless it broadens or substantially amends the charges in the first indictment. United States v. Schmick, 904 F.2d 936, 940 (5th Cir.1990), cert. denied, ---U.S. ----, 111 S.Ct. 782, 112 L.Ed.2d 845 (1991); United States v. Grady, 544 F.2d 598, 602 (2d Cir.1976). "[N]otice is the touchstone in deciding whether a superseding indictment substantially changes the original charges." United States v. Gengo, 808 F.2d 1, 3 (2d Cir.1986). If the allegations and charges contained in the superseding indictment are "substantially the same" as those contained in the original indictment, sufficient notice is presumed. See Schmick, 904 F.2d at 940.

[12] The two indictments allege identical wire transfers as part of a scheme to defraud. Davis claims that the superseding indictment changed the entire theory of criminal liability from a scheme to transfer $20 million for the benefit of the defendants to a scheme to obtain control of three financial institutions, FNBE, SSB and GFB. See Davis's Brief at 23; Reply Brief at 10-12. The wire fraud counts incorporate the conspiracy count which was modified in the superseding indictment. Davis notes that the conspiracy count of the superseding indictment did not include a previously named defendant and omitted various objects of the conspiracy (offenses under 18 U.S.C. §§ 1001 and 1005). Davis's Brief at 23. Davis also points out that additional objects of the conspiracy were added, namely the commission of offenses under 18 U.S.C. §§ 1006 and 1014. An indictment is not amended impermissibly by a superseding indictment which names a greater or lesser number of defendants as coconspirators or contains a slightly different mix of closely related statutory violations as objects of the conspiracy, provided the essential nature of the conspiracy alleged in the first indictment remains the same. See United States v. Sears, Roebuck & Co., 785 F.2d 777, 779 (9th Cir.), cert. denied, 479 U.S. 988, 107 S.Ct. 580, 93 L.Ed.2d 583 (1986); United States v. Panebianco, 543 F.2d 447, 454 (2d Cir.1976), cert. denied, 429 U.S. 1103, 97 S.Ct. 1129, 51 L.Ed.2d 553 (1977).

For purposes of the scheme or artifice to defraud incorporated into the wire fraud counts, we are satisfied that the conspiracy count in the original indictment covered not only Davis's control activities, [FN7] but also transactions including (1) the acquisition of FNBE with $12.5 million of debt, $3.1 million of which was diverted to Davis and Anderson, [FN8] (2) GFB's purchase of subordinated debentures and preferred stock from EVCO and SSBC, with certain proceeds diverted to Burke and Davis, [FN9] (3) the Elkhorn land deal and Davis's $500,000 commission appearing in the false GFB minutes, [FN10] (4) the Dakota Minerals transactions in which Davis and Burke had a secret interest, [FN11] and (5) the loan to Tired Iron, Inc. based on misvalued security. [FN12] Thus, Davis had prior notice of the conspiracy charged in the superseding indictment. Indeed, after a practical reading of the counts in question in each indictment, we must conclude "that essentially the same facts were used to charge almost identical offenses." See United States v. Charnay, 537 F.2d 341, 355 (9th Cir.), cert. denied, 429 U.S. 1000, 97 S.Ct. 528, 50 L.Ed.2d 610 (1976). The wire fraud counts remained the same, and the conspiracy charge (which ***1492** contained a description of the fraudulent scheme alleged in the wire fraud counts) was not materially different. See Grady, 544 F.2d at 602. Therefore, we must reject Davis's contention that counts 2-10 were time-barred.

FN7. See I R. doc. 1 at 7, ¶ 1; 10, ¶ 10; 17, ¶ 18.

FN8. See I R. doc. 1 at 7-10, ¶¶ 3-7; 12-16, ¶¶ 1, 2, 4, 6-14.

FN9. See I R. doc. 1 at 10-11, ¶¶ 10 & 12; 18-21, ¶¶ 21-34.

FN10. See I R. doc. 1 at 11, ¶ 11; 21-22, ¶¶ 35-36.

FN11. See I R. doc. 1 at 11-12, ¶ 13; 26, ¶¶ 48-49.

FN12. See I R. doc. 1 at 24, ¶ 43.

III.

[13][14][15][16] Defendant contends that the district court erred in not submitting his "theory of the defense" instructions and instructing the jury that if the money invested by GFB in the subordinated debentures and preferred stock was used by the recipient corporations in the way promised to GFB, there could be no misapplication. [FN13] A defendant is entitled to correct instructions on defenses supported by sufficient evidence for a jury to find in defendant's favor. Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988); Ratchford, 942 F.2d at 707. Still, a district judge has substantial discretion in formulating the instructions; our review is confined to determining whether the instructions as a whole sufficiently cover the issues presented by the evidence and constitute correct statements of the law. United States v. Pena, 930 F.2d 1486, 1492 (10th Cir.1991). Instructions are considered as a whole; a particular jury instruction is not be read in isolation. See Cupy v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

FN13. The proposed instruction stated: No misapplication of bank funds results where the recipient of bank funds uses them for the very purpose for which the funds were disbursed. IV R. doc. 314.

Davis's "theory of the case" instructions are essentially summaries of the evidence in the light most favorable to the defense, [FN14] summaries more appropriate for closing argument. The trial judge's decision not to give such instructions was proper in every respect. See United States v. Barham, 595 F.2d 231, 245 (5th Cir.1979) ("theory of the defense" instruction properly refused when it "was essentially a recounting of the facts as seen through the rose-colored glasses of the defense--glasses [defendant] hoped the jury would wear when they retired to the jury room"). These summaries marshal facts supporting Davis's version of the events, and would preclude the jury from finding the elements of various charged offenses. After review of the court's instructions to the jury, we note that they adequately (and with commendable clarity) cover the essential elements of every offense charged and encompass Davis's defenses supported by the evidence such as reliance on expert advice, good faith, and approval by bank officials after adequate disclosure. See, e.g., IV R. doc. 332, instr. 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 34, 36, 52 & 53.

FN14. See, e.g., Defendant Davis's Instruction No. [unnumbered] .... COUNT 1: Mr. Davis did not enter into an agreement with Dan Burke, John Edmiston or anyone else to commit criminal acts. While the government claims that he conspired to control three banks, the evidence clearly showed that Mr. Davis was attempting to sell his interest as required by government regulators. Davis's attempts to comply are being unfairly and improperly used against him. .... IV R. doc. 314.

[17] The other challenge concerns the district court's rejection of Davis's instruction concerning misapplication. Davis relies upon United States v. Payne, 750 F.2d 844 (11th Cir.1985), in which the court of appeals set aside misapplication convictions because the government failed to prove that the borrowers for whom the defendants arranged loans were not creditworthy, nor did the government prove the loans undersecured. Id. at 750 F.2d at 856-57. Payne does not support Davis's argument.

[18][19] Misapplication of bank funds under § 657 involves: "(1) the willful (2) misapplication (3) of money, funds or credits (4) of a federally protected bank." United States v. Harenberg, 732 F.2d 1507, 1511 (10th Cir.1984) (construing 18 U.S.C. § 656); [FN15] United States v. Twiford, ***1493** 600 F.2d 1339, 1343 (10th Cir.1979) (same). Misapplication may occur when an officer, director, employee or other person subject to the statute knowingly lends money to a sham borrower or causes all or part of the loan to be made for his own

benefit while concealing his interest from the bank. Twiford, 600 F.2d at 1341-42. Misapplication of funds " 'occurs when funds are distributed under a record which misrepresents the true state of the record with the intent that bank officials, bank examiners, or the Federal Deposit Insurance Corporation will be deceived.' " Id. at 1341 (quoting United States v. Kennedy, 564 F.2d 1329, 1339 (9th Cir.1977), cert. denied, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978)). Thus, when a person within the ambit of § 657 receives material benefits of loans without disclosing this fact, misapplication has occurred. See United States v. Cooper, 464 F.2d 648, 651-52 (10th Cir.1972) (construing 18 U.S.C. § 656).

FN15. Section 656 is a parallel statute to § 657, whereas § 656 protects institutions insured by FDIC, § 657 protects institutions insured by FSLIC. United States v. White, 882 F.2d 250, 253 (7th Cir.1989).

The proffered instruction would have narrowed the test, instructing the jury that if a recipient of bank funds uses them for the purpose intended, misapplication cannot occur. This is an incorrect statement of the law. A borrower of funds may use them for the purpose intended, yet the bank insider (who may or may not be aided and abetted by the borrower) may not disclose other material facts surrounding the extension of credit, such as adverse borrower characteristics, inadequate collateral or self-dealing, and, therefore, commit misapplication of funds. See Payne, 750 F.2d at 856; United States v. Riebold, 557 F.2d 697, 700-01 (10th Cir.), cert. denied, 434 U.S. 860, 98 S.Ct. 186, 54 L.Ed.2d 133 (1977). Indeed, we have recognized that misapplication may occur when the funds are applied by the borrower for the very purpose intended, yet the bank insider has failed to disclose his interest in the transaction. See Twiford, 600 F.2d at 1340-41.

In Twiford, a bank officer and director made a $20,000 loan to a construction company president for operating expenses. The bank officer also indicated to the borrower that the officer knew someone that would cosign a construction bond for a $6,500 fee. A loan for $26,500 loan was made, and the proceeds applied to the borrower's satisfaction. The cosigning fee was paid to a fictitious party and "the jury concluded that through a series of transactions the sum had been channeled to defendant [bank officer]." Id. at 1341. Such lack of disclosure constituted misapplication.

[20] The theory underlying defendant Davis's proffered instruction is "that the money invested by GFB in subordinated debentures and preferred stock was used by the recipient corporations [SSBC and EVCO] in exactly the fashion promised to GFB [to invest in WFS] and, thus, there could be no misapplication." Davis's Brief at 26. The proffered instruction would have made irrelevant Davis's undisclosed self-dealing when it came to GFB's investment in the securities in question and thus was improper. Moreover, the trier of fact is not restricted solely to the immediate transferee of bank funds when determining whether misapplication has occurred. See Harenberg, 732 F.2d at 1511.

IV.

Davis argues that the district court should have granted a new trial because various counts of the indictment were faulty. Presumably, Davis seeks a new trial absent the evidence used to prove the allegedly faulty counts.

A.

[21] Davis contends that counts 11, 12 and 13 of the superseding indictment should have been dismissed. These counts charged Davis with willful misapplication of bank funds with respect to GFB's purchase of subordinated debentures in EVCO and SSBC, and PRSC's (a wholly-owned subsidiary of GFB) purchase of preferred stock in SSBC. The substance of Davis's argument is that Davis could not misapply funds "belonging to or intrusted in the care of" GFB. He points out that GFB invested the funds in bank holding companies (SSBC ***1494** and EVCO), and the bank holding companies then spent only a portion of the funds to acquire an option in WFS. WFS then paid substantial sums to Burke and Davis.

Davis contends that these counts must be dismissed for three reasons: (1) he was not within the class to which 18 U.S.C. § 657 applies, (2) the grand jury did not indict him for misapplication of funds belonging to WFS, but rather belonging to GFB, and (3) as a matter or law, funds belonging to WFS cannot belong to GFB and cannot be the

subject of misapplication counts 11-13.

We have rejected the first reason as discussed above. The second reason concerning the sufficiency of the indictment is without merit. Counts 11-13 incorporate by reference allegations in the conspiracy count indicating that the money was diverted to personal use through WFS; thus, the grand jury indicted on this theory. See II R. doc. 146 at 8, ¶¶ 13 & 15.

[22][23] The third reason, that GFB funds were not involved, is foreclosed by any number of authorities, including United States v. Harenberg, in which Judge Barrett, writing for the court, eloquently and firmly rejected such a grudging interpretation of § 656. First, GFB's decision to purchase these securities in amounts which exceeded the legitimate uses of these funds constituted misapplication of GFB's bank funds. [FN16] Harenberg, 732 F.2d at 1511; United States v. Farrell, 609 F.2d 816, 819 (5th Cir.1980). "The statute does not require that cash actually leave the bank before a violation occurs." Farrell, 609 F.2d at 819. Davis's concealed interest in these funds "did not suddenly materialize after the bank funds were disbursed to the borrowers; rather it existed well before." See Harenberg, 732 F.2d at 1511. Second, recognizing the infinite imagination for evil, see Genesis 6:5, including methods for misapplication of bank funds by those familiar, see Payne, 750 F.2d at 856, we have declined to apply the statute solely on "the flow of funds and the consequent changes in the incidence of ownership." Harenberg, 732 F.2d at 1511. Rather, we look at the substance of the transactions, even if multiple entities are involved. Twiford, 600 F.2d at 1341. It seems to us that Davis's invitation to apply the statute based solely on the exchange of property rights (e.g. subordinated debentures and preferred shares exchanged for cash), without regard to the concealed information and the substance of the transactions, is exactly the approach rejected in Harenberg, one which would "miss the forest for the trees." See Harenberg, 732 F.2d at 1511. Davis's attempt to distinguish Harenberg and Twiford as involving kickbacks to bank officers and directors is unavailing in light of our previous rejection of such a limited approach.

FN16. See VIII R.S. 31 which illustrates the wisdom of this construction: Mr. Pico: Mr. Hogan, had you known that Mr. Davis was going to obtain a substantial portion of the monies from the subordinated debentures and preferred shares, would you have invested those in behalf of Guaranty Federal Bank? Mr. Hogan: No. It matters not that Mr. Hogan viewed the investments as prudent at the time made; such view was based in part on material misinformation. Davis further argues that to the extent that the allegedly misapplied funds came from PRSC, a wholly-owned subsidiary of GFB, such funds are beyond the reach of § 657 because PRSC was not a federally insured institution. Davis relies upon United States v. White, 882 F.2d 250 (7th Cir.1989), which involved allegedly false statements made to a wholly-owned equipment leasing subsidiary of a federally protected bank under 18 U.S.C. § 1014. We view White as turning on a failure of proof; the government did not prove that the defendant knew that the false statements made to the subsidiary would affect the parent bank. See Id. at 254. The evidence indicates that PRSC never received the funds provided by GFB, rather, those funds were disbursed from GFB to SSBC and EVCO. Moreover, even had the funds passed from GFB through PRSC, ample proof indicates that the funds belonged to GFB or that PRSC was merely a conduit through which Burke and Davis exploited GFB. See id. at 253; Prater, 805 F.2d at 1446; United States v. Fulton, 640 F.2d 1104, 1105-06 (9th Cir.1981); United States v. Cartwright, 632 F.2d 1290, 1292-93 (5th Cir.1980); Sell v. United States, 336 F.2d 467, 472 (10th Cir.1964).

B.

[24] Davis next argues that the district court should have dismissed count 18 which ***1495** charged him with overvaluing security by submitting a false appraisal report. Davis argues that because the appraisal report was not received by GFB until almost one year after the loan was made and after the note matured, [FN17] the appraisal report as a matter of law could not be for the purpose of influencing GFB to approve a loan to Tired Iron, Inc., as alleged in the indictment. He also claims that the airplane parts appraised were not collateral for the loan and that he did not in any way submit the appraisal to GFB.

FN17. The note may have matured, but it was not paid. XIV R.S. 35.

Viewed in the light most favorable to the government, sufficient evidence supports the charge that Davis was responsible for submitting the appraisal report to GFB and that the report valued the collateral for the $650,000 loan in question. GFB sought the appraisal as a condition of the initiation and continuation of the loan. Pl. ex. 747, 1260. Johnson, who prepared the appraisal, did so at the behest of Davis. XXXIII Tr. 29. Mike Brown, the executive vice-president of GFB, testified that the appraisal was part of GFB's records pertaining to Tired Iron, Inc., as a borrower. XIV R.S. 45. The jury could logically infer that Davis provided the late appraisal report incident to GFB's extension of credit. Having so determined, it is of no moment that the inflated appraisal report was furnished subsequent to the loan advance. United States v. Kindig, 854 F.2d 703, 706 (5th Cir.1988); United States v. Gardner, 681 F.2d 733 (11th Cir.1982); United States v. Baity, 489 F.2d 256, 257 (5th Cir.1983). The government was not required to prove that GFB actually relied upon the appraisal. See United States v. Goberman, 458 F.2d 226, 229 (3rd Cir.1972).

C.

[25] Davis contends that count 21 should have been dismissed because it alleges that on or about September 28, 1984, Davis and Burke made and caused to be made false entries in GFB minutes of October 3, 1984. According to Davis, "[i]t is factually and legally impossible for defendant Davis or any person to cause the falsification of a future wholly independent event." Davis's Brief at 34.

Under 18 U.S.C. § 1006, the government was required to prove that "(1) defendant made a false entry in bank records, caused it to be made, or aided and abetted its entry; (2) defendant knew the entry was false when it was made; and (3) defendant intended that the entry injure or deceive a bank or public official." United States v. Wolf, 820 F.2d 1499, 1504 (9th Cir.1987), cert. denied, 485 U.S. 960, 108 S.Ct. 1222, 99 L.Ed.2d 423 (1988) (construing 18 U.S.C. § 1005); United States v. Jackson, 621 F.2d 216, 219 (5th Cir.1980) (same). Although Davis contends that the events of September 28 and October 3 are wholly independent, such is not the case. To the contrary, Burke and Davis met with Ron Brown, attorney for GFB, on September 28, 1984, after inquiries by federal regulators, including inquiries about the Elkhorn land deal. XXX Tr. 37-41, 69, 140, 145, 155-56; 184-88; Pl. ex. 1170. The meeting was designed to respond to those inquiries, and therefrom would come the false minutes of October 3, 1984. Burke sat on the board which approved the minutes, although he abstained on the vote concerning the fraudulent amendment. The false entry in the October 3 minutes had its genesis in the September 28 meeting; a reasonable jury could conclude beyond a reasonable doubt that Davis knowingly aided and abetted Burke in creating a false bank record, all in an effort to satisfy federal regulators concerning the previously unmentioned $500,000 Elkhorn commission paid to Davis. It is sufficient that Davis knowingly "set into motion" or knowingly participated in events which would necessarily cause the false entries to be made. See Wolf, 820 F.2d at 1504; United States v. Krepps, 605 F.2d 101, 109 n. 28 (3rd Cir.1979).

V.

[26][27] Davis next argues that the indictment should be dismissed or evidence suppressed because of government agency deception. Specifically, Davis contends ***1496** that the Federal Reserve Board (FRB), the Federal Home Loan Bank Board (FHLBB) and the Office of Comptroller of Currency (OCC) violated the Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422, when, beginning in August 1984, these agencies (along with the Wyoming State Examiner's Office) exchanged information and transferred financial records pertaining to Davis's bank transactions. Davis's Brief at 35-36. In response to a similar argument by Davis in a civil enforcement proceeding, we held that RFPA was not violated by the FRB requested information from the above supervisory agencies in pursuit of its supervisory responsibilities. Burke, 940 F.2d at 1368. We are satisfied that the above agencies acted within their supervisory capacities [FN18] in securing and exchanging information concerning Davis's activities with respect to bank holding companies and individual banks. [FN19] See 12 U.S.C. §§ 3401(7), 3412(d), & 3413(b). Therefore, we must conclude that RFPA did not apply to the information disclosed by these agencies concerning Davis's bank transactions. See Burke, 940 F.2d at 1368; Adams v. Board of Governors, 855 F.2d 1336, 1345 (8th Cir.1988). Moreover, even had the RFPA been violated, we agree with the

district court that suppression is not an available remedy, nor is dismissal of an indictment. See LVI Tr. 81; 12 U.S.C. § 3417(d); United States v. Miller, 425 U.S. 435, 442-43, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976); United States v. Kingston, 801 F.2d 733, 737 (5th Cir.1986), cert. denied, 481 U.S. 1014, 107 S.Ct. 1888, 95 L.Ed.2d 495 (1987); United States v. Frazin, 780 F.2d 1461, 1464-66 (9th Cir.), cert. denied, 479 U.S. 844, 107 S.Ct. 158, 93 L.Ed.2d 98 (1986).

FN18. SSBC and EVCO were regulated by the FRB; FNBE by the OCC; SSB by the FDIC and the Wyoming State Examiner's Office; and GFB by the FHLBB.

FN19. We note that an additional exception to RTPA now in effect, 12 U.S.C. § 3413(l), would encompass the disclosures in this case.

[28] Davis next contends that the FRB induced him participate in a meeting on June 7, 1985, to discuss financial problems of SSBC and EVCO, without revealing to him that, two days earlier, the FRB had sent a criminal referral to the United States Attorney. The criminal referral identified "eight or nine insiders" of SSBC and EVCO as the targets. The referral was drafted not later than May 2, 1985, but was not received by the U.S. Attorney until June 10, 1985. Def. ex. 2038, 2039. Davis seeks suppression of statements made during the meeting or dismissal of the indictment.

The district court denied a suppression motion concerning statements from an earlier FRB meeting in which Davis participated, along with other bank officers. XLI Tr. 93, 105-08. The district court determined that no custodial interrogation was involved. The June 7, 1985, meeting also involved the boards of directors from EVCO and SSBC and various Federal Reserve System personnel. Ron Brown was present and was representing Davis, as well as other directors. The purpose of the June 7, 1985, meeting was to present cease and desist orders to EVCO, SSBC and various individuals. XLI Tr. 133. The Federal Reserve System attorney, who had worked on the criminal referral, indicated that written plans submitted by the boards in response to the consent orders would be accepted if reasonable, and that "the Fed was trying to obtain remedial rather than punitive actions." Pl. ex. 809 at 1; XLI Tr. 159, 161-62.

Also discussed were various supervisory issues, raised at the earlier meeting, which are material to the criminal prosecution. For example, Davis was asked the whereabouts of $475,000 supplied by the holding companies to WFS. XLI Tr. 134. He referred his questioner to the books of WFS. Id. Likewise, in response to questions, Davis stated that he was not a shareholder, officer or director of WFS, but did receive consulting fees. Id. He also indicated that he had attended EVCO board meetings. Pl. ex. 809 at 3. Despite the potential overlap between the civil and criminal cases, Maryann Hunter of the Federal Reserve testified that "we were trying to correct the problems on the supervisory issues that we had through our civil type actions in a remedial type of way." XLI Tr. 161.

***1497** There is no proof of custodial interrogation at the June 7, 1985, meeting. Accordingly, the safeguards of the Fifth Amendment, as interpreted in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), were unnecessary. See Beckwith v. United States, 425 U.S. 341, 347-48, 96 S.Ct. 1612, 1617, 48 L.Ed.2d 1 (1976) (Miranda warnings not required during noncustodial interview pursuant to criminal tax investigation). Moreover, in denying the closely related suppression motion concerning statements made at the earlier meeting, the district court implicitly rejected the idea that the June 7, 1985, meeting was part of "a pattern of trickery on behalf of the government," XLI Tr. 103, in which the government was using the administrative process to obtain criminal information. See XLI Tr. 108. This implicit finding is not clearly erroneous.

[29] A government agency charged with bank oversight may well develop information in civil matters which may be relevant in a potential criminal prosecution. United States v. Copple, 827 F.2d 1182, 1189 (8th Cir.1987), cert. denied, 484 U.S. 1073, 108 S.Ct. 1046, 98 L.Ed.2d 1009 (1988). Although the agency did not tell the parties concerning the referral, Davis has not come forward with evidence on his due process claim indicative of either (1) reasonable reliance on this deliberate omission, or (2) prejudice resulting from such reliance. See United States v. Caceres, 440 U.S. 741, 752-53, 99 S.Ct. 1465, 1472, 59 L.Ed.2d 733 (1979); Cox v. Louisiana, 379 U.S. 559, 573, 85 S.Ct. 476, 485, 13 L.Ed.2d 487 (1965). Accordingly, we reject it just as the district court

apparently did.

VI.

[30][31] Davis next argues that he should have received a new trial based upon prosecutorial misconduct, specifically a sentencing memorandum filed by the government. See V R. Doc. 355. Although we see many a thin argument at the court of appeals, we are hard pressed to determine how the sentencing memorandum (postverdict) would require a new trial, even if it did net the government some press coverage. See V R. doc. 357, ex. A. In any event, we reject the notion that Fed.R.Crim.P. 32(a)(1), which provides that "[t]he attorney for the government shall have an equivalent opportunity to speak to the court," precludes the filing of a written sentencing memorandum. [FN20] For instances of such memoranda being filed by the government, see United States v. Ruminer, 786 F.2d 381, 385-86 (1986) and United States v. Salas, 824 F.2d 751, 752-53 (9th Cir.), cert. denied, 484 U.S. 969, 108 S.Ct. 465, 98 L.Ed.2d 404 (1987). Only if the government's sentencing memorandum is incorporated expressly into the presentence report and the defendant objects to material contained in the memorandum, would compliance with Fed.R.Crim.P. 32(c)(3)(D) (objections to the presentence report) be necessary. Salas, 824 F.2d at 753.

FN20. No common law right of allocution existed for the government. See 3 Charles A. Wright, Federal Practice & Procedure-Criminal § 525 at 87 (1982). The provision in Rule 32 was added in 1975 and requires that the government attorney be heard, if he so chooses. Id.

VII.

[32][33][34] Defense counsel requests a writ of mandamus requiring the district court to process his interim vouchers for payment of fees and expenses pursuant 18 U.S.C. § 3006A. [FN21] Counsel was appointed over his objection on March 23, 1988, and represents that he has yet to receive any interim payments, despite compliance with the district court's order on the subject, which was approved by the Chief Judge of the Tenth Circuit. See VII Administrative Office of the United States Courts, Guide to Judiciary Policies & Procedures app. E ***1498** (interim payments to counsel). In seeking mandamus, however, we note that counsel has not complied with Fed.R.App. 21(a) concerning the requirement of filing a separate petition and proof of service on the respondent judge, as well as other parties below. We therefore deny the request, but without prejudice to a properly filed and served petition. [FN22]

FN21. Fee determinations by the district judge pursuant to the Criminal Justice Act are administrative in character and do not constitute final appealable orders within the meaning of 28 U.S.C. § 1291. United States v. Rodriguez, 833 F.2d 1536, 1537-38 (11th Cir.1987); United States v. Walton (In re Baker), 693 F.2d 925, 926-27 (9th Cir.1982); United States v. Smith, 633 F.2d 739, 741-42 (7th Cir.1980), cert. denied, 451 U.S. 970, 101 S.Ct. 2047, 68 L.Ed.2d 349 (1981). 18 U.S.C. § 3006A(d)(4) requires that the district court "shall fix the compensation and reimbursement to be paid to the attorney" given a properly supported claim. The district court's order indicates that the district judge "will review the interim vouchers when submitted ... and will authorize compensation to be paid" and "payment [of] all reimbursable expenses." I R. doc. 101 at 2. The district judge will also review the final voucher and submit to the chief circuit judge for review and approval. Id. Here, counsel claims that the district court has not complied with its duty to review CJA vouchers and forward them for payment. We view this as fundamentally different from claims concerning the amount of payment and, therefore, conclude that the matter is cognizable under 28 U.S.C. § 1651(a).

FN22. Defense counsel also suggests that a new trial may be warranted if the failure to pay "resulted in an abrogation of Mr. Davis's rights." Davis's Brief at 45. After painstaking review of the proceedings below and in this court, we confidently state that no such abrogation has occurred. A new trial on this ground is not warranted.

Defendant Burke's appeal is DISMISSED. The criminal judgment against defendant Burke is REMANDED to the district court with instructions to VACATE it and DISMISS the underlying indictment against him. The criminal judgment against defendant Davis is AFFIRMED. The request of Davis's counsel for the writ of mandamus to issue is DENIED without prejudice to a proper application. All pending motions are DENIED.

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misappl— jury instr. & elements.

UNITED STATES of America, Plaintiff-Appellee,
v.
Robert L. BAILEY, Kevin Kehoe, Robert M. Lang, and Harold J. Ticktin,
Defendants-Appellants.

Nos. 86-2963 to 86-2965, 86-2982.

United States Court of Appeals,
Seventh Circuit.

Argued June 3, 1988.

Decided Sept. 22, 1988.

Defendants were convicted of mail fraud for their roles in schemes to defraud the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, and shareholders and depositors of particular savings and loan, and one of the defendants was also convicted of violating RICO statute, misapplying funds of federally insured savings and loan, and conspiring to misapply funds. On appeal by defendants after the United States District Court for the Northern District of Illinois, Eastern Division, 675 F.Supp. 1109, Nicholas J. Bua, J., denied defendants' motion to vacate their convictions and dismiss charges against them, the Court of Appeals, Manion, Circuit Judge, held that: (1) evidence would not support finding two of the defendants intended to defraud FHLBB, FSLIC, or savings and loan's depositors and shareholders; (2) indictment charging mail fraud sufficiently alleged conduct that violated mail fraud statute, although charges were couched in intangible rights language, as trial evidence and arguments, along with jury instructions, established that jury necessarily found defendant's schemes were aimed at victims' property rights, so as to make mail fraud convictions proper; and (3) evidence regarding defendant savings and loan's president's acceptance of bonuses and making of loans supported convictions for misapplying savings and loan's funds based on his conduct.

Reversed in part; affirmed in part; and remanded with instructions.

[1] POSTAL SERVICE ⇐ 49(11)
306k49(11)
Evidence would not support conviction for mail fraud in connection with condominium transaction, on indictment counts that alleged mailing of recorded mortgages from recorder of deeds to savings and loan institution as the mailing; similar mailings had previously been held insufficient to support defendant's conviction for mail fraud in connection with that part of condominium transaction financed by bank, and the mailings alleged in instant case were indistinguishable from those alleged in that other case.

[2] CRIMINAL LAW ⇐ 1030(3)
110k1030(3)
Although codefendant did not challenge sufficiency of mailings to sustain conviction on mail fraud counts in his opening appellate brief, it would be plain error to affirm codefendant's conviction on those counts while holding they failed against defendant, and codefendant's convictions on those counts would accordingly be reversed.

[3] CRIMINAL LAW ⇐ 1190
110k1190
Reversing three mail fraud convictions against defendant did not automatically require reversal of defendant's convictions on all counts in indictment under which defendant had been convicted of mail fraud for his role in schemes to defraud Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, and shareholders and depositors of savings and loan corporation of which defendant was president, and also convicted for violating RICO statute, misapplying funds of federally insured savings and loan, and conspiring to misapply funds; all the indictment's counts were properly joined, there was no basis for severance, the indictment's charges were all of similar character and arose from same overall scheme to loot savings and loan, and most, if not all, of the evidence admitted on counts with respect to which convictions were reversed would have been admitted absent those counts. Fed.Rules Cr.Proc.Rules 8(a), 14, 18 U.S.C.A.

[4] POSTAL SERVICE ⇐ 35(5)
306k35(5)
To convict defendants of mail fraud, Government could not simply show that they participated in transaction which turned out to be part of fraudulent scheme, but rather, Government also had to show defendants' willful participation in scheme with knowledge of its fraudulent nature and with intent

that illicit objectives be achieved.

[5] POSTAL SERVICE ⇐ 49(11)
306k49(11)
Evidence was not sufficient to prove defendants intended to defraud Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, or shareholders and depositors of savings and loan corporation, and would thus not support mail fraud convictions, even under "ostrich" instruction, that jury could infer knowledge from combination of suspicion and indifference to the truth, although defendants borrowed money and exercised their irrevocable options to tender collateral back to lender savings and loan on the same day, and made $5,000 for their efforts; highly regarded and respected real estate brokers assured defendant borrowers the deal was legitimate, and the defendant borrowers also had the savings and loan's president's assurance, implied through his participation, that the transaction was legitimate.

[6] POSTAL SERVICE ⇐ 48(4.1)
306k48(4.1)
Formerly 306k48(4.8)
Indictment counts charging mail fraud sufficiently alleged mail fraud offenses, although each specific charge was couched in intangible rights language, and the Supreme Court had rejected the intangible rights theory of mail fraud, holding that the statute makes criminal only schemes intended to deprive people of property rights; substantive allegations in each count charged scheme that had substantial potential to take other people's property by fraud, alleging that savings and loan institution was in precarious financial position, and that defendant president artificially inflated savings and loan's net worth, and alleged acts by president that defrauded savings and loan's shareholders and depositors out of their property interests by committing funds to loans, depriving savings and loan of down payments it would otherwise have received, and paying savings and loan's funds to confederate for commissions.

[7] CRIMINAL LAW ⇐ 1134(2)
110k1134(2)
To determine whether defendant's mail fraud convictions could stand, where indictment alleged intangible rights fraud, which Supreme Court had rejected as theory of mail fraud, as well as substantive allegations charging scheme with substantial potential to take other people's property by fraud, which did state offenses under Supreme Court decision, Court of Appeals had to examine jury instructions, along with evidence and arguments at trial, to see if jury necessarily convicted defendant of conduct that constituted an offense.

[8] CRIMINAL LAW ⇐ 1167(1)
110k1167(1)
Trial evidence and arguments, along with jury instructions, established that jury necessarily found on mail fraud charges that defendant's schemes were aimed at his victims' property rights, rather than at intangible rights, and convictions of mail fraud offenses would thus be sustained, although Supreme Court had rejected intangible rights theory of mail fraud and indictment counts did allege scheme to defraud persons of their intangible rights, as well as alleging scheme with substantial potential to take other people's property by fraud.

[9] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ⇐ 19
319Hk19
Formerly 83k82.71
Defendant's RICO conviction would be upheld, where the RICO count alleged substantive mail fraud counts as predicate offenses, and some of defendant's mail fraud convictions had been upheld, although other of his mail fraud convictions had been reversed; jury had no discretion to pick and choose among predicate offenses. 18 U.S.C.A. §§ 1962, 1963.

[10] EMBEZZLEMENT ⇐ 23
146k23
Consent to award of bonuses to president of savings and loan institution by savings and loan's board of directors was not complete defense to charges defendant president misapplied savings and loan's funds. 18 U.S.C.A. § 657.

[11] EMBEZZLEMENT ⇐ 23
146k23
Although consent by board of directors is important factor to consider in determining whether defendant attempted to defraud savings and loan institution, if intent to defraud or injure exists, board of directors' approval is irrelevant, for purposes of statute proscribing misapplication of savings and loan's funds. 18 U.S.C.A. § 657.

[12] EMBEZZLEMENT ⚿ 23
146k23
Acting in official capacity in accepting salary and bonuses would not be complete defense for defendant president of savings and loan institution to charge of misapplication of savings and loan's funds. 18 U.S.C.A. § 657.

[13] EMBEZZLEMENT ⚿ 48(1)
146k48(1)
Defendant, the president of savings and loan institution, charged with misapplication of savings and loan's funds based on his acceptance of bonuses from savings and loan was not entitled to more than instructions given on approval by board of directors and acting in official capacity as theories of defense and opportunity to argue those points to jury; he was not entitled to proposed instructions, which did not correctly state law, that would have made board's consent to bonuses complete defense and would have made defendant's acting in official capacity in accepting salary and bonuses complete defense. 18 U.S.C.A. § 657.

[14] EMBEZZLEMENT ⚿ 44(1)
146k44(1)
Evidence supported convicting president of savings and loan institution for misapplication of savings and loan's funds through acceptance of bonuses; evidence permitted finding president embarked on series of fraudulent schemes to keep savings and loan artificially alive and permitted finding president was able to receive bonuses because of his pattern of fraudulent conduct, and bonuses were awarded to president at time when he knew savings and loan had negative net worth. 18 U.S.C.A. § 657.

[15] EMBEZZLEMENT ⚿ 4
146k4
Under statute proscribing misapplication of funds of savings and loan, although lack of collateral, by itself, did not make loan made by bank officer misapplication of funds, unsecured or undersecured loan could be misapplication of funds, if made with intent to defraud or injure bank. 18 U.S.C.A. § 657.

[16] EMBEZZLEMENT ⚿ 48(1)
146k48(1)
Proposed instruction in prosecution of savings and loan institution's president for misapplication of funds based on loans defendant president had made, that it was not misapplication for bank officer to make loan with little or no collateral, would have focused jury's attention solely on lack of collateral and away from other facts from which jury could have inferred intent to defraud or injure savings and loan, and the instruction was thus properly refused. 18 U.S.C.A. § 657.

[17] EMBEZZLEMENT ⚿ 4
146k4
Under statute proscribing misapplication of funds of savings and loan, when bank officer makes loan knowing that named borrower will turn proceeds over to third party for the officer's own ultimate benefit, he has made a criminal misapplication of funds, regardless of named borrower's intent or ability to repay the loan. 18 U.S.C.A. § 657.

[18] EMBEZZLEMENT ⚿ 4
146k4
If all facts and circumstances surrounding particular loan indicate that bank officer intended to defraud or injure bank by making loan, jury may then properly find that the loan was criminal misapplication of funds despite named borrower's willingness and ability to repay it; intent to defraud or injure bank is what separates criminal misapplication of funds from mere maladministration. 18 U.S.C.A. § 657.

[19] EMBEZZLEMENT ⚿ 44(1)
146k44(1)
Evidence supported convicting president of savings and loan institution of misapplication of savings and loan's funds with respect to five loans; one loan benefited president and was clever way for him to circumvent regulations prohibiting from loaning himself money from savings and loan, second loan could be seen as benefiting president by allowing himself to pay off personal obligation with savings and loan's money, third and fourth loans went to pay part of another loan third person used in part to pay off president's obligation, and fifth loan was made to person who never met with loan officer and was paid $6,000 to participate in loan transaction, and charges were tried and argued as part of overall theory that president concocted several fraudulent schemes designed to build savings and loan a substantial amount of its assets. 18 U.S.C.A. § 657.

[20] EMBEZZLEMENT ⚿ 26
146k26

Indictment counts alleging misapplication of funds of savings and loan institution by president of savings and loan, through acceptance of bonuses and through making of loans, did sufficiently state offenses; each count alleged that defendant was officer of savings and loan, that savings and loan was federally insured, that defendant willfully misapplied savings and loan's funds and how he misapplied those funds, and that defendant acted with intent to injure or defraud savings and loan. 18 U.S.C.A. § 657.

[21] CRIMINAL LAW ⇐ 1169.11
110k1169.11
Even if testimony of savings and loan institution's in-house attorney, that defendant president of savings and loan billed services in-house attorney performed for confederate at the defendant's request under letterhead of defendant's private law firm, were evidence of other acts to prove character of person to show action conforming therewith in violation of evidence rule, admission of the testimony was not reversible error; evidence was admissible as relevant to conspiracy count and other counts involving defendant and confederate because it showed nature of relationship between them, and any potential for unfair prejudice to defendant was minimal. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[22] CRIMINAL LAW ⇐ 1166(10.10)
110k1166(10.10)
proceedings.
Even if admission of testimony violated district court's prior disclosure order, defendant had not mentioned how that violation affected his defense or prejudiced him in any way, and admission of the testimony was thus not reversible error. Fed.Rules Evid.Rule 103(a), 28 U.S.C.A.

***1268** Barry A. Spevack, Monico & Pavich, Robert A. Fisher, Frazin & Fisher, Michael D. Hayes, Holleb & Coff, Chicago, Ill., for defendants-appellants.

***1269** Chris G. Gair, Asst. U.S. Atty., Anton R. Valukas, U.S. Atty., Chicago, Ill., for plaintiff-appellee.

Before EASTERBROOK and MANION, Circuit Judges, and GORDON, Senior District Judge. [FN*]

FN* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

MANION, Circuit Judge.

A jury convicted Harold Ticktin, Kevin Kehoe, Robert Bailey, and Robert Lang of mail fraud, 18 U.S.C. § 1341, for their roles in various schemes to defraud the Federal Home Loan Bank Board (FHLBB), the Federal Savings and Loan Insurance Corporation (FSLIC), and the shareholders and depositors of Manning Savings and Loan Corporation, a now-defunct savings and loan in Chicago. The jury also convicted Ticktin on one count of violating the RICO statute, 18 U.S.C. §§ 1962 and 1963, various counts of misapplying the funds of a federally insured savings and loan, 18 U.S.C. § 657, and one count of conspiracy to misapply funds, 18 U.S.C. § 371. We affirm in part and reverse in part.

I.
Facts

The evidence, taken in the light most favorable to the government, reveals that Ticktin was the President of Manning Savings and Loan Corporation, a state-chartered savings and loan insured by the FSLIC. Ticktin was also a member of Manning's Board of Directors and a shareholder in Manning, as well as President of Manning's wholly-owned subsidiaries, Manning Service Corporation and Manning Production Corporation.

During 1980 and 1981, Manning's net worth began to decline; by April, 1981, Manning's net worth was below the minimum level set by federal regulations, and still declining. Federal regulators met with Ticktin and the Manning Board of Directors several times during the Spring of 1981 to discuss the problem. During these meetings, the federal regulators advised Manning that the 1980 dividend the board had declared was inappropriate because of Manning's decreasing net worth. The regulators asked the board to refrain from declaring any further dividends and from increasing salaries for the time being. The regulators also discussed with the board the possibility of Manning merging with another financial institution or allowing the FHLBB or state authorities to take over should Manning become insolvent.

In November, 1981, the FHLBB entered a temporary cease and desist order against Manning, requiring Manning to reduce expenses, refrain from paying dividends, and recapitalize. At that time, Manning's net worth was almost $500,000 below the required level. A forced merger or takeover by state or federal regulators was becoming a distinct possibility.

Faced with the imminent prospect of a forced merger or takeover, Ticktin embarked upon the first of several maneuvers to manipulate Manning's net worth and keep the FSLIC and FHLBB at bay. In November, 1981, Ticktin, on behalf of Manning Production Company, agreed to purchase interests in five Texas oil wells from Dalco Petroleum Company for $1,500,000. Manning Production, that same day, sold the interests to ITEX for $4,000,000. Manning and Manning Production supplied all the financing for ITEX's purchase. ITEX gave Manning a $1,000,000 full-recourse note. ITEX also gave Manning Production a $3,000,000 note. The $3,000,000 note was a non-recourse note, so if the oil wells did not produce, ITEX would not have to pay Manning Production on the note. But the non-recourse language did not appear on the note's face, as is standard; instead, a separate side agreement provided that the note would be non-recourse.

Ticktin wanted to record a profit immediately from the Dalco/ITEX transaction so he could increase Manning's net worth immediately. Ticktin requested opinions from four certified public accountants regarding whether he could record a profit ***1270** from the transaction; he wanted the answer in a hurry. The first two accountants told Ticktin that Manning could not record any profit from the transaction. The other two told Ticktin that Manning could record a profit. Ticktin accordingly recorded a $2,164,000 profit from the Dalco/ITEX deal, and reported that profit to the FHLBB. Ticktin, however, had not informed any of the accountants about the non-recourse side agreement; the belief that ITEX would be ultimately liable on the $3,000,000 note to Manning Production was a material factor in the opinions of the two accountants who advised Ticktin that he could record a profit.

James Scanlon was one of the accountants who approved the profit entry. Ticktin subsequently hired Scanlon's firm to conduct Manning's annual spring audit in 1982. While doing the audit, Scanlon attempted to certify that Manning had provided him with all documents concerning the Dalco/ITEX transaction. Ticktin assured Scanlon that Manning had provided the documents. However, Ticktin later misrepresented to Scanlon that Manning had released ITEX from personal liability on the $3,000,000 note in April, 1982.

Soon after the Dalco/ITEX transaction, Manning's net worth began to decline again. In March, 1982, the FHLBB challenged the Dalco/ITEX profit and drafted a proposed merger resolution for Manning. Sensing that Manning's net worth needed another boost, Ticktin returned to the oil business. In May, 1982, Ticktin instructed David Leibson, Manning's in-house counsel, to form a new corporation to buy oil and gas leases from Manning. Paul D. Olson was to be the corporation's sole shareholder. Manning and Olson were well-acquainted, and had a number of common economic interests. The corporation was named PDO Corporation (PDO).

On May 27, Ticktin, on behalf of Manning Production, purchased interests in three oil well leases from ITEX for $2,250,000. That same day, Manning Production sold the leases for $4,500,000 to PDO. PDO was eight days old at the time and had assets of $1,000, the amount of capital Olson paid in to start the corporation. To pay for the leases, PDO gave Manning Production a non-recourse note for $4,500,000. Ticktin recorded a $2,214,000 "profit" on the PDO transaction.

On July 14, 1982, an Administrative Law Judge found that Manning had improperly recorded a profit on the Dalco/ITEX transaction. The ALJ also found that Manning's net worth as of April 30, 1982 was negative $681,431. The ALJ entered a recommended order requiring Manning to meet its net worth requirements within twenty days or merge with another institution. The FHLBB adopted this order in October, 1982.

Against this background, Ticktin decided to take Manning into condominium financing. Jim Elliott and Kevin Kehoe, real estate brokers, were selling condominiums in a development in Orland Park, Illinois. First Security Bank of Glendale Heights, a bank in which Elliott had an interest, had been supplying the financing. After First Security ran

out of money to finance the condominiums, Elliott turned to Ticktin. In late July, 1982 (shortly after the ALJ issued his recommended order), Ticktin agreed to have Manning finance 72 condominiums in Orland Park.

Kay Dwyer, Manning's vice-president, processed the loans. Manning's practice in the past had always been to verify borrowers' employment, deposits, and credit before making loans. Ticktin told Dwyer that she would not have to verify those items before making the Orland Park loans. Ticktin did tell Dwyer to obtain appraisals. Ticktin, however, told her what appraiser to use. The appraisals all came in together within two weeks and were merely photocopies, with only unit numbers changed. All two-bedroom units were appraised at the same price, regardless of location, as were all one-bedroom units.

Elliott and Kehoe sold the units at an inflated purchase price. Manning financed over 100 percent of the condominiums' true market value, and all but ten percent of the purchase price. The seller took second mortgages for the remainder of that price. Elliott and Kehoe received a commission of ***1271** $15,000 on each condominium they sold. Elliott's commissions totalled $1,000,000 and Kehoe's $172,000. Ticktin knew about these commissions.

In September, 1982, the FHLBB was on the verge of closing Manning down. Ticktin told Elliott that he had to "book a profit to keep the regulators at bay." Ticktin felt that buying and selling condominiums would again be a good way to do this. On October 28, on behalf of Manning Service Corporation, he purchased 123 condominiums and nineteen mortgages in Forest Park, Illinois for $3,400,000. Ticktin simultaneously sold the condominiums, in blocks of multiple units, to ten purchasers that Elliott, Kehoe, and Lloyd Tuttle recruited. Ticktin agreed to pay Elliott a commission of $10,000 per unit.

Ticktin set the purchase price and the financing terms. Nine of the purchasers bought twelve condominiums for $804,000, and a tenth bought fifteen condominiums for $1,009,800. Manning financed 100 percent of the purchase price: Manning loaned 80 percent of the price to each purchaser, and each purchaser executed a second mortgage for the remaining 20 percent. Although Manning's loan files contained appraisals justifying the purchase price, those appraisals were rife with inaccuracies and misrepresentations. The condominiums were overpriced, and Manning actually lent more than 100 percent of the fair market value of each.

Ticktin engineered the Forest Park deal so he could book a profit, increase Manning's net worth, and stave off action by the FHLBB. He soon learned from his accountants that he could not record any profit unless he could show a 20 percent down payment from the purchasers. Ticktin therefore had to devise a plan to create the appearance of a down payment. Ticktin's first idea was to loan $1,649,160 (20 percent of the total price) to Olson, who would then return the money as a supposed down payment from the purchasers. This plan fell through when Olson refused to participate unless Ticktin paid him $50,000.

After Olson refused to participate, Ticktin told Elliott to find additional people to borrow money to use for the down payments. Elliott recruited his parents, and Tuttle recruited Robert Bailey and Robert Lang. All four executed documents borrowing $229,790 from Manning; at the same time, each received Manning's irrevocable commitment to buy back the loan at the borrower's option, and each signed a letter exercising that option.

The loans to Bailey, Lang, and Elliott's parents provided only $919,160 toward the appearance of a 20 percent down payment. Two sources provided the rest of the down payment. Manning "bought" (no money ever changed hands) second mortgage notes from Elliott on another set of condominiums in Worth, Illinois. Manning paid the face value of $363,020 for these notes, even though the first mortgages on the Worth condominiums were delinquent. Ticktin also coerced Elliott into returning $361,000 of his commission on the Forest Park condominiums. Ticktin told Elliott that unless Elliott rebated $361,000, the whole deal would be off because Manning needed that amount to record a profit.

On November 16, Manning wired $2,510,760 to Elliott's account at Sears Bank. That $2,510,760 represented the money from the notes to Bailey, Lang, and Elliott's parents, the money from the sale

of the Worth second mortgages, and Elliott's total commission. That same day, Sears Bank wired $1,649,160 (20 percent of the total Forest Park purchase price) from Elliott's account to Manning. The money wired back from Sears Bank served as the down payment on the Forest Park transaction.

After completing the transaction, Ticktin asked an accountant whether he could record a profit. Ticktin wanted the answer "lickety-split." Because there appeared to be a sufficient down payment, the accountant told Ticktin that Manning could record a profit. Ticktin reported a $2,263,000 profit. Actually, no profit could be properly recorded because all the funds in the transaction originated from Manning.

All the time Ticktin was manipulating Manning's books, he was also drawing extraordinarily high salaries, bonuses, and ***1272** other compensation. In 1981, Ticktin's salary was $85,000. By May, 1982, his salary was $100,000--despite Manning's precarious financial position and the FHLBB's express concern that Manning hold down expenses. Ticktin's 1982 compensation included much more than his salary. On January 5, 1982, Manning's five-member Board of Directors--which included Ticktin, Ticktin's father, Ticktin's wife, and Ticktin's father-in-law--voted Ticktin a $30,000 bonus. Ticktin himself voted to grant this bonus. Only four months later, on May 3, 1982, the Manning board (with Ticktin this time abstaining) voted Ticktin a $70,000 bonus for "the fantastic job that President Ticktin has done maintaining the net worth of the Association in these perilous times...." The times were indeed perilous but there was no net worth; Manning was insolvent. On December 16, 1982, two months after the FHLBB adopted the ALJ's recommended order that Manning increase its net worth or merge, the board (again, with Ticktin abstaining) voted Ticktin a $100,000 bonus "for the exemplary work that he has done turning the Association around and for the profits he has generated through Manning Service Corporation." The bonus was paid to Ticktin on January 26, 1983; one week later, the FSLIC closed Manning down.

Besides the salary and bonuses, Ticktin received substantial other consideration from Manning in 1982. In April, 1982, Ticktin received an assumable loan of $228,000 for 95 percent of the purchase price for a condominium in Scottsdale, Arizona. To help cover his Arizona living expenses, Manning gave Ticktin a $1,500 per month Arizona living allowance. Manning also bought two automobiles for Ticktin; a $12,000 automobile for his use in Arizona, and a $47,000 automobile for his use in Illinois. Finally, Manning paid Ticktin a $30,000 consulting fee. All told, Ticktin's compensation in 1982 from Manning--which was insolvent all or most of that year--totalled at least $289,000.

From February, 1982 onward, Ticktin had the sole authority to approve loans from Manning. During that time, while Manning was sinking, Ticktin made a number of substantial questionable loans. Many of these loans benefited Ticktin and his associates (primarily Olson and Elliott). On July 20, 1982, Ticktin made a $260,000 unsecured loan (the first Kay Dwyer had ever seen Manning make) to Olson. Two days later, Olson loaned Ticktin $287,650 from Olson's bank, the First Suburban Bank of Maywood.

A second loan from Manning to Olson on September 7, 1982, arose from prior dealings between Ticktin, Olson, and William Powers. Ticktin, Olson, and Powers had borrowed approximately $1,700,000 from American National Bank (ANB) in Chicago to purchase the Elgin National Bank. Elgin National Bancorp, Elgin National Bank's holding company, also owed ANB $3,000,000. As of August, 1982, both the individuals' and the Bancorp's obligations to ANB were in default. On September 2, Olson agreed to assume Ticktin's individual loan and guarantee of Powers' loan. ANB agreed to continue the $3,000,000 Elgin Bancorp loan if Olson paid the individual loans within one week. Five days later, Ticktin loaned Olson $1,593,000 from Manning Service Corporation, secured by 108,023 shares of Elgin Bancorp stock. There were two problems with this collateral: Elgin Bancorp was in default on its $3,000,000 loan, and Elgin Bancorp's loan from ANB was secured by stock in Elgin National Bank. ANB had first priority on the Elgin National Bank stock. If Elgin Bancorp could not meet its obligations to ANB (and its track record was not very good), ANB could take the Elgin National Bank stock, which was Elgin Bancorp's underlying asset. Thus, the Elgin Bancorp stock was worth little, if anything, as collateral, and the loan from Manning to Olson was undercollateralized. After

Olson received the money from Manning Service Corporation, he used it to extinguish the outstanding individual obligations to ANB.

Six days after the $1,593,000 loan to Olson, Ticktin loaned $300,000 to Tuttle and $300,000 to Kehoe from Manning Service Corporation. Ticktin told Ted Guillem, a Manning vice-president, to use $350,000 of the loan proceeds to pay off part of the ***1273** loan that Ticktin had made to Olson on September 7, and $150,000 to pay off part of a loan that Ticktin had made to Elliott. As part of this transaction, Olson gave Tuttle and Kehoe shares of Elgin National Bank stock; Tuttle and Kehoe pledged those shares as collateral for their loans. Inexplicably, though, Kehoe pledged twice as many shares as Tuttle for the same loan.

When Manning failed, the United States Attorney's office investigated the circumstances. That investigation resulted in a twenty-one count indictment naming Ticktin, Olson, Kehoe, Elliott, Lang, Bailey, and Michael Kelley, a purchaser in the Forest Park deal, as defendants. Elliott and Kelley pleaded guilty and testified for the government at the trial. Olson, who was tried along with the remaining defendants, was found guilty on six of seven charges. He has appealed, but his appeal is not part of this consolidated appeal. The jury found Ticktin, Kehoe, Bailey, and Lang guilty on all counts charged.

II.
Sufficiency of the Mailings in Counts Five, Six, and Seven

[1] The only counts in the indictment naming Kehoe were Counts Five, Six, and Seven. In those counts, the grand jury charged Ticktin, Elliott, and Kehoe with mail fraud in connection with the Orland Park condominium transaction. Each of those counts alleged the mailing of recorded mortgages from the Recorder of Deeds to Manning as the count mailing. In United States v. Kwiat, 817 F.2d 440 (7th Cir.1987), we held that similar mailings were insufficient to support Kehoe's conviction for mail fraud in connection with the part of the Orland Park condominium deal that First Security Bank of Glendale Heights financed. Kehoe contends that we must reverse his convictions here in light of Kwiat. The government has confessed error on Kehoe's convictions, and we agree with the parties that the mailings alleged in Counts Five, Six, and Seven are indistinguishable from those alleged in Kwiat. Therefore, we reverse Kehoe's conviction.

[2][3] Counts Five, Six, and Seven also charged Ticktin with mail fraud. Ticktin did not raise the sufficiency of the mailings in those counts in his opening brief. But it would be plain error to affirm Ticktin's conviction on those counts while holding that those counts fail against Kehoe. See Kwiat, 817 F.2d at 444; Fed.R.Crim.P. 52(b). Therefore, we also reverse Ticktin's convictions on Counts Five, Six, and Seven. [FN1]

> FN1. Reversing these three mail fraud convictions does not, as Ticktin argues, automatically require that we reverse his convictions on all the counts in the indictment. All of the indictment's counts were properly joined, Fed.R.Crim.P. 8(a), and there was no basis for a severance under Fed.R.Crim.P. 14. Also, all of the indictment's charges were similar in character and arose from the same overall scheme to loot Manning. Finally, most, if not all, of the evidence admitted on Counts Five, Six, and Seven would have been admitted even absent those counts. Therefore, our reversing Ticktin's convictions on Counts Five, Six, and Seven does not require us to reverse his convictions on the other counts. See generally United States v. Holzer, 840 F.2d 1343, 1349-50 (7th Cir.1988); United States v. Dicaro, 772 F.2d 1314, 1320-21 n. 4 (7th Cir.1985).

III.
Sufficiency of the Evidence to Convict Bailey and Lang

Bailey and Lang were each charged with and convicted of one count of mail fraud. They contend that there was insufficient evidence to prove that they intended to defraud the FSLIC, FHLBB, or Manning's depositors and shareholders. We agree.

[4] To convict Bailey and Lang, the government could not simply show that they participated in a transaction that turned out to be part of a fraudulent scheme. The government also had to show Bailey's and Lang's "willful participation in [the] scheme with knowledge of its fraudulent nature and with intent that these illicit objectives be achieved." United States v. Price, 623 F.2d 587, 591 (9th Cir.1980); see also United States v. Pearlstein, 576 F.2d 531, 537 (3d Cir.1978); United States v.

***1274** Stull, 743 F.2d 439, 442 (6th Cir.1984). "[T]he requisite mental state in a prosecution for fraud is a specific intent to defraud and not merely knowledge of shadowy dealings." United States v. Piepgrass, 425 F.2d 194, 199 (9th Cir.1970).

[5] Tuttle recruited Bailey and Lang to borrow money to serve as a down payment for the Forest Park purchasers. Elliott and Tuttle met one day with Bailey at a restaurant and explained the transaction to him. Elliott would pay Bailey $5,000 in exchange for using Bailey's name and being able to make the loan. Bailey looked "a little bit funny" and "raised his eyebrows." He asked Elliott if the transaction was legitimate; Elliott responded that it was, explaining that his parents were entering into the same deal, and that a savings and loan president (Ticktin) would be standing behind the non-recourse aspect of the note. After also receiving assurances from Tuttle that the transaction was legitimate, Bailey agreed to participate.

Tuttle later contacted Lang and told him about the transaction. Tuttle explained the transaction to Lang as Elliott had explained it to Bailey, and assured Lang that it was legitimate. Lang also agreed to participate.

A few weeks passed. On November 17, 1982, Bailey and Lang received phone calls telling them to come to Elliott's office and sign the loan papers for the Forest Park deal. Bailey and Lang both signed documents borrowing $229,790 from Manning. The loans were secured by second mortgages from the Forest Park purchasers. Bailey and Lang also received letters from Ticktin on Manning stationery. The letters allowed Bailey and Lang to discharge their loans by tendering the collateral back to Manning within thirty days of the loan's maturity date; Manning was irrevocably committed to take back the collateral and discharge the debt. At the same time, Bailey and Lang signed letters exercising their options to tender the collateral back to Manning. Thus, Bailey and Lang got into and out of the transaction on the same day, and made $5,000 for their efforts.

The government offered no direct evidence that Bailey and Lang intended to defraud the FSLIC, FHLBB, or Manning's depositors and shareholders. The only direct evidence concerning Bailey's and Lang's participation was Elliott's and Tuttle's testimony--and both Elliott and Tuttle testified that they had assured Bailey and Lang that the transaction was legitimate.

Direct evidence, however, is not necessary to prove knowledge and intent to defraud. The government contends that the circumstances surrounding the loan transaction allowed the jury to properly infer Bailey's and Lang's guilty knowledge and intent. Alternatively, the government argues that the jury could properly infer that Bailey and Lang suspected that the transaction might be defrauding Manning but deliberately avoided further knowledge for fear of what they might learn. This combination of suspicion and deliberately avoiding further knowledge may support an inference of actual knowledge or criminal recklessness sufficient to convict. See United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.1986). The district court gave an "ostrich" instruction, informing the jury that it could "infer knowledge from a combination of suspicion and indifference to the truth." See id. at 190.

The government characterizes its circumstantial case against Bailey and Lang as "powerful"; we characterize it as insufficient. The scheme was one to deceive the FSLIC, FHLBB, and Manning's depositors and shareholders. As we will discuss in more detail later, the government's theory was that Ticktin fraudulently inflated Manning's net worth to keep the federal regulators at bay so he could keep Manning open and plunder it. Nothing suggests that Bailey and Lang knew or had reason to know about Manning's precarious financial position, the FHLBB's scrutiny, or Ticktin's efforts to manipulate Manning's books. There is no evidence that Bailey or Lang had any expertise in banking or real estate financing. Cf. Pearlstein, 576 F.2d at 543-44. The government notes that both Bailey and Lang were small businessmen who were involved in local politics. ***1275** But to infer any special knowledge from this requires too great a leap; the government offered very little detail about Bailey's and Lang's business and political experience, and not all small businessmen and politicians are familiar enough with real estate financing to suspect an illegal or fraudulent transaction. Bailey and Lang may have suspected (or even known) that the loan transactions they were entering were not "standard operating procedure." But Elliott and Tuttle, both highly regarded and respected real estate brokers at

the time, assured Bailey and Lang that the deal was legitimate. Compare United States v. Browne, 225 F.2d 751, 758 (7th Cir.1955). The evidence reveals no reason why Bailey and Lang should have doubted Elliott and Tuttle. Bailey and Lang had been involved in other deals with Elliott and Tuttle (including Orland Park); the government does not suggest that Bailey or Lang had reason to doubt that those transactions were legitimate. Elliott even told Bailey that Elliott's parents were involved in the same transaction. Bailey and Lang also had Ticktin's assurance, implied through his participation, that the transaction was legitimate. There was no evidence that Bailey or Lang knew Ticktin personally. They knew only that he was President of Manning Savings and Loan. Ticktin's participation would tend to signal that the transaction was not one meant to harm Manning.

The "ostrich" instruction does not save this conviction. "[I]t takes a fairly large amount of knowledge" to permit a jury to infer guilty knowledge under an "ostrich" theory; "to permit an inference of knowledge from just a little suspicion is to relieve the prosecution of its burden of showing every element of the case beyond a reasonable doubt." Ramsey, 785 F.2d at 190. There was no evidence--except, perhaps, Bailey's "raised eyebrows" and "funny" look--that Bailey or Lang harbored any suspicion that would have required them to investigate Manning or Ticktin's relationship and dealings with Manning or that Bailey or Lang deliberately avoided seeking further knowledge for fear of what they might learn. In fact, as we have noted, Bailey did ask, and he was assured by two people with much greater expertise and experience than he that the deal was legitimate. Speculation, "funny" looks, and "raised eyebrows" are not sufficient to convict people for knowingly participating in a scheme to defraud. Therefore, we reverse Bailey's and Lang's convictions.

IV.
The Validity of Ticktin's Mail Fraud Convictions in Light of McNally v. United States

[6] In McNally v. United States, --- U.S. ----, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court rejected the so-called "intangible rights" theory of mail fraud, holding that the mail fraud statute makes criminal only schemes intended to deprive people of property rights. See id. 107 S.Ct. at 2879-80; see also Carpenter v. United States, --- U.S. ----, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987). Ticktin asserts that we must reverse his mail fraud convictions in light of McNally. [FN2]

> FN2. Bailey, Lang, and Kehoe also challenged their convictions as invalid under McNally. Because we have reversed their convictions for other reasons, see supra at 1274-77, we consider only Ticktin's McNally challenge.

Ticktin contends that the indictment's mail fraud counts do not state an offense under McNally. At first blush, Ticktin appears to be right. The specific charging language in each of the mail fraud counts alleges that Ticktin schemed to defraud Manning's depositors and shareholders, the FSLIC, and the FHLBB "out of their right to have the affairs of the Manning Savings and Loan Association conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty and fraud." Standing alone, this language does not pass muster under McNally; the right to honest services is "too ethereal in itself to fall within the protection of the mail fraud statute...." Carpenter, 108 S.Ct. at 320.

Even though each specific charge is couched in "intangible rights" language, the substantive allegations in each mail ***1276** fraud count charge a "scheme that had substantial potential to take other people's property by fraud," and therefore state offenses under McNally. United States v. Keane, 852 F.2d 199, 205 (7th Cir.1988). As we noted in United States v. Wellman, 830 F.2d 1453, 1462 (7th Cir.1987), the common thread running through "intangible rights" cases is that they involve rights whose violation would ordinarily result in no concrete economic harm; that is not the case here. All eleven mail fraud counts charged that Manning was in a precarious financial position, and that Ticktin artificially inflated Manning's net worth. The counts also charged that Manning was an insured institution, with the FSLIC insuring each depositor's account up to $100,000. The counts also state that Ticktin's family members controlled the Board of Directors and had the authority to grant Ticktin salary, loans, and bonuses. Each count thus alleged schemes with the potential to expose Manning's money and property to plunder by artificially keeping Manning in operation. This could affect the property interests of the depositors,

shareholders, and FSLIC, which would be potentially on the hook for some or all of the depositors' losses.

The mail fraud counts also alleged other affected property interests. The Forest Park counts alleged that Ticktin loaned more than $6,500,000 with no down payments to the Forest Park purchasers, and $916,160 to Bailey, Lang, and Elliott's parents to create the appearance of a down payment. These counts also alleged that Ticktin paid commissions to Elliott as part of the deal. These counts thus alleged that Ticktin defrauded Manning's shareholders and depositors out of their property interests by committing Manning's funds to the loans, depriving Manning of down payments it would have otherwise received, and paying Manning's funds to Elliott for commissions.

The Dalco/ITEX count alleged that Ticktin paid $1,500,000 for the oil and gas leases, and financed the resale that same day for $4,000,000. Of that $4,000,000, $3,000,000 was both undersecured and without recourse, thus putting Manning's funds at greater than usual risk. The PDO counts alleged that Manning purchased leases from ITEX for $2,250,000, sold them to PDO for $4,500,000, and financed PDO's purchases. The PDO counts also alleged that on May 3, 1982, the directors voted a $70,000 bonus to Ticktin.

[7] Thus, although the government would no doubt draft the indictment differently today, the indictment sufficiently alleged mail fraud offenses even after McNally. But the indictment also alleged "intangible rights" mail fraud. We must examine the jury instructions, along with the evidence and arguments at trial to see if the jury necessarily convicted Ticktin of conduct that constituted an offense. See Wellman, 830 F.2d at 1462-63.

[8] The trial judge properly instructed the jury that to convict Ticktin it had to find beyond a reasonable doubt:

> 1) that the defendant knowingly participated in a scheme to defraud, as described in the indictment;
> 2) that, for the purpose of carrying out a scheme or attempting to do so, the defendant used the United States mails or caused the United States mails to be used in a manner charged in the particular count;
> 3) that the defendant did so knowingly and with the intent to defraud.

The instructions also defined a "scheme" and "intent to defraud":

> A "scheme" means some plan or course of action intended to deceive another and to deprive another of something of value by means of false pretenses, representations, or promises.
> It is not necessary that the government prove all of the false pretenses, representations, promises, and acts charged in the indictment. However, it is essential that the evidence establish beyond a reasonable doubt that the defendants intended to deceive the shareholders, depositors, or the FSLIC to their detriment.
> ....
> To act with intent to defraud means to act willfully and with the specific intent ***1277** to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself or another.

The judge further instructed the jury that:

> It is a theory of Harold J. Ticktin's defense in this case that he undertook all of his activities with respect to the ITEX, PDO, Orland Park, and Forest Park transactions in good faith for the purpose of benefiting rather than injuring the financial position of Manning Savings and Loan Association, and not for the purpose of his own improper financial gain. Since it is an element of all the crimes charged that Defendant Harold J. Ticktin had the intent to injure or defraud the association, you should acquit him if you find the government has not proved beyond a reasonable doubt that Defendant Ticktin had the requisite intent.

Ticktin argues that the court's instructions did not sufficiently ensure that the jury convicted him only for schemes that injured (or could have injured) the victims' property rights. When examining the sufficiency of jury instructions we must examine the jury charge as a whole, rather than focus on isolated passages. Moreover, because " 'a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge,' " we review the instructions in the context of the overall trial and the arguments by counsel. See United States v. Piccolo, 835 F.2d 517, 519 (3d Cir.1987) (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct.

396, 38 L.Ed.2d 368 (1973)).

Ticktin asserts that the definition of "scheme" does not limit "something of value" to money or property. In Wellman, we found the same language to be consistent with McNally. See 830 F.2d at 1463. Unlike United States v. Holzer, 840 F.2d 1343, 1346 (7th Cir.1988), nothing in the instructions specifically advised the jury that "intangible rights" could be "something of value" for purposes of finding a scheme.

The jury instruction defining "intent to defraud" equated that intent with an intent to cause financial loss to another or bring about financial gain to oneself. Ticktin complains that the word "ordinarily" made the instruction open-ended, and allowed the jury to find intent even absent an intent to bring about financial gain or loss. We think, however, that Ticktin parses this instruction much more closely than the average juror would; read naturally, the instruction defining intent focuses on financial gain or loss. Furthermore, Ticktin's "good faith" theory of defense instruction (which Ticktin has understandably ignored on appeal) clearly equates intent to defraud with an intent to injure Manning and bring about improper financial gain for Ticktin. Taken together, the intent instruction and Ticktin's good faith instruction adequately informed the jury that it had to find conduct aimed at injuring Manning's financial interests to convict Ticktin of mail fraud. A scheme to injure Manning financially is necessarily one to injure its shareholders and depositers financially.

Finally, the evidence and arguments in this case emphasized that the schemes were aimed at Manning's property. This case is unlike Holzer and Ward v. United States, 845 F.2d 1459 (7th Cir.1988), where the government's attorneys argued at trial that the jury should convict the defendants for depriving their victims of honest services but then adopted a different argument on appeal. From the beginning of the trial, the government's theory has been that Ticktin had "looted" Manning through a series of mail fraud schemes and misapplications. The jury heard testimony about how Ticktin's schemes depleted Manning's assets. And the closing arguments are replete with references to Ticktin using the transactions in the mail fraud schemes to artificially keep Manning open so he could divert more of its assets into his own pocket. Manning was, as the government puts it, "the goose that laid the golden eggs" and Ticktin had to keep that goose alive ***1278** while there were still eggs to be gathered. [FN3]

> FN3. Ticktin argues that the jury instruction defining a "scheme" allowed the jury to convict Ticktin solely for conduct "intended to deceive ... the FSLIC." But the trial evidence and arguments made clear that deceiving the FSLIC was an integral part of defrauding Manning's shareholders and depositers of their property; the FSLIC and FHLBB had the power to shut Manning down and thus deny Ticktin access to Manning's funds. Moreover, as the indictment alleged, the FSLIC had a property interest at stake: the $100,000 per depositer it might have had to pay had Manning gone under. Thus, the reference to scheming to deceive the FSLIC does not require us to reverse Manning's conviction.

[9] In sum, the indictment adequately alleged conduct that violated the mail fraud statute, and the trial evidence and arguments, along with the jury instructions, convince us that the jury necessarily found that Ticktin's schemes were aimed at his victims' property rights. Therefore, Ticktin's mail fraud convictions (except, as we have already noted, the Orland Park convictions) were proper. [FN4]

> FN4. Since the RICO count alleged the substantive mail fraud counts as predicate offenses and we have upheld Ticktin's other mail fraud convictions, we also uphold his RICO conviction even though we have reversed Counts Five, Six, and Seven. The jury has "no discretion to pick and choose among predicate offenses." Holzer, 840 F.2d at 1351.

V.
Ticktin's Convictions for Misapplying Manning's Funds

Ticktin challenges the sufficiency of the evidence to convict him for misapplying Manning's funds and the district court's refusal to give certain jury instructions on misapplication that he tendered. The savings and loan misapplication statute, 18 U.S.C. § 657 states, in relevant part:

> Whoever, being an officer ... of ... any ... savings and loan association ... the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ... willfully

misapplies any moneys, funds, credits, securities, or other things of value belonging to such institution or pledged or otherwise entrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both....

The district court instructed the jury that:

To sustain a charge of willful misapplication by Ticktin ... the government must prove the following propositions:

First, that at the time of the offense charged, the defendant was an officer, an agent, an employee of or connected in any capacity with Manning Savings and Loan Association;

Second, that the Manning Savings and Loan Association was an insured association;

Third, that the defendant used his position as an officer and agent to willfully misapply moneys, funds and credits belonging to the association, or entrusted to its care;

Fourth, that the defendant did so willfully and with the intent to injure or defraud the association.

....

A "willful misapplication" ... is an unauthorized, unjustifiable, or wrongful use of the association's funds with the intent to injure or defraud the association.

To show a willful misapplication, the government must prove a conversion of [the] association's funds to the use of a defendant or third party. However, ... actual loss need not be proved. It is sufficient that the defendant at least temporarily deprived the association of the possession, control or use of its funds.

The word "willfully" means that the person knowingly and intentionally committed the acts which constitute the offense charged.

The district court's instructions accurately stated the elements of a § 657 violation. See United States v. Marquardt, 786 F.2d 771, 785 (7th Cir.1986). The district court also accurately defined the term "willful misapplication." See United States v. Olson, 825 F.2d 121, 122-23 (7th Cir.1987). But Ticktin argues that the instructions were incomplete and did not adequately ***1279** distinguish between criminal misapplication and mere maladministration. Ticktin appeals the district court's decision to refuse to give several of his tendered instructions that he claims would have cured this alleged defect.

A. The Bonus Counts.

[10] The jury convicted Ticktin on Counts 14, 15, and 20, for accepting bonuses from Manning. Since the Board of Directors voted him the bonuses, Ticktin tendered an instruction stating that the board's consent was a complete defense to the misapplication charges. Ticktin based this instruction onUnited States v. Britton, 108 U.S. 193, 2 S.Ct. 526, 27 L.Ed. 701 (1883) (Britton III). In Britton III, the indictment charged that Britton, who was president of the National Bank of the State of Missouri, had made a promissory note to his brother, who endorsed it back to Britton. Britton submitted the note to the bank's Board of Directors who discounted the note, and Britton took the proceeds for his own use. At the time, Britton knew that both he and his brother were insolvent. The Supreme Court held that the Board of Directors, "knowing all the facts," could discount the note, and that the indictment did not charge an offense against Britton. Id. at 197, 2 S.Ct. at 529.

Britton III does not stand for the broad principle that consent by the Board of Directors is an absolute defense to misapplication. Britton III turned on a technical defect in the pleadings: the indictment did not charge that Britton had fraudulently procured the discount. See id. In any event, the Court's subsequent decision in Evans v. United States, 153 U.S. 584, 14 S.Ct. 934, 38 L.Ed. 830 (1893) undercut the broad reading of Britton III that Ticktin proposes. In Evans, a bank director was charged with (among other things) aiding and abetting the bank's cashier's misapplication by presenting a note to the cashier to discount; both knew that the note was not adequately secured. Id. at 591-92, 14 S.Ct. at 937-38. One of Evans' arguments for dismissing the charge was that the indictment did not charge that the cashier was not authorized to discount the note. Id. at 592-93, 14 S.Ct. at 938. The Court held even if the board had authorized the cashier to discount the note, if he discounted it with the intent to defraud the bank he would be guilty of criminal misapplication. Id. at 593, 14 S.Ct. at 938. Thus, under Evans, the Board of Directors' consent is not an absolute defense to a misapplication charge.

[11] As more recent cases have held, the board's consent is an important factor to consider in determining whether a defendant attempted to defraud an institution. But if intent to defraud or injure exists, the Board of Directors' approval is irrelevant. See United States v. Cauble, 706 F.2d

1322, 1353-54 (5th Cir.1983); United States v. Beran, 546 F.2d 1316, 1321 (8th Cir.1976).

[12] Ticktin submitted a second instruction that the district court refused to give concerning the bonuses. This instruction would have told the jury that Ticktin's "acting in his official capacity in accepting the salary and bonuses" was a complete defense. Ticktin based this instruction on another in the line of Britton cases, United States v. Britton, 108 U.S. 199, 2 S.Ct. 531, 27 L.Ed. 698 (1883) (Britton IV). In Britton IV, Britton was charged with misapplying the bank's funds by conspiring with another director to persuade the bank's directors to declare a dividend even though he knew that the bank had no net profits with which to pay it. Id. at 206, 2 S.Ct. at 535. The Court held that "[t]he declaring of a dividend by the association when there were no net profits to pay it ... is an act done by an officer of the association in his official and not in his individual capacity" and was therefore not a misapplication. Read broadly, Britton IV seems to hold that any act performed by an officer in his official capacity is not a misapplication.

However, Evans undercuts this broad reading of Britton IV, just as it undercuts the broad reading of Britton III. Evans held that a bank officer or employee who fraudulently discounts a worthless note commits a criminal misapplication, even ***1280** though discounting notes is part of his job (i.e., his "official capacity"). Evans, 153 U.S. at 593, 14 S.Ct. at 938. Similarly, as the Third Circuit stated almost forty years ago in construing Britton and Evans, "[i]f a dividend be illegally declared with the intent to defraud the bank the persons responsible for the declaration face criminal sanctions and have committed the crime defined by the statute." United States v. Matsinger, 191 F.2d 1014, 1017 (3d Cir.1951). Intent is the key element: "[T]he gravamen of the offense consists in the evil design with which the misapplication is made...." Evans, 153 U.S. at 594, 14 S.Ct. at 938.

[13] Neither of Ticktin's proposed instructions concerning the bonuses accurately stated the law. The district court did not err in refusing to give these instructions. In any event, the district court did instruct the jury on both board approval and official capacity as theories of Ticktin's defense. Ticktin was able to argue both these points to the jury. He was entitled to no more.

[14] The evidence was sufficient to convict Ticktin on all the misapplication counts concerning the bonuses. There was ample evidence for the jury to believe the government's theory that Ticktin embarked on a series of fraudulent schemes to keep Manning artificially alive and to believe that Ticktin was able to receive the bonuses because of his pattern of fraudulent conduct. This pattern supported an inference that Ticktin intended to defraud Manning when he accepted the bonuses. Moreover, each bonus was awarded to Ticktin at a time when he knew Manning had a negative net worth. The board was dominated by Ticktin's family, and Ticktin himself voted to grant the initial bonus. The board awarded the final two bonuses based on Ticktin's "fantastic" and "exemplary" work in turning Manning around and maintaining its profits, raising an inference that Ticktin deceived the board about Manning's true financial condition. In short, there was sufficient evidence for the jury to find that by accepting the bonuses Ticktin converted Manning's funds to himself with the intent to defraud or injure Manning.

B. The Loan Counts.

The jury convicted Ticktin on the other misapplication counts for five loans he made: a $260,000 loan to Olson, a $1,500,000 loan to Olson, $300,000 loans to Tuttle and Kehoe, and a $634,200 loan to Michael Kelley as part of the Forest Park transaction. The indictment alleged that the loans to Olson, Elliott, and Kehoe were unsecured or insufficiently secured. The indictment also alleged that Ticktin made the $1,500,000 loan to Olson for Ticktin's own benefit, and that Ticktin paid the proceeds of the loans to Tuttle and Kehoe over to Olson, and not the named borrowers. The indictment alleged that the loan to Kelley was secured by overvalued property, and that Kelley had not supplied a down payment for the loan.

[15][16] Ticktin submitted an instruction stating that it is not a misapplication for a bank officer to make a loan with little or no collateral. It is true that lack of collateral, by itself, does not make a loan a misapplication. Banks often make unsecured loans, based on the borrower's wealth, general creditworthiness, and other risk factors; increased interest compensates the lender for the increased risk involved. It would be an incredible and unjustified expansion of the misapplication statute to put

bankers in jail simply for making unsecured loans.

But Ticktin's proposed instruction is incomplete and misleading. An unsecured or undersecured loan can be a misapplication, if made with the intent to defraud or injure the bank. United States v. Kahn, 381 F.2d 824, 832 (7th Cir.1967); cf. Evans, 153 U.S. at 592, 14 S.Ct. at 938 (discount of unsecured note is misapplication if made with intent to defraud). Ticktin's instruction would have focused the jury's attention solely on the lack of collateral and away from other facts from which the jury could have inferred an intent to defraud or injure Manning. Because Ticktin's proposed instruction did not accurately state ***1281** the law, the district court did not err in refusing to give it.

[17] Ticktin also submitted an instruction that would have informed the jury that it is not a misapplication for a bank officer to make a loan knowing that the named borrower will turn the proceeds over to a third party, unless the officer knows that the named borrower will not or cannot repay the loan. Ticktin based this instruction on United States v. Gens, 493 F.2d 216, 222 (1st Cir.1974) and United States v. Gallagher, 576 F.2d 1028, 1045-46 (3d Cir.1978). Those cases held that, "absent other circumstances," Gens, 493 F.2d at 222, it was not a criminal misapplication for a bank officer to loan money to one person knowing that the named borrower will pass the proceeds to other persons, except in three situations: where the bank officer knows the named borrower is either fictitious or unaware that his name is being used; where the bank officer knows that the named debtor will be unable to repay the loan; and where the bank officer assures the named borrower that he will not have to repay the loan. Gens, 493 F.2d at 221-22; Gallagher, 576 F.2d at 1046. This circuit has cited Gens and Gallagher in holding that merely loaning money to a named borrower for somebody else's benefit is not, absent more, a criminal misapplication. United States v. Bruun, 809 F.2d 397, 411-12 (7th Cir.1987); see also United States v. Olson, 825 F.2d at 123 (dictum); United States v. Shivley, 715 F.2d 260, 265 (7th Cir.1983) (dictum).

[18] But Ticktin's proposed instruction concerning third-party loans was also incomplete and misleading. The instruction ignores the principle, clearly and repeatedly stated in this circuit, that when a bank officer makes a loan to a third party for the officer's own ultimate benefit he has made a criminal misapplication, regardless of the named borrower's intent or ability to repay the loan. See, e.g., Olson, 825 F.2d at 123; Bruun, 809 F.2d at 412; Shivley, 715 F.2d at 265. Ticktin claims that a third-party loan can never be a misapplication if the named borrower can and will repay it, but this circuit has never held that. See, e.g., Olson, 825 F.2d at 123 ("Without more," such third-party loans to financially capable borrowers are not misapplications). (Emphasis added.) And Gens and Gallagher did not set out an exhaustive list of situations in which third-party loans could or could not be misapplications; Gens itself acknowledged that other circumstances could make such loans criminal misapplications. 493 F.2d at 222; see also United States v. Kennedy, 564 F.2d 1329, 1339 (9th Cir.1977). If all the facts and circumstances surrounding a particular loan indicate that a bank officer intended to defraud or injure the bank, then the jury may properly find that the loan was a criminal misapplication despite the named borrower's willingness and ability to repay it. The intent to defraud or injure the bank is what separates criminal misapplication from mere maladministration.

[19] The evidence was sufficient to convict Ticktin for misapplication on all five loan counts. The first loan count involved a $260,000 loan to Olson. That loan was unsecured. The loan shortly followed the PDO transaction, and could be seen as a payoff for Olson's participation in that scheme. And two days later Olson loaned Ticktin $287,650 from Olson's First Suburban Bank of Maywood, secured by Manning shares (ten days after the ALJ had ordered Manning to increase its net worth or close down). It was a reasonable inference that the loan to Ticktin was in exchange for the loan to Olson. This inference is buttressed by the overall relationship between Ticktin and Olson, and by evidence of the fact that that relationship proceeded on an essentially quid pro quo basis--for example, Olson's demand that Ticktin pay him $50,000 to participate in the Forest Park scheme. Thus, the loan to Olson benefited Ticktin; it was a clever way for Ticktin to circumvent the regulations prohibiting him from loaning himself money from Manning.

The $1,500,000 loan to Olson was secured by Elgin Bancorp stock, stock that was worth little, if

anything, as collateral. Olson used a substantial part of this loan to ***1282** pay off Ticktin's personal obligation at American National Bank. Although Olson had agreed to assume this obligation five days before receiving the loan, Ticktin had agreed to loan him the money before Olson assumed the obligation. The loan could thus be seen as one that benefited Ticktin by allowing himself to pay off a personal obligation with Manning's money.

The $300,000 loans to Kehoe and Tuttle arose out of the $1,500,000 loan to Olson. All or part of each loan went to pay part of the $1,500,000 loan that Olson had used, in part, to pay off Ticktin's obligation at ANB. Thus, these loans could be seen as part of a "complicated morass of clandestine financial dealings ... [that] ultimately inured" to Ticktin's benefit. Olson, 825 F.2d at 123. These loans were also secured by Elgin Bancorp stock, so these loans were also undersecured.

The indictment's final misapplication count charged that Ticktin misapplied Manning's funds by loaning $643,200 to Michael Kelley, one of the purchasers in the Forest Park deal. Kelley never met with a loan officer, and was paid $6,000 to participate in the transaction. Kelley also made no down payment on the condominiums he purchased. That in itself may not indicate any intent to defraud because it is not uncommon for bankers to loan 100 percent of the purchase price of a piece of real estate, based on the borrower's creditworthiness and other risk factors. Here, however, there was evidence that Ticktin never evaluated any of these factors before making the loan to Kelley. Moreover, Ticktin went out of his way to create the appearance of a 20 percent down payment for the Kelley loan and the other Forest Park loans, even though Manning never actually received any down payments. There was also evidence that the condominiums Kelley purchased were valued well above their market price, and that Manning financed more than the market price for the purchase.

[20] We finally note that the government tried and argued the misapplications as part of its overall theory that Ticktin concocted several fraudulent schemes designed to bilk Manning of a substantial amount of its assets. We cannot view each misapplication count in isolation; instead, we must view the counts in light of Ticktin's overall course of conduct and in light of the fact that by convicting Ticktin on every count charged, the jury obviously believed the government's theory. Given this, it is difficult to believe that the jury would have convicted Ticktin on the misapplication counts unless it found that he intended to enrich himself at Manning's expense. Ticktin's convictions on the misapplication counts were proper. [FN5]

FN5. On both the loan and bonus counts, Ticktin rather obliquely seems to argue that the indictment did not state offenses. His opening brief mentions the allegations in the indictment but focuses its argument on the sufficiency of the evidence and the jury instructions. His reply brief is more forthright in arguing that the indictment did not state offenses but it does not discuss the applicable standards for determining an indictment's sufficiency. Assuming Ticktin has properly presented the issue, we hold that the misapplication counts sufficiently stated offenses. Each count alleged that Ticktin was an officer of Manning, that Manning was federally insured, that Ticktin willfully misapplied Manning's funds and how he misapplied those funds, and that Ticktin acted with the intent to injure or defraud Manning. See United States v. Broome, 628 F.2d 403, 405 (5th Cir.1980) (per curiam). Ticktin also argues that reversing any substantive misapplication count requires us to reverse the conspiracy counts as well. Because we affirm the substantive misapplication counts, we do not reach this argument.

VI.
Alleged Erroneous Evidentiary Ruling

Ticktin finally contends that we must reverse his conviction on all counts because an evidentiary ruling by the district court deprived him of a fair trial. While questioning David Liebson, Manning's in-house attorney, the government's attorney asked Liebson how Ticktin billed the legal services that Liebson performed for Olson at Ticktin's request. Liebson answered that Ticktin billed those services under the letterhead of Ticktin's private law firm. Ticktin's counsel immediately objected, but the ***1283** district court refused to strike Liebson's answer.

On appeal, Ticktin argues that the district court abused its discretion by not striking Liebson's answer and allowing the government to ask further questions about the billing arrangement (eliciting the

same information). According to Ticktin, Liebson's testimony was "other acts" evidence under Fed.R.Evid. 404(b) that the district court should not have admitted because the government failed to disclose the evidence before trial. Ticktin also asserts that the evidence was irrelevant to any issue in the case, and unduly prejudicial to him.

[21][22] Rule 404(b) prohibits evidence of other acts "to prove the character of a person in order to show action conforming therewith." Assuming that Liebson's testimony about the billing was Rule 404(b) evidence, its admission was not reversible error. For one thing, the evidence was admissible. The testimony was relevant to the conspiracy count and other counts involving Ticktin and Olson because it showed the nature of the relationship between them. Any potential for unfair prejudice to Ticktin was minimal at best. Liebson's response was an isolated piece of testimony from a trial that lasted almost four weeks, and the government never argued or presented evidence to show that the billing arrangement was improper. And even if the admission of the evidence violated the district court's prior disclosure order, Ticktin has not mentioned how that violation affected his defense or prejudiced him in any way. See Fed.R.Evid. 103(a).

VII.
Conclusion

For the reasons stated above, we REVERSE Kehoe's, Bailey's, and Lang's convictions. We also REVERSE Ticktin's convictions on Counts Five, Six, and Seven (the Orland Park mail fraud counts). We AFFIRM Ticktin's convictions on all other counts. We REMAND to the district court with instructions to enter judgments of acquittal on all reversed convictions, and to resentence Ticktin on his remaining convictions.

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sentencing under §657 - guidelines consider loss to be amt of $ actually at risk or actually taken.

UNITED STATES of America, Plaintiff-Appellant,
v.
Janet Rebecca JOHNSON, Defendant-Appellee.

No. 92-3318.

United States Court of Appeals,
Eighth Circuit.

Submitted April 14, 1993.

Decided May 25, 1993.

Defendant was convicted in the United States District Court for the Southern District of Iowa, Ronald E. Longstaff, J., of embezzlement and **misapplication** of credit union funds by credit union employee. United States appealed denial of sentencing enhancement under Sentencing Guidelines for defendant's **misapplication** of credit union funds. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that credit union's "loss" did not include misapplied funds, as they were never removed from credit union.

Affirmed.

EMBEZZLEMENT ⇐ 52
146k52
Under Sentencing Guidelines, "loss," for purposes of calculating sentence of credit union employee convicted of embezzlement and **misapplication** of credit union funds, did not include funds that she misapplied by transfer from one account to another; that money was never actually removed from credit union accounts, and credit union was not "at risk" to lose it. U.S.S.G. §§ 2B1.1, 2B1.1, comment. (n.2), (backg'd.), 18 U.S.C.A.App.

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

***1358** John D. Griffith, Asst. U.S. Atty., Des Moines, IA, argued, for plaintiff-appellant.

Steven A. Kloberdanz, Marshalltown, IA, argued, for defendant-appellee.

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge and MORRIS SHEPPARD ARNOLD, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The government appeals the district court's [FN1] denial of an additional three-level sentencing enhancement under United States Sentencing Guideline ("U.S.S.G.") § 2B1.1 due to Janet Johnson's **misapplication** of credit union funds. We affirm.

FN1. The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa.

Johnson was an employee of the Lennox Credit Union of Marshalltown, Iowa from September 1977 until August, 1991. During an internal investigation in August 1991, Johnson called the credit union and admitted that she had embezzled funds from credit union accounts. Johnson then pled guilty to one count of embezzlement and **misapplication** of credit union funds by a credit union employee in violation of **18** U.S.C. § **657.** In the stipulation of facts, Johnson admitted to embezzling $88,483.41 and misapplying $318,915. Johnson misapplied the funds by transferring money from one credit union account to another credit union account. The district court sentenced Johnson under § 2B1.1 of the Guidelines on September 11, 1992. The court computed Johnson's total offense level at 14, based upon a base offense level of four, an eight-level increase because the loss amounted to over $70,000, a two-level increase for more than minimal planning, a two-level increase for abuse of trust, and a two-level reduction based on acceptance of responsibility. Based on Johnson's adjusted base offense level of 14, the district court sentenced Johnson to 15 months imprisonment and three years of supervised release.

The government argues the court erred in not increasing Johnson's offense level by eleven levels based on the total amount of "loss" to the credit union. The government argues that the proper amount of loss was $407,398.41, which includes the $88,483 in embezzled funds and the $318,915 in misapplied funds. We disagree. "Loss" is defined ***1359** as "the value of the property taken, damaged, or destroyed." U.S.S.G. § 2B1.1, comment. (n. 2). "The value of property taken plays an important role in determining sentences for theft offenses, because it is an indicator of both the harm to the victim and the gain to the defendant." U.S.S.G. § 2B1.1,

comment. (backg'd). In this case, the amount of loss to the credit union was $88,483, which represents the amount of money actually removed from the credit union accounts. The misapplied funds were never removed from the credit union, but were transferred from one credit union account to another. [FN2] The credit union was never "at risk" to lose the misapplied funds, United States v. Brach, 942 F.2d 141, 143 (2d Cir.1991), and the district court properly excluded that figure from its calculation of loss under U.S.S.G. § 2B1.1.

FN2. See United States v. Shattuck, 961 F.2d 1012, 1017 (1st Cir.1992) (court indicated in dicta that amount of "victim loss" for sentencing purposes does not include the amount of misapplied funds that remained in bank accounts).

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Elements of willful misapplication

UNITED STATES of America, Plaintiff-Appellant,
v.
Leonard W. EVANS, Defendant-Appellee.

No. 93-2051.

United States Court of Appeals,
Tenth Circuit.

Dec. 5, 1994.

Bank president was acquitted of misapplying bank funds and making false entry in bank records, by the United States District Court for the District of New Mexico, Santiago E. Campos, J. Government appealed. The Court of Appeals, Seymour, Chief Judge, held that: (1) government failed to prove bank president's intent to injure bank, in connection with **misapplication** of bank **funds** charge; (2) sufficient evidence existed for jury to find bank president guilty of making false entries; and (3) new trial should not have been granted on false entry counts.

Affirmed, reversed in part and remanded.

[1] CRIMINAL LAW ⇐ 1134(8)
110k1134(8)
Court of Appeals reviews district court's grant of motion for acquittal under same standard that trial court applied in granting motion.

[2] BANKS AND BANKING ⇐ 509.15
52k509.15
To prove violation of statute criminalizing **misapplication** of bank **funds,** government must show that: defendant was executive officer of bank; bank was connected in some way to Federal Reserve System; defendant willfully misapplied funds of bank; and defendant acted with intent to injure or defraud that bank. 18 U.S.C.A. § 656.

[3] BANKS AND BANKING ⇐ 509.15
52k509.15
Defendant bank president was properly acquitted of willful **misapplication** of bank **funds,** in connection with failed attempt to bring insolvent bank out of insolvency, pursuant to which investors borrowed money necessary to purchase bank from bank itself, as according to its own indictment government had to prove that president acted with intent to defraud bank, i.e., that natural tendency of his actions was likely to injure bank, and it failed to do so. 18 U.S.C.A. § 656.

[4] BANKS AND BANKING ⇐ 509.10
52k509.10
Buying bank stock with money loaned by that bank is not illegal.

[5] BANKS AND BANKING ⇐ 509.10
52k509.10
False entries made by bank president and investors on loan approval and funding sheets, in connection with scheme to purchase bank by borrowing money from bank itself were "material," for purposes of statute criminalizing bank officer's making of false entries in book, report, or statement of bank with intent to deceive any agent or examiner; evidence was sufficient to support conclusion that president actively concealed nature of loans so that bank examiners would not realize source of funding. 18 U.S.C.A. § 1005.

[6] BANKS AND BANKING ⇐ 509.20
52k509.20
Under statute which criminalizes knowingly making any false statement or report on loan and credit applications, actual reliance on false entry need not be shown in order to obtain conviction, but rather, only that false entry had capacity to influence decision need be shown. 18 U.S.C.A. § 1014.

[7] CRIMINAL LAW ⇐ 1139
110k1139
Determination of materiality of false statements is legal issue which Court of Appeals reviews de novo. 18 U.S.C.A. §§ 1001, 1005.

[8] BANKS AND BANKING ⇐ 509.10
52k509.10
Whether loans for which false purposes were disclosed on loan approval and funding sheets were fully collateralized was irrelevant, for purposes of statute which criminalizes bank officer's making of false entries in book, report, or statement of bank with intent to deceive any agent or examiner, as long as books did not reflect actual state of affairs. 18 U.S.C.A. § 1005.

[9] BANKS AND BANKING ⇐ 509.25
52k509.25
Sufficient evidence existed for jury to find bank president guilty of making false entries in book,

report, or statement of bank with intent to deceive any agent or examiner, based on false purposes disclosed on loan approval and funding sheets in connection with scheme to borrow money needed to buy bank from bank itself; funding sheets and loan approval forms specifically stated false purpose for loans, and those documents were part of loan files reviewed by office of comptroller of currency (OCC) examiners. 18 U.S.C.A. § 1005.

[10] CRIMINAL LAW ⇐ 935(1)
110k935(1)
In deciding motion for new trial, court may weigh evidence and consider credibility of witnesses in determining whether verdict is contrary to weight of evidence such that miscarriage of justice may have occurred.

[11] CRIMINAL LAW ⇐ 935(1)
110k935(1)
Power to grant new trial on ground that verdict was against weight of evidence should be invoked only in exceptional cases in which evidence preponderates heavily against verdict.

[12] CRIMINAL LAW ⇐ 935(1)
110k935(1)
Evidence did not preponderate heavily against jury verdict which convicted bank president of making false entry in a book, report, or statement of bank with intent to deceive any agent or examiner, so as to have warranted granting of new trial; funding sheets and loan approval forms specifically stated false purposes for loans, and those documents were part of loan files reviewed by office of comptroller of currency (OCC) examiners. 18 U.S.C.A. § 1005.

[13] CRIMINAL LAW ⇐ 718
110k718
Reference, in government's closing argument in prosecution of bank president for making false entry in book, report, or statement of bank with intent to deceive any agent or examiner, to savings and loan bailout and its effect on taxpayers, did not rise to level of prosecutorial misconduct; government's only reference to bailout or its effect on taxpayers was made in context of things that were "not going to be relevant" when jury made decision, was made in response to president's allegation of bad faith on part of office of comptroller of currency (OCC), and government stated shortly thereafter that fact that bank fails does not mean that banker committed a crime. 18 U.S.C.A. § 1005.

[13] CRIMINAL LAW ⇐ 723(1)
110k723(1)
Reference, in government's closing argument in prosecution of bank president for making false entry in book, report, or statement of bank with intent to deceive any agent or examiner, to savings and loan bailout and its effect on taxpayers, did not rise to level of prosecutorial misconduct; government's only reference to bailout or its effect on taxpayers was made in context of things that were "not going to be relevant" when jury made decision, was made in response to president's allegation of bad faith on part of office of comptroller of currency (OCC), and government stated shortly thereafter that fact that bank fails does not mean that banker committed a crime. 18 U.S.C.A. § 1005.

[14] CRIMINAL LAW ⇐ 919(3)
110k919(3)
Even if statement made by government in prosecution of bank president for making false entry with intent to deceive, which referred to savings and loan bailout were improper, new trial was not warranted, as remark in context did not have substantial influence on outcome of trial or leave court in grave doubt as to whether it had such effect. 18 U.S.C.A. § 1005.

***588** John J. Kelly, U.S. Atty. (Robert J. Gorence, Asst. U.S. Atty., with him on the brief), Albuquerque, NM, for plaintiff/appellant.

Glen L. Houston, Hobbs, NM, for defendant/appellee.

Before SEYMOUR, Chief Judge, McKAY, and BALDOCK, Circuit Judges.

SEYMOUR, Chief Judge.

The government appeals the district court's judgment of acquittal and alternative grant of a new trial after a jury found Defendant Leonard W. Evans guilty on all fifteen counts before it. Eight of the counts charged Mr. Evans with making a false entry in bank records in violation of 18 U.S.C. §§ 1005 and 2, and seven counts charged him with misapplying bank funds in violation of 18 U.S.C. §§ 656 and 2. The government contends that the

judgment of acquittal was erroneous because the evidence was sufficient to convict Mr. Evans on all counts and that the district court abused its discretion in granting a new trial. We affirm the judgment of acquittal on the misapplication counts and we reverse the judgment of acquittal and the grant of a new trial on the false entry counts.

I.

Mr. Evans was the president of American Bank, N.A. of Rio Rancho. The bank was having financial difficulties, so a group of investors formed to purchase it from its owner. Mr. Evans worked with this group and was to remain as the bank's president upon completion of the change of control. The group filed the necessary application with the Office of the Comptroller of the Currency (OCC) for a change of control of the bank. This application stated that the group would acquire all of the outstanding common stock for $200,000. Additionally, the group would inject $2.5 million dollars of capital into the bank. Because of the bank's critical financial condition, the OCC ordered an independent audit. This audit showed that the bank was insolvent at the date of the examination.

In its decision letter to Mr. Evans, the OCC stated that in order to consummate the ***589** change of control, the group had to deposit $1.8 million of capital (first tier) in the bank within five days and the additional $700,000 (second tier) ten days later. After the infusion of the first tier capital, one of the second tier investors dropped out, leaving a deficiency of $450,000. This shortfall occurred around the time the money was to be deposited, and the investment group moved quickly to recruit new investors. Although the group found people who were interested in investing, the potential investors were unable to come up with the necessary cash on such short notice. Consequently, Mr. Evans and members of the investment group decided to arrange bank loans from American Bank to these investors to purchase American Bank stock. The charges against Mr. Evans are based on these loans and the use of their proceeds to purchase bank stock.

The pattern shown at trial, with slight variations, was that an investor would apply for a line of credit of about $75,000. Almost immediately after approval of the loan, the investor would draw out $50,000 and use the money to buy bank stock. In almost every case, the stock was held in trust for the investor under someone else's name. The loan approval and funding sheets for these loans reflected various purposes for the loans, none of which was to buy bank stock. The loan approval and funding sheets for four investors stated that the loan was for working capital for their businesses. Two investors' sheets stated that the loan was for debt consolidation and personal expenses. One investor's sheet claimed that the loan was for home improvement and bill consolidation, and the final investor's sheet stated that the loan was for purchasing a home. Richard Brown, an OCC examiner, testified that because the majority of the money was used to purchase bank stock, these purposes were false and would mislead a bank examiner. Rec., vol. IV, at 818-30.

The government does not argue that making loans to purchase bank stock is illegal, that any of the loans were deficient, or that the bank did not have the authority to make the loans. The government's theory is that Mr. Evans and members of the investment group schemed to deceive the OCC by hiding from regulators the fact that bank loan proceeds were being used to buy bank stock, and they thereby injured the bank by depriving it of much needed new capital.

Prior to submitting the case to the jury, the district court dismissed four counts against Mr. Evans. At the conclusion of the trial, the jury found Mr. Evans guilty on all remaining counts.

[1] The district court granted Mr. Evans a judgment of acquittal as to each count and, in the alternative, granted Mr. Evans a new trial on all counts. We review a district court's grant of a motion for acquittal under the same standard that the trial court applied when granting the motion. United States v. White, 673 F.2d 299, 301 (10th Cir.1982).

> We must view the evidence, both direct and circumstantial, in the light most favorable to the government, and without weighing conflicting evidence or considering the credibility of witnesses, determine whether that evidence, if believed, would establish each element of the crime. If the government has met that standard, we, as well as the trial court, must defer to the jury's verdict of guilty. This standard reflects a deep respect for the fact-finding function of the jury.

Id. at 301-02 (citations omitted).

II.

[2][3] The government appeals the judgment of acquittal as to the misapplication counts under 18 U.S.C. § 656. Section 656 makes it a crime for an officer or employee of any bank to "willfully misappl[y] any of the moneys, funds or credits of such bank." To prove a violation under this statute, the government must show that "(1) the defendant was an executive officer of the bank, (2) the bank was connected in some way to the Federal Reserve System, (3) the defendant willfully misapplied the funds of the bank, and (4) the defendant acted with the intent to injure or defraud that bank." United States v. Haddock, 961 F.2d 933, 934-35 (10th Cir.) [Haddock II], cert. denied, --- U.S. ----, 113 S.Ct. 88, 121 L.Ed.2d 50 (1992).

***590** In its brief, the government states that " 'a willful **misapplication'** of bank **funds** 'occurs when **funds** are distributed under a record which misrepresents the true state of the record with the intent that bank officials, bank examiners, or the [Federal Deposit Insurance Corporation] will be deceived.' " Aplt.Br. at 28 (quoting United States v. Twiford, 600 F.2d 1339, 1341 (10th Cir.1979)); see also United States v. Davis, 953 F.2d 1482, 1493 (10th Cir.1992) (also quoting Twiford in context of **18** U.S.C. § **657,** a parallel statute protecting institutions insured by FSLIC), cert. denied --- U.S. ----, 112 S.Ct. 2286, 119 L.Ed.2d 210 (1992). The government argues that "[t]here is no requirement that the 'misapplication' itself be unlawful; what makes it criminal is that the use of bank funds occurs with the specific intent to 'injure or defraud' the bank.' " [FN1] Aplt.Br. at 28-29 (quoting Hernandez v. United States, 608 F.2d 1361, 1364-65 (10th Cir.1979) (emphasis added)).

FN1. There is case law in this circuit stating that under some circumstances, "evidence of 'an intent to deceive' supplie[s] the necessary proof of criminal intent required by section 656." United States v. Harenberg, 732 F.2d 1507, 1511-12 (10th Cir.1984); see also, Davis, 953 F.2d 1482; Twiford, 600 F.2d 1339; Bruce A. Green, After the Fall: the Criminal Law Enforcement Response to the S & L Crisis, 59 Fordham L.Rev. S155, S159 (1991) (courts have interpreted section 656 broadly, reading the section to "simply require[ ] deceitful handling of bank funds"). We need not address the relationship between intent to deceive bank examiners and intent to injure the bank, however, because the government did not argue it. More significantly, the misapplication counts in the indictment specifically charge that Mr. Evans, with "intent to injure and defraud" the bank, made loans "knowing that the loan majority of the proceeds would not be used for the purpose stated on the loan approval and funding sheets and instead the majority of the proceeds would be used to finance the Bank Investment Group's efforts to recapitalize" the bank. Aplt.App., doc. 1 at 6.

The court instructed the jury that "intent to injure or defraud the bank may be shown by [a knowing], voluntary act by the defendant, the natural tendency of which may have been to injure the bank." Rec., vol. XI, at 2312; see also United States v. Tokoph, 514 F.2d 597, 603-04 (10th Cir.1975). Mr. Evans allegedly loaned money under a false record and then used that money to recapitalize the bank. The natural tendency of loaning the money could not have been to injure the bank because the government did not attempt to prove at trial that any of the loans were not adequately collateralized or that the borrowers were not creditworthy. [FN2] In addition, the loans were made at a time when the bank had lending authority. Rec., vol. V, at 938.

FN2. In fact, at oral argument, the government asserted that the condition of the loans was not relevant to its argument.

[4] The government also did not prove that using funds borrowed from the bank to buy stock in the bank tended to injure the bank. Buying bank stock with money loaned by that bank is not illegal. The only relevant statute states that a bank may not make loans on the security of its own shares. 12 U.S.C. § 83 (1988). The loans in this case were not secured by bank stock, but by other collateral.

The government argued at trial and also on appeal that Mr. Evans intended to injure the bank by depriving it of new capital. Aplt.Br. at 29. However, the government did not prove that using the loan proceeds as bank capital would tend to injure the bank, nor that Mr. Evans knew or should have known that using these loan proceeds for part of the capital infusion would tend to injure the bank. The only testimony tending to show that the bank

officers believed the capital had to be "new money" came from Benjamin Lee Dante, an original member of the investment group. [FN3] He testified that he thought the capital needed to be "new money, not money loaned from the bank." Rec., vol. VIII, at 1496. He claims he made this assumption only on the basis of Mr. Evans' statement that they had to "watch what we are doing ... [w]e're all going to wind up going to jail." Id. 1496-97. In addition, Mr. Dante had previously testified that they hid the true purpose of the loans from the regulators because at the time they mistakenly thought that "it was illegal for loan proceeds ***591** from the bank to be used to purchase stock." Rec., vol. VII, at 1289; see also rec., vol. VI, at 1229.

> FN3. Mr. Dante pled guilty to **misapplication** of bank **funds** before Mr. Evans' trial, but was allowed to withdraw his plea after the judgment of acquittal.

Richard Brown, the OCC examiner, testified about the consequences of not having "new money" make up all of the required capital. Rec., vol. V, at 1002-03. The first consequence, he said, was that if the OCC had known where the money came from, the OCC might not have approved the change of control application. Id. at 1002. However, this assertion only establishes that the false purpose deceived the OCC, not that the actual transaction adversely affected the bank itself. Mr. Brown also testified that under appropriate accounting, this money could not have been used to make loans. Id. at 1002-03.

In earlier testimony, Robert Norris, another OCC examiner, gave his opinion that if the $2.5 million of needed capital were not all "new money," the bank would probably fail. Rec., vol. IV, at 770-71. This statement was only presented as Mr. Norris' opinion, and the government offered no other evidence that this lack of new capital contributed or could have contributed to the bank's failure. In fact, Mr. Brown testified extensively on cross-examination that seventy-one days after the change of control took place, the examiners caused the bank to become insolvent in spite of the capital infusion by charging-off around $3.5 million dollars of loans. Rec., vol. V, at 908-28. Mr. Norris also testified that under generally accepted accounting principles, "money borrowed from the bank which is used to purchase stock in the bank would not qualify as capital. That's an accounting as well as a regulatory practice." Rec., vol. III at 604. He further stated that he would not have let the people invest their money. Id. at 605. However, he did not state how the bank itself would have been injured.

The district court asked the government whether a regulation existed that would prohibit making bank loans to investors to purchase stock in the same bank. Rec., vol. XI, at 2175. The government answered that an accounting regulation would have prohibited this money from being treated as capital. Id. at 2176. The court told the government to produce the regulation. Id. The government went on to state: "It could have been done if it was disclosed and the OCC says [sic] yes, but the regulation says they could not count this as part of the new paid[-in] capital." Id. It does not appear from the record that the government ever produced the regulation; nor has the government cited any such regulation to us on appeal.

In sum, the government had to prove, according to its own indictment, that Mr. Evans acted with intent to defraud the bank, i.e., that the natural tendency of his actions was likely to injure the bank. The government did not meet this burden. The government presented sufficient evidence that had the loan approval and funding sheets stated that the proceeds of the loans were used to buy bank stock, the OCC might not have approved change of control. This evidence, however, is not sufficient to prove that Mr. Evans intended to injure or defraud that bank. The bank was insolvent when the investment group submitted its change of control application. The OCC examiners approved the application contingent upon the infusion of $2.5 million of bank capital. According to the government, that infusion did not fully take place because the bank loans were not "new" capital, and had the OCC examiners known it in time, they might not have approved the change of control. The government does not address the fact that if the OCC had not approved the change of control, the bank would have remained in its original insolvent condition. In fact, seventy-one days after the $2.5 million was injected, OCC examiners charged-off bank loans totaling around $3.5 million. These charge-offs returned the bank to its insolvent position, despite the $2.5 million capital infusion, so the OCC closed the bank.

In sum, Mr. Evans and the investors tried to bring the bank out of insolvency but failed in their attempt, and the investors lost $2.5 million. The government's theory that Mr. Evans intended to injure the bank by arranging to supply $450,000 of capital that was not "new" is thus untenable. We therefore affirm the district court's judgment of acquittal on these counts.

***592** III.

The false entry counts charge Mr. Evans with violating 18 U.S.C. § 1005. This section criminalizes a bank officer's "false entry in any book, report, or statement [of certain banks] with intent to ... deceive ... any agent or examiner." In granting the judgment of acquittal, the district court stated that "[t]he false entry must pertain to material information," Aplt.App., doc. 2 at 10, and then found that the entries, "if false, were not material," id. at 11.

[5][6][7] We need not decide whether Congress intended that a false entry under section 1005 be material because we hold that the false entries made in this case were material. In the context of other false statement statutes, we have defined materiality as "a natural tendency to influence, or the capability of influencing" a decision maker. United States v. Daily, 921 F.2d 994, 1003 n. 9 (10th Cir.1990) (construing 18 U.S.C. § 1001, which forbids the "mak[ing] of any false, fictitious or fraudulent statements or representations to government officials"), cert. denied, --- U.S. ----, 112 S.Ct. 405, 116 L.Ed.2d 354 (1991); see also United States v. Haddock, 956 F.2d 1534, 1550 (10th Cir.1992) [Haddock I] (construing 18 U.S.C. § 1014, which criminalizes "knowingly mak[ing] any false statement or report on loan and credit applications"). Actual reliance on the false entry need not be shown, only that it "had the capacity to influence" the decision. Haddock I, 956 F.2d at 1550. The determination of materiality is a legal issue which we review de novo. See United States v. Brittain, 931 F.2d 1413, 1417 (10th Cir.1991) (construing 18 U.S.C. § 1001).

Courts have held in other contexts that stating a false loan purpose is material. The Eighth Circuit, which recognizes materiality as an essential element of a section 1001 violation, upheld a conviction under the statute in a situation very similar to the instant case. United States v. Whitaker, 848 F.2d 914, 916 (8th Cir.1988). In Whitaker, the court held that false statements made by a bank president to a Federal Deposit Insurance Corporation examiner concerning the use of loan proceeds were material. During a visit by the examiner, the defendant told him that the proceeds of certain loans were to be used for business purposes, with only some of the proceeds to be used to buy "penny" stock. Id. at 915. In actuality, all of the funds were used to purchase stock. At the time the defendant made these statements, the bank examiner already had information from a confidential source and from the bank's records which alerted him to the fact that the loans were suspicious. The defendant argued that because the examiner already knew the loans were suspect, his statements could not have influenced the examiner. Id. at 916. The examiner testified at trial that had he known the true purpose of the loans, he would have inquired into the matter further and recommended that practice of making these types of loans be stopped immediately. Id. The court held that the false statements about the purpose of the loans were thus material because they had the " 'capacity of influencing' the decisions of the FDIC." Id. [FN4]

> FN4. The facts in the present case suggest that the misrepresentation by Mr. Evans was more material than that made by Mr. Whitaker. Mr. Whitaker claimed that some of the loan proceeds would go to purchase bank stock but then used all of the money for that purpose. The loan approval and funding sheets in the present case, however, did not even mention the possibility that the money would be used to purchase stock.

Other courts have held that making false statements about the purpose of a loan is material under section 1014, which criminalizes making a false statement "for the purpose of influencing in any way the action of [certain banking entities]." Under this section, various circuits have held "that the stated purpose of a loan is a material fact." United States v. Van Dyke, 820 F.Supp. 1160, 1163 (N.D.Iowa 1993) (citing cases), rev'd on other grounds, 14 F.3d 415 (8th Cir.1994). The Seventh Circuit upheld a conviction under section 1014 when the defendant "falsely stated the purpose of the loan." United States v. Shively, 715 F.2d 260, 264 (7th Cir.1983), cert. denied, 465 U.S. 1007, 104 S.Ct. 1001, 79 L.Ed.2d 233 (1984). The court

stated:

> There is no question that by signing a promissory note which contained a statement ***593** that he knew was false (that the purpose of the loan was "business expense and marketing operation") [the defendant] was making a false statement within the meaning of the statute.

Id.

[8] Cases construing section 1005, at issue here, also support the conclusion that false entries with regard to loan purposes are material. The Ninth Circuit upheld a conviction under the statute where the jury found that the "bank's records of the loans were false in that they did not reflect either the true borrower or the actual purpose of the loans." U.S. v. Wolf, 820 F.2d 1499 at 1504 (9th Cir.1987). The Third Circuit was faced with an analogous situation under the statute in United States v. Krepps, 605 F.2d 101 (3d Cir.1979). In that case, the bank's books showed loans to two separate parties, but did not show that the defendant, an officer of the bank, was the ultimate beneficiary of the loans. Krepps, 605 F.2d at 109. The court held it did not matter that the named debtors were capable of repaying the loan and recognized their legal obligation to do so.

> [T]he fact that there is no evidence demonstrating that the named debtors are incapable of repaying the loans, or that they deny their legal obligation to do so, does not shield the true nature of the transactions.... Because those who are charged by law with the examination of these records have a significant interest in obtaining a full picture of the bank's actual condition ... the true nature of the transaction should have been entered in the bank's records.

Id. The Third Circuit's reasoning applies to the instant case as well. Whether the loans were fully collateralized is irrelevant as long as the books did not reflect the actual state of affairs. The evidence is sufficient to support the conclusion that Mr. Evans actively concealed the nature of the loans so that the examiners would not realize the source of the second tier financing.

[9] The evidence presented at Mr. Evans' trial supports our conclusion that the entries were material. Richard Brown, an OCC national bank examiner, testified that if the true purposes of the loans had been listed on the funding sheets, he would have notified the OCC in Dallas. Rec., vol. V, at 846-47. He also testified that when he realized what the true purpose of the loans was, he did notify Bob Norris in the OCC office. Id. at 847. He said that the purpose of loans is important in general, id. at 856-57, and that the purpose of the loans was particularly important in this case because it had "a direct impact upon the balance sheet of the bank." Id. at 1000. In addition, he testified that had the loans been reflected accurately, the OCC might not have approved the application. Id. at 1002. Mr. Norris testified that the OCC might not have allowed the change in control if it had known that part of the second tier money was actually coming from loans made by the bank. Rec., vol. III, at 600. Sufficient evidence existed for the jury to find Mr. Evans guilty of the false entry violations. The judgment of acquittal therefore is reversed.

IV.

Because we have reversed the district court's judgment of acquittal on the false entry counts, we must address the district court's alternative grant of a new trial on those counts. "We review the trial court's grant or denial of a motion for new trial under the abuse of discretion standard." United States v. Muldrow, 19 F.3d 1332, 1339 (10th Cir.1994). The district court gave several reasons for granting a new trial. We address all but the one relating to improper jury instructions, which pertains only to the misapplication counts on which we have affirmed the judgment of acquittal.

[10][11] The district court held that the verdict was against the weight of the evidence. As the court noted, "[i]n deciding a motion for new trial, the court may weigh the evidence and consider the credibility of witnesses in determining whether the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred." Aplt.App., doc. 2 at 13. The court went on to state that " 'the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.' " ***594** Id. (quoting 3 C. Wright, Federal Practice & Procedure, § 553, at 248 (2d ed. 1982)). The district court stated the correct standard, but we disagree that the evidence in this case preponderates heavily against the verdict.

[12] The court determined that the verdict on the false entry charges was against the weight of the evidence because the loan applications established revolving lines of credit which "can be used for any legal purpose unless there is a specific restriction on it. None of these lines of credit had restrictions." Aplt.App., doc. 2 at 13-14. Although the promissory notes that were signed by the loan applicants described these loans as revolving lines of credit, the funding sheets and loan approval forms specifically stated false purposes for the loans. Mr. Evans argues that the promissory notes were the controlling documents because they were the only documents legally binding on the loan applicants. The loan funding and approval sheets, however, were part of the loan file which the OCC examiners reviewed. See rec., vol. XI, at 2188-91. These documents contained purposes which could not be read to authorize use of the proceeds to purchase bank stock. See rec., vol. IV, at 818-30. It is irrelevant for purposes of the false entry statute that the customers did not see these documents and were not bound by them, or that the purposes of the loans as stated in other documents in the file were broad enough to allow the money to be used to buy stock. It only matters that false entries which would deceive examiners were made in documents in the bank files.

The district court also said "there was strong evidence that the defendant acted in good faith in all respects.... The government did not negate the defendant's good faith and prove that he acted in bad faith." Aplt.App., doc. 2 at 14. We disagree. The evidence the government presented that Mr. Evans entered false purposes of the loans into the bank records with the intent to deceive the bank examiners was sufficient evidence for a jury to find that Mr. Evans acted in bad faith. Moreover, the government introduced other specific evidence that Mr. Evans did not act in good faith. Cindy Richards, vice-president of loan operations for the bank, produced the loan documents at the request of Mr. Evans. When she asked Anthony Aguilar, the bank's loan officer, what to put for the purpose of the loans, he said " 'I don't care, just put something.' " Rec., vol. VI, at 1118. See id. at 1125. She acknowledged that Mr. Evans' initials appeared on the loan approval and funding sheets. Id. at 1128-36. She also recalled Mr. Evans stating at a board meeting, "[w]hat we're doing here is not exactly kosher." Id. at 1144. Laura Shaefer, who worked as Mr. Evans' personal secretary, also testified that Mr. Evans stated that "what we had done quote, 'was not exactly kosher,' unquote." Id. at 1194. The district court abused its discretion in granting a new trial on this ground because the evidence does not weigh heavily against the jury's verdicts on the false entry counts.

[13] The district court further concluded that a new trial was warranted because "the government's closing argument was unduly prejudicial in that it referred to the multibillion dollar savings and loan bailout and its effect on taxpayers." Aplt.App., doc. 2 at 14. The court believed that this reference was inappropriate because the bank's insolvency had nothing to do with Mr. Evans' actions. Id. We have reviewed the closing argument, and the government's only reference to the savings and loan bailout or its effect on taxpayers was made in the context of "things that I submit really are not going to be relevant when you go in that jury room to make your determination as to that man's guilt or innocence." Rec., vol. XI, at 2320. The government made this reference during its reply to Mr. Evans' allegation of bad faith on the part of the OCC. Id. at 2322. The government explained that Congress had mandated that the OCC look at how a change of control will affect taxpayers and try to "avoid the same spectacle with commercial banks or nationally chartered banks as has happened with the S and L's and the $200 billion plus losses [that happened] there." Id. at 2323. A few sentences later the government said, "[i]f a bank fails that doesn't mean the banker committed a crime." Id.

***595** [14] Given the context in which the statement about the savings and loan failure was made, the statement does not rise to the level of prosecutorial misconduct. Even if the statement were improper, a new trial is not warranted because the remark in context could not have had a " 'substantial influence' on the outcome" of the trial or leave us "in 'grave doubt' as to whether it had such effect." United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir.1990) (en banc). Consequently, we hold that the district court's grant of a new trial on the false entry counts was an abuse of discretion.

We AFFIRM the judgment of acquittal on the misapplication counts. We REVERSE the judgment of acquittal and the grant of a new trial on the false

entry counts, and we REMAND for sentencing in accordance with the jury verdict.

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"connected to" an institution as element of 18 USC § 657

UNITED STATES of America, Appellee,
v.
Frederick Charles BOLSTAD, Jr., Appellant.

No. 92-3725.

United States Court of Appeals,
Eighth Circuit.

Submitted May 10, 1993.

Decided July 12, 1993.

Defendant was convicted in the United States District Court for the District of Minnesota, Donald D. Alsop, J., of misapplication of savings and loan funds and fraudulent participation in loan, and he appealed. The Court of Appeals held that: (1) defendant was sufficiently related to savings and loan to fall under statutes prohibiting misapplication of funds and fraudulent participation in loan; (2) evidence was sufficient to show intent to defraud savings and loan; and (3) any error in instructing on willful blindness was harmless.

Affirmed.

[1] BUILDING AND LOAN ASSOCIATIONS ⇐ 23(8)
66k23(8)
Defendant who was president of wholly owned subsidiary of savings and loan and was responsible for preparing and presenting loan documents to savings and loan was "connected" with savings and loan for purposes of statutes prohibiting anyone connected in any capacity with savings and loan from misapplying savings and loan funds and fraudulently participating in loan. 18 U.S.C.A. §§ 657, 1006.

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

[2] BUILDING AND LOAN ASSOCIATIONS ⇐ 23(8)
66k23(8)
Evidence in prosecution of president of subsidiary of savings and loan for misapplying savings and loan funds and fraudulent participation in loan was sufficient to show intent to defraud savings and loan; evidence included proof that defendant knew that loan proceeds could only be used for buying and developing real estate, that defendant structured two-part transaction to artificially increase real estate's purchase price, that defendant lied to savings and loan about actual price, and that he did not tell savings and loan that he was partner of subsequent transferee of real estate or that he received part of loan proceeds for personal use. 18 U.S.C.A. §§ 657, 1006.

[3] CRIMINAL LAW ⇐ 1172.1(3)
110k1172.1(3)
Any error in giving willful blindness instruction was harmless in prosecution arising from fraud on savings and loan; defendant did not ask trial court to limit instruction to the other defendant, government never asserted that instruction applied to defendant during closing argument, and evidence of defendant's criminal intent was overwhelming. 18 U.S.C.A. §§ 657, 1006.

***597** Virginia Villa, Minneapolis, MN, Katherian D. Roe, (on the brief), for appellant.

James E. Lackner, Minneapolis, MN, argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, LAY, Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Frederick Charles Bolstad, Jr., appeals his jury convictions for misapplication of savings and loan funds and fraudulent participation in a loan in violation of 18 U.S.C. § 657 and § 1006. We affirm.

***598** Bolstad was the president of Midwest Federal Mortgage Corporation (MFM), a wholly owned subsidiary of Midwest Federal Savings and Loan (MFS & L). Bolstad was responsible for originating commercial real estate loans, gathering the documentation, and presenting the documents to MFS & L for approval. Unknown to MFS & L, Bolstad was also a partner of CDR/Minnesota, a real estate development company. One of Bolstad's responsibilities for CDR/Minnesota was to obtain financing for its development projects.

In 1985, CDR/Minnesota agreed to purchase some real estate. Bolstad structured the purchase as a

Defrauding the SBIC program.
applies §§ 1001, 1006, 1343, 371

UNITED STATES of America Plaintiff-Appellee,
v.
Herman K. BEEBE, Sr. and Dale A. Anderson, Defendants-Appellants.

No. 85-4428.

United States Court of Appeals, Fifth Circuit.

June 30, 1986.

Defendants were convicted on three counts of defrauding the Small Business Administration in the United States District Court for the Western District of Louisiana, Tom Stagg, Chief Judge. Defendants appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) count which informed defendants that illegal benefit they received was their participation in $100,000 loan was sufficient, and (2) evidence was sufficient to sustain convictions in that reasonable jurors could have concluded beyond a reasonable doubt that defendants, as officers of small business investment company, set up sham corporation with intent to defraud.

Affirmed.

[1] INDICTMENT AND INFORMATION ⇦ 71.2(1)
210k71.2(1)
To be sufficient, indictment must fairly inform defendant of charge against which he must defend and enable him to plead double jeopardy in future prosecutions of same offense. U.S.C.A. Const.Amend. 5.

[2] INDICTMENT AND INFORMATION ⇦ 117
210k117
Indictment's validity is determined by practical, not technical, reading of indictment as whole.

[3] INDICTMENT AND INFORMATION ⇦ 110(3)
210k110(3)
Generally, indictment is sufficient when charge tracks governing statute as long as statutory language unambiguously sets forth all essential elements; otherwise, if statute defines offense in generic terms, indictment must descend to particulars.

[3] INDICTMENT AND INFORMATION ⇦ 110(4)
210k110(4)
Generally, indictment is sufficient when charge tracks governing statute as long as statutory language unambiguously sets forth all essential elements; otherwise, if statute defines offense in generic terms, indictment must descend to particulars.

[4] INDICTMENT AND INFORMATION ⇦ 71.4(4)
210k71.4(4)
Count which informed defendants, who were chairman and vice-chairman of corporation's board, that illegal benefit they received was their participation in $100,000 loan from corporation licensed by Small Business Administration as small business investment company was sufficient, notwithstanding contention that that count of indictment was impermissibly vague because it failed to specify illegal "benefit" which defendants allegedly received in connection with loan.

[5] INDICTMENT AND INFORMATION ⇦ 121.1(3)
210k121.1(3)
District court did not abuse discretion when it denied request for bill of particulars, in that indictment was sufficient.

[6] CRIMINAL LAW ⇦ 1038.2
110k1038.2
Trial court did not commit plain error in failing to warn jury against Government's supposed new theory of benefit, where, throughout trial and in closing argument, Government argued that defendants benefitted from $100,000 loan because borrowing corporation was sham setup for second corporation's benefit.

[7] FRAUD ⇦ 69(5)
184k69(5)
Reasonable jurors could have concluded beyond reasonable doubt that borrowing corporation was sham setup for second corporation's benefit, so as to support conviction of benefitting from specific Small Business Administration loans; borrowing corporation was reactivated at defendant's request, corporation's stock was all issued to president at no cost, and president knew nothing about management or affairs of corporation and performed only

investment company **(SBIC). SBIC's** are private lending institutions which are licensed by the SBA. If the **SBIC** follows the regulations and restricts its loans to qualified business concerns--generally those with a relatively minimal net worth--the **SBIC** is eligible to receive "leveraged" financing through debt instruments purchased or guaranteed by the SBA. However, before it can apply for this financing, the **SBIC** must obtain private investment capital and loan these funds to qualified borrowers. Once the officer of the **SBIC** certifies that the privately generated funds have been loaned to qualified borrowers, the SBA will generally replenish the **SBIC** coffers with funds up to three times the amount of the **SBIC's** private capital. See 13 C.F.R. § 107 (1986).

The license application submitted by SVCC certified that it received $1,000,000 in private capital from Savings Life Insurance Company in return for 100% of its stock. Savings Life is a corporation wholly owned by AMI, Inc. After receiving the private capital, SVCC made numerous loans to small business concerns and qualified for and received SBA financing. At all relevant times, appellant Beebe was chairman of AMI's board and appellant Anderson was vice-chairman. Additionally, Beebe was a director of SVCC and Anderson was its president.

In November 1980, AMI contracted to buy from Christian Care, Inc., a leasehold interest in the San Jacinto Nursing Home located in Deer Park, Texas, for $100,000. Pursuant to the contract, AMI gave Christian Care a $25,000 deposit and was required to complete the purchase on December 29, 1980. However, AMI assigned the contract to American Medical Management Corporation (AMMC), an entity that was at least facially qualified to borrow from a **SBIC.** On December 29, 1980, SVCC loaned $100,000 to AMMC and AMMC used the proceeds of the loan to purchase the leasehold interest in the San Jacinto Nursing Home. After buying the leasehold interest, AMMC entered into an agreement with AMI whereby AMI agreed to manage the nursing home for a fee.

AMMC was initially incorporated in 1977 by George Owen, a business associate and personal friend of appellant Beebe, as a vehicle to acquire and operate hospitals. This venture, financed by Owen and Beebe, was shortlived and AMMC became inactive. On December 29, 1980--the same day AMMC acquired the interest in the San Jacinto Nursing Home--David Robinson, Owen's personal bookkeeper, was made president of AMMC. All of AMMC's stock was issued to Robinson without any investment or personal obligation on his part. Robinson had no experience operating nursing homes and knew nothing about the ***1366** affairs of AMMC. Robinson's only duties, for which he received $500 a month, involved ministerial tasks assigned to him by AMI officers.

George Owen also knew nothing about AMMC's financial affairs, had no duties and held no stock in AMMC although he testified that he expected to profit if AMMC was successful. He did receive a $1,000 per month "consulting" fee to help defray expenses incurred in the use of his Dallas apartment by Beebe and other AMI officers. After suffering losses for two years, AMMC's stock was acquired by Louisiana Nursing Homes, Inc. (LNH), a corporation effectively owned by Beebe's children, in exchange for the cancellation of a debt owed to LNH. The government proceeded against appellants in Count 5 on the theory that AMMC was a sham corporation through which SVCC loaned $100,000 to AMI for appellants' benefit in violation of **18** U.S.C. § **1006.**

II. SUFFICIENCY OF THE INDICTMENT

[1][2][3] To be sufficient, an indictment must fairly inform the defendant of the charge against which he must defend and enable him to plead double jeopardy in future prosecutions of the same offense. Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). The indictment's validity is determined by a practical, not technical, reading of the indictment as a whole. United States v. Webb, 747 F.2d 278, 284 (5th Cir.1984), cert. denied, --- U.S. ----, 105 S.Ct. 1222, 84 L.Ed.2d 362 (1985). Generally, an indictment is sufficient when the charge tracks the governing statute as long as the statutory language unambiguously sets forth all essential elements, United States v. Gordon, 780 F.2d 1165, 1169 (5th Cir.1986); otherwise, if the statute defines the offense in generic terms, the indictment "must descend to particulars." Russell v. United States, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962).

[4] Appellants contend that Count 5 of the indictment is impermissibly vague because it fails to specify the illegal "benefit" which they allegedly received in connection with the $100,000 loan to AMMC. [FN3] However, Count 5 did inform appellants that the illegal benefit they received was their participation in the $100,000 loan from SVCC to AMMC. Under the established law of this circuit, the indictment is sufficient. [FN4]

FN3. Count 5 of the indictment alleges: On or about the 31st day of December 1980, in the Western District of Louisiana, [appellants], being officers, directors, employees, agents, or connected in a capacity with SVCC, a Small Business Investment Company, duly licensed by the SBA, with intent to defraud said SBA, did unlawfully and willfully participate, share in, and directly and indirectly receive monies and benefits by means of and through the disbursement by SVCC of a wire transfer in the amount of $100,000 drawn against the SVCC account at Bossier Bank and Trust Co. for benefit of American Medical Management Corporation, the same representing proceeds of a purported legitimate loan from SVCC to American Medical Management Corporation.

FN4. Appellants urge that we should find Count 5 insufficient because a similarly worded count in an indictment alleging a violation of **18** U.S.C. § **1006** was found deficient in United States v. Quinn, 365 F.2d 256 (7th Cir.1966). Appellant's reliance on Quinn is misplaced. That court was not concerned with the adequacy of the description of benefit; the court there found that Count II of the indictment contained "no allegation as to the manner or means employed in receiving money, profits and benefits, or that the check described was issued without proper authority." Id. at 262. To the extent that Quinn can be read to support appellant's view that more detail is required in the indictment at issue, we decline to follow it.

[5][6] Appellants also complain that before the trial the district court denied their request for a bill of particulars requesting information regarding the illegal benefit they received and argue that this ruling constituted reversible error. Because the indictment was sufficient, the district court did not abuse its discretion when it denied appellants' request for a bill of particulars. ***1367** [FN5] United States v. Chenaur, 552 F.2d 294, 302 (9th Cir.1977).

FN5. Appellants additionally complain that that ambiguity of the indictment and the jury instructions allowed the jury to conclude that the illegal "benefit" appellants received was the legitimate management fee paid to AMI pursuant to its contract with AMMC to operate the San Jacinto Nursing Home. They refer to three questions asked by the government on cross-examination of appellant Anderson which they argue introduced this new theory of "benefit" to the jury. Appellants in effect contend that the trial judge failed to instruct the jury that the management fee could not be considered an "illegal benefit" under section 1006. However, appellants failed to request such a jury instruction or seek an appropriate cautionary instruction during cross-examination. At the charge conference, defense counsel specifically declined to request any such instruction upon being informed that the government had no intention of asserting this theory of benefit. Throughout the trial and in its closing argument, the government argued that appellants benefitted from the $100,000 loan described in Count 5 because AMMC was a sham corporation set up for AMI's benefit. Therefore, we conclude that the trial court did not commit plain error in failing to warn the jury against the government's supposed new theory of benefit.

III. SUFFICIENCY OF THE EVIDENCE

Appellants argue that the evidence does not support their convictions on Count 5 because it fails to establish that AMMC was a sham corporation. Alternatively, Anderson contends that the evidence fails to prove that he had knowledge of this fact. On review, we consider whether the evidence viewed favorably toward the verdict could establish guilt beyond a reasonable doubt in the mind of a reasonable trier of fact. United States v. Hernandez, 731 F.2d 1147, 1149 (5th Cir.1984).

[7] Appellants' first contention lacks merit. A review of the record persuades us that reasonable jurors could conclude beyond a reasonable doubt that AMMC was set up as a sham corporation for AMI's benefit. AMMC was reactivated at appellant Beebe's request. David Robinson was made president of AMMC at Owen's suggestion and all of its stock was issued to Robinson at no cost. Robinson admitted that he knew nothing about the

management or affairs of AMMC and performed only those ministerial duties assigned him by AMI personnel.

Appellants assert that Robinson held the AMMC stock for Owen's benefit and that Owen was the true owner of AMMC. Although Owen testified that he expected to profit if AMMC was profitable, he did not invest any funds in AMMC, did not perform any duties on behalf of AMMC, and knew nothing of AMMC's financial affairs. The only payment Owen received from AMMC was $1,000 a month which he testified Beebe obtained for him from AMMC to help pay for the use of his apartment by AMI officers. Ultimately, AMMC's stock was acquired by LNH, a corporation effectively owned by Beebe's children.

Appellants insist that the evidence is entirely consistent with their contention that AMI did not control AMMC at the time of the SVCC loan, and that Robinson and Owen were placed in the role of passive investors by AMMC's management agreement with AMI. This argument is misplaced. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir.1982), aff'd., 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). Here, the jury was "free to choose among reasonable constructions of the evidence" and properly did so. Id.

[8] Similarly, Anderson's argument that the evidence fails to prove his intent to defraud the SBA is meritless. At the time of the SVCC loan to AMMC, Anderson was a board member of AMI and president of SVCC. He signed a resolution authorizing AMI to assign the San Jacinto Nursing Home contract to AMMC and admitted ***1368** knowing that AMI had contracted with AMMC to manage the nursing home. He approved the SVCC $100,000 loan to AMMC and was aware that the money would be used to purchase the nursing home leasehold interest. Although he testified that he believed George Owen owned AMMC and that the transaction was proper, the jury was entitled to infer from the evidence that Anderson was aware that AMMC was a sham corporation and approved the SVCC loan with intent to defraud the SBA.

IV. JURY INSTRUCTION

Appellants requested the trial judge to instruct the jury that good faith on their part is a complete defense to all counts of the indictment. The trial judge gave a good faith defense instruction but limited it to the charges of wire fraud and filing false statements contained in Counts 6-12.

[9] The parties agree that the applicable law in this circuit establishes that an accused is ordinarily entitled to a good faith defense instruction when intent to defraud is an element of the offense charged and the defense is fairly raised by the evidence. United States v. Goss, 650 F.2d 1336 (5th Cir.1981); United States v. Fowler, 735 F.2d 823 (5th Cir.1984). However, failure to give the instruction is not reversible error if intent is properly defined in the charge to exclude a good faith belief and defense counsel presents the substance of this defense to the jury in closing argument. United States v. Fooladi, 746 F.2d 1027, 1030 (5th Cir.1984), cert. denied, --- U.S. ---, 105 S.Ct. 1362, 84 L.Ed.2d 382 (1985); United States v. Gray, 751 F.2d 733, 735 (5th Cir.1985).

[10] In light of this authority, appellants do not argue that the trial judge's failure to give a good faith defense instruction for Counts 1 and 5 demands reversal. Rather, they contend that the court's instruction approving a good faith defense for Counts 6-12 allowed the jury to infer that good faith was not a defense to Counts 1 and 5. We are not persuaded by this ingenious argument. It is unrealistic to believe that the jury would place such emphasis on a single sentence in a lengthy charge. The government did not argue to the jury that good faith was not a defense to Counts 1 and 5; in closing argument both the prosecution and the defense focused on whether the defendants acted in good faith. This issue was squarely put to the jury which decided it against the defendants.

V. CONCLUSION

Having rejected appellants' points of error on Count 5 of the indictment, we need not consider their contingent arguments relating to their convictions on Counts 1 and 12. The judgment of the district court is

AFFIRMED.

indictment / conviction - fraud, false statements to SBA

reversed due to bad reas. doubt instruction.

UNITED STATES of America, Plaintiff/Appellee,
v.
Harold T. WOSEPKA, Defendant/Appellant.

No. 83-3117.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 5, 1985.

Decided April 9, 1985.
As Modified July 9, 1985. [FN*]

FN* The order modifying this opinion is published at 787 F.2d 1294.

Defendant was convicted in the United States District Court for the Western District of Washington, Jack E. Tanner, J., of mail and wire fraud, false statements, and misapplying funds of small business investment company, and he appealed. The Court of Appeals, Ferguson, Circuit Judge, held that reasonable doubt instruction given by district court was inadequate.

Reversed and remanded.

[1] CRIMINAL LAW ⇐ 822(16)
110k822(16)
If district court's reasonable doubt charge, taken as a whole, does not fairly and accurately convey meaning of reasonable doubt, conviction must be reversed.

[2] CRIMINAL LAW ⇐ 789(2)
110k789(2)
Court's instruction on reasonable doubt, merely stating that reasonable doubt "is a doubt based on reason and common sense," and deleting critical language defining reasonable doubt in terms of "hesitation to act" and requiring jurors to decide question of guilt or innocence with same degree of care and attention they would bring to bear "in the most important of their own personal affairs" failed to provide jury with any meaningful principles or standards to guide it in evaluating sufficiency of Government's evidence.

[3] POSTAL SERVICE ⇐ 35(6)
306k35(6)
To establish offense of mail fraud, in addition to scheme to defraud, government must prove beyond reasonable doubt that defendant caused use of United States mails to execute scheme. 18 U.S.C.A. § 1341.

*1007 Robert Westinghouse, Harry McCarthy, Asst. U.S. Attys., Seattle, Wash., for plaintiff-appellee.

Mark O. Heaney, Los Angeles, Cal., for defendant-appellant.

Appeal from the United States District Court for the Western District of Washington.

Before FARRIS, ALARCON and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

The defendant, Harold T. Wosepka, contends that his convictions for mail and wire fraud, 18 U.S.C. §§ 1341, 1343, false statements, 18 U.S.C. § 1001, and misapplying the funds of a small business investment company, **18** U.S.C. § **657,** should be reversed because, inter alia, the reasonable doubt instruction given by the district court was inadequate. Given the circumstances of this case, we agree and reverse.

I.

The charges upon which Wosepka was convicted arose out of Wosepka's participation in a loan program operated by the Small Business Administration ("SBA") pursuant to the Small Business Investment Act of 1958 (the "Act"). 15 U.S.C. §§ 681-687.

Under the Act, the SBA is authorized to license privately owned investment companies with sufficient capital from private funds as Small Business Investment Companies (**"SBIC"s).** The purpose of an **SBIC** is to provide equity capital, long-term loans and management assistance to small business concerns. When adequately capitalized by private funds, an **SBIC** may gain access to SBA funds in amounts equal to up to four times the private capital of the **SBIC.** These SBA funds, known as "leverage funds," are provided in the form of a loan, typically for a ten year period, at interest rates determined by the Treasury Department's cost

of funds. Although it is independent and privately owned, an **SBIC** is subject to reporting requirements and annual examinations by the SBA. In short, an **SBIC** is a federally regulated investment company which lends the government's money as well as its own to small business concerns.

In 1978, Wosepka purchased all the stock of an **SBIC** named the Small Business Investment Company of America (the "Company"). After acquiring the Company, Wosepka sought the approval of the SBA for the transfer of ownership and control. Because the Company had been inactive for some time, the SBA required a fresh injection of private capital as a condition of any transfer of ownership.

In order to satisfy the SBA's requirement, Wosepka made a $268,719 deposit to the Company's account. This deposit was made possible by a complicated series of transactions which the government terms a "check kite"--a circular flow of nonsufficient funds checks culminating in an illusory deposit--and which Wosepka terms a valid series of close business transactions with real cash injected from a line of credit.

Wosepka then, on March 23, 1979, sent a letter to the SBA representing that a capital increase had been made and enclosing a balance sheet for the Company and a bank verification letter confirming that an unencumbered cash deposit of $268,719 had been made to the Company's account. Because of the private cash increase to the capital base of the Company, the SBA approved the license transfer to Wosepka and the Company also qualified for SBA leverage funding.

***1008** The Company, with its name changed to Trans-Am Bancorp, Inc. ("Trans-Am"), applied for leverage funds on March 27, 1979 ($500,000), August 9, 1979 ($450,000), August 30, 1979 ($500,000), and October 31, 1979 ($500,000). All applications were approved and funds totalling $1.95 million were wired by the SBA in four increments to Trans-Am's bank account in Oregon. The government claims that Wosepka then set up various loans to small businesses which resulted in most of the monies being routed back to corporations controlled by Wosepka or to his own private use.

Based upon these alleged transactions, a federal grand jury returned a thirty-two count indictment against Wosepka. Counts I through V each charged Wosepka with a separate mailing in execution of a scheme and artifice to defraud the SBA in violation of 18 U.S.C. § 1341 & § 2. (These included Wosepka's letter to the SBA of March 23, 1979 and its enclosed balance sheet and bank's verification letter (Count I) and the four form applications submitted to the SBA by Wosepka for leverage funds (Counts II through V)). Counts VI through IX charged Wosepka with causing four separate wirings of funds from the SBA totaling $1.95 million in violation of 18 U.S.C. § 1343 & § 2. Count X charged Wosepka with making a material false statement to the SBA in violation of 18 U.S.C. § 1001 when he represented that an increase in the private capital of the Company had been made by him. Counts XI through XXVIII charged Wosepka with misapplying the funds of Trans-Am in violation of **18** U.S.C. § **657** by making a series of sham loans which resulted in the return of a substantial portion of the funds to Wosepka and his designees. Counts XXIX through XXXII were dismissed by the district court on the government's motion after Wosepka's motion for their severance had been granted.

Wosepka pled not guilty to all counts of the indictment. During the course of a twelve-day trial, the government called thirty-eight witnesses and introduced approximately five hundred exhibits. Both Wosepka and the government submitted proposed "reasonable-doubt" instructions to the district court. The court declined to use either instruction and, over Wosepka's objection, gave no definition of reasonable doubt other than stating:

> Reasonable doubt, as the name implies, is a doubt based on reason and common sense.

The jury then returned guilty verdicts on all counts.

II.

Wosepka contends that, under the circumstances of this case, the district court's abbreviated reasonable-doubt instruction did not provide the jury with a sufficient basis to determine guilt or innocence and thus constitutes reversible error. Due to the complexity of the case and the conflicting evidence, we agree.

[1] "[A] society that values the good name and

freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." In re Winship, 397 U.S. 358, 363-64, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The reasonable-doubt standard is thus indispensable in our American scheme of criminal procedure. Id. at 364, 90 S.Ct. at 1072. It reduces "the risk of convictions resting on factual error" and "provides concrete substance for the presumption of innocence" which " 'lies at the foundation of the administration of our criminal law.' " Id. at 363, 90 S.Ct. at 1072 (quoting Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481 (1895)). Thus, if in reviewing the district court's reasonable-doubt charge we find that the charge taken as a whole does not fairly and accurately convey the meaning of a reasonable doubt, we must reverse. See Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954); United States v. Newport, 747 F.2d 1307, 1308 (9th Cir.1984).

The skeletal instruction on reasonable doubt given by the court in this case did not fairly or accurately convey the meaning of a reasonable doubt. Although the court ***1009** noted the government's burden to prove guilt beyond a reasonable doubt several times during the instructions, it failed to provide any meaningful explanation of the reasonable-doubt concept. The instructions submitted by both the government and Wosepka gave fuller treatments to the concept of reasonable doubt than that given by the court. The government's requested instruction explained, among other matters, that reasonable doubt is such a doubt as "would cause a reasonable person to hesitate or pause in the graver or more important transactions of life" and "is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt." Wosepka's proposed instruction explained that reasonable doubt is "the kind of doubt that would make a reasonable person hesitate to act" and that proof beyond a reasonable doubt must "be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs."

[2] The court, however, rejected both these instructions and gave its own shortened version. The court merely stated that reasonable doubt "is a doubt based on reason and common sense." The court, for no apparent reason, deleted critical language defining reasonable doubt in terms of a "hesitation to act" and requiring the jurors to decide the question of guilt or innocence with the same degree of care and attention they would bring to bear "in the most important of their own personal affairs." Given the complexity of this case, the court's abbreviated instruction failed to provide the jury with any meaningful principles or standards to guide it in evaluating the sufficiency of the government's evidence.

We do not find United States v. Witt, 648 F.2d 608 (9th Cir. 1981), to the contrary. Witt found that the trial judge's failure to provide a definition of reasonable doubt was not reversible error. It also noted that " 'an omission or an incomplete instruction is less likely to be prejudicial than a misstatement of the law.' " Witt, 648 F.2d at 610 (quoting Henderson v. Kibbe, 431 U.S. 145, 155, 97 S.Ct. 1730, 1737, 52 L.Ed.2d 203 (1977)). Wosepka involves an instruction which did not fairly or accurately convey the meaning of a reasonable doubt--an instruction Witt recognized as a potential ground for reversal. Furthermore, Witt does not authorize the elimination of explanatory reasonable-doubt instructions in all cases. The issues to be resolved by the jury in that case were fairly straightforward and the evidence was not complex. See 648 F.2d at 611. The Witt court clearly recognized this and limited its holding to the unique circumstances in that case. See 648 F.2d at 610-11 ("We hold that in this case the district court was not required to define reasonable doubt" and that a complete instruction as to the presumption of innocence was not required "under the circumstances of this case.") (emphasis added).

In contrast, the issues raised and the evidence presented in the present case concern disputed transactions. Such transactions, compounded by the vast amount of evidence presented, made it difficult to determine whether the requisite elements could be found beyond a reasonable doubt with respect to each offense. Indeed, the government called thirty-eight witnesses and introduced approximately five hundred exhibits during the twelve-day trial. The testimony of the FBI agent called by the government as a summary witness at the conclusion of its case-in-chief alone fills one hundred and forty-seven

pages of trial transcript.

[3] Furthermore, the inadequacy of the reasonable doubt instruction is clearly demonstrated by the jury's conviction of Wosepka on Counts II through V of the mail fraud counts. To establish an offense of mail fraud under 18 U.S.C. § 1341, in addition to a scheme to defraud, the government must prove beyond a reasonable doubt that Wosepka caused a use of the United States mails to execute the scheme. United States v. Beecroft, 608 F.2d 753, 757 (9th Cir.1979). With respect to the four applications for leverage funds submitted by Trans-Am to the SBA (which constitute the mailings charged in Counts II through V), the government presented no evidence of the use of the mails other than: (1) the conclusory "yes" of the SBA representative who processed the applications four years prior to trial in response to the prosecutor's questions of whether he had received the applications through the ***1010** mail; and (2) certain exhibits (two of which are applications for leverage funds which are the subjects of Counts IV and V) bearing SBA date and mail room stamps. The defendant introduced into evidence the cover letter accompanying the application that constitutes the mailing charged in Count II expressly stating that such application was delivered "via Federal Express." No evidence was presented by the government to show that Federal Express deliveries were not received and stamped in the SBA mail room. Because a use of Federal Express would not constitute a use of the United States mails, under these circumstances, given a proper reasonable-doubt instruction, a reasonable juror could have had a reasonable doubt with respect to the use of the mails. United States v. Clevenger, 733 F.2d 1356, 1358 (9th Cir.1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). Cf. United States v. Stull, 521 F.2d 687, 690 (6th Cir.1975), cert. denied, 423 U.S. 1059, 96 S.Ct. 794, 46 L.Ed.2d 649 (1976) (testimony of print shop owner that he received defendant's work orders through the mail four years prior to trial constituted "no more than a conclusion" and was insufficient to sustain conviction in light of other evidence presented). Considering Wosepka's evidence and the government's scarcity of proof, a fuller description of reasonable doubt was clearly necessary to guide the jury in its determination of whether the necessary elements for conviction were present.

III.

Given the circumstances of this case, the district court did not give a sufficient instruction on reasonable doubt. Even the government submitted a proposed reasonable doubt instruction much fuller and more detailed than that given by the court. The court's abbreviated instruction did not provide the guidance the jury needed in this complicated case.

"It was the duty of the court to safeguard the [defendant's] rights, a duty only it could have performed reliably." Taylor v. Kentucky, 436 U.S. 478, 489, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978). The skeletal reasonable-doubt instruction given by the district court was not sufficient to protect the defendant from erroneous conviction. See In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

We therefore REVERSE and REMAND for retrial.

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Single v multiple conspiracy - false entries to defraud SBA. Temporary investments in SBIC to falsely boost capitalization.

UNITED STATES of America, Plaintiff-Appellee,
v.
Glenn W. McMURRAY and R. Glade Whiting, Defendants-Appellants.

Nos. 78-1928, 78-1929.

United States Court of Appeals, Tenth Circuit.

Feb. 10, 1981.

Defendants were convicted in the United States District Court for the District of Utah, Central Division, William G. Juergens, J., of substantive and conspiratorial offenses in violation of the Small Business Investment Act, and they appealed. The Court of Appeals, William E. Doyle, Circuit Judge, 656 F.2d 540, affirmed, and rehearing en banc was sought. The Court of Appeals, Seth, Chief Judge, held, on rehearing, that where money was assembled in segments with different groups providing funds for sole purpose of supporting Small Business Administration applications for guaranty, there was but one conspiracy and thus Government was precluded from retrying defendants on conspiracy charges in view of previous conspiracy prosecutions and fact that members of two groups of "spoke" defendants were not found to have any connection did not mean that there were two separate conspiracies.

Reversed and remanded with directions.

William E. Doyle, Circuit Judge, dissented with opinion in which McWilliams and Barrett, Circuit Judges, concurred.

DOUBLE JEOPARDY ⇐ 151(2)
135Hk151(2)
Formerly 110k202(1)
Where money was assembled in segments with different groups providing funds for sole purpose of supporting Small Business Administration applications for guaranty, there was but one conspiracy and government was precluded from retrying defendants on conspiracy charges in view of previous conspiracy prosecutions and fact that members of two groups of "spoke" defendants were not found to have any connection did not mean that there were two separate conspiracies. **18** U.S.C.A. §§ 2, **1006**; Small Business Investment Act of 1958, § 303, 15 U.S.C.A. § 683.

***696** Keith Biesinger, Salt Lake City, Utah, for defendant-appellant Glenn W. McMurray.

Michael A. Neider, of Watkins & Faber, Salt Lake City, Utah, for defendant-appellant R. Glade Whiting.

William C. Hendricks, III, Atty., U. S. Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Before SETH, Chief Judge, and HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

On Rehearing En Banc

SETH, Chief Judge.

These are appeals from the District of Utah in number CR-77-11 wherein the appellants were convicted in a jury trial. The appellants McMurray and Whiting urge that errors were committed by the trial court in its denial of their motions for acquittal, and as to certain instructions. They also urge that there was not sufficient evidence to support the verdicts.

Appellants McMurray and Whiting assert that the trial court was in error in its denial of their motions to dismiss on the ground of double jeopardy. The cases were based on several indictments all relating to a Small Business Investment Company.

The grand jury handed down several indictments based on applications made by the Utah Capital Corporation, which was a Small Business Investment Company, to the Small Business Administration. Each indictment in identical language alleges a conspiracy to make false entries in reports and statements in violation of **18** U.S.C. ss **1006** and 2 to defraud the United States by frustrating the operation of the Small Business Administration. Substantive counts were also included in each.

Utah Capital was under the supervision of the Small Business Administration and was in the business of lending funds to small concerns. Under the statute (15 U.S.C. s 683) it could apply to the SBA to issue government guaranteed debentures.

The amount of such debentures which could be issued by Utah Capital depended on the total of its paid-in capital and surplus. For authorization to issue debentures, Utah Capital had to apply and did apply to the SBA by an Application for Guaranty. In this application it was required to state the amount of its paid-in capital and surplus.

The Government in the indictments alleged that the defendants conspired to falsely and fictitiously misrepresent the amount of Utah Capital's capital and surplus. This was alleged to have been done by making deposits in the corporate bank account of funds which in fact were not unencumbered corporate funds but were provided by a number of persons for temporary use to increase the corporate bank deposits to support an application to issue guaranteed debentures. These advances were by prearrangement returned to the individuals within a very short time. The ***697** application to the SBA was submitted at the time when the bank account of Utah Capital was so fictitiously increased.

The defendant McMurray was president and defendant Whiting was vice president of Utah Capital. Defendant Cassity was the attorney for the corporation. The record shows that the purpose of the conspiracy was to assemble funds in a certain agreed amount, deposit them in a bank, prepare and file the application with the SBA based on the then balance in the account, then return the funds to the individuals who had provided them for the described purpose.

The four indictments each named defendants McMurray, Whiting, and Cassity who came to be known as the "hub defendants." In each indictment there were named other defendants who it was asserted had conspired to provide one of the four segments of the total deposit. These "spoke" defendants were eight in number and were each named in but one indictment. For example, in the indictment which became case number CR-76-126, and was the first tried, defendants McMurray, Whiting, and Cassity were named with the "spoke" defendants Lindquist, Nemelka, and Solomon. It was there alleged that this group had provided $550,000.00 of the $2,185,000.00 deposit on May 21st for use in a SBA application. In CR-77-11 (the case before us) defendant Wilstead was named with McMurray, Whiting, and Cassity in providing $725,000.00, part of which was used in the same May 21st deposit of $2,185,000.00 and part used in a September deposit. The indictments in 76-126 and 77-11 both concern the same deposit to provide apparent support for the same SBA application.

In trial court case number CR-76-126 there were tried defendants McMurray, Whiting, and Cassity, the so-called "hub" defendants, as mentioned above, and others. In CR-76-126 Count I alleged a conspiracy and Counts II through V alleged false entries and aiding and abetting. After jeopardy had attached during the trial in 76-126 the court on the Government's motion dismissed all counts except the conspiracy count.

The jury in CR-76-126 acquitted defendant Cassity but convicted defendants McMurray, Whiting, and Nemelka. The convictions were appealed and became in this court 79-1655, 79-1654, and 79-1393. The cases were consolidated and the panel opinion was filed November 13, 1980.

The defendant Cassity who was acquitted in CR-76-126 was brought to trial under another of the four indictments in case CR-77-13. On motion of Cassity the trial court dismissed on the ground of double jeopardy arising from the trial in 76-126. We affirmed the dismissal on the Government's appeal in our 79-1077 with an opinion filed January 31, 1980.

The Government also sought to again try defendants McMurray and Whiting, who had been convicted in 76-126 on another of the four indictments as case number CR-77-11. Defendant Wilstead was tried in CR-77-11. He had not been tried before. The trial judge, who did not hear 77-13 (Cassity), denied the double jeopardy motions of defendants McMurray and Whiting and they went to trial. This denial, and the subsequent convictions, were appealed to this court and became numbers 78-1928, 78-1929, and 78-1930. The panel filed an opinion on March 5, 1980. 656 F.2d 540. Rehearing en banc was granted and this is the opinion on such rehearing.

We must hold that there was but one conspiracy and this was to amass the $2,185,000.00 for deposit to support the SBA application. It was assembled in segments with different groups providing funds for the purpose of supporting the Application for Guaranty. This was the objective of all the

arrangements.

The Government asserts that there was no connection directly between the two "spoke" groups here concerned (CR-76-126 and CR-77-11), and thus each acted independently with the "hub" group. The Government thus takes the view that each arrangement with a "spoke" group for a segment of the total deposit was a separate conspiracy. It thus moves back one step from the assembly of, and the making of ***698** the total deposit, and moves back from the submission of the application.

We are persuaded by the singleness of the ultimate objective of all the defendants. It was a narrow one and was to make the deposit to support the application to the SBA. It took a lot of arranging, some close timing, and a number of individuals to accomplish the objective, but again it was but one well defined objective. With each of the two "spoke" groups the subsidiary objective was to arrange for one segment or portion of the total deposit. The "spoke" group in CR-76-126 had no direct relationship with the group in CR-77-11; each was negotiated with separately by the "hub" group directly. All planning was directed by the "hub" defendants to the ultimate deposit and application.

In examining the scope of the conspiracy, we must look to the submission of the Application for Guaranty as the most important element. This submission was the basic aim of all the arrangements. The dollar total therein or in the supporting deposit is not significant for our purposes, but the submission was. It is apparent that all the convicted conspirators in CR-76-126 and CR- 77-11 entered into the sham investment plan to support an Application for Guaranty. The success of the application influenced the "spoke" defendants' compensation or that of most of them. The indictment alleged that the "spoke" defendants would receive loans for their participation. It is thus apparent that all the defendants in both cases were concerned with the success of the application, and the whole arrangement was dependent thereon.

The proof did not show that the "spoke" defendants had any contact or connection with other "spoke" defendants. Obviously the "hub" defendants were the same. Thus as the record before us stands, there is no showing of any connection or meetings between the two groups of "spoke" defendants.

Under the authorities it is not necessary that each conspirator agree with all others or even know of the others, or have contact with each of them. Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 S.Ct. 154, presents fundamental issues as to the admission of evidence and its impact on the various defendants. However, on the broader questions the Court stated that participants could be convicted upon a showing of the nature of the plan and their connections with it, and "without requiring evidence of knowledge of all its details or of the participation of others." The Court continued to demonstrate several details in the conspiracy which might be unknown to some of the conspirators. This included knowledge of the participation by the unknown owner of the whiskey in the arrangement. The Court also there stated:

> "By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

And further:

> "All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it and not merely to the integrating agreement with Weiss and Goldsmith."

In Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557, each loan was a separate transaction complete in itself each with a separate illegal purpose and end. The only connection shown was that Brown handled all the loan applications. Each was a direct transaction, and was not part of a chain of events common in drug conspiracies.

We must again refer to the single purpose of the arrangement for the temporary use of the "spoke" defendants' funds. The defendants in both cases knew of this purpose; this was the plan and the agreement. Again, it was not necessary for all to know the ultimate dollar figure. It was not necessary that all know the others involved in the same purpose-those who provided other ***699** dollars. The "hub" defendants dealt separately with

the groups in the accumulation of the funds, but all was for the same purpose and the separate dealings did not thereby create separate conspiracies. Nor could the Government by separate indictments divide up a single conspiracy. Thus we must hold that but one conspiracy has been shown to exist, and the defense of double jeopardy was valid.

It is apparent that the issue as to whether one or more conspiracies existed in the cases before us is to be resolved by an examination of the facts. The problem is a factual one and each case is unique. There are no general legal propositions which will decide all the cases; instead, an examination must be made on a case by case basis starting with the purpose of the conspiracy and how it was carried out. The agreement obviously is the central element of any conspiracy. The agreement includes the objective of the combination. The objective here was to defraud the SBA by the Application for Guaranty based on fictitious bank deposits. All the convicted defendants knew the objective-the purpose of the accumulation of funds, and all participated in attaining the objective. In the cases before us there were two groups seeking to accomplish the same ends. The several participants had somewhat different roles as we have described. The success of the agreement was to be the approval of the application, and all worked to this end. The facts before us with the clear objective-a single business transaction-which all participants were seeking to bring about present a very much clearer picture than do the many drug conspiracies which find their way to the courts. See, for example, our United States v. Martinez, 562 F.2d 633 (10th Cir.). We have here a limited time span with the same cast of characters throughout. The comparison must again be made with the facts in Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 S.Ct. 154, from which we have taken quotations in the preceding paragraphs. This was a conspiracy to sell whiskey provided by an unidentified owner which had come into the possession of Weiss and Goldsmith. The issue was whether there was one conspiracy to dispose of the whiskey or whether there were two conspiracies, one between Weiss-Goldsmith and the owner and another between Weiss-Goldsmith and the several salesmen. The Court decided there was one conspiracy and said:

> "All knew of and joined in the overriding scheme. All intended to aid the owner, whether Francisco or another, to sell the whiskey unlawfully, though the two groups of defendants differed on the proof in knowledge and belief concerning the owner's identity. All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it and not merely to the integrating agreement with Weiss and Goldsmith."

The defendants here all knew of the general plan, purpose, and aim, as we have mentioned. All were aware of the accumulation of funds for the May deposit and the purpose of the deposit. Some participated by providing different amounts of money as compared to the sales in Blumenthal of different quantities of whiskey. The knowledge, the awareness of the purpose and objective are the same in this case as in Blumenthal.

The judgments of conviction of defendant Glenn W. McMurray in CR-77-11 Utah (our number 78-1928) and of R. Glade Whiting in CR-77-11 Utah (our number 78-1929) are reversed and the cases remanded with directions to dismiss the actions and the indictments.

DOYLE, Judge, dissenting.

I respectfully dissent.

The problem is whether a prior adjudication forms a basis for claiming former jeopardy. The ultimate question is whether the several indictments involved one conspiracy or four, and so the cause has to be determined ***700** in relationship to the surrounding facts, with a view to deciding whether the indictments which are here being considered have an independent identity, or whether they are all part of a single conspiracy. The authorities, and particularly the decisions of the United States Supreme Court, must be examined and the standards and tests which are contained in those cases are to be applied to the solution.

I have no quarrel with the facts which are set forth in the majority opinion. I do feel, however, that some supplemental statement must be given for the purpose of showing the case in a light which shows my approach to the case.

On February 8, 1977, in the United States District Court for the District of Utah, an indictment was returned against Glenn W. McMurray, R. Glade Whiting, Donn E. Cassity and Robert H. Wilstead. This indictment alleged that the Small Business Administration, a United States agency charged with the administering of the Small Business Investment Act of 1958, was defrauded by the defendants. Appellants McMurray and Wilstead were convicted following a trial to a jury. Cassity was dismissed out. They were found guilty on a conspiracy count and on additional substantive counts which charged false entries in books and accounts. Two of the several substantive counts were dismissed during the trial.

McMurray and Whiting are referred to throughout the case as "hub" defendants. Wilstead, on the other hand, for the purposes of the conspiracy, is referred to as a so-called "spoke" defendant. The appeal by McMurray and Whiting pertains to their contention that the conspiracy is barred by the Fifth Amendment doctrine of former jeopardy. Various other errors are set forth in the briefs, but there is no necessity for treating these contentions here.

The instrument for carrying out the fraud was Utah Capital Corporation, which was a small business investment company organized by the hub defendants, and licensed by the SBA pursuant to 15 U.S.C. Sec. 681. McMurray was the President and Chairman of the Board of Directors of UCC, and Cassity was Legal Counsel; R. Glade Whiting was the Vice-President and Director.

The Small Business Administration sought to make private funds available to small businesses. At the same time it sought to insure the private financial interests of the owners of small business investment companies such as UCC. To achieve these purposes it guaranteed payments on debentures issued by the Small Business Administration, subject to the restriction that the total amount of debentures guaranteed at any time from an **SBIC** was not to exceed 200% of the combined private paid-in capital and paid-in surplus of the company. This feature is the key to the fraud that was perpetrated. Because of it the defendants sought to build up their apparent paid-in capital and surplus in order to be able to issue a greater amount of securities debentures. Following the grand jury investigation four indictments were returned, charging a total of eleven defendants. Three of these, McMurray, Whiting and Cassity, were charged in each of the four indictments, although they have not been prosecuted on all indictments. Wilstead and the other defendants, all of whom have been referred to as spoke participants in the conspiracy cases, were charged in one indictment each.

The several indictments described distinct transactions, so I contend; conspiracies to defraud the government and substantive offenses involving independent false entries in the books and records of the Utah Capital Corporation. McMurray and Whiting were charged in each of the indictments. They were the operators of UCC, and were the ones who apparently conceived the scheme. Wilstead participated only in this one transaction and had nothing to do with the prior transaction which occurred four months or so before. In this case his role was loaning the added funds to swell the paid-in capital.

Although its mechanics were the same, the amounts of money utilized and the other cover-up facts were generally distinct. ***701** The Small Business Administration was defrauded distinctly and independently in all four transactions; each group was charged with the making and receipt of a distinct sham investment in UCC. The investment was a substantial amount of money and was not retained by UCC. It was immediately returned to the contributing defendants by way of alleged sham loans to fictitious business entities. In truth these purported loans constituted the return of moneys that had been loaned for just long enough to mislead the Small Business Administration as to the amount of paid-in capital that the corporation had. There were false entries made in the books in order to support the fraud.

UCC qualified for matching funds guaranteed by the Small Business Administration, and upon its receipt of these guarantees each of the four capital providing groups was provided with accommodation loans as consideration for their previous participation. Wilstead was no exception.

The defendants McMurray and Whiting were charged with serving as a hub in arranging sham investments by various spoke defendants. There is no showing that one group of spoke defendants was familiar with the fact that there were other

transactions and other spoke participants.

In CR-76-126, United States District Court for the District of Utah, which charge is held to bar the offense here, the hub defendants and principals of UCC were charged with conspiracy to fictitiously increase UCC's paid-in capital and surplus in the amount of $550,000. The funds were raised by other defendants who were in no way involved here. They were Lindquist, Nemelka and Solomon, and the funds were reflected on UCC's books as an investment by Robert Solomon. Shortly after its receipt, the $550,000 became part of a larger $2,185,000 bank deposit, on May 21, 1973, which deposit was shown in UCC's application for guarantee submitted to the SBA on May 21, 1973. The $550,000 was withdrawn from UCC's bank account within a very short time after it was deposited. Thereafter the funds were returned to Solomon and Lindquist, according to plan, through a series of bogus loans made to sham corporations controlled by Solomon, Lindquist and Nemelka. In return for this circular capitalization process, defendants Solomon, Lindquist and Nemelka received other loans from UCC. This was to compensate them for the momentary use of the $750,000.

The transaction that is here being considered, which is the subject of the indictment, occurred some months later, September, 1973. This was CR-77-11 in the United States District Court for the District of Utah, with the same hub defendants and principals, being McMurray, Whiting and Cassity, with Wilstead being the spoke defendant and financier. They were alleged to have entered into a separate agreement to fictitiously increase UCC's paid-in capital surplus by $725,000. As a result of this agreement, $200,000 became part of the May 21, 1973 bank deposit, and $525,000 became part of a second application, made in September of 1973. These funds were almost immediately withdrawn from UCC's control and returned to defendant Wilstead, the spoke defendant, through the use of sham loans to corporations controlled by him. Thereafter Wilstead received other pay-off loans from UCC to compensate him for the temporary use of the $725,000.

Similar schemes were alleged to have occurred in CR-77-13, with defendants West and Jolly participating, and CR-77-16, with defendants Rigby and Lord participating. Both of these indictments were dismissed as to McMurray and Whiting. There was a degree of co-mingling of other funds in the September transaction which is CR-77-11 in the district court. In CR-76-126 the amount co-mingled on May 21, 1973 constituted 100% of the sham capitalization employed in the alleged conspiracy. In CR-77-11, however, the amount co-mingled on May 21, 1973, constituted only 20%, $200,000, of the total $725,000. This is attributable to the fact that the sham capitalization in CR-77-11 agreement continued up to the September, 1973 UCC application, whereas CR-76-126 had nothing to do with this later period.

***702** In June of 1978, CR-76-126, was tried to a jury before Chief Judge Fred M. Winner of the Colorado United States District Court. During the trial, on the government's motion, the court dismissed all counts of the indictment except the count of conspiracy. The jury returned verdicts of acquittal as to Cassity and guilt as to defendants McMurray and Whiting, and this is the basis for the present contention that former jeopardy precludes subsequent prosecution in the September transaction, which is the conviction which is being reviewed here.

The present case was tried to a jury in August of 1978, with the Honorable John Jurgens presiding. The jury returned verdicts of guilty as to conspiracy and as to Counts II, III, IV and VII, involving false entries and aiding and abetting, as to appellants McMurray, Whiting and Wilstead. Counts V and VI were dismissed on motion of the government. McMurray and Whiting, after entry of the judgments, moved the court for judgments of acquittal because of former jeopardy. These motions were denied, and they are now appealed.

The basic contention of the appellants is that the allegations of the various indictments are substantially identical and this called for treating the several incidents as a single conspiracy. Under their characterizations of the facts, there is only one agreement and objective, namely to obtain for UCC guaranteed debentures by allegedly increasing UCC's paid-in capital in connection with UCC's May, 1973, application for a guarantee. Since McMurray and Whiting were tried and convicted for this, they claim it is double jeopardy to convict them for the conspiracy which was established in the

present case.

The government's position is, of course, that the four original indictments each charge a separate and independent agreement. Although each agreement contemplated violation of the same statute, they were separate transactions and not part of a single grand jury scheme. Therefore, the government contends that conviction for the conspiracy charged in the separate cases does not constitute double jeopardy, and that is what this dissent is all about.

We now address the question whether the several frauds are a part of one single conspiracy or are to be regarded as independent transactions, because the result reached depends upon this analysis.

The mere fact that the same hub defendants are charged with being members of the two conspiracies and that both concerned transactions with the same subject matter and overlapped in time does not establish that they are the same for double jeopardy purposes. See United States v. Martinez, 562 F.2d 633 (10th Cir. 1977). The Government's argument, which to this writer is valid, is that although various different parties conspire with one common hub group of conspirators, the evidence may nevertheless show that separate conspiracies were involved, and that no one combination embraced the objectives of the others. United States v. Martinez; United States v. Butler, 494 F.2d 1246, 1255 (10th Cir. 1974); Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1945).

The scope of the agreement to do unlawful acts and the scope of the conspiracy gives the answer to our question. If the evidence reveals a single over-all agreement to carry out an illegal plan or goal, then a single conspiracy may very well exist. A single plan, however, requires more dependence between the participants, and general knowledge of the spoke defendants as to the scope of the scheme or plan. Thus, this is not like a conspiracy to possess and distribute heroin and to sell it to various people. This may very likely be one conspiracy while it lasts, and in each instance the sellers that "retail" know full well of the general conspiracy and that their particular sales serve that conspiracy. If the numerous defendants participating in a conspiracy are to be brought into the fundamental scheme it is necessary that there be facts present to justify bringing all of the conspirators within the single agreement. And it would have to appear also that all of the objectives were contemplated in the one conspiracy.

***703** The Supreme Court has spoken on this in positive terms in the case of Kotteakos v. United States, supra, which has facts which are similar to those before the court. The issue there was whether the petitioner suffered substantial prejudice from being convicted of a single general conspiracy by evidence which, as admitted by the government, proved to be not one conspiracy, but several of the same type and having the same subject matter, and did so through a common figure, as here. In Kotteakos the indictment alleged that one Brown was the central figure (the hub defendant) in a scheme to induce various financial institutions to grant credit with the intent that the loans or advancements would then be offered to the Federal Housing Administration for insurance upon applications containing false and fraudulent information. Brown pleaded guilty. He had acted as a broker for others in placing the loans, and charged five percent commission for his services. Brown obtained loans for several persons and groups of persons named in the original conspiracy indictment. The Supreme Court concluded:

> The evidence against the other defendants whose cases were submitted to the jury was similar in character. They too had transacted business with Brown relating to National Housing Act loans. But no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction. As the Circuit Court of Appeals said, there were "at least eight, and perhaps more, separate and independent groups, none of which had any connection with any other, though all dealt independently with Brown as their agent." (United States v. Lekacos,) 151 F.2d (170) at 172 ((2nd Cir.)). As the Government puts it, the pattern was "that of separate spokes meeting in a common center," though, we may add, without the rim of the wheel to enclose the spokes.

The Supreme Court further said (328 U.S. at 768, 66 S.Ct. at 1249):

> The trial court was of the view that one conspiracy was made out by showing that each defendant was

linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of the purpose presented in the various applications for the loans.

This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous, separate adventures of like character.

The Supreme Court concluded that the petitioners before it had suffered substantial prejudice by being convicted of a single general conspiracy on evidence which the government admitted proved not one conspiracy, but some eight or more. The ruling was believed necessary in order to protect each defendant's right to have guilt determined on an individual basis, and thereby to avoid the dangers of transference of guilt from one defendant to another across lines separating conspiracies. We submit that if a single conspiracy for the four transactions had been here charged, and the trial had been on that theory, the defendants would be here protesting that they were being prejudiced by several conspiracies; that they were convicted of one conspiracy when, in truth, there were several, and they were thereby prejudiced. Therefore, the government is placed in a situation in which there will be protests regardless of how it proceeds.

Another Supreme Court decision which deals with this general problem is Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 S.Ct. 154 (1947). There, four petitioners and another defendant were convicted of conspiring to sell whiskey at prices above the ceiling set by regulations of the Price Administration, in violation of the Emergency Price Control Act. The evidence showed that each of the defendants had a part in arranging sales and deliveries of portions of two larger shipments of liquor ***704** to purchasers. The defendants were intermediaries between an unknown owner of the liquor and the tavernkeepers. The indictments alleged a single conspiracy. The issue considered by the Supreme Court was whether the evidence established that there was more than one conspiracy.

It is of interest to note that the defendants in the Blumenthal case who were intermediaries between an unknown owner of the liquor and the tavernkeepers were alleged to have acted pursuant to a single conspiracy. The issue addressed by the Supreme Court was whether the evidence established multiple conspiracies, and thus ran counter to Kotteakos.

The ruling of the court stemmed from the concept that the five defendants joined in a single conspiracy to sell whiskey at excessive prices and did so in the guise of legal sales, and the agreements involved were merely steps in the formation of the larger and ultimately general scheme. The court said the scheme was, in fact, the same one. The court added that the determining factor was that the salesmen knew, or must have known, that others unknown to them were sharing in so large a project. The court said further that by their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, even though they did not know its exact limits. Blumenthal differed from the Kotteakos case in that in the latter each loan was an end in itself, separate from others, although were alike in having similar illegal objects. With the exception of Brown, the common figure, no conspirator was interested in whether any loan, except his own, went through, and no one aided in any way, by agreement or otherwise, in procuring another's loan. The court concluded:

The conspiracies, therefore, were distinct and disconnected, not part of the larger general scheme, both in the phase with Brown and in the absence of any aid given to any others, as well as in specific object and result.

The court also said there was no drawing of all (participants) together in a single, over-all comprehensive plan.

It is to be concluded from reading the above two decisions that the distinguishing feature in this type of case is some knowledge on the part of the spoke participants as to the general scope of the alleged goals of the general conspiracy. One cannot be said to agree to join a conspiracy to achieve illegal objectives without general knowledge of the scope of a larger plan and what is involved in the plan. Thus, there must be interdependence among the conspirators in reaching the ultimate objective of the conspiracy, and this serves as a basis for imputing knowledge of the larger plan to peripheral participants and ties all of them together in one scheme.

But in the case before us there is a complete lack of evidence as to the knowledge of the spoke defendants of the other transactions. None of the defendants charged with putting up the money, which was the main feature in the conspiracy in four separate indictments, had any knowledge that McMurray and Whiting were engaged in any similar transactions involving the money of other people, which transactions also misled the Small Business Administration. The separate transactions appear to have proceeded independently and to have had, as well, an independent character and identity. The success or failure of each transaction was not dependent upon the success or failure of the others.

The facts of the case here are very close to those in Kotteakos, where a core group of individuals was involved in distinct transactions with a variety of unrelated other persons.

This court in Bartlett v. United States, 166 F.2d 928 (10th Cir. 1948) considered a fact situation in which the appellants, along with another individual, were convicted under a charge of conspiracy to violate federal laws having to do with the rationing of sugar. They had previously been convicted on a conspiracy charge involving another scheme to manipulate entries of credit in the sugar account. They contended that double jeopardy precluded the second conviction. This court disagreed. It determined that the evidence justified the conclusion that separate agreements were entered into, rather than that there was a ***705** single large conspiracy. The test for determining whether the offenses charged were identical was stated to be whether the facts alleged in one, if offered in support of the other, would sustain a conviction. When one indictment requires proof of a fact which the other indictment does not, the conclusion is that the several offenses charged are not identical for double jeopardy purposes.

The same evidence test is admittedly broader than the test that is discussed by the Supreme Court in Kotteakos and Blumenthal, but it nevertheless has been used to a great extent, even though recently there has been some criticism of it. See United States v. Papa, 533 F.2d 815 (2nd Cir. 1976); cert. denied 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329. The criticisms have been made in the course of considering narcotics conspiracies, and in those cases there is potential for prosecutorial splitting of conspiracies, due to the nature of the relationships involved. It would appear that in narcotics cases it has been regarded more logical to proceed on the theory of the conspiracy being one rather than several. In the Papa case the claim of double jeopardy was raised when the defendant was convicted of a charge of conspiring to traffic in narcotics. He claimed the conviction was barred because of a previous conviction on a guilty plea to another indictment which involved conspiracy to traffic in narcotics. The court found that the defendant was the director of two unrelated chains distributing narcotics, and the mere fact that he supervised each did not transform two separate conspiracies into one.

A more recent case in the Second Circuit is United States v. DeFillipo, 590 F.2d 1228 (2d Cir. 1979), cert. denied 442 U.S. 920, 99 S.Ct. 2844, 61 L.Ed.2d 288. The court there recognized that the government was not empowered to prosecute a defendant for conspiracy twice where there is a single agreement, but two crimes. The court rejected, however, the defendant's double jeopardy argument, because it determined that there were two separate distinct conspiracies to commit the same substantive offense, and although it acknowledged that the same evidence test was not necessarily applicable, it considered the relationship to be two transactions. It held that there had been independent agreements involved in each case, rather than one continuing conspiracy.

In summary, the evidence here discloses independent transactions, the use of independent funds in the fraud and the obtaining of an independent result. The spoke defendant Wilstead is not shown to have known of other transactions. The two transactions here being scrutinized occurred at different times with a different financier, and a distinct act of misleading the Small Business Administration.

After all, the ultimate question should be whether the transactions are identical whereby an adjudication of one bars the other. I maintain that the facts show that each of these has its own identity.

I am authorized to state that Circuit Judge McWILLIAMS and Circuit Judge BARRETT concur in the foregoing dissent.

If SBA had known → approval?

Purpose of loan. (Tucker) CS&W appl.

⇒ proceeds for init operating capital, → funct. op. + down payment
maint & painting of storage tank.

SBIC → financial institution

* Collateral

§ 1341 –

UNITED STATES of America, Plaintiff-Appellee,
v.
J. Frank HANCOCK, Defendant-Appellant.

No. 28067.

United States Court of Appeals, Fifth Circuit.

April 28, 1971, Rehearing Denied May 27, 1971.

Defendant was convicted before the United States District Court for the Middle District of Florida, Joseph P. Leib, Chief Judge, of embezzling, abstracting, and willfully misapplying small business investment company funds, and he appealed. The Court of Appeals, John R. Brown, Chief Judge, held that evidence on issue whether funds were property of small business investment corporation at time funds were acquired by corporate organizer, who had engineered series of corporate loans entailing direct or circuitous repayments to himself, supported conviction.

Affirmed.

[1] CRIMINAL LAW ⇐ 629(3.1)
110k629(3.1)
Formerly 110k629
Denial of defendant's motions for list of government witnesses and discovery order for purpose of taking their depositions did not violate his rights under the Fifth and Sixth Amendments; but, in any event, defendant was not prejudiced where all of the major witnesses were individuals with whom defendant had had significant personal or financial relations and it did not appear that list would have materially aided him in preparation of defense. U.S.C.A.Const. Amends. 5, 6.

[1] CRIMINAL LAW ⇐ 1166(11)
110k1166(11)
Denial of defendant's motions for list of government witnesses and discovery order for purpose of taking their depositions did not violate his rights under the Fifth and Sixth Amendments; but, in any event, defendant was not prejudiced where all of the major witnesses were individuals with whom defendant had had significant personal or financial relations and it did not appear that list would have materially aided him in preparation of defense. U.S.C.A.Const. Amends. 5, 6.

[2] CRIMINAL LAW ⇐ 629(3.1)
110k629(3.1)
Formerly 110k629
Apart from congressionally created exception in capital cases, granting of defense request for list of adverse witnesses is a matter of judicial discretion, and the denial can be challenged only for abuse. 18 U.S.C.A. § 3432.

[3] CRIMINAL LAW ⇐ 627.5(1)
110k627.5(1)
Discovery in criminal prosecutions is narrower than it is in civil cases.

[4] EMBEZZLEMENT ⇐ 20
146k20
Phrase "small business investment company" as used in statute making it offense to improperly receive or use funds belonging to small business investment company refers only to those businesses licensed under Small Business Investment Act. 18 U.S.C.A. § 657.

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

[5] CRIMINAL LAW ⇐ 29(3)
110k29(3)
Formerly 110k29
It was for prosecutorial discretion whether to charge small business investment corporation organizer, who engineered series of corporate loans entailing direct or circuitous repayments to himself, either under statute governing fraudulent misapplication of funds or under statute prescribing fraudulent receipt. 18 U.S.C.A. §§ 657, 1006.

[6] EMBEZZLEMENT ⇐ 44(1)
146k44(1)
Evidence on issue whether funds were property of small business investment corporation at time funds were acquired by corporate organizer, who had engineered series of corporate loans entailing direct or circuitous repayments to himself, supported conviction of embezzling, abstracting, and willfully misapplying small business investment company funds. 18 U.S.C.A. § 657.

***1286** Loyd C. Mosley, N. S. Gould, Clearwater, Fla., for defendant-appellant.

John L. Briggs, U.S. Atty., Thomas G. Wilson,

Special Asst. U.S Atty., Hugh N. Smith, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Before JOHN R. BROWN, Chief Judge, and WISDOM and MORGAN, Circuit judges.

JOHN R. BROWN, Chief Judge:

J. Frank Hancock, former president and principal organizer of the Clearwater Capital Corporation, was charged in a nine count indictment with embezzling, abstracting, and willfully misapplying small business investment company funds in violation of 18 U.S.C.A. 657. Following a jury trial he was convicted and sentenced to concurrent five-year terms on all counts. We affirm.

Initially Hancock alleges error of constitutional dimensions by asserting that the Trial Court's denial of his motions for a list of government witnesses and a discovery order for the purpose of taking their depositions violated his rights under the Fifth and Sixth Amendments. We reject this contention. Apart from the Congressionally created exception in capital cases, /1/ the granting of a defense request for a list of adverse witnesses is a matter of judicial discretion, and a denial can be challenged only for abuse. O'Neal v. United States, 5 Cir., 1969, 411 F.2d 131, 138, cert. denied, 396 U.S. 827, 90 S.Ct. 72, 24 L.Ed.2d 77; Downing v. United States, 5 Cir., 1965, 348 F.2d 594, 599, cert. denied, 382 U.S. 901, 86 S.Ct. 235, 15 L.Ed.2d 155. All of the major witnesses were individuals with whom the defendant had had significant personal or financial relations, and it does not appear that the list would have ***1287** materially aided him in the preparation of his defense.

Likewise, with the scope of discovery in criminal prosecutions narrower than it is in civil cases, Campbell v. Eastland, 5 Cir., 1962, 307 F.2d 478, 487, cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502, and in the absence of a rule which permits the taking of depositions of witnesses who will appear at the trial of a criminal case, we cannot say at this juncture that such a procedure has yet been elevated to a constitutional plane even though some states have been fit to adopt it.[FN2] It any event the defendant's relationship with the prospective witnesses preculdes a finding that he was prejudiced by the denial of his motion for discovery.

[4] Appellant also asserts that 657 is fatally defective-- presumably on grounds of vagueness-- because it does not explicitly define the phrase 'small business investment company,' and that this omission can be cured only by the indictment's unwarrnated addition of the words 'licensed under the Small Business Investment Act.' Since Title VII of the Small Business Investment Act of 1958[FN3] amended the related criminal provision, we think it clear that the reference in 657 is only to those businesses licensed under the Act, rather than to all small businesses generally. Clearwater Capital Corporation is thus a 'small business investment company' designated by 657.

[5] As for Appellant's argument that he could more appropriately have been charged under 18 U.S.C.A. 1006,[FN4] the obvious answer is that a criminal defendant has no choice in the matter. Prosecutorial decisions of this nature are wholly matters of Executive discretion. United States v. Cox, 5 Cir., 1965, 342 F.2d 167 (en banc), cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700.

[6] Finally Appellant mounts a frontal assault on the sufficiency of the evidence, contending that the funds were not the property of the corporation at the time he acquired them. We think it clear from a careful reading of the record that there was ample evidence from which the jury could have concluded that the defendant had engineered a series of corporate loans entailing direct or circuitous repayments to himself, in which the borrowers-- all personal or business acquaintances-- were mere conduits through which the funds were ultimately rechanneled for his use of benefit, not the least of the benefits being that the equity capital required by the organizers of a small business investment company came from loans made by the company after it was set up. The predictable result of these transactions was that Hancock benefited and Clearwater Capital Corporation went into receivership. The evidence amply supports a finding of misapplication of corporate funds with criminal implications.[FN5]

Affirmed.

FN1. 18 U.S.C.A. 3432.

FN2. Fla.R.Crim.P. 1.220, 33 F.S.A.

FN3. 'Section 657 of title 18, United States Code, is amended by inserting after 'Federal Savings and Loan Insurance Corporation,' the following: 'or any small business investment company." 72 Stat. 689, 698 (1958).

FN4. Fraudulent misapplication of funds is the essence of 657, while 1006 proscribes fraudulent receipt. United States v. Weaver, 7 Cir., 1966, 360 F.2d 903, 904.

FN5. We need not here belabor the technical and perhaps somewhat illusory distinctions between the terms 'embezzle,' 'abstract,' 'purloin,' and 'willfully misapply,' a problem we considered under the identical provisions of 656 in Williamson v. United States, 5 Cir., 1964, 332 F.2d 123, 133. The Trial Court's instructions incorporated adequate definitions, and we think the jury might properly have concluded that the acts charged fell within any or all of these prohibitions.

END OF DOCUMENT

§ 19. Petty offense defined

As used in this title, the term "petty offense" means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization.

(Added Pub.L. 100–185, § 4(a), Dec. 11, 1987, 101 Stat. 1279, and amended Pub.L. 100–690, Title VII, § 7089(a), Nov. 18, 1988, 102 Stat. 4409.)

HISTORICAL AND STATUTORY NOTES

1988 Amendment

Pub.L. 100–690 inserted ", for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization" after "infraction".

Legislative History

For legislative history and purpose of Pub.L. 100–185, see 1987 U.S.Code Cong. and Adm. News, p. 2137. See, also, Pub.L. 100–690, 1988 U.S.Code Cong. and Adm.News, p. 5937.

NOTES OF DECISIONS

Sentences 1
Trial by jury 2

1. Sentences

Petty offense constitutionally can include sentences of up to six months for criminal contempt. In re Betts, C.D.Ill.1990, 730 F.Supp. 942, reversed 927 F.2d 983, on remand 770 F.Supp 457.

2. Trial by jury

To same effect as U.S. v. Kovel, 908 F.2d 205, this note number, see Matter of Betts, C.A.7 (Ill.) 1991, 927 F.2d 983.

Statute defining the term "petty offense" did not create entitlement to jury trial, even in cases of criminal contempt where prison sentence might be imposed; purpose of statute was simply to limit prison time for crimes covered by section to six months, without forbidding it, and to put $5,000 cap on permissible fines. U.S. v. Kozel, C.A.7 (Ill.) 1990, 908 F.2d 205, certiorari denied 111 S.Ct. 969, 498 U.S. 1089, 112 L.Ed.2d 1055.

§ 20. Financial institution defined

As used in this title, the term "financial institution" means—

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act; or

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978).

(Added Oct. 12, 1984, Pub.L. 98–473, Title II, § 1107(a), 98 Stat. 2145, § 215(c); renumbered § 215(b) and amended Aug. 4, 1986, Pub.L. 99–370, § 2, 100 Stat. 779; renumbered § 20 and amended Aug. 9, 1989, Pub.L. 101–73, Title IX, § 962(e)(1), (2), 103 Stat. 503; Nov. 29, 1990, Pub.L. 101–647, Title XXV, § 2597(a), 104 Stat. 4908.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 3 of the Federal Deposit Insurance Act, referred to in pars. (1) and (6), is classified to section 1813 of Title 12, Banks and Banking.

Section 5.35(3), of the Farm Credit Act of 1971, referred to in par. (4), is classified to section 2271(3) of Title 12.

Section 25 of the Federal Reserve Act, referred to in par. (8), is classified to subchapter I (section 601 et seq.) of chapter 6 of Title 12, Banks and Banking.

Section 25(a) of the Federal Reserve Act, referred to in par. (8), is classified to subchapter II (section 611 et seq.) of chapter 6 of Title 12.

Section 1(b) of the International Banking Act of 1978, referred to in par. (9), is classified to section 3101 of Title 12.

1990 Amendment

Pars. (7)–(9). Pub.L. 101–647 added pars. (7) to (9).

1989 Amendment

Pub.L. 101–73 transferred former subsection (b) of section 215 of this title to this section and, in this section as so transferred, added section heading, in provisions preceding par. (1) struck out former "(b)" designation and substituted "this title" for "this section", in par. (1) substituted "an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act)" for "a bank with deposits insured by the Federal Deposit Insurance Corporation", redesignated pars. (3) to (7) as (2) to (6), respectively, and struck out former par. (2), reading "an institution with accounts insured by the Federal Savings and Loan Insurance Corporation", in par. (4), as so redesignated, substituted "a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971 Federal intermedia eratives production eral land bank as redesignated, subs tion holding comp 3(w)(1) of the Fed for "a bank holdin tion 2 of the Bank (12 U.S.C. 1841); reading "a savings defined in section Act (12 U.S.C. 173

1986 Amendment

Pub.L. 99–370 e the definition of "f

Separability of Pr

If any provision cation thereof to a held invalid, the re the application of not similarly situa not to be affected Pub.L. 101–73, se 1811 of Title 12, B

Legislative Histo

For legislative 101–73, see 1989 News, p. 86. Se U.S.Code Cong. a

FEDERAL SENTENCING GUIDELINE

See §§ 2B1.1, 2B4.1, 2F1.1.

CHAPTER 2—AIRCRAFT AND MOTOR

§ 31. Definitions

When used in this chapter the term—

"Aircraft engine", "air navigation facility", "appliance", "commerce", "interstate air commerce", "landing area", "over peller", "spare part" and "special aircraft jurisdiction of the the meaning ascribed to those terms in the Federal Aviation

"Motor vehicle" means every description of carriage or oth drawn by mechanical power and used for commercial purpos transportation of passengers, passengers and property, or p

"Destructive substance" means any explosive substance, fl machine, or other chemical, mechanical, or radioactive device contaminative, corrosive, or explosive nature;

"Used for commercial purposes" means the carriage of pe fare, fee, rate, charge or other consideration, or directly or in any business, or other undertaking intended for profit;

"In flight" means any time from the moment all the exter closed following embarkation until the moment when any disembarkation. In the case of a forced landing the flight s until competent authorities take over the responsibility for t and property on board; and

"In service" means any time from the beginning of pr aircraft by ground personnel or by the crew for a specific fli

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which the maximum fine is no greater than the
in section 3571(b)(6) or (7) in the case of an
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101 Stat. 1279, and amended Pub.L. 100–690, Title VII,

ND STATUTORY NOTES

Legislative History

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OF DECISIONS

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cial institution" means—

tion (as defined in section 3(c)(2) of the Federal

s insured by the National Credit Union Share

a member, as defined in section 2 of the Federal
1422), of the Federal home loan bank system;
Farm Credit System, as defined in section 5.35(3)

company, as defined in section 103 of the Small
(15 U.S.C. 662);

ing company (as defined in section 3(w)(1) of the

a member bank of the Federal Reserve System;
nder section 25 or section 25(a) of the Federal

foreign bank (as such terms are defined in
1(b) of the International Banking Act of 1978).

e II, § 1107(a), 98 Stat. 2145, § 215(c); renumbered
L. 99–370, § 2, 100 Stat. 779; renumbered § 20 and
IX, § 962(e)(1), (2), 103 Stat. 503; Nov. 29, 1990, Pub.L.
8.)

ND STATUTORY NOTES

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Section 25(a) of the Federal Reserve Act, referred to in par. (8), is classified to subchapter II (section 611 et seq.) of chapter 6 of Title 12.

Section 1(b) of the International Banking Act of 1978, referred to in par. (9), is classified to section 3101 of Title 12.

1990 Amendment

Pars. (7)–(9). Pub.L. 101–647 added pars. (7) to (9).

1989 Amendment

Pub.L. 101–73 transferred former subsection (b) of section 215 of this title to this section and, in this section as so transferred, added section heading, in provisions preceding par. (1) struck out former "(b)" designation and substituted "this title" for "this section", in par. (1) substituted "an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act)" for "a bank with deposits insured by the Federal Deposit Insurance Corporation", redesignated pars. (3) to (7) as (2) to (6), respectively, and struck out former par. (2), reading "an institution with accounts insured by the Federal Savings and Loan Insurance Corporation", in par. (4), as so redesignated, substituted "a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971" for "a Federal land bank, Federal intermediate credit bank, bank for cooperatives production credit association, and Federal land bank association", in par. (6), as so redesignated, substituted "a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act." for "a bank holding company as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841); or", and struck out par. (8), reading "a savings and loan holding company as defined in section 408 of the National Housing Act (12 U.S.C. 1730a)".

1986 Amendment

Pub.L. 99–370 expanded and generally revised the definition of "financial institution".

Separability of Provisions

If any provision of Pub.L. 101–73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101–73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101–73, set out as a note under section 1811 of Title 12, Banks and Banking.

Legislative History

For legislative history and purpose of Pub.L. 101–73, see 1989 U.S.Code Cong. and Adm. News, p. 86. See, also, Pub.L. 101–647, 1990 U.S.Code Cong. and Adm.News, p. 6472.

FEDERAL SENTENCING GUIDELINES

See §§ 2B1.1, 2B4.1, 2F1.1.

CHAPTER 2—AIRCRAFT AND MOTOR VEHICLES

§ 31. Definitions

When used in this chapter the term—

"Aircraft engine", "air navigation facility", "appliance", "civil aircraft", "foreign air commerce", "interstate air commerce", "landing area", "overseas air commerce", "propeller", "spare part" and "special aircraft jurisdiction of the United States" shall have the meaning ascribed to those terms in the Federal Aviation Act of 1958, as amended.

"Motor vehicle" means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo;

"Destructive substance" means any explosive substance, flammable material, infernal machine, or other chemical, mechanical, or radioactive device or matter of a combustible, contaminative, corrosive, or explosive nature;

"Used for commercial purposes" means the carriage of persons or property for any fare, fee, rate, charge or other consideration, or directly or indirectly in connection with any business, or other undertaking intended for profit;

"In flight" means any time from the moment all the external doors of an aircraft are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing the flight shall be deemed to continue until competent authorities take over the responsibility for the aircraft and the persons and property on board; and

"In service" means any time from the beginning of preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours

UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS

98th Congress—Second Session 1984

Convened January 23, 1984

Adjourned October 12, 1984

Volume 2

PUBLIC LAWS 98–473 to 98–623
[98 Stat. pages 1837 to 3414]
PRIVATE LAWS 98–47, 98–53

LEGISLATIVE HISTORY
[PUBLIC LAWS 98–216 to 98–276]

ST. PAUL, MINN.
WEST PUBLISHING CO.

PUBLIC LAW 98-473 [H.J.Res. 648]; October 12, 1984

CONTINUING APPROPRIATIONS, 1985—COMPREHENSIVE CRIME CONTROL ACT OF 1984

For Legislative History of Act, see p. 3182

Joint Resolution making continuing appropriations for the fiscal year 1985, and for other purposes.

TITLE I

That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1985, and for other purposes, namely:

Agriculture, rural development appropriations.

SEC. 101. (a) Such sums as may be necessary for programs, projects, or activities provided for in the Agriculture, Rural Development and Related Agencies Appropriation Act, 1985 (H.R. 5743), to the extent and in the manner provided for in the conference report and joint explanatory statement of the Committee of Conference (House Report Numbered 98-1071), filed in the House of Representatives on September 25, 1984, as if such Act had been enacted into law.

D.C. appropriations.

(b) Such sums as may be necessary for programs, projects, or activities provided for in the District of Columbia Appropriation Act, 1985 (H.R. 5899), to the extent and in the manner provided for in the conference report and joint explanatory statement of the Committee of Conference (House Report Numbered 98-1088), filed in the House of Representatives on September 26, 1984, as if such Act had been enacted into law.

Post, p. 1838.

(c) Such amounts as may be necessary for programs, projects or activities provided for in the Department of the Interior and Related Agencies Appropriations Act, 1985, at a rate of operations and to the extent and in the manner provided as follows, to be effective as if it had been enacted into law as the regular appropriation Act:

PART N—RACKETEERING IN OBSCENE MATTER

SEC. 1020. Section 1961(1) of title 18, United States Code, is amended— *Ante*, p. 2136.

(1) in clause (A) by inserting after "extortion," the following: "dealing in obscene matter,"; and

(2) in clause (B) by inserting after "section 1343 (relating to wire fraud)," the following: "sections 1461-1465 (relating to obscene matter),".

CHAPTER XI—SERIOUS NONVIOLENT OFFENSES

Crimes and misdemeanors. Penalties.

PART B—WARNING THE SUBJECT OF A SEARCH

SEC. 1103. Section 2232 of title 18 of the United States Code is amended—

(a) by deleting in the first paragraph "shall be fined not more than $2,000 or imprisoned not more than one year, or both" and inserting in lieu thereof "shall be fined not more than $10,000 or imprisoned more than five years, or both;

(b) by adding a new paragraph as follows:

"Whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined not more than $10,000 or imprisoned not more than five years, or both.".

PART C—PROGRAM FRAUD AND BRIBERY

SEC. 1104. (a) Chapter 31 of title 18 of the United States Code is amended by adding a new section 666 as follows:

State and local governments. 18 USC 666.

"§ 666. Theft or bribery concerning programs receiving Federal funds

"(a) Whoever, being an agent of an organization, or of a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000 or an amount equal to twice that which was obtained in violation of this subsection, whichever is greater, or both so imprisoned and fined.

"(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not

"(1) the term 'counterfeited' means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

"(2) the term 'forged' means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

"(3) the term 'security' means—

"(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693(c)), money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property; 15 USC 1693n.

"(B) an instrument evidencing ownership of goods, wares, or merchandise;

"(C) any other written instrument commonly known as a security;

"(D) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or

"(E) a blank form of any of the foregoing;

"(4) the term 'organization' means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association or persons which operates in or the activities of which affect interstate or foreign commerce; and

"(5) the term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.".

(b) The analysis at the beginning of chapter 25 of title 18 is amended by adding after the item relating to section 509 the following:

"510. Securities of the State and private entities.".

Part E—Receipt of Stolen Bank Property

Sec. 1106. Subsection (c) of section 2113 of title 18 is amended to read as follows:

"(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.".

Part F—Bank Bribery

Sec. 1107. (a) Section 215 of title 18 is amended to read as follows:

"(a) Whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, except as provided by law, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value, for himself or for any other person or entity, other than such financial institution, from any person or entity for or in connection with any transaction or business of such financial institution; or

"(b) Whoever, except as provided by law, directly or indirectly, gives, offers, or promises anything of value to any officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, or offers or promises any such officer, director, employee, agent, or attorney to give anything of value to any person or entity, other than such financial institution, for or in connection with any transaction or business of such financial institution, shall be fined not more than $5,000 or three times the value of anything offered, asked, given, received, or agreed to be given or received, whichever is greater, or imprisoned not more than five years, or both; but if the value of anything offered, asked, given, received, or agreed to be given or received does not exceed $100, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(c) As used in this section—

"(1) 'financial institution' means—

"(A) any bank the deposits of which are insured by the Federal Deposit Insurance Corporation;

"(B) any member, as defined in section 2 of the Federal Home Loan Bank Act, as amended, of the Federal Home Loan Bank System and any Federal Home Loan Bank;

12 USC 1422.

"(C) any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;

"(D) any credit union the accounts of which are insured by the Administrator of the National Credit Union Administration;

"(E) any Federal land bank, Federal land bank association, Federal intermediate credit bank, production credit association, bank for cooperatives; and

"(F) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); and

"(2) 'bank holding company' or 'savings and loan holding company' means any person, corporation, partnership, business trust, association or similar organization which controls a financial institution in such a manner as to be a bank holding company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956 (12 U.S.C. 1841) or the Savings and Loan Holding Company Amendments of 1967 (12 U.S.C. 1730a).

12 USC 1841 note.

"(d) This section shall not apply to the payment by a financial institution of the usual salary or director's fee paid to an officer, director, employee, agent, or attorney thereof, or to a reasonable fee paid by such financial institution to such officer, director, employee, agent, or attorney for services rendered to such financial institution.".

12 USC 1701 note.

Repeal.

(b) Section 216 of title 18 is repealed, and the section analysis of chapter 11 for section 216 be amended to read:

18 USC 216.

"216. Repealed.".

18 U.S.C. § 1001
1001

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL

1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D. C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: 10/11/95

TO: ERIC JASO

Company Name: OIC-LR

Fax Number: _____ Telephone Number: _____

FROM: ALEX AZAR

Number of Pages: 20 (including this cover sheet)

Message: _____

CONFIDENTIALITY NOTE

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-- DRAFT 3/1/95 --

MEMORANDUM

TO: Alex Azar

FROM: Rajeev Duggal

DATE: March 1, 1995

RE: Research Regarding 18 U.S.C. § 1001

Summary

You have requested preliminary research regarding the issue of whether or not an official of the Executive Branch who has made false statements and has concealed information in a Congressional oversight hearing is prosecutable under 18 U.S.C. § 1001. What follows are the preliminary results of that research. As you will see, substantial additional research will be required before charging decisions are made.

Discussion

Section 1001, the false statements statute, states:

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

18 U.S.C. § 1001. There are three distinct offenses that fall within Section 1001: 1) concealing a material fact; 2) making a false statement; and 3) making or using a false writing or document. See id.; Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal § 37.00, at 411 (4th ed. 1990); Jennifer L. Kraft & David A. Sadoff, Ninth Survey of White Collar Crime, False Statements, 31 Am. Crim. L. Rev. 539, 540 (1994).

In order to convict a defendant under Section 1001 for making a false statement or writing or concealing a material fact, it must be proven that 1) the defendant knowingly and willfully; 2) made a false statement or writing or by trick, scheme, or device concealed a fact; 3) that was material; 4) in any matter within the jurisdiction of a department of the United States. United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir.), cert. denied, 474 U.S. 825

(1985) (concealing fact case); Freidus v. United States, 223 F.2d 598, 601 (D.C. Cir. 1955) (false statement case); United States v. Weinberger, Crim. A. No. 92-235, 1992 WL 294877, at *4 (D.D.C. Sept. 29, 1992) (false statement case); United States v. Dale, 782 F. Supp. 615, 626 (D.D.C. 1991) (concealing fact case).

a. Knowing and Willful False Statement

In a false statement or writing case, it must be shown that the defendant "had the specific intent to make a false or fraudulent statement." United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976). This is established if the statement or writing is "untrue when made, and known at the time to be untrue by the person making it." United States v. Milton, 8 F.3d 39, 46 (D.C. Cir. 1993) (quoting jury instruction). The jury makes this determination of falsity by "considering the [statement] in context and taking into account the setting in which it appeared and the purpose for which it was used." Id. at 45. The jury must "determine how the defendant construed the question or answer and . . . decide, in that light, whether the defendant knowingly gave a false answer." Id. at 46.

b. Knowing and Willful Concealment of Fact

In a concealment case, it must be shown that the defendant 1) had a duty to disclose the fact and 2) used a "trick, scheme, or device" in concealing the fact.[1]

"It [is] incumbent on the Government to prove that the defendant had a duty to disclose the material facts at the time he was alleged to have concealed them." United States v. Irwin, 654 F.2d 671, 678 (10th Cir. 1981); United States v. Mattox, 689 F.2d 531, 533 (5th Cir. 1982) ("Silence may be falsity when it misleads, particularly if there is a duty to speak."). Under 2 U.S.C. § 192, it is clear that a summoned witness has a duty to disclose facts inquired of in a Congressional hearing.

In the absence of a Congressional summons, it may nevertheless be possible to establish that a duty to disclose exists as to an Executive Branch official testifying in a Congressional oversight hearing by virtue of the official's requirement to report to Congress. For example, the Thrift Depositor Oversight Protection Board, which includes the CEO of the RTC, is required to appear before the House and Senate Banking Committees. 12 U.S.C. § 1441a(k)(6)(A) (requiring semiannual appearance). As such, it may be possible that such a requirement to appear implies a duty to disclose. Additional research is required as to this issue.

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[1] One who makes a knowing failure to disclose a material fact is as culpable as one who makes a false statement. See United States v. McCarthy, 422 F.2d 160, 162 (2d Cir. 1970) ("Leaving a blank is equivalent to an answer of 'none' or a statement that there are no facts required to be reported.")

In order to satisfy the "trick, scheme, or device" requirement, it must be shown that there was an "affirmative act" by which means a material fact was concealed. United States v. London, 550 F.2d 206, 212-13 (5th Cir. 1977). "The mere omission of failing truthfully to disclose a material fact, which is simply the negative aspect of the affirmative act of falsely stating the same material fact, does not make out an offense under the conceal or cover up clause of section 1001." Id. at 213-14. "Rather the latter clause of section 1001 requires the government to prove something more [--] that the material fact was affirmatively concealed by ruse or artifice, by scheme or device." Id. at 214.

However, "a person's deliberate failure to disclose to the government material facts, in the face of a duty to disclose such facts, constitutes an 'affirmative act' within the contemplation of the statute." United States v. Dale, 782 F. Supp. 615, 626 (D.D.C. 1991) (Penn, J., citing no authority). Thus, this situation is distinguishable from "passive failure to disclose" or "mere silence in the face of an unasked question." Id. "The case law is clear that the deliberate failure to disclose material facts in the face of a specific duty to disclose such information constitutes a violation of the concealment provision of section 1001." Id.

c. Applicability of Brontson: Whether or Not Nonresponsive Answers Can Constitute Concealment of Material Facts Under Section 1001

The issue here relates to the difference between questioning in a congressional setting versus an adversarial trial setting. In Brontson, a perjury case, the Court held that the perjury statute was to be strictly construed such that if a witness 1) speaks the literal truth or 2) is nonresponsive to a question and thereby succeeds in concealing certain facts, the witness is not culpable for perjury. Brontson v. United States, 409 U.S. 352, 360 (1973). "The burden is on the questioner to pin the witness down to the specific object to the questioner's inquiry." Id. "Unresponsive answers are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Id. at 362.

The Court reasoned that "[i]t is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." Id. at 358-59. That is so because "[i]t should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so; or that a debtor may be embarrassed at his plight and yield information reluctantly." Id. at 358.

This Brontson line of thought -- that the questioner has a high burden that inures to the benefit of the witness -- has been extended by some courts to section 1001 cases. The issue is whether or not this extension is proper or whether Brontson should be limited to perjury or false statements cases occurring in an adversarial trial context or whether it should

be extended to all cases falling within those statutes, including concealment cases.[2]

If Brontson applies not only to the false statements prong of section 1001 but also to the concealment aspect, little would be left of concealment as a separate and distinct offense under section 1001. Substantial additional research must be conducted on this issue.

d. Materiality

The materiality determination is a matter of law to be determined by the courts. United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985) (Scalia, J.) (concealment case).[3] The test for materiality is whether the statement "has a natural tendency to influence or was capable of influencing, the decision of the tribunal in making a particular determination." Id. at 948. Proof of actual reliance on the statement is not necessary. Id. As such, "a lie influencing the possibility that an investigation might commence" stands in the same posture under section 1001 as "a lie distorting an investigation already in progress." Id.

From the language of the statute, it is clear that the "materiality" element is not repeated in the second and third prongs. However, it is clear that the courts have read the materiality element in to each clause. See United States v. Notarantonio, 758 F.2d 777, 785 (1st Cir. 1985).[4]

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[2] The D.C. Circuit accepted the Brontson defense that a literally true response is non-prosecutable in a false statements case. United States v. Milton, 8 F.3d 39, 45 (D.C. Cir. 1993).

[3] Some Circuits hold that materiality is an issue for the jury.

[4] In Swaim, the court couched its language in terms of concealment as well as false statements:

> The charge of materiality requires only that the fraud in question have a natural tendency to influence, or be capable of affecting or influencing, a government function. The alleged concealment or misrepresentation need not have influenced the actions of the government agency, and the government agents need not have been actually deceived.
>
> The Government does not have to show actual reliance on false statements or documentation. A statement is material even if it is ignored or never read by the agency receiving the misstatement. The concealment must simply have the capacity to impair or pervert the functioning of a government agency.

United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir. 1985).

e. Statements to Congress

The false statement, false writing, or concealed fact must relate to a matter within the jurisdiction of a department of the United States. Although "Congress" does not come squarely within the definition of an "agency" or "department," the Supreme Court has held that the term "department" was meant to describe the executive, legislative, and judicial branches of government. United States v. Bramblett, 348 U.S. 503, 509 (1955). As such a congressional committee is a department for section 1001 purposes. United States v. Poindexter, 951 F.2d 369, 387 (D.C. Cir. 1991) (section 1001 applied to false statements made by Poindexter to members of House Intelligence Committee); United States v. Hansen, 772 F.2d 940, 943-44 (D.C. Cir. 1985) (forms submitted by congressman to House Committee as required by Ethics in Government Act involve "matter within the jurisdiction of a department.") In addition, section 1001 is applicable to "statements that were not under oath and were not stenographically transcribed." Poindexter, 951 F.2d at 387-88 (section 1001 applies to private discussions between Poindexter and Congressmen; problems of proof in such situations (one person's word against another) are issues for sufficiency of evidence not substantive law).

In Hubbard, the Supreme Court is currently being asked to limit the reach of section 1001 solely to executive agencies. The outcome of Hubbard would significantly limit the applicability of section 1001 in the context of unsworn Executive testimony before Congressional oversight committees.

Conclusion

If you have any questions, please let me know.

Supplement to Memorandum

I. Duty to Disclose Cases

United States v. Irwin, 654 F.2d 671 (10th Cir. 1981)

Defendant enters into contract with City Council to provide assistance in obtaining federal and state funds to finance a project. He was to receive compensation based on amount of grant received. He was then informed that this was illegal, but proceeded to enter into a second contract of the same nature. Defendant submitted grant application to Economic Development Administration (EDA) that was approved. Defendant was then appointed to City Council and was in charge of disbursing funds from EDA grant and approved City Council bills paid by EDA grant. Defendant approved bills that were allegedly performed by the defendant. In statement to EDA , defendant either left blank or claimed that he had received "0" compensation, when in fact he had been paid. Court holds that "the jury is able to find beyond a reasonable doubt that a false statement was made on the grant application concerning the amount of compensation paid by city council to defendant for expediting the application and that defendant knowingly and willfully made the false statement. In respect to the duty to disclose, the Court believes it was incumbent on the Government to prove that defendant had a duty to disclose the material facts at the time he was alleged to have concealed them. The Government in this case failed to show a legal duty to disclose subcontractors bills to City Council the payments made by subcontractor to defendant.

United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985)

The defendant, a former congressman, was convicted for false statements to a federal agency, here under the Ethics in Government Act (EIGA). Defendant failed to disclose bank loans to his wife, commodities profits, and other personal loans. EIGA requires members of Congress to file annual financial disclosure reports. Defendant challenged the conviction on materiality, jurisdiction, and whether § 1001 has application to EIGA violations. Court says that the statute is one of general applicability..."it's sweeping language clearly embraces the omissions on defendants EIGA forms." Court ruled that House Committee's are federal departments for purposes of § 1001. The subject of forms is also a matter within the jurisdiction of the department since the Supreme Court has held that the phrase should not be given narrow or technical meaning. Affirmed.

United States v. Zalman, 870 F.2d 1047 (6th Cir. 1989)

Defendant was convicted on two counts of aiding and abetting individuals to make false statements to the Immigration and Naturalization Service (INS). Defendant assisted individuals in arranging fixed marriages in order to remain in the U.S., therefore misleading the INS. Defendant has charged as error the trial court's failure to instruct the jury as to the

government's burden to prove that he or his clients had a duty to disclose the purposes of their marriages. Court holds that the defendant was correct in asserting that to support a concealment case there must be a duty to disclose. However, the defendant's assertion is misplaced because the issue of duty and proof thereof is not a question of fact to be decided by a jury. It is a question of law properly considered and determined by the court. United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983) Consequently, there was no requirement imposed upon the trial court to instruct the jury as to the issue of duty as an element of the concealment offense. Affirmed.

II. Bronston Issue Cases

United States v. Milton, 8 F.3d 39 (D.C. Cir. 1993)

Defendant was convicted of making materially false statements under § 1001. Defendant was employed as a staff attorney for the Equal Employment Opportunity Commission (EEOC). In settlement of a case, defendant was to deposit a $1,000,000 check into an EEOC account to be distributed to job applicants who had been discriminated against. Instead he deposited it into separate account, had claimants submit false claims, gave them money from separate account, and then collected it in cash from false claimants. Defendant stated that statements of claims were literally true. Court states that the defense of literal truth applies to § 1001 prosecutions, but defendant proposed no jury instructions to this effect, raised no objections on instructions given, and did not argue this defense to the court or jury. (However, court rules that defendant preserved objection to literal truth argument in motion of acquittal.) Affirmed.

United States v. Clarridge, 811 F. Supp. 697 (D.D.C. 1992)

Defendant, a senior officer at the CIA, was indicted on seven counts relating to the Iran-Contra affair, six of these as a result of his testimony to a Congressional committees. The basis for the perjury and false statement charges is that defendant lied about when he first learned that the U.S. was shipping arms to Iran. Defendant challenges multiplicity of counts. The Court states that the test for multiplicity is that "each count must set forth a separate lie or false statement, and in the cases where the facts present a close question of whether separate lies exist it is relevant to inquire into the degree in which the second statement impaired the body before which it was made." The Court then addresses separate counts out of appearances before separate committees being multiplicitous. Court states that defendants testimony before different committees on different dates cannot, under any interpretation, constitute the same offense for multiplicity purposes. (Even if they were the exact same lies.) Court holds the same answers to essentially identical questions are multiplicitous. Here the defendant was responding to the same line of questioning by the same person on behalf of the same body on each occasion, and the repetition of the alleged lie did not further impair the operations of the committee. The defendant then moves to dismiss the counts on the grounds that they are literally true. The court holds that the indictment is sufficient if it contains the elements of the offense charged and fairly informs a defendant of the charge against him. The indictment in this case meets this standard, falsity is an element of both § 1001 and § 1621. The possibility that a question or answer may have a number of interpretations does

not invalidate the indictment/conviction. Statements where there is one or more arguable constructions, that question is left for the jury. Court reduces charges from seven to five, all other motions denied.

United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991)

Defendant was convicted on several charges, including making false statements to Congress. Defendant falsely stated to members of the House Intelligence Committee that he had not learned until January 1986 that missiles had been shipped in November 1985 and that he had not learned until November 1986 that anyone in the U.S. Government might have had prior knowledge of that shipment. Defendant asserts that § 1001 does not apply to a false but unsworn and untranscribed oral statement made by an official in the Executive branch to members of Congress acting in their "legislative capacity." Court has held that a congressional committee is a department for the purposes of § 1001. United States v. Hansen) Defendant attempts to distinguish Hansen, saying that it involved Congress' housekeeping function, not its true legislative function. Defendant also points out that Courts' have recognized a "judicial function" exception, making § 1001 inapplicable to conduct occurring before a court acting in its judicial capacity, and that this rationale equally supports an exception for the "legislative function." The Court does not accept this, "we doubt that traditional trial tactics rationale shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding. " (Remanded due to Independent Counsel's inability to carry burden of showing that defendant's compelled testimony was not used against him at trial.)

United States v. Mayer, 775 F.2d 1387 (9th Cir. 1985)

Defendant was convicted under § 1001 with submitting fictitious letters of recommendation to the District Court for consideration when it sentenced him on an unrelated conviction. This circuit had previously recognized that application of § 1001 should be limited to matters arising in judicial proceedings that can be characterized as 'administrative' or 'housekeeping' functions of the court. The Court concludes that the defendant's sentencing hearing constituted a judicial proceeding for purposes of § 1001, and that the district judge's sentencing determination constituted an adjudicative function. The judge's role in sentencing is not a housekeeping or administrative duty, but is an extension of the defendant's trial itself. Therefore, misrepresentations made during a sentencing hearing would not be covered under § 1001. Reversed.

United States v. Abrahams, 604 F.2d 386 (5th Cir. 1979)

In a proceeding in front of a magistrate to determine defendant's bail for another conviction the defendant made false, unsworn statements as to his identity and past criminal record. The Court addresses the question of whether a false statement made in a judicial proceeding is a proper basis for a prosecution under § 1001. Court holds that conviction must be reversed because § 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding.

United States v Harrod, 981 F.2d 1171 (10th Cir. 1992)

Defendant convicted of making a false statement to the Department of Labor Workers Compensation Office. In order to receive benefits for his disability, defendant had to complete a federal form annually. Questions from form that are at issue regard if he was employed, number of hours employed, and rate of pay. In the years of 1988-1990 defendant claimed that he was not employed, only had a hobby, that he worked on it 4-6 hours per week. Defendant also left some questions blank. His "hobby" yielded $5,000 in 1988, $16,000 in 1989, and $34,000 in 1990. Defendant cites Bronston, saying an unresponsive answer cannot be the basis for a perjury prosecution. Court rules that Bronston does not apply here because it was decided under a federal perjury statute, not a § 1001 prosecution. Affirmed.

United States v. Mandanici, 729 F.2d 914 (2nd Cir. 1984)

Defendant convicted for making false statements to Department of Housing and Urban Development(HUD). Defendant made false statements in application, and two contracts with the Government in order to receive subsidies from HUD. Defendant said he would perform work on property that would cost $88,000, well knowing it would not cost this amount. Defendant also made claims in contract that work had already been performed, when in fact it had not, and then signed contract certifying that data contained was true,correct, and complete. Court found no merit in defendant's claim that contract was literally true and further stated that "while a defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true, the factual premise for application of this principle here is absent." Affirmed.

United States v. Stephenson, 895 F.2d 867 (2nd Cir. 1990)

Defendant was an export licensing officer for the Department of Commerce, convicted for taking bribes in exchange for export licenses. Defendant told applicant that he wanted 5% for the license. Defendant then told another Commerce officer that the applicant offered him a bribe first. Defendant also convicted for making a false statement to a government official when he reported that applicant had offered him a bribe. Defendant argues that statement was literally true. Judge charged jury that it could convict defendant either by finding that he made false statements or that he falsified, concealed his unlawful acts by accusing applicant of offering bribe. Defendant argues that literally true statements cannot be the basis of a § 1001 conviction. Court rules "even if defendant's statement were construed to be literally true , the jury still could have found that he misrepresented and concealed what had occurred. " Affirmed.

MEMORANDUM

TO: Alex Azar

FROM: Monica Molloy

DATE: March 28, 1995

RE: More research regarding 18 U. S. C. § 1001

I. 18 U.S.C. 1001, the false statement statute states:

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

Here is a simple outline of the offenses contained within § 1001, as well as the elements necessary to convict a person under the statute.

A. Concealing a material fact

1. Defendant knowingly concealed a fact by trick, scheme, or device.
2. Defendant acted willfully
3. The fact concealed was material.
4. Subject matter was within the jurisdiction of a department or agency of the United States.
5. Defendant had a legal duty to disclose the facts he concealed.

B. Making a false, fictitious, or fraudulent statement

1. Defendant knowingly made a false, fictitious, or fraudulent statement.
2. Defendant acted willfully
3. Statement was made within the jurisdiction of a department or agency of the United States.
4. The statement was material.

C. Making or Using any false writing or document

1. Defendant knowingly made or used a false writing or document containing a false, fictitious, or fraudulent statement.
2. Defendant acted willfully.
3. The writing or document was material.
4. Subject matter was within the jurisdiction of a department or agency of the United States.

II. Discussion

As you can see, there are three separate offenses contained in Section 1001. The first violation is to knowingly and willfully conceal a material fact; second,the prohibition of making any false or fraudulent statements; and lastly the statute prohibits the making or use of any false writing or document. The three offenses have four elements in common, with the offense of concealing a material fact having one additional element, a legal duty to disclose. Following is a brief synopsis of the case law on each element, followed by a discussion of two defenses that have been claimed § 1001 cases.

The elements that must be proven in order to convict a defendant under 18 U. S. C. 1001 for concealment are: 1) knowingly and willfully; 2) concealing and covering up by trick, scheme, or device; 3) a material fact; 4) in any matter within any jurisdiction of a department or agency with in the United States. United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir.), cert. denied, 474 U.S. 825 (1985).

The intent of the defendant must be shown to be knowingly and willfully in a concealment of a fact or false statement case. Lange states that " a violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement." United States v Lange, 528 F. 2d 1280, 1288 (5th Cir. 1976) "In order to establish fraudulent intent on the part of a person, it must be established that such person knowingly and intentionally attempted to deceive another." United States v Diggs, 613 F.2d 988, 1000 (D.C.Cir. 1979)

The element of materiality in a false representation case must pass the following test : whether the statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a particular determination." United States v. Hansen, 772 F.2d 940, 950 (D.C. Cir. 1985) Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects. United States v. Diggs,613 F.2d 988, 998 (D.C. Cir 1979) (It is clear in the D. C. Circuit that the materiality element is a question to be determined by the court. However in both the 9th and 10th Circuits materiality is a question for the jury and must be proved beyond a reasonable doubt.) Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal Section 37.00, at 413 (4th ed 1990).

The element of jurisdiction of a department or agency of the United States is undoubtedly a

question for the court. The scope of a department or agency was meant to describe the executive, legislative, and judicial branches of Government. United States v. Bramblett, 348 U.S. 503, 509 (1955). The court held that the House Office and Finance disbursing office was a "department or agency" of the United States within the meaning of 18 U.S.C. § 1001. Id. As evidenced by the case law, the courts have given the jurisdiction phrase of the statute a very broad scope and I have yet to see a case where the offense was dismissed due to lack of jurisdiction. In the situation at hand I do not believe there will be any difficulty in establishing this element.

A "duty to disclose" is only required in a concealment of a material fact offense. "In prosecuting a § 1001 concealment violation it is incumbent on the government to prove that the defendant had a legal duty to disclose the material facts at the time he was alleged to have concealed them. " United States v Anzalone, 766 F. 2d 676, 683 (1st Cir. 1985) However, "...there is no requirement imposed upon the trial court to instruct the jury as to the issue of duty as an element of the concealment offense." United States v Zalman, 870 F.2d 1047, 1055 (10th Cir. 1989) United States v Larson, 796 F.2d 244, 245 (8th Cir. 1986) (Court held that since defendant had no legal duty to disclose he could not be convicted under § 1001) United States v Irwin, 654 F.2d 671,678 (10th Cir. 1981) (Government failed to prove defendant had a legal duty to disclose facts to the Economic Development Agency.) In Hansen, a D.C. Circuit case, duty to disclose is briefly addressed. Defendant was charged with failure to disclose financial reports under the Ethics in Government Act, where there was obviously a legal duty. The indictments were upheld under § 1001.

III. Defenses

Two defenses that have been raised in false statement cases are the "exculpatory no" doctrine and the good faith defense. The "exculpatory no" doctrine is when a person under criminal investigation makes a simple denial of criminal liability to an investigator cannot then be prosecuted for making a false statement because this would violate their 5th Amendment rights. United States v Cogdell, 844 F.2d 179, 182 (9th Cir. 1988) However affirmative measures designed to mislead and thwart a government are not protected by the doctrine. Edward J. Devitt, Federal Jury Practice and Instructions, Criminal, § 37.00 at 414 (4th ed. 1990). Defendant Oliver North attempted to claim the "exculpatory no" doctrine as an excuse for not responding to the allegations against him. The Court responded" This circuit has not adopted the doctrine, but in any event it is not applicable here....Just as private persons cannot claim the "exculpatory no" doctrine in a claim against the government, government officials cannot claim its protection in seeking to maintain their positions. " United States v North, 788 F. Supp. 364, 369 (D.D.C. 1988) Because the doctrine has not been adopted by the D.C. Circuit and the ruling in the North case, it is highly unlikely that this defense would be successful.

The good faith defense was raised in defense of mail fraud and false statement allegations. The Court stated that "good faith constitutes a complete defense to a charge with the defense of which fraudulent intent is an essential element. ...What I have said respecting good faith as a defense in a mail fraud charge is also applicable to false official statement charges." United

States v Diggs, 613 F.2d 988,1000 (D.C. Cir. 1979)

IV. The Bronston issue

The issue of whether nonresponsive answers or literally true answers constitute concealment of a material fact has not been decided by the Supreme Court. However, this issue has been decided under the federal perjury statute. In Bronston, the defendant was charged with perjury under 18 U.S.C. § 1621 and the court held that the general federal perjury statute does not reach a witnesses' literally true,or unresponsive answer, even if the witness intends to mislead the questioner by the answer, be it phrased in the negative or the affirmative, is arguably false by implication. Bronston v United States, 409 U.S. 352 (1973). Bronston places the burden of getting the correct answer on the questioner. "It is the responsibility of the lawyer to probe; testimonial interrogation, and cross examination in particular is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." Id. at 358-359.

Milton, a 1993 D.C. circuit case applies the defense of literal truth to § 1001 prosecutions, but fails to distinguish whether this rule applies to both judicial trials and administrative hearings. United States v. Milton, 8 F.3d 39, 45 (D.C. Cir.1993) However a number of courts have actually held that there is a judicial function exception to § 1001. United States v Poindexter, 951 F.2d 369, 386 (D.C. Cir. 1991) United States v Mayer, 775 F.2d 1387, 1388-1392 (9th Cir. 1985) (Section 1001 does not cover submission of fictitious letter of recommendation to sentencing court.); United States v Abrams, 604 F.2d 386, 392-393, (5th Cir. 1979) (Answering magistrate falsely regarding aliases and arrest record at bail hearing not covered by § 1001).

United States v Clarridge, a D.C. District Court case, charges the defendant with offenses under both 18 U.S.C. § 1001, the concealment statute, and 18 U.S.C. § 1621, the federal perjury statute. United States v Clarridge, 811 F. Supp. 697. The defendant requested a motion to dismiss the perjury charges as well as the false statement charges based on the Bronston decision that literally true answers cannot be prosecuted under the statute. Id. at 712. The Court declines to dismiss the Counts on this basis, stating that the defendant "stretched the language" and "may not insulate himself from prosecution by reinterpreting his statements in order to give them a meaning which is literally true." Id. at 712. The court denied the motion in this case, and did not distinguish between § 1001 and § 1621, it only addresses them by saying "the federal perjury statutes." Id. This could be interpreted as either including both sections or only § 1621.

The second circuit has had two cases that have directly addressed this issue of convicting a defendant under § 1001 when statements have been unresponsive, but literally true. United States v Mandanici , where defendant was convicted of making false statements within the jurisdiction of the Department of Urban Housing and Development, states that " a defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true." United States v Mandanici, 729 F.2d 914, 921 (2nd Cir. 1984) However, the

court ruled, in this case, that the factual premise for application of this principle was absent, therefore upholding the conviction under § 1001. Id. The second case, United States v Stephenson, involves making false statements to government agents. United States v Stephenson, 895 F.2d 867 (2nd Cir. 1990) The defendant argued that literally true statements cannot be the basis of a section 1001 conviction, but the jury found that his statements were plainly false. Id. The court said that "even if Stephenson's statement were construed to be literally true, the jury still could have found that he misrepresented and concealed what had occurred." Id. at 874. In Mandanici, it is clear that the Court feels that Bronston is applicable to § 1001 convictions, on the other hand it is also clear from the two cases that there must be a factual premise and that the decision is in the hands of the jury.

The tenth circuit, under the case of United States v Harrod, however disagrees with the second circuit view that Bronston applies to § 1001 cases. United States v Harrod, 981 F.2d 1171, (10th Cir. 1992). Defendant was convicted of making false statements to the Department of Labor's Office of Worker's Compensation. Id. at 1173. The defendant attempted to assert a Bronston defense, stating that an unresponsive answer, if true cannot be the basis of a perjury prosecution even though it may be likely to mislead. Id. The court holds that Bronston does not apply, because it "was decided under the federal perjury statute, 18 U.S.C. § 1621, which implicates significantly different policy concerns than does a prosecution under 18 U.S.C. § 1001." Id. at 1175. The court then goes on to explain that the holding in Bronston states how it is the interrogator's job to pin down the witness with skillfully asked questions. "But no such question and answer interplay exists in an 18 U.S.C. § 1001 false statement action. When seeking information outside the adversarial context of trial, the government needs and expects those who answer its inquiries to answer truthfully and precisely. In such cases, the respondent is not readily available for cross-examination, as in a perjury trial." Id. at 1175. This is the reasoning that we would like to have in the D.C. Circuit, the type that plainly states that Bronston is not applicable to § 1001 cases.

V. Legislative History

18 U.S.C. § 1001 is derived from the original 1909 Criminal Code version of the false claims statute. Since then it has been amended several times, with the most significant revision in 1934. The House report contains a letter from the Attorney General to the chairman of the committee which sets out the purpose and the need for the legislation. "The bill proposes to amend the Criminal Code so as to prohibit injury to and depredations against Government property wherever situated.... there are no Federal statutes under which prosecutions may be had for willful injury to property of the United States." H.R. Rep. No. 1463, 73d Cong., 2d Sess. 1 (1934), Sen. Rep. No. 1202, 73d Cong., 2d Sess. 2 (1934)

MEMORANDUM

TO: Alex Azar

FROM: Monica Molloy

DATE: May 17, 1995

RE: Research on 18 U.S.C. §162, Perjury generally, and 18 U.S.C. §1623, False declarations before grand jury or court.

The Modern Federal Jury Instructions define perjury as "the willful giving of false testimony, before a competent tribunal while under oath, knowing the testimony is false as to a material matter." This instruction is applicable to both §1621 and §1623 prosecutions because the substantive elements in these perjury statutes are the same. Sand, Siffert, Loughlin, & Reiss, Modern Federal Jury Instructions, Vol. 1A, Ch. 48 at 48-6 (1995). Although this definition of perjury applies to both §1621 and §1623, there are several differences between the two statutes, therefore they will be addressed separately in this memo.

I. 18 U.S.C. §1621 Perjury generally

Whoever:

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification , or statement under penalty of perjury as permitted under section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

A. Essential Elements

The following essential elements of a perjury conviction under §1621 must be proved beyond a reasonable doubt:

1) the defendant testified under oath in a proceeding for which a law of the United

States authorizes the administration of an oath;
2) the oath was administered by a qualified person;
3) the defendant knowingly made the false material statements detailed in the indictment; and
4) the defendant acted willfully and contrary to the oath that was given.

Two of these four elements are for the jury to decide, whether the defendant knowingly gave false testimony and whether the defendant did so willfully. The trial judge decides the under oath element, whether it was properly administered, whether the person administering it was competent, and in a majority of the circuits, materiality. Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal, Section 43.00 at 43.03 (4th ed 1990) The elements of the crime of perjury under §1621 are set out in United States v. Debrow as: 1)an oath authorized by law of the United States, 2) taken before a competent tribunal, officer or person, and 3) a false statement willfully made as to facts material to the hearing. United States v. Debrow, 346 U.S. 374 (1953).

"The general test for determining whether a false statement is material is if it has a natural tendency to influence, or is capable of influencing, the decision of the fact finder." United States v. Flowers, 813 F.2d 1320, 1325 (4th Cir. 1987) (This is the same test we saw for 18 U.S.C. §1001cases under United States v. Hansen) The D.C. Circuit has adopted the majority decision that materiality is a question of law to be determined by the trial judge. United States v. Bridges, 717 F.2d 1444, 1448 (D.C. Cir. 1983) Sinclair v. United States is the Supreme Court case that supports the rule that "the materiality of what is falsely sworn, when an element of a crime of perjury, is one for the court", however it is noted that this is only dictum. Sinclair v. United States, 279 U.S. 263 (1929) Federal jury instructions as to materiality state that the "materiality of the matter involved in the alleged false testimony-that is a question of law for me to decide. It is not a question of fact for you, the jury, to determine." Sand, Siffert, Loughlin, & Reiss, Modern Federal Jury Instructions, Vol. 1A, Ch. 48 at 48-10, 49 (1995).

B. "Two Witness Rule"

Under § 1621 there is a requirement of corroboration rule , also known as the "Two witness rule." This is a judge made rule of ancient origin that prevents a defendant from being convicted based solely on the uncorroborated testimony of only one witness. Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal, Section 43.00 at 43.07 (4th ed 1990). Federal jury instructions explain the two witness rule as requiring that "the falsity of the defendant's two statements must be established *either* by the testimony of two witnesses whose testimony you, the jury, believe to be true, *or* by the testimony of one such witness which is corroborated or confirmed by other independent evidence...to substantiate the testimony of one witness." Sand, Siffert, Loughlin, & Reiss, Modern Federal Jury Instructions, Vol. 1A, Ch. 48 at 48-26 (1995). The Supreme Court has also held that "it is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment." Weiler v. United States, 323 U.S. 606 (1945).

C. Literal Truth Defense

The literal truth defense is a defense available under both perjury statutes. It is a defense to a charge of perjury if the evidence shows either: 1) the defendant made a statement in response to a question that was ambiguous or capable of being understood in more than one way, and the answer given by the defendant to one reasonable interpretation of the ambiguous question was not false; or 2) the defendant made a statement in response to a question that was c;ear and unambiguous, but the answer to the clear question was ambiguous and capable of being understood in more than one way, and one reasonable interpretation of the answer was not false. Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal, Section 43.00 at 43.12 (4th ed 1990). The D.C. Circuit approved an instruction on the literal truth defense, based upon Bronston v. United States, that provides "...a statement is not false if it is literally true and technically responsive. If a statement, or a reasonable interpretation of a statement, made by a defendant is narrowly or literally true, there can be no violation of this statute." United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), United States v. Bronston, 409 U.S. 352 (1973).

II. 18 U.S.C. §1623 False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information , including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

A. Essential Elements

Three essential elements must be proved beyond a reasonable doubt in order to prove false declarations:

1) the defendant gave testimony under oath before a federal court or grand jury,
2) the defendant made the false material statement as detailed in the indictment during that testimony, and
3) the defendant knew that the statement was false when he gave the testimony.

Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal, Section 43.00 at 43.08 (4th ed 1990).

Dunn v. United States concerns the scope of the phrase "ancillary proceeding", more specifically, whether a sworn statement given in an interview at an attorney's office is considered ancillary to a court or grand jury proceeding. Dunn v. United States, 442 U.S. 100 (1979). The government contends that any statement under oath should fall within §1623. The court disagreed and concluded that the statement given in the interview "lacked the degree of formality required by §1623. For the government does not and could not seriously maintain that the interview... constituted a deposition." Id. at 2196.

The state of mind requirement under §1623 differs from that of §1621. The requirement of *knowing* in §1623 is less stringent than that of *wilfulness* that is required in §1621. Instruction 48-26-Knowingly states; "If you decide that any of the answers the defendant gave were false , you must then decide whether the defendant gave those answers knowingly. That is, at the time the answers were given, did the defendant know and believe that the answers were false; (and, if so, did the defendant give the answers consciously and in the exercise of his free will.)" Sand, Siffert, Loughlin, & Reiss, Modern Federal Jury Instructions, Vol. 1A, Ch. 48 at 48-54 (1995)

B. §1623(c) Multiple Declarations

§1623 (c)-An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if -

(1) each declaration was material to the point in question, and

(2) each declaration was made within the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declaration material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

"Statements are irreconcilably contradictory if both were made under oath, if both concerned the same subject and if both are inconsistent with each other to such a degree that one of them must be false. The government is not required to prove which irreconcilably contradictory statement is false." Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal, Section 43.00 at 43.03 (4th ed 1990).

C. §1623(d) Recantation Defense

§1623 (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

This defense, also known as the recantation defense, is not available in §1621 prosecutions. The defense contains three elements:

1) the defendant admitted that the statement originally made was false before the same proceeding that heard the original statement,

2) at the time that the false statement was recanted, the false statement had not substantially affected the proceeding, and

3) at the time the false statement was recanted, it had not become obvious that the

falsity of that statement had been exposed or would be exposed.
Edward J. Devitt et al., Federal Jury Practice and Instructions, Criminal, Section 43.00 at 43.10 (4th ed 1990).

D. §1623(e)

§1623 (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Section (e) obviously abandons the two witness rule requirement under §1621, proof beyond a reasonable doubt is sufficient. Congress created §1623 because the common law requirements for a perjury prosecution had become exceptionally difficult, hence the abandonment of the two witness rule in §1621. "Congress sought to afford greater assurance than testimony obtained in a grand jury and court proceedings will aid the cause of truth." Dunn v. United States, 442 U.S. 100 (1979).

As a sidenote, a case that I thought might be of interest to you, because of the responses given by the defendant, is Gebhard v. United States, 422 F.2d 281 (9th Cir. 1970). The defendant was charged under §1621. The responses to the questions involved were "I don't recall," "I don't know," or "I don't remember." The court states that "given the nature of these answers it would be difficult to find two witnesses to testify that the defendant did in fact know, believe, or recall a matter which he said he did not." Id. at 287 The court instructed that these charges could be proved by circumstantial evidence. Comment to the Federal Jury Instructions states that "where the responses in issue are answers such as 'I don't know' or 'I don't remember', the governmentmay prove the falsity of the defendant's responses by proof of facts from which the jury may infer that the defendant must have known or remembered that which he denied knowing or remembering while under oath." Sand, Siffert, Loughlin, & Reiss, Modern Federal Jury Instructions, Vol. 1A, Ch. 48 at 48-29 (1995).

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1. Bandy v. U. S., 82 S.Ct. 11, 7 L.Ed.2d 9 (U.S., Jun 28, 1961)

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27. U.S. v. Posner, 549 F.Supp. 475 (S.D.N.Y., Jun 28, 1982) (NO. 82 CRIM. 0325 (LBS))

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A PRIMER ON INCOME TAXES AND THE CANCELLATION OF DEBT

Louisiana State Bar Association

April, 1992

Frederick R. Parker, Jr. [FNa]

It is not uncommon for a creditor to forgive part or all of a debtor's obligation to him. But beware of the income tax consequences.

It is not uncommon, in these financially troubled times, for a creditor to forgive part or all of a debtor's obligation to him. This "forgiveness" may be prompted by business considerations or ordered by the court in a bankruptcy setting. In either event, the cancellation of debt may give rise to certain income tax consequences to the debtor. This article presents an overview of those (often unexpected) consequences.

Circumstances Giving Rise to COD Income

General Rule

The courts have long recognized the principle that a taxpayer may realize taxable income from the cancellation of indebtedness (often referred to by tax practitioners as "COD income"). This result is the natural corollary to the fundamental rule that, because there was no accession to wealth when the debtor initially incurred the liability, the debt did not give rise to taxable income when created. Where the later forgiveness of the debt gives rise to an accession to wealth represented by either a traceable increase in assets or a previous tax benefit, however, the taxpayer will be called to account to the government for the taxes which otherwise would have been due with respect to his economic gain. This rule first was developed by the courts and later was codified as Section 61(a)(12) of the Internal Revenue Code.

The general rule of income recognition applies only when there exists a traceable increase in the debtor's assets or when the debt has given rise to a tax benefit in his favor. The most obvious example of the former is where the debtor received cash in exchange for his promissory note when the loan initially was confected. [FN1] Other circumstances are not so readily apparent. Query whether a taxpayer would realize COD income from the forgiveness of rent due with respect to his apartment or of a liability for some other nondeductible personal expenditure for which he can show no tangible asset, such as legal services. The same issue would be presented where a taxpayer makes a binding pledge to donate a certain sum of money to a charity and later settles the obligation for something less. While these situations may appear to give rise to COD income when considered from the liability side of the balance sheet, the essential element of a traceable increase in assets may be lacking in each. The analysis focuses on whether the taxpayer experienced a traceable increase in his assets as a result of the forgiveness of the original loan rather than on the mere fact that a debt was forgiven. The reduction of a binding obligation, without more, simply should not give rise to COD income. [FN2]

Alternatively, a taxpayer may realize COD income where the liability itself gives rise to a tax benefit as it accrues. For example, an accrual basis taxpayer who claims deductions for office rent as it becomes due must recognize COD income to the extent his liability is later forgiven. While COD income may be realized under the "traceable increase in assets" theory both by accrual and cash basis taxpayers, only accrual basis taxpayers will realize COD income under the pure "tax benefit" theory. This is so even though cash basis taxpayers in effect

may receive tax benefits by way of depreciation deductions claimed with respect to property acquired with loan proceeds; such indirect tax benefits are generated from the "traceable increase in assets" engendered by the forgiven loan.

COD Income Versus Gain or Loss from Sale or Exchange

While the foregoing discussion sets forth the general rule that a taxpayer may realize COD income as a result of the cancellation of part or all of a liability, the character of what may appear to constitute ordinary COD income may in fact partially represent gain or loss from the sale of an asset. This result obtains where the taxpayer transfers property in full or partial satisfaction of his liability. The classification of the resulting income is important to the taxpayer for two reasons.

First, COD income is always ordinary income. It is not subject to the rate preferences which otherwise may exist with respect to capital gains, and it may be offset only by a limited amount of capital losses. Gain or loss from the sale or exchange of a capital asset, on the other hand, is capital in nature, with capital gains possibly being taxed at preferential rates and available to absorb capital losses.

The second important distinction between pure COD income and that portion of an exchange which gives rise to exchange gain or loss is that the latter is not excludable from income by taxpayers who are insolvent or in bankruptcy, unlike the COD component of the income which is realized upon a taxpayer's surrender of property in cancellation of his debt.

The determination of the character of income as ordinary COD income or exchange gain or loss depends upon whether the property is given in satisfaction of recourse or nonrecourse debt. COD income clearly will not arise from the transfer of property in satisfaction of either type of debt where the fair market value of the property exceeds the amount of the debt. In this case, the debt simply is paid in full, and the transaction will be treated as if the debtor sold the property at its fair market value and used the proceeds to satisfy his obligation. The exchange therefore will give rise to gain or loss under the general rule of Section 1001 of the Code, measured by the difference between the property's fair market value and its adjusted basis. Accordingly, the character of the gain or loss as ordinary or capital will be determined with reference to the character of the property itself.

A different result obtains, however, when the amount of the outstanding debt exceeds the fair market value of the property given in satisfaction of the debt. In a recourse setting, the transaction is bifurcated into two components: a sale of the property and a forgiveness of the debt. [FN3] The debtor is treated as having sold the property at its fair market value and as having satisfied the debt in full with the proceeds of the deemed sale. He thus will realize a gain or loss on the sale of the property in an amount equal to the difference between the property's fair market value and its adjusted basis. He also will realize COD income to the extent the outstanding balance of the debt exceeds the property's fair market value.

Example

Assume that T transfers securities, purchased several years ago for $1,000 but now valued at $1,800, to C in satisfaction of a $2,000 recourse debt. The value of the securities has been steadily increasing since T acquired them and C is willing to accept them in satisfaction of the debt because of T's shaky financial condition. T will be treated as having sold the securities for $1,800 and as having satisfied his $2,000 liability with that amount of money. Accordingly, T will realize an $800 gain on the deemed sale of the securities (which will be capital in nature if the securities are capital assets), and $200 of COD income. If, on the other hand, the securities are valued at only $800 at the time of the exchange, T will realize a $200 loss on the deemed sale ($800 FMV--$1,000 basis) and $1,200 of COD income ($2,000 debt--$800 deemed payment).

In contrast with the bifurcated analysis of both the asset and liability sides of a transfer of property in satisfaction of a recourse obligation, a transfer in the nonrecourse setting is analyzed only from the asset side. The amount of nonrecourse debt which is discharged as a result of the transfer of the encumbered property is

simply included in the amount realized on the exchange for purposes of calculating the transferor's gain or loss. The forgiven nonrecourse debt therefore does not give rise to COD income, even though the debt may exceed the fair market value of the property. [FN4]

Exceptions to Recognition of COD Income

Although logical and theoretically defensible, the general rule that a debtor must recognize income from the cancellation of debt often would, if universally applied, strike taxpayers at a time when they are least able to bear the tax consequences. Recognizing that debt cancellation often is the result of a debtor's weak financial condition, Congress responded to the general jurisprudential rule by enacting Section 108 of the Code.

As originally enacted, Section 108 permitted debtors in the business context to exclude from taxation any COD income at the cost of reducing various tax attributes, such as their basis in depreciable property and the amount of otherwise available loss and credit carryovers. Since Section 108 was intended to provide relief to financially distressed debtors caught in the COD income tax trap, the original version of that provision limited its application to taxpayers in "unsound financial condition." This requirement later was dropped because it became difficult to apply, and the benefits of the Section 108 election thus became available both to debtors in financial trouble and to those who were financially sound. The benefits of Section 108 became quite valuable to the latter in the 1980s when they were able to reacquire their own debt from the public at the lower market values caused by rising interest rates. Congress then responded to this unintended benefit to such debtors in 1986 by amending Section 108 and limiting its application to taxpayers whose debt is discharged in bankruptcy or while they are insolvent (the benefits of Section 108 also apply to the cancellation of certain farm indebtedness). As a result, with certain limited exceptions, solvent taxpayers now are required to recognize COD income in the year the discharge of debt occurs.

Bankrupt or Insolvent Debtors

According to Section 108(a)(1), what otherwise would constitute COD income is not taxable as such when the discharge of debt occurs "in a Title 11 case" or when the taxpayer is "insolvent" (this exclusion from gross income is mandated by statute and is not elective). A debtor will qualify under the Title 11 bankruptcy exception only if he is under the jurisdiction of the bankruptcy court and the discharge either is granted by the court or occurs pursuant to a plan approved by the court. [FN5] The insolvency exception, on the other hand, generally applies to taxpayers whose liabilities exceed the fair market value of their assets.

A taxpayer's insolvency is determined with reference to his assets and liabilities immediately before the discharge of debt occurs. [FN6] The jurisprudence indicates that assets such as going concern value and goodwill should be considered when determining whether and to what extent a taxpayer is insolvent. [FN7] Assets exempt from the claims of creditors should not be included in the determination, however, [FN8] nor should the assets of a spouse be taken into account when determining the insolvency of the other spouse. [FN9] All of the taxpayer's liabilities should be taken into consideration when applying the insolvency test and, although it is unclear whether contingent liabilities are to be considered, such liabilities were included in the equation in at least one case under the judicially developed exception which later was codified as part of Section 108. [FN10]

The bankruptcy exception takes precedence over the insolvency exception where both otherwise would apply. [FN11] This coordination of the two exclusionary provisions is significant because, while the bankruptcy exception operates to exclude from gross income all of the income which otherwise would be recognized from the cancellation of debt, the amount of COD income so excluded is limited under the insolvency exception. The insolvency exception excludes COD income only to the extent the taxpayer was insolvent immediately before the discharge. [FN12] A taxpayer therefore will be subject to tax on COD income to the extent the discharge of debt renders him solvent. The ordering rules established by the Code with respect to these exclusions thus broaden the Section 108 exception to the benefit of taxpayers who satisfy both the bankruptcy and insolvency tests.

Example

Assume that T has total liabilities of $1,000, of which he owes $500 to C. If T has total assets with a fair market value of $800, he is insolvent to the extent of $200. If T transfers assets with a fair market value and basis of $200 to C in full satisfaction of his debt, he would be rendered solvent to the extent of $100 and, in the absence of Section 108, would be required to recognize $300 of COD income for tax purposes. Even under Section 108, T would be able to exclude COD income under the insolvency exception only to the extent he was insolvent before the discharge ($200), and would be required to recognize the balance of this COD income ($100) (which amount represents the extent to which the discharge renders the debtor solvent, and its inclusion is consistent with the "freeing up of assets" theory underlying the jurisprudential development of the COD income doctrine). If, however, T is insolvent and is under the jurisdiction of the bankruptcy court, under whose order the discharge occurs, the Section 108 ordering rules will invoke the bankruptcy exception and thereby prevent him from having to recognize any of the COD income.

Although COD income is not taxable to the extent a debtor qualifies for either the bankruptcy or insolvency exception provided under Section 108, the exclusion of COD income under those exceptions does not come without a price. The amount so excluded must be applied to reduce certain of the debtor's tax attributes. [FN13] Thus, while the debtor is not required to pay taxes currently as a result of the discharge, he must forego tax benefits which otherwise would flow in the future from tax attributes which he possesses at the end of the year in which the discharge occurs (such as depreciation deductions with respect to depreciable property and various loss or credit carryovers). The taxpayer has the option of electing first to reduce his remaining basis in depreciable property [FN14] or of reducing his tax attributes in the following order:

Any net operating loss (NOL) for the year of the discharge and any NOL carryover to that year;

Any carryover to or from the year of the discharge of an amount representing certain allowable general business credits;

Any net capital loss for the year of the discharge and any such loss carryover to that year;

The basis of certain property held by the taxpayer on the first day of the taxable year following the year of the discharge; and

Any foreign credit carryover to or from the year of the discharge. [FN15]

The reduction in tax attributes is to be made after the determination of tax for the year of the discharge. [FN16] This ordering rule enables taxpayers to obtain the full benefit of their existing tax attributes otherwise available for the year in which the debt is discharged. The reduction of tax attributes is made on a dollar-for-dollar basis, except with respect to credit carryovers, of which 33 1/3 cents are reduced for each dollar of COD income excluded under Section 108(a). [FN17] Any amount of COD income remaining after being applied to reduce the taxpayer's various tax attributes is simply excluded from income under the general exclusion set forth in Section 108(a)(1).

Qualified Farm Indebtedness

In addition to the Title 11 and insolvency exceptions, the Code provides an exception to the recognition of COD income with respect to "qualified farm indebtedness." [FN18] The availability of this exception does not depend upon the debtor being insolvent or in bankruptcy. If the debt is cancelled while the taxpayer in fact is insolvent, the insolvency exception will apply in lieu of the more limited exception for qualified farm indebtedness, however. [FN19] Further, if the discharge occurs while the taxpayer is in bankruptcy, he will be entitled to the broader benefits available under the bankruptcy exception. [FN20]

The qualified farm indebtedness exception is available only with respect to the cancellation of a debt by a creditor who is not related to the taxpayer [FN21] and who is regularly engaged in the business of lending money. [FN22] Further, the cancelled debt qualifies for the exclusion only if it was incurred directly in connection with

the business of farming. [FN23] Finally, only taxpayers with gross receipts from the three prior years at least 50 percent of which are attributable to the trade or business of farming may avail themselves of the exclusion. [FN24] The exclusion of COD income with respect to qualified farm indebtedness comes at the same price as the exclusion provided for discharges of debt in Title 11 cases or when the taxpayer is insolvent: the taxpayer is required to reduce certain of his tax attributes. [FN25] In contrast with the Title 11 and insolvency exceptions, however, the qualified farm indebtedness exception applies only to the extent the taxpayer has tax attributes available for reduction; any COD income remaining after reduction of those tax attributes must be recognized as taxable income. [FN26]

Student Loans

Certain student loans may be cancelled without any income tax consequences to the debtor. The exclusion applies to loans made by certain creditors (governmental agencies and certain health or educational organizations) which, under their terms, are cancelled because the debtor fulfilled an obligation to work for a specified period of time in a designated profession. [FN27]

Exceptions to COD Income Treatment

In addition to the specific statutory exclusions from COD income recognition discussed above, Section 108 sets forth a number of other exceptions to the general rule that gross income includes income from the cancellation of debt. [FN28] Rather than simply excluding COD income from recognition, these provisions preclude the initial characterization of certain items as COD income. Some of these statutory exceptions are derived from a long line of jurisprudence, under which they still may find sanction even when the technical requirements for their application are not satisfied. These exceptions to COD income realization are summarized below.

Lost Deductions

First, the Code provides that COD income will not be realized to the extent the debtor would have been entitled to a deduction had he paid the discharged debt. [FN29] For example, a cash basis taxpayer who is discharged from a liability to pay for office supplies which he received and consumed would not be treated as having realized COD income because he would have been entitled to a deduction had he paid the debt. This benefit would not flow to an accrual basis taxpayer, however, who presumably would have claimed a deduction when the supplies were delivered or used.

Purchase Price Reductions

The second exception involves the reduction of a debt due to the seller of property while the debtor is solvent (this exclusion does not apply either in a Title 11 case or while the debtor is insolvent). The courts historically treated such reductions as adjustments to the purchase price of the property, and the Code follows suit. [FN30] The legislative history indicates that the statutory provision does not apply, however, either where the buyer has transferred the property or where the seller has transferred the debt. [FN31] The original judicially created exception may be available even when the statutory exception is not, however. [FN32]

Contributions to Capital

The Code also excepts from treatment as COD income any acquisition by a corporation of its own debt from a shareholder as a contribution to capital. [FN33] This exception applies in cases where the corporation does not issue additional stock in satisfaction of the debt. In such cases, the corporation is treated as having satisfied its obligation with an amount of money equal to the shareholder's basis in the debt. Whether or not the corporation will realize COD income as a result of the discharge thus depends upon whether the forgiving shareholder employs the cash or accrual method of accounting for tax purposes. In either case, the shareholder generally will have a basis in the debt at least equal to its principal amount. The corporation's potential for realizing COD income as a result of the discharge therefore exists only with respect to the interest element of the obligation.

Subject to possible exclusion under other exceptions provided by Section 108 of the Code, COD income will arise with respect to accrued but unpaid interest where the shareholder-creditor employs the cash method of accounting. This is so because a cash basis creditor will not have included as taxable income the accrued but unpaid interest and, accordingly, will have no tax basis in that amount. Since the contribution to capital exception treats the corporation as having satisfied the obligation with an amount of money equal to the shareholder's basis in the debt, any part of the forgiven obligation in excess of that amount (interest) will be treated as COD income under the general rule (if a cash basis corporation would have been entitled to a deduction had it paid the interest, however, the realization of COD income arguably would be avoided under the lost deduction theory discussed above). This potential does not exist with respect to accrual basis shareholders, however, since under their method of accounting their basis in the debt will include the accrued but unpaid interest.

Stock for Debt

The Code also provides an exception to COD income realization in cases where a corporate debtor transfers its stock in satisfaction of a debt. [FN34] In such cases, the corporation is deemed to have sold the stock at its fair market value and used the cash from the sale to satisfy the debt. The corporation therefore will realize COD income only to the extent the amount of the debt exceeds the fair market value of the stock given in the exchange. The statutory stock-for-debt exception does not apply if the debtor-corporation is in a Title 11 case or if the exchange occurs while the corporation is insolvent. [FN35] In that event, the corporation may avail itself of the general exclusion provided by Section 108(a) (subject, of course, to the requirement under Section 108(b) that certain tax attributes be reduced--it is arguable that a bankrupt or insolvent corporation which satisfies the judicially developed stock-for-debt exception may avoid the initial realization of COD income, thereby falling outside the Code treatment of such income and escaping the attribute reduction otherwise called for under the statutory exception). [FN36]

New Debt Instruments

Finally, in a vein similar to the statutory stock-for-debt exception, the Code provides that a debtor who issues a debt instrument in satisfaction of an existing obligation will be treated as having satisfied the debt with an amount of money equal to the issue price of the new instrument. [FN37] In essence, the issue price represents the principal amount of the new obligation as determined under the original issue discount rules of the Code. [FN38] Any excess amount of the existing debt over the issue price of the new debt will be treated as COD income, subject to possible exclusion under the other exceptions set forth in Section 108.

Conclusion

Because of the potentially severe income tax consequences which may attend the cancellation of debt, practitioners should keep the tax aspect of any debt restructuring in mind when helping debtors obtain relief from financial hardship. It is important to consider both the form in which a debt discharge is cast and (because of the statutory insolvency and bankruptcy exceptions to COD income recognition) the timing of the transaction. Finally, the Code and regulations set forth a variety of technical details which are beyond the scope of this article but which may affect taxpayers differently depending upon their individual financial and tax situations. Practitioners therefore should consult with their client's tax adviser before concluding any rearrangement of debt.

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FN1. There are both judicial and statutory exceptions to the general rule where the debtor gives his note in exchange for property other than cash; these exceptions will be discussed below.

FN2. For this reason, the forgiveness of a guarantor's secondary obligation to pay a liability with respect to which the primary debtor has defaulted does not give rise to COD income on the part of the guarantor. Since the guarantor did not receive any of the loan proceeds, he realized no traceable increase in assets arising out of the loan. See Hunt v. Comm'r, 57 TCM 919 (1989), PLR 9105042 and Bradford v. Comm'r, 233 F.2d 935 (6th Cir.1956). Nor does COD income result from the compromise of a contingent obligation. Such an "obligation" does not represent an indebtedness until the necessary condition occurs and produces neither a traceable increase in assets nor a tax benefit.

FN3. Danenberg v. Comm'r, 73 TC 370 (1979). This analysis comports with Treas.Reg. § 1.1001-2(a)(2), which provides that the amount realized on the sale or exchange of property subject to a recourse liability does not include COD income. See also Treas.Reg. § 1.1001-2(c) (ex. 8) and Rev.Rul. 90-16, 1990-1 C.B. 12.

FN4. Treas.Reg. § 1.1001-2(a)(1) provides that, except as provided in Paragraphs (2) and (3) thereof, the amount realized from the sale or other disposition of property includes the amount of liabilities from which the transferor is discharged as a result of the exchange. Although Paragraph (2) of this regulation excludes COD income from the amount realized in a recourse setting, no such exclusion is provided in the case of nonrecourse debt. See Comm'r v. Lufts, 461 U.S. 300, 103 S.Ct. 1826, 75 L.Ed.2d 863 (1983); Treas.Reg. § 1.1001-2(c)(2) (ex. 7); and Rev.Rul. 76-111, 1976-1 C.B. 214.

FN5. IRC Section 108(a)(1)(A) and (d)(2).

FN6. IRC Section 108(d)(3). The determination of insolvency of either a C or S corporation is made at the corporate level without regard to the assets and liabilities of the shareholders. The determination is made at the partner level with respect to the excludability of COD income realized by a partnership, however. See IRC Section 108(d)(6) and (7).

FN7. Conestoga Transportation Co. v. Comm'r, 17 TC 506 (1951); J.A. Maurer, Inc. v. Comm'r, 30 TC 1273 (1958). On the other hand, the tax court did not include as assets the value of an individual taxpayer's business expertise and business relationships. See Davis v. Comm'r, 69 TC 814 (1978).

FN8. Davis, supra at n. 7; Cole v. Comm'r, 42 BTA 1110 (1940); Estate of Marcus v. Comm'r, 34 TCM 38 (1975); Hunt v. Comm'r, supra at n. 2; PLR 9130005; PLR 9125010.

FN9. PLR 8920019.

FN10. Conestoga Transportation Co., supra at n. 7.

FN11. IRC Section 108(a)(2).

FN12. IRC Sections 108(a)(3) and (d)(3).

FN13. IRC Section 108(b)(1).

FN14. IRC Section 108(b)(5).

FN15. IRC Sections 108(b)(2) and 1017.

FN16. IRC Section 108(b)(4)(A).

FN17. IRC Section 108(b)(3).

FN18. IRC Section 108(a)(1)(C).

FN19. IRC Section 108(a)(2)(B).

FN20. IRC Section 108(a)(2)(A).

FN21. Within the meaning of IRC Section 465(b)(3)(C).

FN22. IRC Section 108(g)(1)(B).

FN23. IRC Section 108(g)(2)(A).

FN24. IRC Section 108(g)(2)(B).

FN25. IRC Section 108(b)(1).

FN26. IRC Section 108(g)(3).

FN27. IRC Section 108(f).

FN28. Since these exceptions prevent the initial treatment of certain debt cancellations as giving rise to COD income, it is not necessary to look to any other provision of the Code for exclusion of those amounts.

FN29. IRC Section 108(e)(2).

FN30. IRC Section 108(e)(5).

FN31. S.Rep. No. 1035, 96th Cong., 2d Sess. 16 (1980); H.Rep. No. 833, 96th Cong., 2d Sess. 13 (1980).

FN32. S.Rep. No. 1035, 96th Cong., 2d Sess. 20, n. 24 (1980) indicates that the original jurisprudential exception remains alive.

FN33. IRC Section 108(e)(6).

FN34. IRC Section 108(e)(10).

FN35. Section 108(e)(10)(B). The exception also does not apply to exchanges after Oct. 9, 1990 which involve certain redeemable stock. Id.

FN36. Since IRC Section 108(e)(10)(B) precludes application of the statutory stock-for-debt exception in cases where the debtor corporation is in a Title 11 case or is insolvent, the original judicially developed exception may apply to such corporations.

FN37. IRC Section 108(e)(11).

FN38. IRC Section 108(e)(11)(B).

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 05/11/95
THE CURRENT DATABASE IS BLRLR

Baylor Law Review

Spring, 1989

*231 THE DISPOSITION OF PROPERTIES SECURED BY RECOURSE AND NONRECOURSE DEBT

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INTRODUCTION

A discussion of sales and exchanges of property secured by recourse and nonrecourse debt brings to mind a court's finding of an "optimist's valhalla,"' "'miraculous dreams of a rising phoenix"' and "sophisticated tax legerdemain."' [FN1] The tax consequences inherent in the use of recourse and nonrecourse debt were unsure,

became ***232** established and are now mixed. This paper will review the tax treatment of the disposition of property which is financed by recourse and nonrecourse financing. The discussion will be mostly chronological and an attempt will be made to discern the tax policy presented by the varying treatment. Examples will be used to demonstratively show the results of the evolution of the tax treatment.

I. PRIOR TO CRANE V. COMMISSIONER

If a taxpayer sold property that was encumbered by a recourse debt, the amount realized or the sales price the taxpayer received was the amount of money received plus the fair market value of property other than money received. [FN2] If the recourse debt was paid, it was considered that the taxpayer received that amount as money. If the recourse debt was assumed by the buyer, it was deemed that such assumption was the equivalent of the receipt of money by the taxpayer equal to the amount of the liability so assumed. [FN3]

Since it was properly assumed that no purchasers would pay more than fair market value for an asset, the note assumed or paid plus any other money and other property received equaled the property's fair market value. The amount of gain was then determined by deducting the adjusted basis of the property [FN4] from the amount realized. This is illustrated as follows (Example 1):

Note	100,000
Fair Market Value	110,000
Sales Price (10,000 + note)	110,000
Adjusted Basis	90,000
Gain/(Loss)	20,000

The tax policy surrounding such treatment appeared sound. The taxpayer, being personally liable on the note, either received the cash to pay the note and thus received money or the note was assumed and the taxpayer was relieved of payment, a situation equal to receipt of money. The amount realized by the taxpayer must include the amount he received and this includes the extinguishment of the obligation he was required by law to pay.

A taxpayer does not have a legal requirement to pay a nonrecourse debt. The lender may look solely to the collateral for satisfaction of the obligation. Upon a sale of property and payment by ***233** the purchaser of money or other property to the seller equal to the nonrecourse debt, a seller would have an amount realized equal to the consideration, and tax treatment similar to that of recourse debt would ensue. Confusion arose when the property was sold subject to the nonrecourse debt. It was argued that a taxpayer that was never personally liable on the nonrecourse debt could not and did not receive any benefit or consideration as regards the nonrecourse debt upon a sale that was subject to the debt. [FN5] It was further argued that the basis of such property did not include the nonrecourse debt and upon a sale subject to nonrecourse financing a taxpayer could only sell a "merely equity."' [FN6] Since a taxpayer had no personal obligation to pay the debt it was reasoned that, when the property was sold subject to the debt only, other consideration received would be calculated in the amount realized from a sale. [FN7] In fact, it was determined to be erroneous for the Commissioner to include the amount of a nonrecourse mortgage in the amount realized for a sale. [FN8] The tax consequences of a sale subject to nonrecourse debt, prior to 1947, are illustrated in Example 2:

Note (nonrecourse)	100,000
Fair Market Value	110,000
Sales Price (10,000 cash)	10,000
Adjusted Basis	0
Gain/(Loss)	10,000

The fair market value of the property is irrelevant to the calculation except that it shows what the property would sell for on an all-cash transaction. The tax policy at this time was simply that a nonrecourse debt was entirely different from a recourse debt. A nonrecourse debt did not give basis, and conveyance of the property subject to the debt was not a factor in the amount realized. Since the taxpayer had no liability for payment of the debt, it was disregarded in all calculations. While this certainly resulted in different tax treatment in the use of recourse and nonrecourse debt (see Examples 1 and 2), such a bifurcated approach fully recognized that there indeed exists a real difference between personal liability obligations and ones from which a taxpayer may walk away with impunity. Since nonrecourse debt is not calculated in the basis of an asset, the amount of depreciation a taxpayer may take is limited to ***234** the amount of money or other property with which he actually parted. This policy, in fact, seems sound in light of subsequent legislation to limit basis to debt upon which the taxpayer is personally liable. [FN9]

II. CRANE V. COMMISSIONER

In Crane v. Commissioner, [FN10] the taxpayer sold a mortgaged apartment building, which she had inherited, to a third party. She received $3,000 in cash and the buyer agreed to take the property subject to the mortgage. The property had previously been appraised for estate tax purposes at about one-quarter million dollars. [FN11] Mrs. Crane had taken $28,045.10 depreciation on the building. [FN12] Mrs. Crane asserted she had a taxable gain of $2,500 calculated by deducting $500 sales expense from $3,000 received and claiming a zero basis. The IRS asserted Mrs. Crane had a taxable gain of $24,031.45. [FN13]

The Supreme Court determined that Mrs. Crane inherited not the equity but the property's full value. [FN14] The Court then addressed the issue of the amount realized from the sale. First, the Court said, it would be an "absurdity"' to believe that Mrs. Crane sold property valued at $250,000 for only $3,000 in cash unless she sold only the equity and, secondly, that Mrs. Crane was benefited by being relieved from the mortgage. [FN15] The Court noted that such a principle was well established as to recourse debt, [FN16] and made the rule equally applicable to nonrecourse debt having an unpaid balance less than the value of the property:

> [A]n owner of property, mortgaged at a figure less than that at which the property will sell, must and will treat the conditions of the mortgage exactly as if they were his personal obligations. If he transfers subject to the mortgage, the benefit to him is as real and substantial as if the mortgage ***235** were discharged, or as if a personal debt in an equal amount had been assumed by another. [FN17]

The nonrecourse debt is now to be calculated in all respects as if it were a recourse debt. This may be illustrated as follows (Example 3):

	Recourse Debt	Nonrecourse Debt
Note	100,000	100,000
Fair Market Value	110,000	110,000
Sales Price (deemed amount realized)	110,000	110,000
Adjusted Basis	90,000	90,000
Gain/(Loss)	20,000	20,000

The Supreme Court determined that, as a matter of tax policy, the taxpayer owns the entire property, not just the equity, when the property is encumbered by nonrecourse debt. Therefore, the taxpayer owes the whole debt. Likewise, it was determined that upon sale of property encumbered by nonrecourse debt, a taxpayer transfers the entire value of the property and receives release from the whole debt. [FN18] The decision was not unanimous by far. Mr. Justice Jackson, joined by Mr. Justice Frankfurter and Mr. Justice Douglas, would have affirmed the tax

court. [FN19] They reasoned, as had the tax court, that the taxpayer never became personally liable for the debt, and when the asset was sold subject to the debt the taxpayer was released from no debt. [FN20] The dissent concluded that the debt was simply a subtraction from the value of what she did receive and from what she sold, and this left the taxpayer only the cash she actually received when she sold the property. [FN21] The decision in Crane now allowed a taxpayer to obtain basis in property that would include the debt secured by the property, be it recourse or nonrecourse debt.

While equal treatment of recourse and nonrecourse debt when the sales price (and thus fair market value) is greater than the amount of the debt was mandated by the Court, it was less definitive in the tax treatment afforded upon a disposition of property securing nonrecourse debt when the property's fair market value (thus sales price) is less than the debt. In the now-famous footnote 37, the Court pondered:

> ***236** Obviously, if the value of the property is less than the amount of the mortgage, a mortgagor who is not personally liable cannot realize a benefit equal to the mortgage. Consequently, a different problem might be encountered where a mortgagor abandoned the property or transferred it subject to the mortgage without receiving boot. This is not this case (emphasis added). [FN22]

After a pronouncement of the obvious, taxpayers argued that the benefit and amount realized from disposition of property with a fair market value was limited to the property's fair market value. [FN23] Quite as obviously, the Service took the opposite view. [FN24] The post-Crane footnote 37 treatment taken by taxpayers is illustrated as follows (Example 4):

	Recourse Debt	Nonrecourse Debt
Note	100,000	100,000
Fair Market Value	75,000	75,000
Sales Price (deemed amount realized)	100,000	75,000
Adjusted Basis	90,000	90,000
Gain/(Loss)	10,000	(15,000)

The tax policy hereby recognized is that without personal liability the amount realized upon a sale cannot exceed the value of the property when nonrecourse debt is involved, but the amount realized can exceed the value of the property when recourse debt is secured by the property. While this makes some sense, it would seem that either nonrecourse debt should be fully counted in the amount realized or it should be totally disregarded, as was the policy prior to Crane.

III. COMMISSIONER V. TUFTS

Footnote 37 was finally and squarely raised in Commissioner v. Tufts. [FN25] In Tufts, the property had a value substantially less than the nonrecourse mortgage. The partnership financed an apartment house with a nonrecourse loan, the rental market declined, and the partners sold their interest subject to the debt and $250 in cash. [FN26] ***237** The partners limited the amount they claimed as realized to the fair market value of the property and thereby claimed a loss. [FN27] The Service, on audit, determined the sale resulted in a partnership capital gain of approximately $400,000. [FN28]

The Court read Crane "to have approved the Commissioner's decision to treat a nonrecourse mortgage in this context as a true loan."' [FN29] The Commissioner had been on record in his position that the excess of nonrecourse indebtedness cancelled over the adjusted basis of the asset transferred, or the excess of the adjusted basis over the nonrecourse indebtedness cancelled, represents gain or loss from the sale of assets under section 1001 of the 1958 Code. [FN30] The Commissioner had decided to afford nonrecourse indebtedness the same

treatment as he gives a recourse mortgage. [FN31]

The Commissioner also had chosen not to characterize the transaction as a cancellation of indebtedness. [FN32] It is important to note at this juncture that the IRS had issued Treasury Regulation § 1.1001-2 (Discharge of Liabilities) shortly before this decision. [FN33] The Court expressly withheld opinion or dictum regarding the issues of debt forgiveness. [FN34] The Court did, however, state:

> In the context of a sale or disposition of property under § 1001, the extinguishment of the obligation to repay is not ordinary income; instead, the amount of the canceled debt is included in the amount realized, and enters into the computation of gain or loss on the disposition of property. According to Crane this treatment is no different when the obligation is nonrecourse. [FN35]

Up to this point, one may almost believe that clarity reigns and that "one of the murkiest pools of obscurity in the tax law for the past three decades"' [FN36] has become spring fed. By edict from the high nine on the Potomac, nonrecourse and recourse indebtedness ***238** will be treated similarly upon the sale or disposition, and gain or loss will be then easily determined under section 1001 of the Code. Tufts treatment can be analyzed by the following example and, when compared to Example 4, the distinction is apparent (Example 5):

	Recourse Debt	Nonrecourse Debt
Note	100,000	100,000
Fair Market Value	75,000	75,000
Sales Price (deemed amount realized)	100,000	100,000
Adjusted Basis	90,000	90,000
Gain/(Loss)	10,000	10,000

The Tufts decision further established that nonrecourse debt will have all the tax attributes of recourse debt. The fact that recourse and nonrecourse debt are treated significantly differently to all but the taxman is irrelevant and the pre-Crane position of the tax court is fully and completely buried.

IV. VOLUNTARY AND INVOLUNTARY SALES

That a sale is voluntary or forced (foreclosure) does not result in different treatment. [FN37] The term "sale"' may have many meanings depending on the context. [FN38] The Supreme Court stated that they could find no basis in the language of the Act, its purpose or legislative history for saying that losses from sales of capital assets were to be treated any differently whether they result from forced sales or voluntary sales. [FN39] It is the sale, be it voluntary or forced, which finally cuts off the interest of the mortgagor and is the means for determining the amount of deficiency judgment against him and is a means adopted by statute for determining the amount of his capital gain or loss from the sale of the mortgaged property. [FN40]

V. THE AMOUNT REALIZED OR SALES PRICE

Before we explore how the IRS can turn a capital transaction into one generating ordinary income in some instances, we will look at what the sales price really is. Obviously, in a voluntary sale, determination of the sales price, absent chicanery, is not difficult. I will limit this part of the discussion to an involuntary sale of real estate. ***239** I will avoid discussion of depreciation recapture, ITC recapture, and the like.

We do not, immediately, need to differentiate between recourse and nonrecourse indebtedness since real estate is excepted from the at-risk requirements. [FN41] Further, whether or not the mortgagor filed for protection under the Bankruptcy Act or whether the mortgagor is solvent, is not in issue as to the amount realized. One way

or another, a trustee's sale is held on the first Tuesday of a month and the mortgagor's property is struck off to a third party or to the debt holder. [FN42] The amount received or credited at the trustee's sale will be the sales price and amount realized by the mortgagor. But what if that amount is not the fair market value of the property on the date of sale? A secured party has a fiduciary duty to sell the collateral at the highest possible price, but as a purchaser his interest is to buy the collateral at the lowest price. [FN43] Prior to 1986, the rule in Texas was that a trustee, while having a fiduciary duty to the debtor, could sell or bid on the collateral as long as the price was not grossly inadequate. [FN44] In 1980 the Fifth Circuit decided the Durrett case. [FN45] Durrett was a debtor in possession under Chapter XI of the Bankruptcy Act and sought to set aside and vacate a transfer of real property that was foreclosed on by the insurance company nine days before he filed for protection. Durrett's sole issue on appeal was whether a fair equivalent had been paid at the foreclosure sale. [FN46] The property was sold for 57.7% of its fair market value and the fifth circuit, in voiding the sale, could locate no district court or appellate court decision that dealt with a transfer of real property which had approved the transfer for less than 70% of the market value of the property. [FN47] Thus sprang up the Durrett Rule or the 70% Rule. Lenders embraced it as if it would absolutely apply to all foreclosures. This belief was strengthened in 1985 by the Willis decision ***240** in the Southern District of Texas. [FN48] Mr. Willis voided the involuntary sale of his residence. The court looked at four different methodologies in determining what percentage of the fair market value the sales price was. The methodologies resulted in 73%, 18%, 41% and 20% as possible percentages. The court rejected the 73% test, did not decide which of the remaining three methods was correct, and voided the sale. [FN49]

A debtor in bankruptcy could litigate the sales price determined at foreclosure based on these rules. A state court action was still controlled by the grossly inadequate sales price standard of Maxey. [FN50]

In 1986, the Beaumont Court of Appeals decided Sabine Bank. [FN51] While the case dealt with the foreclosure upon and sale of personalty, the court used the case to write upon the law of foreclosure, be it of personalty or realty. The court reasoned that:

> A lender who has secured collateral, whether personalty or realty is under a trust arrangement with the borrower, in the event of foreclosure, to make an honest effort to reduce the loan as much as possible by securing a fair price for the collateral. [FN52]

Noting that the Texas Supreme Court had never spoken precisely on the subject, [FN53] the court held that a borrower may contest the sale if a significant disparity exists between the sales price and the property's fair market value. [FN54] The reasoning of the court is in line with other jurisdictions that have reviewed the issue. [FN55]

Now a taxpayer can at least litigate the sales price that the lender will report to the IRS. A taxpayer may now determine his basis in the real estate that was foreclosed on, accept, negotiate or seek legal recourse of the sales price, go to section 1001 of the Code and determine the amount and recognition of his gain or loss.

***241** A distinction between recourse and nonrecourse financing must now be made. If the property secured nonrecourse financing, Crane and Tufts control, and the fair market value of the property is not in issue when the property has a value less than the debt owed. If, however, the financing was recourse, the determination of the sales price becomes critical.

VI. ABANDONMENT VS. SALE OR EXCHANGE

A related issue is the nature of any gain or loss upon an abandonment of property secured by nonrecourse financing. In 1980 the tax court decided Freeland. [FN56] Freeland had purchased real estate for $50,000, put $9,000 cash down and gave the seller a $41,000 note secured by a deed of trust on the property. [FN57] Under the terms of California law, a seller who owner-financed the sale of his property could not seek a deficiency judgment against a purchaser, thus making the note nonrecourse in nature. [FN58] The market value of the property was reduced to $27,000 and Freeland quitclaimed the property back to the seller when the balance of the

note was still $41,000. [FN59] Freeland claimed an ordinary loss of $9,188 ($188 sales expense) on his tax return for the year in which he abandoned the property back to the seller by quitclaim deed. [FN60] The amount of the loss was not in dispute, but the Service determined that the loss was deductible only as a loss on the sale or exchange of a capital asset subject to the limitations provided in sections 1211 and 1212. [FN61] The parties framed the issue in terms of abandonment, and both parties implicitly agreed that a loss sustained on abandonment is an ordinary one. [FN62] Freeland stated that the issue to be decided is whether a disposition by abandonment constitutes a sale or exchange. [FN63] The Commissioner, while conceding that abandonment of property is not a disposition by sale or exchange, argued that this disposition was the equivalent of a foreclosure sale rather than an abandonment. ***242** [FN64] The court determined that by reconveying the property to the seller. Freeland had accomplished an abandonment under California law. [FN65] "That a disposition, causing gain or loss to be recognized under § 1001 occurs upon a reconveyance of property in satisfaction of a mortgage obligation is well settled."' [FN66] However, not every taxable disposition of property is a sale or exchange. [FN67] The court looked at five factors that were given consideration in other decisions, namely:

(1) whether the transfer was voluntary or involuntary,

(2) whether the mortgage debt was released or not, and whether the transferor received an additional (even minimal) consideration or boot,

(3) whether the transferor-mortgagor was personally liable on the mortgage debt,

(4) whether the transferor-mortgagor received any tax benefits from including the mortgage debt in his basis while he held the property, and

(5) whether the fair market value of the property at the time of reconveyance exceeded or was less than the unpaid balance due on the mortgage debt. [FN68]

The court then analyzed what the result would be if the mortgage was recourse. "'It has been well established that where a taxpayer transfers property to his mortgagee in [satisfaction] of a mortgage obligation for which he is personally liable, any loss sustained by him will be deemed to have resulted from a sale or exchange on the ground that the taxpayer received consideration in return for transferring this property, the consideration being his release from liability."' [FN69] It is important to note that the court, in restating the law as it applied to recourse financing, did not apparently include the concept of debt forgiveness resulting from a reconveyance when the fair market value of the property is less than the outstanding principal balance of the mortgage.

The court reviewed the decision in Hammel wherein the Supreme Court concluded that a foreclosure sale (or involuntary sale) constituted ***243** a sale or exchange resulting in a capital loss, [FN70] a reviewed Crane [FN71] and later decisions and decided that they believed that the holdings of Crane, and subsequent cases decided in light of Crane, mandate the conclusion that relief from indebtedness, even though there is no personal liability, is sufficient to support a sale or exchange. [FN72]

In 1984 the fifth circuit decided a case directly on point with Freeland. [FN73] In Yarbro v. Commissioner, the taxpayer formed a joint venture that purchased unimproved real estate. [FN74] The purchase price was $362,132.08; approximately 10% was paid in cash as a down payment and the balance was represented by four nonrecourse promissory notes secured by deeds of trust on the property. The property was subject to a grazing lease and the joint venture continued to rent the property for grazing during its ownership period. Due to an increase in property taxes and decline in the value of the property, the joint venture decided to abandon the property. [FN75] Unlike Freeland, the taxpayer notified the lending institution that he was abandoning the property, would not pay the taxes due on it and would not deed it back in lieu of foreclosure, stating that he "had nothing to convey and would have nothing to do . . . with the property from that point on."' [FN76] The bank subsequently foreclosed on the property.

The taxpayer claimed an ordinary loss of approximately $10,000. [FN77] The Commissioner took the position that the taxpayer's abandonment of the property constituted a sale or exchange within the meaning of sections 1211 and 1212 of the Code. The Commissioner further determined that the taxpayer held the land as an investment and not for use in his trade or business, and concluded that the abandonment was the sale or exchange of a capital asset. [FN78]

The tax court agreed with the Commissioner and, relying on Freeland, held that an abandonment of property constituted a sale or exchange for purposes of Code sections 1211 and 1212. [FN79] Further, ***244** the tax court relied on Middleton v. Commissioner, a case which was very similar in material aspects to the instant case. [FN80]

The fifth circuit held the question to be whether a taxpayer can avoid the tax consequences of Hammel by the simple expedient of abandoning the property before the mortgagee can foreclose and stated: "The Freeland court saw no reason, nor do we, to put such a premium on artful timing."' [FN81]

Thus a foreclosure, deed in lieu of foreclosure or simple abandonment of real property secured by a nonrecourse mortgage, will be treated as a sale or exchange and, if held for investment, will create capital gains and losses. If an asset is transferred, the amount realized from disposition is first offset by the adjusted basis of the transferred property in order to determine the transferor's gain or loss from the transaction. [FN82] Qualifying gains or losses [FN83] are subject to the capital gain and loss rules which provide for more stringent limitations on deductibility in the case of a net loss for the year. [FN84] The courts seem to have erased all distinctions between the use of recourse and nonrecourse debt upon the sale or exchange of the asset.

VII. YEAR OF INCLUSION

Assuming a foreclosure or abandonment of property secured by recourse debt and assuming the lender declares a deficiency, which year does the taxpayer take into account in determining his loss and/or income from any debt forgiveness? Ordinarily the taxpayer would account for the transaction on his tax return in the year of foreclosure or abandonment. This is the transaction approach. [FN85] However, if the taxpayer challenges the amount determined by the lender as not being the fair market value, the event could take place in one year and the amounts be determined in a later year. Further, as to any debt forgiveness, the lender has four years from date of default to bring a deficiency action. [FN86] Until the statute of limitations ***245** has run or other indicia of forgiveness is apparent, it would seem the taxpayer is free to choose the year of inclusion. [FN87] The taxpayer can elect a year that may be more beneficial from a tax standpoint than others. For instance, in the year of foreclosure the taxpayer may be solvent but in the next year other property declines in value and the taxpayer may now be insolvent in an amount equal to or greater than the claimed deficiency. In year two the taxpayer includes the income on his tax return and may exclude the income that the deficiency has generated. [FN88]

Upon the death of a taxpayer, if the decedent's executor does not intend to satisfy a debt of the decedent and it is apparent either due to the failure to file a claim or otherwise that the creditor is not going to seek to enforce the claim, the decedent's estate will realize debt forgiveness income. [FN89]

VIII. TREASURY REGULATION § 1.1001-2(A)(2) -- DISCHARGE OF INDEBTEDNESS

Up to this point, it would seem that the tax treatment on disposition of an asset encumbered by a recourse or nonrecourse debt will be treated similarly. The amount realized on sale or exchange includes the amount of the debt even if it is nonrecourse and the property has a fair market value less than the debt.

While Tufts pending before the Court of Appeals for the Fifth Circuit, the Treasury promulgated Regulation § 1.1001-2(b) which states that the fair market value of an asset at time of sale is not relevant for purposes of determining the amount realized nor the amount of liability from which a taxpayer is discharged. [FN90] Along with that section of the regulation, the Treasury promulgated Regulation § 1.1001-2(a)(2): "Discharge of

indebtedness. The amount realized on a sale or other disposition of property that secures a recourse liability does not include amounts that are (or would be if ***246** realized and recognized) income from the discharge of indebtedness under § 61(a)(12) . . . ."' [FN91]

The Service was required by the Crane/Tufts reasoning to include the entire amount of the principal debt owed in the amount realized when the debt was nonrecourse. The lesson of these cases seemed to be one of equal treatment for recourse and nonrecourse debt. Now, however, the Service has bifurcated the treatment of recourse and nonrecourse debt when the fair market value of the asset is less than the amount owed. [FN92] Prior to the Treasury taking this approach, the courts had, as a rule, treated income realized by a debtor from the transfer of property in discharge of nonrecourse debt in the same manner as such income from recourse debt -- as gain from the sale of the transferred property. [FN93] Almost uniformly the taxable event has been characterized as a sale of the transferred property resulting in gain to the extent that the liability discharged exceeded the property's adjusted basis. [FN94] The same result was reached even in some cases in which the Service attempted to characterize the transaction as producing cancellation of indebtedness income. [FN95] The problem before Crane and Tufts was the treatment of nonrecourse indebtedness upon a sale or exchange (voluntary or involuntary), not how to treat a sale or exchange of property securing recourse debt. The tax consequences of the latter were well understood:

> If an owner sells property for more than its basis, the assumption that there has been a taxable gain follows almost inevitably. This is as true where the consideration received is property as where it is cash. Sometimes the transaction involves an atypical sort of consideration such as a release of the transferor's indebtedness. That does not prevent the transfer from being a sale or exchange resulting in capital gain or loss. So where an owner pledges his property for a loan, the proceeds of which are greater than his basis, and subsequently succeeds in transferring the property for ***247** a cancellation of debt, the excess of what is received over the basis of the property is gain, taxable in the year which the property is disposed of and the debt discharged. [FN96]

In each case the transaction is treated as if the mortgagor had sold the property for cash equivalent to the amount of the debt and had applied the cash to the payment of the debt. [FN97]

As stated above, Regulations § 1.1001-2(a)(2) was promulgated at the time the Supreme Court decided Tufts. A portion of the regulation was cited in the case. [FN98] Further, in discussing the issue that nonrecourse financing gave rise to most tax shelters and that Congress enacted at-risk rules but exempted real estate from them, the Court states in a footnote, "[a]lthough this congressional action may foreshadow a day when nonrecourse and recourse debts will be treated differently, neither Congress nor the Commissioner has sought to alter Crane's rule of including nonrecourse in both basis and amount realized."' [FN99] The Court goes on to state in another footnote:

> In the context of a sale or disposition of property under § 1001, the extinguishment of the obligation to repay is not ordinary income; instead, the amount of the cancelled debt is included in the amount realized, and enters into the computation of gain or loss on the disposition of the property. According to Crane, this treatment is no different when the obligation is nonrecourse: the basis is not reduced as in the cancellation of indebtedness context and the full value of the outstanding liability is included in the amount realized (emphasis added). [FN100]

To be sure, the Supreme Court could have decided Tufts differently. [FN101] Justice O'Connor, is her concurring opinion, indeed bemoaned the fact that she felt compelled to follow the teachings of Crane, "[i]ndeed, were we writing on a clean slate except for the ***248** Crane decision, I would take quite a different approach . . . ."' [FN102] The court did not take a different approach but affirmed the Crane reasoning. Does Regulation § 1.1001-2(a)(2) conflict with the Crane/Tufts decisions?

IX. AFTER REGULATION § 1.1001-2(a)(2)

The Service has found no conflict and has applied the two-step analysis set forth in the regulation for treatment of recourse debt upon sale or exchange of the asset. To demonstrate the Treasury's approach to nonrecourse and recourse indebtedness upon a sale or exchange of an asset, the regulation includes two examples. First, nonrecourse debt:

> In 1974 E purchases a herd of cattle for breeding purposes. The purchase price is $20,000, consisting of $1,000 cash and a $19,000 note. E is not personally liable for repayment of the liability and the seller's only recourse in the event of default is to the herd. In 1977 E transfers the herb back to the original seller, thereby satisfying the indebtedness . . . . At the time of the transfer the fair market value of the herd is $15,000 and the remaining principal balance on the note is $19,000. At that time E's adjusted basis in the herb is $16,500 . . . . As a result of the indebtedness being satisfied, E's amount realized is $19,000 . . . . E's realized gain is $2,500 ($19,000-$16,500); [FN103]

Second, recourse debt:

> In 1980, F transfers to a creditor an asset with a fair market value of $6,000 and the creditor discharges $7,500 of indebtedness for which F is personally liable. The amount realized on the disposition of the asset is its fair market value ($6,000). In addition, F has income from the discharge of indebtedness of $1,500 ($7,500-$6,000). [FN104]

Since the promulgation of the regulation, the Service has been consistent in its application of the bifurcated or two-step approach upon a sale or exchange of an asset securing a recourse debt when the fair market value of the asset is less than the amount of the debt. Ordinary income will result from the cancellation of indebtedness. ***249** [FN105] Tax treatment after Regulation § 1.1001-2(b) may be further illustrated by the following example:

	Recourse Debt	Nonrecourse Debt
Note	100,000	100,000
Fair Market Value	75,000	75,000
Sales Price (deemed amount realized)	75,000	100,000
Adjusted Basis	90,000	90,000
Gain/(Loss)	(15,000)	10,000
Debt Forgiveness	25,000	

The changes in tax treatment are dramatic. The deemed amount realized is now the opposite of what would have been determined under post-Crane footnote 37 treatment. Other examples can show even greater disparity in tax treatment between disposition of property secured by recourse and nonrecourse financing. [FN106]

***250** The tax court has adopted the Commissioner's position. In Michaels v. Commissioners, [FN107] the court held that a discount that the taxpayer received on the prepayment of a recourse mortgage that was made in connection with the sale of her residence is not included in the amount realized for purposes of computing gain. The taxpayers included the discount as part of the gain they realized on the sale of their residence which they deferred. [FN108] The court in interpreting Regulation § 1.1001-2(a)(2) stated:

> This Regulation effectively bifurcates the instant transaction by removing the amount of the discount from the computation of the amount realized and recognizing it as a separate income item. [FN109]

While section 108 [FN110] allows a reduction in basis for the reduction of a debt held by the seller, no such allowance is made for reduction in a mortgage held by a third party.

X. DEBT FORGIVENESS

Since a taxpayer may recognize debt forgiveness income, a determination of what is and is not such income is required. A taxpayer realizes and recognizes ordinary income if he is relieved of payment of a debt. [FN111] If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, the debtor realizes income in the amount of the debt as compensation. [FN112] A taxpayer does not realize income when money is borrowed due to the corresponding obligation to repay the amount borrowed. [FN113] If, however, the taxpayer is for some reason not required to repay the borrowed money income will result. In 1931, the U.S. Supreme Court held that if a corporation repurchases its own bonds for an amount less than the price for which it sold those bonds, the difference between the sale or issue price and the repurchase price constitutes taxable income to the corporation. [FN114] The Court based its ***251** decision on the theory that the reduction in outstanding liabilities (the difference between the issue and repurchase prices) resulted in a freeing of assets and an accession to income. [FN115]

This position is now statutorily embodied in section 61(a)(12) which states, "'[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: . . . Income from discharge of indebtedness."' [FN116]

In order for a taxpayer to have income from discharge of indebtedness, there must in fact be a debt that is in some manner cancelled. There is no discharge of indebtedness income if there is no obligation to repay the funds that were advanced. In Millar v. Commissioner, [FN117] the taxpayers signed nonrecourse notes and invested the proceeds into the capital of a corporation they owned. Upon default the note holder foreclosed upon the taxpayers' stock in the corporation. The Commissioner took the position that the taxpayers had realized cancellation of indebtedness income on the surrender of their stock in the amount of their discharged nonrecourse obligation. [FN118] The issue as stated by the court was whether the taxpayers had an obligation to repay the funds advanced to them and if not then no cancellation of indebtedness could arise. Not surprisingly, one of the taxpayers took the position that the cash advances made to them were intended as gifts, not loans. [FN119] The court remanded for a factual determination of gift or loan, the tax court found a loan, [FN120] and that finding was affirmed on appeal. [FN121] Without a repayment obligation a transaction cannot be elevated to indebtedness and, therefore, cannot result in discharge of indebtedness income.

The discharge of a debt that is contingent may not result in income. If an obligation is so contingent that it does not constitute a debt of the taxpayer then a discharge of that debt does not give rise to income. [FN122] Mere bookkeeping entries, though of some evidentiary value, are not determinative. They cannot alter the legal effects of transactions, nor create income where none in fact exists. [FN123] ***252** If the debt is too contingent at the creation of the debt so as to allow it to be included in an asset's basis for Federal income tax purposes, then the taxpayer cannot realize income upon the release of the obligation to repay. Repayment that is highly contingent, such as upon the discovery of recoverable amounts of oil and gas [FN124] will not allow a nonrecourse note amount to be included in basis, and the forgiveness of such indebtedness will not give rise to income.

Income from discharge of indebtedness requires that the debt be cancelled. The absolute cancellation of a debt, while easy of concept, occurs infrequently. Cancellation of debt also occurs where a creditor accepts property that has a value less than the debt or an amount of money less than the debt in complete satisfaction of that debt. This may occur when the creditor is convinced that the debtor can pay no more than what is being offered or when the debt instrument carries an interest rate significantly below the now prevailing rates. [FN125] However, a cancellation of debt can also occur if the creditor fails to act timely, and his claim is barred by an applicable statute of limitations or other rule of law. [FN126] If there exists a reasonable expectation of repayment of the debt, a cancellation of the debt will not generally be found. If the expectation of repayment vanishes in a subsequent year, then a taxpayer may realize income. [FN127]

The cancellation of a debt may not be, in and of itself, the source of income but may simply be the method by which a creditor makes a payment to the debtor. [FN128] Whether such payment is ordinary income to the debtor

depends upon the nature of payment. For example, a discharge of indebtedness may constitute a payment for services [FN129] or a constructive dividend. [FN130] A discharge of indebtedness can also constitute a contribution to capital [FN131] or a gift, [FN132] in which case the forgiveness of indebtedness is not income to the debtor. The discharge of a debt may also represent a payment for property, [FN133] in which case the gain, if any is derived from dealings ***253** in property, not the discharge of indebtedness. [FN134] The discharge of indebtedness may also constitute a payment for the settlement of a litigated claim. [FN135] Where a payment is made in settlement of litigation, the nature of the claims involved and the basis of the recovery determine the tax treatment of the settlement proceeds. [FN136] The Senate Finance Report accompanying the passage of section 108 of the Code states that "debt discharge that is only a medium for some other form of payment, such as gift or salary, is treated as the form of payment rather than under the debt discharge rules."' [FN137]

Discharge of debt is not realized where there is a modification of the debt or if the taxpayer substitutes a new obligation for the original debt. [FN138] A taxpayer will, however, recognize income on an exchange of an old obligation for a new debt instrument to the extent that the face amount of the new debt is less than the old. [FN139]

A taxpayer who is primarily liable for a debt may wish to substitute a guarantee agreement for joint and several primary liability on a debt. Under tax law, no immediate tax consequences result from the execution of a guarantee agreement. [FN140] While refinancing of a debt may preclude income realization, the substitution of a guaranty that is contingent and which has no ascertainable value vis-a-vis a true debt is not a substitute for the debt nor is it refinancing of the debt. [FN141] There is no real continuation of the indebtedness when a highly contingent obligation is substituted for a true debt. [FN142] Therefore, upon such a substitution, income is realized to the extend the taxpayer is discharged from the initial indebtedness.

XI. AMOUNT REALIZED AND ACCRUED INTEREST

As we have seen, a sale or exchange of an asset securing a nonrecourse debt that has a fair market value less than the debt will result in the amount realized being the amount of the debt. But when a taxpayer sells or disposes of property encumbered by an obligation ***254** involving accrued interest as well as principal, then, assuming the accrued interest was neither previously deducted nor included in basis, the amount realized under section 1001(B) does not include the accrued interest. Only the outstanding principal is included. [FN143] However, if the accrued interest became a part of the principal pursuant to the terms of the mortgage then it is included in the amount realized even though the taxpayer may have previously deducted these amounts. [FN144]

In Allan v. Commissioner, [FN145] the taxpayers were partners in a limited partnership which purchased residential property subject to a mortgage insured by the Department of Housing and Urban Development (HUD). The partnership deducted interest on the accrual basis of accounting. The partnership defaulted and HUD acquired the mortgage. HUD paid the real estate taxes and charged the partnership for interest payments when they fell due on the mortgage. Four years after HUD acquired the mortgage, the partnership transferred the property to HUD in lieu of foreclosure. The amount of the outstanding nonrecourse debt to HUD exceeded the fair market value of the property at the time the deed in lieu of foreclosure was given. The issue presented was whether the partnership was required to recognize ordinary income in an amount equal to the previously deducted interest and taxes. [FN146] The mortgage provided that the advances that HUD made to pay the real estate taxes and interest payments due were to be added to the principal and were subject to the mortgage interest rate. [FN147] As such the Court determined it was required by Tufts to include in the amount realized the full principal amount of the nonrecourse debt which by its own terms included the advances for real estate taxes and interest. [FN148]

XII. SECTION 108

If a taxpayer realizes ordinary income upon the voluntary or involuntary sale of an asset at a price less than the recourse debt owing against it, the nonrecognition provisions of section 108 and the ordering provisions of section

1017 become important. Section 108 provides that if a taxpayer would otherwise recognize discharge of indebtedness income, the income will be excluded under certain circumstances. ***255** [FN149] A taxpayer must first realize discharge of indebtedness income in order to qualify for the exclusions allowed in section 108. [FN150] Section 108 applies to indebtedness incurred or assumed either by a corporation or by an individual in connection with property used in a trade or business for which the corporation or individual taxpayer is liable or subject to which the taxpayer holds the property. [FN151]

Income from discharge of indebtedness income will be excluded if the discharge occurs in a Title 11 case or if the discharge occurs when the taxpayer is insolvent. [FN152] A Title 11 exclusion takes precedence over the insolvency exclusion. [FN153]

The Code defines insolvency to mean the excess of liabilities over the fair market value of assets immediately before the discharge of indebtedness occurs. [FN154] Bankruptcy or a Title 11 case means solely that a bankruptcy court has jurisdiction over the taxpayer and that the discharge of indebtedness is granted by the court or pursuant to a plan approved by the court. [FN155]

The debt from which a taxpayer may be discharged includes that for which he is liable (recourse) and that which encumbers his property and for which he is not personally liable. [FN156] Since the Supreme Court has made no distinction between recourse and nonrecourse debt in determining the amount realized, and has considered nonrecourse debt to be real debt for tax purposes, the inclusion of nonrecourse debt in the definition of indebtedness of a taxpayer is mandated.

The Tax Reform Act of 1986 repealed a third category for discharges of indebtedness after December 31, 1986. [FN157] The now-defunct third category provided that cancellation or discharge of indebtedness income would not be recognized if the indebtedness discharge was "qualified business indebtedness."' [FN158] This exception was repealed because Congress believed that the prior law treatment of the discharge of qualified business indebtedness was too ***256** generous in that income from such a discharge generally was deferred by reducing the basis of depreciable assets, regardless of the economic ability of the taxpayer to currently pay the tax. Moreover, the exclusion produced disparate results among taxpayers depending upon the makeup of their depreciable assets. [FN159]

The question of whether a debt is discharged in a Title 11 proceeding or not depends solely upon whether the taxpayer has filed for protection under Title 11 and whether the debt has been all or partially discharged pursuant to a court order or pursuant to an approved plan of arrangement under court supervision. [FN160] The Internal Revenue Code provides that a taxpayer who meets these criteria does not have income from the cancellation or discharge of indebtedness. [FN161]

The insolvency exception applies to the extent the taxpayer is insolvent before the debt is discharged and solvent afterwards with income realized to the extent the taxpayer is made solvent. [FN162] Insolvency is defined to mean the excess of a taxpayer's liabilities over the fair market value of the taxpayer's assets. [FN163] The determination of insolvency is made on the basis of the taxpayer's assets and liabilities immediately before the discharge. [FN164]

The insolvency provisions of section 108 are tested at the partnership, not the partner, level, [FN165] and the insolvency exception applies only for discharge of indebtedness income, not for other types of ***257** income, such as the cancellation of a wage claim or of rents that are due. [FN166]

The insolvency exception, while a needed provision, only applies to the extent the taxpayer is insolvent before the debt is discharged. Income is realized to the extent the taxpayer is made solvent. [FN167] Further, as stated above, in determining the extent of liabilities, there apparently is no authority for counting contingent or contested liabilities within the scope of the term liability as used to define insolvency in section 108. [FN168]

As with most matters, a taxpayer is rarely given a free lunch. The price of a section 108 exclusion is that the taxpayer's tax attributes will be reduced to the extent the amount of income from discharge of indebtedness is excluded from gross income under section 108(a)(1). [FN169] Thus the exemption is not totally free, but lunch is paid for in a different manner. The taxpayer is given a deferral (except as noted below) on the discharge income by offsetting such amounts against the taxpayer's tax attributes. The taxpayer's tax attributes must be reduced in the following order:

(A) The net operating loss for the taxable year of discharge (if any), and any net operating loss carryover to that year;

(B) Any carryover of the general investment tax credit under Section 38;

(C) Any net capital loss generated in the taxable year of discharge and any capital loss carryover to that year;

	Recourse Debt Paid First	Nonrecourse Debt Paid First
Recourse Note	50,000	50,000
Nonrecourse Note	50,000	50,000
Fair Market Value	75,000	75,000
Sales Price (deemed amount realized)	75,000	100,000
Adjusted Basis	75,000	75,000
Gain/(Loss)	0	25,000
Debt Forgiveness	25,000	

***258 (D)** The basis of the taxpayer's assets (depreciable and nondepreciable); and

(E) Foreign tax credit carryovers. [FN170]

Before application of section 108 attribute reductions, the taxpayer must first determine his tax for the taxable year of the discharge, applying the general rules of the Code. [FN171] The reduction in net operating loss carryovers and capital loss carryovers applies to the loss (if any) for the taxable year of the discharge and then applies to reduce the loss carryovers in the order in which they arose. [FN172] Tax credits are now reduced at the rate of 33 1/3 cents for each dollar of indebtedness discharged. [FN173]

After reduction in operating losses, capital losses, and tax credits, the remainder of the amount of indebtedness that was discharged is applied to the taxpayer's assets (depreciable and nondepreciable). An important note is that the basis of a taxpayer's assets may not be reduced below the amount of the taxpayer's remaining undischarged liabilities. [FN174] Therefore, if the taxpayer sells all of his assets after debt discharge occurs but prior to the end of the tax year in which the debt discharge occurred, for an amount equal to the outstanding and nondischarged liabilities of the taxpayer, no income is recognized by the bankrupt or insolvent taxpayer.

A very important provision found in the Committee Report is the fresh start or free lunch provision. [FN175] That provision states that any amount of debt discharge that is left after the attribute reduction under section 108 is disregarded. Such excess amount of debt discharge is not income nor does it have other tax consequences. By allowing this excess to disappear, the taxpayer has obtained a fresh start and a free lunch.

In a case under Title 11 involving an individual debtor, the attribute reduction required under section 108(b) of

the Code applies to the attributes of the bankruptcy estate which succeeded to the tax attributes of the individual debtor. [FN176] The attribute reduction does not apply to the tax attributes of individual taxpayers which were generated after the filing of the bankruptcy petition. [FN177] Property of ***259** an individual debtor that is exempt such as a homestead, automobile and furnishings will not be subject to basis reduction rules. [FN178] The Code also provides that a reduction in the basis of assets pursuant to section 108 is not considered a disposition for tax purposes and there is no recapture of investment tax credit. [FN179] The Code specifically states that a taxpayer under Title 11 will not have a basis reduction in exempt property. It is silent as to insolvent taxpayers who do not require bankruptcy court protection. If silence is construed to mean a nonbankrupt taxpayer will be required to reduce his basis in all other property, including exempt property, then a large disparity exists. An insolvent taxpayer may well want to and be able to avoid filing a bankruptcy petition, but may be well advised to do so in order to retain the tax basis on his homestead, automobile and exempt furnishings. For example, if taxpayer A is insolvent in the amount of $500,000 due to a bad real estate investment and has as his sole asset a residence with a basis of $375,000, he would reduce his basis in the residence to zero. A subsequent sale for $500,000 would produce $500,000 of ordinary income (unless a section 121 exclusion is allowed). Taxpayer B, with the same amount of insolvency and the same asset and basis, files for bankruptcy protection. The debt is discharged pursuant to a court- approved plan. A subsequent sale of the residence results in a gain of $125,000 ($500,000 sales price less adjusted basis of $375,000) which may be excluded under section 121 resulting in no gain and no tax. Taxpayer A may have tax to pay of $144,000 ($500,000 x 28%).

Prior case law looked to state law to determine whether a taxpayer's assets were exempt from the claims of creditors. To the extent assets were exempt from creditor claims they were not considered in a determination of whether a taxpayer was solvent. [FN180]

Section 108(d)(10) provides a cross reference to section 1017(c)(1) for a provision which states that no reduction is to be made in the basis of exempt property of an individual debtor. The referenced section, while entitled "'Reduction Not To Be Made In Exempt Property,"' provides that no basis reduction will occur in property which the debtor treats as exempt under the Bankruptcy ***260** Code. The section does not state that no basis reduction will occur in property which a taxpayer owns that is exempt from the claims of creditors under applicable state law. The term "debtor"' has a specific definition in bankruptcy law: "[a] person or municipality concerning which a case under this title has been commenced."' [FN181] This construction would overrule prior case law and treat insolvent taxpayers and Title 11 debtors in a very different manner. It should not be the policy of tax law to encourage the filing of bankruptcy petitions in order to obtain more favorable tax treatment, and it would seem the better interpretation is to allow both bankrupt and insolvent taxpayers to retain basis in exempt property and have an equal fresh start.

An alternative to the ordering of the reduction of tax attributes is available to a bankrupt or insolvent taxpayer. In lieu of the normal ordering set forth above, a taxpayer may elect (but only up to the amount of insolvency) to first reduce the basis of depreciable property by all or any portion of the income from discharge of indebtedness excluded under section 108(a)(1). [FN182] The general rule that prohibits a taxpayer from reducing the basis of his depreciable assets below the amount of the taxpayer's remaining undischarged liabilities is not applicable. [FN183] If the taxpayer elects, the Code permits the taxpayer to elect to reduce the entire basis of the taxpayer's depreciable assets, but not below zero. [FN184]

A taxpayer makes an election to reduce basis in depreciable property on his return for the year in which the discharge of indebtedness occurs. [FN185] Once the election is made, the election can be terminated only with the Commissioner's consent. [FN186] Temporary Treasury Regulations provide that the election must be made on a statement attached to a completed Form 982, or on that form itself if the form provides a space for the election. [FN187] Failure to file the basis adjustment form can result in the full amount of the income from debt forgiveness being recognized fully in the year in which the statute of limitations for instituting suit to collect on the taxpayer's notes expires. [FN188]

***261** XIII. SECTION 1017

The operational rules for reducing the basis in assets are contained in section 1017 of the Code, which controls for reducing basis under section 108(b)(2)(D) or under the election in section 108(b)(5). Section 1017(b)(1) states that the order of reduction of the basis of the particular assets will be determined pursuant to Treasury Regulations. The Regulations [FN189] require that basis reduction will first apply only to property used in a trade or business in the following order:

(A) In the case of indebtedness used to purchase a particular asset (other than inventory, notes or accounts receivable) that is discharged, the cost or other basis of such property will be decreased by the amount excluded from gross income under IRC § 108(a) which is attributable to the discharged debt used to purchase that property. This is so even if a lien is placed against the property securing payment of that debt;

(B) In the case of property that has a nonpurchase money lien against it (other than inventory, notes or accounts receivable), the cost or other basis of such property will be decreased by an amount equal to the amount excluded from gross income under IRC § 108(a) and attributable to the discharge of indebtedness secured by such lien;

(C) Any remaining excess will next be applied proportionately to other property of the taxpayer (other than inventory, notes and accounts receivable); and

(D) Any remaining excess will next be applied proportionately to inventory, notes and accounts receivable. [FN190]

If after application of the above, nontaxable income from discharge of indebtedness remains, a taxpayer looks to the basis of property he holds for the production of income. In the case of an individual the cost or other basis in property held for the production of income is reduced on a proportionate basis. [FN191] Any excess nontaxable income from discharge of indebtedness after application of the above is then applied against basis in property other than property used in any trade or business and property held for the production of income, with such reductions also being made on a proportionate basis. [FN192]

***262** As can be seen, all the property of a taxpayer can realize a basis reduction. But here the bankrupt taxpayer appears to have the advantage. As stated above, property which is treated by the debtor as exempt in a bankruptcy case will not be subject to the basis reduction rules. [FN193] If the Code gives disparate treatment to debtor and nondebtor insolvent taxpayers in this area, then a bankruptcy filing may serve to save a considerable amount of basis and attendant tax upon disposition of those exempt assets.

XIV. RECAPTURE OF DEPRECIATION

To the extent the taxpayer has had a free lunch of debt forgiveness, the case is closed. To the extent the taxpayer paid for lunch with a postponement via a basis reduction in his property, the taxman waiteth. A taxpayer will report debt forgiveness basis adjustments as ordinary income upon disposition of the asset. The Committee Report states: "This rule operates to ensure that the taxpayer has only obtained a postponement of the recognition of the income and not a complete exemption from recognition."' [FN194] If the basis of property is reduced under the general attribute rule of section 108(b)(2)(D) or the special election under section 108(b)(5), any gain realized on a subsequent sale or disposition of non-sections 1245 and 1250 property will be treated as the recapture of depreciation under section 1245 to the extent of basis reduction under section 108. [FN195] A special rule for section 1250 property applies. [FN196] The recapture rules imposed by section 1017(d) apply to all assets whether depreciable or nondepreciable. Since an insolvent taxpayer who does not file for bankruptcy protection may be treated differently than one who has filed under Title 11, do these rules control over section 1034 dealing with the nontaxable exchange of a residence, and how does a taxpayer treat the over age 55 exemption on sale of a residence? [FN197] The smarter policy, one would hope, would be one of equal tax treatment and preservation of the special treatment afforded a taxpayer on the sale or exchange of a residence.

*263 XV. PURCHASE PRICE ADJUSTMENTS

Not all reductions in indebtedness will activate discharge of indebtedness rules. If a taxpayer purchases property which is financed by the seller of the property and the seller subsequently reduces the amount of the purchase money debt, the reduction will be treated as a purchase price adjustment and not income to the payor if the reduction does not occur in a bankruptcy case or when the purchaser is insolvent. [FN198] Further, the amount of the reduction must otherwise qualify as discharge of indebtedness income. [FN199] Since discharge of indebtedness income cannot arise with use of nonrecourse debt this provision is inapplicable to nonrecourse debt. Section 108(e)(5) will apply only if the seller and buyer have retained the same position vis-a-vis each other (buyer has not conveyed property nor seller assigned note) and section 108(e)(5) will not apply where the debt is reduced other than by a direct agreement between the seller and buyer such as the running of the statute of limitations on a portion of the debt. [FN200] While the other basis reduction rules do not treat the reduction as a disposition, a purchase price adjustment will trigger the recapture of business credits. [FN201]

XVI. SUMMARY

The voluntary or involuntary conveyance of an asset is a sale or exchange of that asset under section 1001. If the asset secured nonrecourse debt the amount realized upon that sale will never be less than the amount of that debt. The amount of the gain will be the difference between the adjusted basis of the property and the debt secured by it. There can be no debt forgiveness.

If, however, the property secures payment of a recourse debt, the fair market value of the property, if less than the debt, enters the equation. The gain is the difference between the adjusted basis in the property and its fair market value. The remaining amount of the debt will be categorized as debt forgiveness and ordinary income.

A taxpayer may litigate the amount of debt forgiveness by putting in issue the amount for which the property was sold or bid on at foreclosure sale in state court.

Since the definition of liabilities for purposes of determining insolvency under section 108 precludes the addition of contingent ***264** claims, can a taxpayer include the amount he is being sued for on a deficiency judgment if he contests the entirety of the claim?

The insolvency exception should not be available to exclude gain realized on the disposition of an asset secured by a nonrecourse note if that asset has a fair market value less the debt since a taxpayer will have no change in his net worth after disposition. The exception is limited to cancellation of indebtedness income. The exceptions under section 108 offer a taxpayer some ability to defer the tax on the recognized ordinary income and can even result in the true forgiveness of the debt and attendant tax consequences. The perceived disparity in treatment on exempt assets between a debtor taxpayer and an insolvent taxpayer who does not file for bankruptcy protection can cause very divergent final results.

CONCLUSION

What was confusing and allowed for various theories of tax treatment, namely the manner of treatment of nonrecourse liabilities upon a sale or exchange of an asset, was settled with Tufts. We could then treat nonrecourse and recourse alike for this purpose. What appeared settled before the issuance of Treasury Regulation § 1.1001-2(a)(2), namely treatment of recourse debt on the sale or exchange of an asset with a fair market value less than the debt, is now confusing and may allow for different theories of tax treatment. The inability to get basis in seller-financed nonrecourse indebtedness of real estate due to the change to section 465 means that a greater amount of real estate sales will have attendant recourse loans. A decline in value will leave the solvent taxpayer with the prospect of a large amount of ordinary income if payment on the deficiency has not been made.

The insolvency exception under section 108 and the basis reduction ordering rules under section 1017, while

appropriate, seem to offer divergent treatment on the basis reduction of exempt property. This is particularly important in Texas where a residence may be claimed as exempt irrespective of the taxpayer's basis in it. Bankruptcy, in this instance, may give rise to the phoenix rising from the ruins.

The growth of tax shelters and the cost to the taxpayers in policing and legislation related to tax shelters may have been spared had the Supreme Court declined to give nonrecourse debt the status of recourse debt. We would truly have a bifurcated approach but one that has more basis in the realities of the difference in personal liability and nonpersonal liability debt. That Justice O'Connor would ***265** like to treat both types of debt again in the identical manner only seems to further distance tax treatment in this area from what the taxpayer perceives to be reality. The present bifurcated approach that can result in ordinary income from debt forgiveness and capital loss by use of recourse financing, but never ordinary income from debt forgiveness (and rarely loss) by use of nonrecourse financing, does not seem justified. The introduction of passive gain and loss and, in particular, section 469(e)(1)(A)(ii) of the 1986 Act will further produce disparate tax treatment regarding the disposition of property securing recourse and nonrecourse debt.

That a judge should accuse tax practitioners of financial fantasies constructed of gossamer wings and of sophisticated tax legerdemain can only mean that he, too, has tried to read the Code and tax cases and failed to comprehend the distinctions without difference that become difference with distinction.

FNa J.D. Baylor 1973; Sullins, Johnston, Rohrbach & Magers, Houston, Texas. Board Certified Commercial Real Estate Law. Thesis prepared in satisfaction of requirements for LL.M. Degree in Taxation, University of Houston Law Center.

FN1 In re Maxim Indus., Inc., 22 Bankr. 611, 613 (Bankr. D. Mass. 1982). "'Bankruptcy is perceived as a haven for wistfulness and the optimist's valhalla where the atmosphere is conducive to fantasy and miraculous dreams of the phoenix rising from the ruins. Unfortunately, this court is not held during the full moon, and while the rays of sunshine sometimes bring the warming rays of the sun, they more often also bring the bright light that makes transparent and evaporates the elaborate financial fantasies constructed of nothing more than gossamer wings and of sophisticated tax legerdemain."' Id.

FN2 Revenue Act of 1938, ch. 289, § 111(b), 52 Stat. 484 (1938).

FN3 Brons Hotels, Inc. v. Commissioner, 34 B.T.A. 376 (1936); Haass v. Commissioner, 37 B.T.A. 948 (1938).

FN4 Revenue Act of 1938, ch. 289, § 113(b), 52 Stat. 493 (1938).

FN5 Crane v. Commissioner, 3 T.C. 585, 589 (1944).

FN6 Id.

FN7 See Commonwealth, Inc. v. Commissioner, 36 B.T.A. 850 (1937); Lapsley v. Commissioner, 44 B.T.A. 1105 (1941); Polin v. Commissioner, 114 F.2d 174 (3d Cir. 1940).

FN8 Crane, 3 T.C. at 590.

FN9 I.R.C. § 465 (1988).

FN10 Crane v. Commissioner, 331 U.S. 1 (1947).

FN11 Id. at 3. The property was appraised at $262,042.50, the amount of the unpaid principal and the interest accrued at the time of the appraisal. Id. at 4.

FN12 Id.

FN13 Id. at 4-5. $262,042.50 less land basis of $55,000 less depreciation allowable of $28,045.10 equals an adjusted basis of $178,997.40. The Service calculated the amount realized as the net amount of cash ($2,500) plus unpaid principal of the note ($255,000) and allocated this amount between land and building.

FN14 Id. at 9-10.

FN15 Id. at 13.

FN16 Id. (citing United States v. Hendler, 303 U.S. 564 (1938)).

FN17 Crane, 331 U.S. at 14.

FN18 Id.

FN19 Id. at 16.

FN20 Id.

FN21 Id.

FN22 Id. at 14 n.37.

FN23 See Millar v. Commissioner, 577 F.2d 212 (3d Cir.), cert. denied, 439 U.S. 1046 (1978); Estate of Delman v. Commissioner, 73 T.C. 15 (1979).

FN24 See, e.g., Mendham Corp. v. Commissioner, 9 T.C. 320 (1947); Lutz & Schramm Co. v. Commissioner, 1 T.C. 682 (1943), nonacq., 1943 C.B. 35.

FN25 461 U.S. 300 (1983).

FN26 Id. at 302-03.

FN27 Id. n.1. The loss was the difference between the adjusted basis, $1,445,740, and the fair market value of the property, $1,400,000.

FN28 Id. n.2. The Commissioner determined partnership gain on the sale by subtracting the adjusted basis, $1,455,740, from the liability assumed, $1,851.500.

FN29 Id. at 307.

FN30 Rev. Rul. 76-111, 1976-1 C.B. 215.

FN31 Tufts, 461 U.S. at 308.

FN32 Id. at 311 n.11.

FN33 26 C.F.R. § 1.1001-2 (1982), 1981-2 C.B. 430 (1980).

FN34 Tufts, 461 U.S. at 306 n.11. "'We are not presented with and do not decide the contours of the cancellation-of-indebtedness doctrine."DD'

FN35 Id.

FN36 Eustice, Cancellation of Indebtedness and the Federal Income Tax: A Problem of Creeping Confusion, 14 TAX L. REV. 225 (1959).

FN37 See Helvering v. Hammel, 311 U.S. 504 (1941).

FN38 Id. at 507.

FN39 Id. at 508 (citing Revenue Act of 1934, ch. 277, § 117(d), 48 Stat. 683 (1934). See I.R.C. §§ 1001, 1231 (1986).

FN40 Id. at 508.

FN41 I.R.C. § 465(b)(6)(A) (1988). "'Notwithstanding any other provision of this subsection, in the case of an activity of holding real property, a taxpayer shall be considered at risk with respect to the taxpayer's share of any qualified nonrecourse financing which is secured by real property used in such activity."' Id.

FN42 TEX. PROP. CODE ANN. § 51.002 (Vernon 1988).

FN43 Maxey v. Texas Commerce Bank, 571 S.W.2d 39, 45 (Tex. Civ. App. --Amarillo 1978, writ ref'd n.r.e.)

FN44 "The phrase 'grossly inadequate' has been judicially defined as 'consideration so far short of the real value of the property as to shock a correct mind, and thereby raises a presumption that fraud attended the purchase."DD" Id. at 45, (citing Richardson v. Kent, 47 S.W.2d 420, 425 (Tex. Civ. App. -- Dallas 1982, no writ)).

FN45 Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980).

FN46 Id. at 203.

FN47 Id. at 203.

FN48 Willis v. Borg-Warner Acceptance Corp., 48 Bankr. 295 (Bankr. D. D.C. 1985).

FN49 Id. at 301.

FN50 See supra note 43 and accompanying text.

FN51 Lee v. Sabine Bank, 708 S.W.2d 582 (Tex. App. -- Beaumont 1986, writ ref'd n.r.e.).

FN52 Id. at 584.

FN53 Id.

FN54 "We, therefore, hold that when a lender or its surrogate purchases collateral to secure a loan given by a borrower, and where there is a probable significant disparity between the sales price of the property and its fair market value, the borrower may contest the sale and present evidence contending such."' Id. at 585.

FN55 Weiner v. American Petrofina Mktg., Inc., 482 So. 2d 1362 (Fla. 1986), additional credit up to fair market value allowed; Brown v. C.I.T. Corp., 258 S.E.2d 44 (Ga. Ct. App. 1979), no deficiency judgment of sale not commercially reasonable; Morgan v. Freel, 513 P.2d 461 (Colo. Ct. App. 1973), lender to account to borrower for sums up to fair market value of property.

FN56 Freeland v. Commissioner, 74 T.C. 970 (1980).

FN57 Id. at 971.

FN58 Id. at 971-72 (citing § 508b, California Code of Civil Procedure).

FN59 Id. at 973.

FN60 Id. at 973. "'The amount of the loss was arrived at by including in petitioner's basis the cash he paid plus the face amount of the purchase-money mortgage (and the escrow fee) and subtracting therefrom the unpaid balance due on the mortgage, thus including in the 'amount realized' the full unpaid balance due on the nonrecourse obligation."' Id. at 973 n.2.

FN61 Id. at 973. Section 1211 provides for a limitation on capital basis and § 1212 allows for capital loss carrybacks and carryovers.

FN62 Id. at 974.

FN63 Id.

FN64 Id.

FN65 Id. (citing Gerhard v. Stephens, 442 P.2d 692, 69 Cal. Rptr. 612 (1968)).

FN66 Id. at 974. See, e.g., Parker v. Delaney, 186 F.2d 455 (1st Cir. 1950).

FN67 Schleppy v. Commissioner, 601 F.2d 196 (5th Cir. 1979); Smith v Commissioner, 66 T.C. 622 (1976); Fox v. Commissioner, 61 T.C. 704 (1974).

FN68 Freeland v. Commissioner, 74 T.C. 970, 975 (1980).

FN69 Id. at 975-76 (citing Stamler v. Commissioner, 145 F.2d 37 (3rd Cir. 1944)); Kaufman v. Commissioner, 119 F.2d 901 (9th Cir. 1941); Peninsula Properties Co. v. Commissioner, 47 B.T.A. 84 (1942).

FN70 See supra note 24 and accompanying text.

FN71 Crane v. Commissioner, 331 U.S. 1 (1947).

FN72 Freeland, 74 T.C. at 981.

FN73 Yarbro v. Commissioner, 84-2 USTC 84,969 (1984).

FN74 Id. at 84,970.

FN75 Id.

FN76 Id.

FN77 The taxpayer's total cash investment in the joint venture of $10,250. Id. at 84,970-84,971.

FN78 Id. at 84,971.

FN79 Id.

FN80 Middleton v. Commissioner, 77 T.C. 310 (1981), aff'd, 693 F.2d 124 (11th Cir. 1982).

FN81 Yarbro, 84-2 USTC at 84,974.

FN82 I.R.C. § 1001(a) (1988).

FN83 Qualifying gains and losses arise from disposition of property that constitutes a capital asset within the meaning of § 1221 (assuming satisfaction of the sale or exchange requirement of § 1222) and gains and losses from property covered by § 1231 (assuming satisfaction of the netting requirements), subject to the recapture rules of §§ 1245 and 1250.

FN84 I.R.C. §§ 62(a)(3), 1211, 1212 (1988).

FN85 See Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931).

FN86 TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1988).

FN87 Woltman v. United States, 85-2 USTC 89,472 (S.D. Cal. 1985) (in absence of a basis reduction election debt forgiveness income recognized in the year the statute of limitations for instituting suit for collection of debt expires). But see Callan Court Co. v. Commissioner, T.C.M. (CCH) 1965-261, 24 TCM 1419 (1965) (discharge income in year debt written off a loss rather than in year statute of limitations had run on enforcement of debt); Priv. Ltr. Rul. 86-49-051 (Sept. 10, 1986) (actual foreclosure sale determines date of recognition under I.R.C. § 1001).

FN88 I.R.C. §§ 108(b)(5), (d)(9) (1988); see I.R.C. § 1017 (1988), regarding manner of reduction.

FN89 B.M. Marcus Estate v. Commissioner, 34 T.C.M. (CCH) 40, 41 (1975).

FN90 Treas. Reg. § 1.1001-2(b) (1980); see also T.D. 7741, 1981-1 C.B. 430.

FN91 Treas. Reg. § 1.1001-2(a)(2) (1980).

FN92 See generally Cunningham, Payment of Debt With Property - The Two-Step Analysis After Commissioner v. Tufts, 38 TAX LAWYER 575 (1984) (analysis and justification of this approach).

FN93 Unique Art Mfg. Co. v. Commissioner, 8 T.C. 1341 (1947), acq., 1947-2 C.B. 4; Peninsula Properties Co. v. Commissioner, 47 B.T.A. 84 (1942), acq., 1942-2 C.B. 14.

FN94 R. O'Dell Co. v. Commissioner, 8 T.C. 1165 (1947), aff'd, 169 F.2d 247 (3d Cir. 1948); Nutter v. Commissioner, 7 T.C. 480 (1946), acq., 1946-2 C.B. 4; Helvering v. Hammel, 311 U.S. 504 (1941); Parker v. Delaney, 186 F.2d 455 (1st Cir. 1950), cert. denied, 341 U.S. 926 (1951).

FN95 See supra note 81 and accompanying text.

FN96 R. O'Dell Co., 8 T.C. at 1167.

FN97 Peninsula Properties Co., 47 B.T.A. at 84.

FN98 Tufts v. Commissioner, 461 U.S. 300, 306 (1983) (citing Treas. Reg. § 1.1001-2(b)).

FN99 Id. at 309 n.7.

FN100 Id. at 311 n.8.

FN101 Professor Wayne G. Barnett, in his Amicus Curiae brief, would have treated the facts in Tufts as if there was a transfer of the property for $1,400,000 (the fair market value), a cancellation of the $1,850,000 mortgage for payment of $1,400,000. The taxpayer then had a capital loss of $50,000 (adjusted basis, $1,450,000, less fair market value, $1,400,000, equals $50,000) and the taxpayer had ordinary income of $450,000 ($1,850,000 debt cancellation less adjusted basis of $1,400,000). This was rejected by the Court but is precisely the Service's position for treatment of Tufts' facts with recourse debt.

FN102 Tufts, 461 U.S. at 317 (O'Connor, J., concurring). Justice O'Connor apparently would adopt Professor Barnett's position set out supra note 99.

FN103 Treas. Reg. § 1.1001-2(c) example (7) (1980).

FN104 Id. example (8).

FN105 Priv. Ltr. Rul. 87-35-065 (June 4, 1987). Because you are personally liable for the balance of the outstanding debt, and the lending institution has full recourse to your assets in addition to the property proposed to be transferred, we conclude you will realize income from the discharge of indebtedness to the extent the amount of the debt cancelled exceeds the fair market value of the property transferred. See also Priv. Ltr. Rul. 85-04-010, where the taxpayer argued that the entire amount realized over its adjusted basis was discharge of indebtedness and ordinary income.

FN106

	Recourse Debt	Nonrecourse Debt
Note	100,000	100,000
Fair Market Value	75,000	75,000
Sales Price (deemed amount realized)	75,000	100,000
Adjusted Basis	100,000	100,000
Gain/(Loss)	(25,000)	0
Debt Forgiveness	25,000	

	Recourse Debt	Nonrecourse Debt
Note	100,000	100,000
Fair Market Value	75,000	75,000
Sales Price (deemed amount realized)	75,000	100,000
Adjusted Basis	75,000	75,000
Gain/(Loss)	0	25,000
Debt Forgiveness	25,000	

Tax impact on various types of property:

If a principal residence, the gain is long-term capital gain subject to the maximum tax, of 28% or possibly excludible if reinvested or over 55 years old. Any loss in non-deductible.

If a capital asset (such as land), the gain is long-term capital gain. The loss is a long-term capital loss subject to capital loss limitations (i.e. $3,000 per year).

If the asset is business or rental property (I.R.C. § 1231), the gain is long-term capital gain; however, the loss is an ordinary deduction. Furthermore, if the gain is from a passive activity, it can be offset against losses (current year as well as suspended) from other passive activities.

See also Treas. Reg. § 1.1001-2(c) examples 4-6 (1980).

FN107 Michaels v. Commissioner, 87 T.C. 1412 (1986).

FN108 I.R.C. § 1034 (1988).

FN109 Michaels, 87 T.C. 1412.

FN110 I.R.C. § 108(e)(5) (1988).

FN111 I.R.C. § 61(a)(12) (1988). "'Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: . . . Income from discharge of indebtedness."' Id.

FN112 Treas. Reg. § 1.61-12(a) (1980).

FN113 United States v. Rochelle, 384 F.2d 748, 751 (5th Cir. 1966).

FN114 United States v. Kirby Lumber Co., 284 U.S. 1 (1931).

FN115 Id. at 3.

FN116 I.R.C. § 61(a)(12) (1988).

FN117 Millar v. Commissioner, 540 F.2d 184 (3d Cir. 1976).

FN118 Id. at 186.

FN119 Id. at 185.

FN120 Millar v. Commissioner, 67 T.C. 656.

FN121 Millar v. Commissioner, 577 F.2d 212 (3d Cir.), cert. denied, 439 U.S. 1046 (1978).

FN122 Terminal Investment Co. v. Commissioner, 2 T.C. 1004 (1943), acq., 1944 C.B. 27.

FN123 Id. at 1013.

FN124 CRC Corporation v. Commissioner, 693 F.2d 281 (3d Cir. 1982); Brountas v. Commissioner, 50 AFTR 2nd 82-5900 (1982).

FN125 Rev. Rul. 82-202, 1982-2 C.B. 35 (prepayment discount on mortgages with below market rates of interest).

FN126 Miller Trust v. Commissioner, 76 T.C. 191 (1981).

FN127 Alexander v. Commissioner, 61 T.C. 278, 291 (1973).

FN128 Spartan Petroleum Co. v. United States, 437 F. Supp. 733 (D. S.C. 1977).

FN129 Newark v. Commissioner, 311 F.2d 913, 915 (2d Cir. 1962).

FN130 Shephard v. Commissioner, 340 F.2d 27 (6th Cir. 1965).

FN131 Perlman v. Commissioner, 252 F.2d 890 (2d Cir. 1958).

FN132 Capital Coal Corp. v. Commissioner, 26 T.C. 1183 (1956), aff'd, 250 F.2d 361 (2d Cir. 1957).

FN133 See supra note 16.

FN134 Danenberg v. Commissioner, 73 T.C. 370 (1979).

FN135 Commercial Electrical Supply Co. v. Commissioner, 8 B.T.A. 986 (1927).

FN136 Henry v. Commissioner, 62 T.C. 605 (1974).

FN137 S. Rep. No. 1035, 96th Cong., 2nd Sess. 8 n.6, reprinted in 1980 U.S. Code Cong. & Admin. News 7017, 7023; see also Treas. Reg. § 1.61-12(a) (as amended in 1968); Rev. Rul. 84-176, 1984-2 C.B. 34; Gen. Couns. Mem. 39049 (Nov. 2, 1983).

FN138 Fifteen Hundred Walnut Street Corp. v. Commissioner, 237 F.2d 933 (3d Cir. 1956).

FN139 Great Western Power Co. of California v. Commissioner, 297 U.S. 543 (1936); Rev. Rul. 77-437, 1977-2 C.B. 28.

FN140 Zappo v. Commissioner, 81 T.C. 77, 87 (1983).

FN141 Id. at 89.

FN142 Id.

FN143 Focht v. Commissioner, 68 T.C. 223 (1977), acq., 1980-2 C.B. 1.

FN144 Allan v. Commissioner, 86 T.C. 655 (1986), aff'd, 856 F.2d 1169 (8th Cir. 1988).

FN145 Id.

FN146 Id.

FN147 Id.

FN148 Id.

FN149 I.R.C. § 108(a) (1988).

FN150 Colonial Savings Association v. Commissioner, 85 T.C. 855 (1985), aff'd, 854 F.2d 1001 (7th Cir. 1988) (penalties received by association for premature withdrawals of deposits were not discharge of indebtedness income).

FN151 Treas. Reg. § 1.108(a)-1(a)(1) (1960).

FN152 I.R.C. § 108(a) (1988).

FN153 Id. § 108(a)(2).

FN154 Id. § 108(d)(3).

FN155 Id. § 108(d)(2).

FN156 Id. § 108(d)(1).

FN157 Tax Reform Act of 1986, Pub. L. 99-514 § 822(a), 100 Stat. 2085, 2373 (1986).

FN158 I.R.C. § 108(a)(1)(c) (1954).

FN159 Witt, Troubled Real Estate: Tax Aspects, Fourth Annual Advanced Institute for Partnership and Real Estate Tax Planning, State Bar of Texas (1987).

FN160 I.R.C. § 108(d)(2) (1988), definition of a Title 11 case is a bankruptcy case under Title 11 of the United States Bankruptcy Code, but only if the taxpayer is under the jurisdiction of the court in such case and the discharge of indebtedness is granted by the court or is pursuant to a plan approved by the court.

FN161 Id. § 108(a)(1)(A).

FN162 I.R.C. § 108(a)(3) (1988); see also Gershkowitz v. Commissioner, 88 T.C. 984, 1006 (1987); Estate of Delman v. Commissioner, 73 T.C. 15, 32 (1979).

FN163 I.R.C. § 108(d)(3) (1988).

FN164 Id.

FN165 Priv. Ltr. Rul. 83-48-001 (Aug. 18, 1983). This Private Letter Ruling also points up the difference in the event the property secures part recourse and part nonrecourse debt and is disposed of. The Service believes the recourse debt will be paid first. For example:

Which of the above results is most desirable? Of course, the answer depends in part on the following factors:

a. The type of property involved (residence or 1231 property);

b. Whether the taxpayer is insolvent or filing for bankruptcy;

c. Personal tax attributes such as capital loss carryovers; and

d. Whether the recourse debt is actually forgiven.

FN166 Gershkowitz v. Commissioner, 88 T.C. 984 (1987).

FN167 Haden Co. v. Commissioner, 118 F.2d 285 (5th Cir.), cert. denied, 314 U.S. 622 (1941); Texas Gas Distrib. Co. v. Commissioner, 3 T.C. 57 (1944), acq., 1944 C.B. 27.

FN168 Pri. Ltr. Rul. 83-48-001 (Aug. 18, 1983) (citing United States v. Consolidated Edison, 366 U.S. 380 (1961)).

FN169 I.R.C. § 108(b) (1988).

FN170 I.R.C. § 108(b)(2)(A)-(E) (1988).

FN171 Id. § 108(b)(4).

FN172 See id. § 172(b)(2).

FN173 Id. § 108(b)(3)(B).

FN174 S. Rep. No. 1035, 96th Cong., 2nd Sess. 13, reprinted in 1980 U.S. Code Cong. & Adm. News 7017, 7028; I.R.C. § 1017(b)(2) (1986).

FN175 Id.

FN176 I.R.C. § 1398(g) (1986).

FN177 Id. § 108(d)(8).

FN178 Id. § 1017(c)(1); for property treated as exempt, see 11 U.S.C. § 522 (1982).

FN179 Rev. Rul. 81-206, 1981-2 C.B. 9.

FN180 Davis v. Commissioner, 69 T.C. 814, 833-4 (1978); B.M. Marcus Estate v. Commissioner, 34 T.C.M. (CCH) 38 (1975) (in determining that excess assets exempt from the claims of creditors under state law are not to be included among the assets of the estate); Rufus S. Cole v. Commissioner, 42 B.T.A. 1110 (1940) (in determining whether or not petitioner was solvent or insolvent after cancellation of the debt, his exempt property should not be considered).

FN181. 11 U.S.C. § 101(12) (1982).

FN182. I.R.C. § 108(b)(5) (1988); Id. § 1017(b)(3)(E).

FN183. Id. § 108(b)(5)(C).

FN184. Id. §§ 108(b)(5) and 1017(b)(2).

FN185. Id. § 108(b)(5).

FN186. Id. § 108(d)(9).

FN187. Temp. Treas. Reg. § 7a.1(d)(1).

FN188. Woltman v. United States, 85-2 USTC Par. 9581 (S.D. Cal. 1985).

FN189. Treas. Reg. § 1.1017-1(a).

FN190. Treas. Reg. § 1.1017-1(a)(1-4) (paraphrased).

FN191. Treas. Reg. § 1.1017-1(a)(5).

FN192. Treas. Reg. § 1.1017-1(a)(6).

FN193. I.R.C. § 1017(c)(1) (1988).

FN194. Committee Report, supra note 172, at 7029.

FN195. I.R.C. § 1017(d)(1) (1988).

FN196. Id. § 1017(d)(2). For purposes of § 1250(b), the determination of what would have been the depreciation and adjustments under the straight line method shall be made as if there had been no reduction under this section.

FN197. Id. § 121. Can the gain be sheltered up to the applicable amounts or does § 1017 control and require inclusion of gain up to the amount of basis reduction?

FN198. Id. § 108(e)(5).

FN199. Id. § 108(e)(5); Juister v. Commissioner, 53 T.C.M. (CCH) 1079 (Section 108(e)(5) held not to apply to reduction of non-purchase money indebtedness).

FN200. Committee Report, supra note 172, at 7030.

FN201. Committee Report, supra note 172, at 7032.

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Arkansas Law Review

1989

*1 TAX ANATOMY OF DEBT RESTRUCTURING

James R. Monroe [FNa]

Consideration of tax consequences is an important element of almost any major personal or business transaction. In particular, the tax implications of debt restructuring merit attention because seemingly subtle differences in the decisions made can create significantly divergent results under the current Internal Revenue Code. The following example illustrates this anomalous result and serves as a conduit for a proposal which would temper that result.

I. FACTUAL PATTERN

As of December 1, 1987, Ezra and Samantha Rich had the following assets and liabilities:

ASSETS	FAIR MARKET VALUE	ADJUSTED BASIS
Land/Building	$400,000	$100,000
Equipment	40,000	30,000
Inventory	100,000	90,000
Stocks	504,000	50,000
Personal Residence	175,000	70,000
Chevrolet	7,000	10,000
	$1,226,000	$350,000
LIABILITIES	**PRINCIPAL**	**INTEREST**
Friendly Bank	$ 500,000	$ 75,000
Easy Loan Company	1,000,000	150,000
GM Credit	8,000	500
First Credit Union	300,000	20,000
Asiv Card	10,000	4,000
	$1,818,000	$249,500

Obviously, the Riches are unable to meet their financial commitments and have a negative net worth of $841,500. [FN1] In agonizing *2 over the decision to restructure their financial obligations, they decided to talk with I. M. Slack, their attorney.

Mr. Slack informed the Riches that they may have causes of action against Easy Loan for fraud and misrepresentation and against Friendly Bank for the decrease in value of the Riches' assets, which the bank was managing. [FN2] After reviewing the financial statements of the Riches and considering their threatened legal actions through negotiations with Mr. Slack, Easy Loan is willing to satisfy the Riches' obligation if the Riches transfer their land and building to Easy Loan. Similarly, Friendly Bank agrees to accept $200,000 in cash from the Riches in full satisfaction of the Riches' debt to Friendly Bank. Finally, the Riches contacted their tax adviser regarding the implications of the proposed debt restructuring.

The Riches' situation is a common yet frightening occurrence in many areas of the United States. [FN3] The tax implications of a proposal like the Riches' are initially ignored by *3 many taxpayers and their advisers. However, without proper tax planning the Riches and similarly situated taxpayers will have to live daily with the tax consequences as the tax collector seeks the government's due from the debt restructuring. [FN4]

In order to minimize or avoid altogether the tax effects of debt restructuring, the Riches and their advisers must first be aware of the adverse tax consequences of the restructuring. These consequences are analyzed in Section II of this Article, while Section III provides an explanation of alternatives to avoid or minimize the adverse tax consequences. An amendment to the Internal Revenue Code (Code), [FN5] which would relieve the tax burden of many debtors caused by debt restructuring, is proposed in Section IV. This proposed amendment should add certainty and equity to transactions involving debt restructuring.

II. TAX LAW--DEBT RESTRUCTURING

A. General Rule--The Problem of Debt Discharge Income

The Supreme Court in United States v. Kirby Lumber Co. [FN6] held that a taxpayer which purchased its own bonds for *4 less than the issue price had gross income to the extent that the issue price exceeded the purchase price. Therefore, as a general rule, when a taxpayer has debt reduced by a creditor without payment of full consideration, the taxpayer has cancellation of indebtedness (debt discharge) income (CODI) equal to the excess of the cancelled debt over the amount of consideration paid by the debtor for the cancellation. [FN7] Thus, applying the general rule and ignoring its exceptions, [FN8] the Riches will report debt discharge income (CODI) in the amount of $750,000 [FN9] from the reduction of the Easy Loan obligation and $375,000 [FN10] from the reduction of the Friendly Bank obligation. Obviously, the income resulting from CODI presents tax planning problems for the taxpayer and the tax adviser.

B. Relief--Exceptions to General Rule

1. Background

Long after the Kirby Lumber decision, [FN11] lower courts found exceptions to the general rule of CODI when debt was discharged for less than the full amount owed by the debtor. These courts evidently believed the general rule was too harsh in certain circumstances and formulated various exceptions:

a. Exclusion to the extent that the taxpayer was insolvent before the debt cancellation, but only to the extent *5 of the insolvency. [FN12]

b. Exclusion if cancellation of the taxpayer's debt results in no net gain to the taxpayer. [FN13]

c. Exclusion if the debt cancellation is a purchase price adjustment. [FN14]

d. Exclusion if the debt cancellation is a gift. [FN15]

If the taxpayer could come within one of these exceptions, all or part of the CODI could be excluded from gross income, thereby giving full or partial relief from the general rule of Kirby Lumber.

2. Congressional Response

To clarify the feneral rule of Kirby Lumber, to add certainty to its exceptions, and to adopt tax provisions to replace those repealed by the Bankruptcy Act of 1978, [FN16] Congress in 1980 codified a somewhat modified version of the exceptions. [FN17] Under the codification, CODI is excluded from a taxpayer's *6 gross income if the discharge occurs:

a. While the taxpayer is subject to bankruptcy proceedings and the bankruptcy court either has issued a discharge order concerning the debt or discharge is pursuant to a plan approved by the court; [FN18] or,

b. While the taxpayer is insolvent, but only to the extent of the taxpayer's insolvency; [FN19] or,

c. For interest or other expenses which, if paid, would be deductible by the taxpayer; [FN20] or,

d. When the taxpayer is not subject to bankruptcy and is not insolvent if the debt reduction occurs as a result of a purchase price adjustment with the original seller. [FN21]

In 1986, Congress adopted another CODI exclusion--one for qualified farmers who are solvent at the time of debt discharge. [FN22] Under this provision, CODI is excluded as if the ***7** qualified farmer were insolvent. However, this CODI exclusion has been both limited and expanded by the Technical and Miscellaneous Revenue Act of 1988. [FN23]

The exclusion of the CODI from gross income may affect the debtor/taxpayer's tax attributes--examples of which are net operating losses, capital losses, tax credits, and adjusted basis in assets. [FN24]

Numerous articles have already explored the statutory exceptions to debt discharge income. [FN25] Therefore, except for application of these rules to the Riches' situation, these statutory exceptions will not be analyzed further. However, other planning techniques to avoid adverse tax effects from debt restructuring will be explored. [FN26]

3. Application of Exceptions to Riches

a. Initial Result

If the Riches restructure their debts as proposed, under the general rule of Kirby Lumber and absent application of the statutory exceptions, the Riches must report $1,125,000 [FN27] of income from the debt discharge. A substantial portion of this income, however, can be excluded from the Riches' gross income by invoking the statutory exceptions. [FN28]

***8** b. Interest

Because the payments to Friendly Bank and Easy Loan are insufficient to pay the principal, the interest is regarded as cancelled. [FN29] If the Riches are cash basis taxpayers and entitled to deduct the interest if paid, the cancelled interest will be excluded from gross income and will not be classified as CODI. [FN30] The cancelled interest would be includable in gross income if the Riches were accrual basis taxpayers and had deducted the unpaid interest. [FN31]

c. Insolvency

Additionally, because the Riches are insolvent (liabilities of $1,842,500--assuming the interest owed to Friendly Bank and Easy Loan Company is excludable under Code § 108(e)(2)-- [FN31] exceed the fair market value of assets of $1,051,000), [FN33] they can exclude up to the amount of their insolvency ($791,500) from their gross income. [FN34] Thus, the CODI [FN35] in excess of the amount excluded as interest or under the insolvency rule ($108,500) will be included as gross income on the Riches' tax returns subject to the exceptions and planning techniques discussed in Section III.

***9** C. Gain

A surprise to taxpayers, in addition to the discharge of indebtedness income, sometimes results when

appreciated assets are transferred to satisfy a debt obligation. [FN36] For example, the Riches propose to transfer their land and building to Easy Loan to satisfy their obligation of $1,150,000. [FN37] If the Easy Loan liability is nonrecourse [FN38] (nonpersonal) to the Riches, the Riches will have a gain of $1,050,000 with no CODI to report. [FN39] On the other hand, if the Riches' liability to Easy Loan is recourse [FN40] (personal), the Riches' gain, according to the Treasury Department Regulations, will be $300,000. [FN41] The remainder of the Easy Loan indebtedness ($750,000) in excess of the fair market value of the land and buildings ($400,000) will be CODI and subject to the CODI exception. [FN42]

Originally, the Treasury Department acquiesced in a case holding that no gain resulted from the transfer of appreciated property to a creditor to discharge a debt because the discharge ***10** resulted in CODI to the debtor/ taxpayer. [FN43] However, the Treasury Department recently withdrew its acquiescence and currently takes the position that a taxpayer who transfers appreciated property to satisfy a recourse debt has gain rather than CODI to the extent that the lesser of the asset's fair market value or the cancelled debt exceeds the adjusted basis of the asset. [FN44]

Recently, the IRS argued that no loss deduction should be allowed a taxpayer who did not sustain an economic loss. [FN45] Query whether a taxpayer could argue that no gain should be reported where there is no economic gain. This would be the situation if the taxpayer is insolvent both before and after the transfer of property to the creditor.

The importance of this distinction between gain and cancellation of indebtedness income under the current Code, Treasury Regulations, rulings, and case law should not be overlooked. CODI may be excluded from gross income under one of the above exceptions, whereas gain is not subject to these exclusions. [FN46] Thus, gain will be subject to the usual gain-related rules of realization, recognition, capital gains, depreciation recapture, and section 1231 treatment. [FN47]

D. Options

Without utilization of the tax planning techniques discussed in Section III, if the Riches settle their financial obligations as suggested, they may incur substantial federal income tax liability. The relevant factors considered in determining ***11** that liability may include the availability of net operating losses, capital losses, and credits to offset the CODI of $108,500; the gain of $300,000; or the tax resulting from the gain or CODI. If the Riches do incur substantial tax liability, their options may be limited to one, or a combination, of the following:

1. Pay the tax liability either at once or under an installment payment agreement. [FN48]

2. File bankruptcy in an attempt to discharge the liability. [FN49]

3. Make an offer in compromise. [FN50]

4. Ignore the liability. [FN51]

Any of these options--except the final one which is unrealistic and too simplistic in most cases--may involve substantial present and future financial hardships to the Riches.

III. TAX PLANNING TECHNIQUES TO AVOID UNDESIRED TAX EFFECTS

A. Overview of the Problem

As the previous discussion illustrates, adverse tax effects of the proposed debt restructuring may force the Riches into further financial hardship and may require bankruptcy [FN52] if ***12** they are unable to exclude the CODI or gain from their gross income. However, the Riches should first consider the following methods for

excluding CODI from their gross income:

Plan 1. Allocation of some of the CODI to damages suffered by the Riches.

Plan 2. Transfer of property to the spouse with the lower income potential.

Plan 3. Change of the debt from nonrecourse to recourse.

Plan 4. Other less practicable alternatives.

B. Plan 1--Damages

1. General Rules

a. Personal Damages

If a taxpayer receives compensatory damages for personal injuries, these damages are excluded from gross income. [FN53] The IRS formerly took the position that punitive damages arising from a personal injury were also excludable from gross income; [FN54] however, the IRS has recently revised its position and now contends that all punitive damages are included in gross income. [FN55]

A debtor may have numerous causes of action against a creditor arising from a loan. [FN56] If possible, a debtor should structure his or her position (complaint or petition) or settlement to take advantage of the personal damage exclusion. Causes of action which result in personal injuries and are excludable from gross income include libel, [FN57] slander, [FN58] negligence and fraud. [FN59]

b. Capital Recovery

Additional damage recoveries may result in no income if the recovery is for loss or a reduction in value of capital ***13** caused by the creditor(s). [FN60] For example, if a creditor is in a fiduciary position or has control of a debtor's assets which decline in value, the debtor's damage recovery due to loss of asset values will not result in gain to the debtor except to the extent that the amount of damages exceeds the debtor's adjusted basis in the asset. [FN61]

c. Allocation

If the judge or jury fails to allocate the damage recovery between those damage items which are excludable from gross income and those items which are includable in gross income, or if the debtor and creditor fail to allocate the damages in their settlement agreement, then the Internal Revenue Service (IRS) will allocate the award or settlement amount according to the damages pled. [FN62] If no damage amount was pled, the allocation is based upon the facts in the case. [FN63]

2. Application to the Riches

a. Personal Recovery

If the Riches have damage claims against Easy Loan and/or Friendly Bank, the Riches and their attorney should consider an allocation of any settlement amount to those damage claims which are excludable from gross income. For instance, assuming the Riches settle their damage dispute with Easy Loan for $150,000 which is allocated for emotional distress to the Riches, the $150,000 is treated as paid to the Riches by Easy Loan and no income is reported. [FN64] In addition, the Riches would be treated as having paid $150,000 to reduce the amount owed to Easy Loan. [FN65] The settlement agreement should be specific in applying the $150,000 to reduce ***14**

principal or to pay interest, whichever is in the Riches' best interest.

If the Riches and their counsel fail to allocate the settlement amount, the IRS may allocate the settlement amount on the same basis that the amounts were allocated in the Riches' complaint or petition. [FN66] If no complaint or petition was filed, then the IRS may apply the $150,000 to the taxpayer's disadvantage. [FN67] For example, the IRS may allocate all or a portion of the damages to items not excludable from gross income, including wages, punitive damages, contract recovery, and other nonpersonal injuries. [FN68]

b. Capital Recovery

An alternative to the personal damage exclusion would be available if the Riches had grounds to claim that either creditor had breached a fiduciary relationship and that this breach had caused a decline in property values. Any recovery up to the Riches' adjusted basis in their properties, which had declined in value due to the breach, would be a return of capital. Any amount received in excess of the adjusted basis would be gain realized, and perhaps recognized, to the Riches. [FN69]

3. Conclusion

Counsel for taxpayers must be aware of the tax implications of settlement agreements and lawsuits filed. Improper or ill-advised allocations can result in adverse tax effects to debtor/taxpayers who are already in financial trouble. However, properly structured settlements may result in substantial tax savings from less gain and cancellation of indebtedness ***15** income. [FN70]

C. Plan 2--Transfer to Spouse

If the Riches transfer their land and building to Easy Loan to satisfy their obligations, the Riches will have a gain to report on their tax return [FN71] and/or CODI which may be wholly or partially excluded from gross income. [FN72] Unless the Riches have net operating losses or capital losses [FN73] to offset the gains and CODI, or, alternatively, credits to offset the resulting taxes, [FN74] the Riches will owe federal income tax as a result of the transfer of assets to their creditor(s).

The assessment, if not paid, will result in collection efforts by the IRS. [FN75] Bankruptcy may not be a viable solution because the Riches will not be able to discharge these taxes until at least three years after the taxes are assessed. [FN76] Thus, the Riches' income for the three year period will be subject to levy by the IRS. Additionally, any acquisition of assets or increase in asset value during the three years will be subject to the tax lien or levy. [FN77]

As an alternative to the Riches' transfer of the land and building to Easy Loan, they should consider transferring the real estate from the spouse who is either earning more income or has more income potential (transferor spouse) to the other spouse (transferee spouse). This transfer will result in no gain ***16** or loss to the transferor spouse. [FN78] The transferee spouse will acquire the same adjusted basis in the land and building as did the transferor spouse. [FN79]

Upon transfer of the real estate to Easy Loan, the transferee spouse will have either gain or loss to report, and both the transferee and transferor may have CODI. [FN80] However, both transferee and transferor spouses can attempt to exclude the CODI from gross income under the insolvency exclusion or other applicable exclusions. [FN81]

If the transferee spouse reports gain (which results in the assessment of income tax on that gain) and the transferor spouse has no gain to report, the transferor spouse will not be taxed on the gain if the spouses file separate income tax returns. Furthermore, the transferor will not be taxed on the CODI if one of the CODI exceptions applies. [FN82] Therefore, the transferor can have a substantial salary, purchase assets which may

appreciate in value, and own a sole proprietorship without fear that the IRS will levy on these assets and income. [FN83]

The IRS may attempt to collapse the transfer between the spouses and argue that the subsequent transfer from the transferee spouse to Easy Loan was in reality a transfer from both spouses to the creditor. This is commonly known as the step transaction doctrine. [FN84] Application of this doctrine may ***17** be avoided if sufficient time elapses between the initial transfer between the spouses and the subsequent transfer to Easy Loan. [FN85] Moreover, if the purpose of the transfer between the spouses is estate planning [FN86] or business related, [FN87] application of the doctrine may similarly be avoided.

D. Plan 3--Nonrecourse to Recourse Debt

As previously stated, when a debtor transfers property to a creditor to satisfy a debt, the tax consequences differ depending upon various factors:

1. whether the debt is recourse or nonrecourse; [FN88]

2. whether the fair market value of the property is less or more than the amount of the debt; [FN89] and

3. whether the adjusted basis is less or more than the fair market value of the property and/or debt. [FN90]

The following diagram contains the possible different tax results of the above combinations:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***18** Thus, if a taxpayer has appreciated property which has a fair market value less than the debt and the debt is nonrecourse, a taxpayer will have more gain to report than if the debt were recourse. This is because the amount realized with a nonrecourse note will equal the amount of the unpaid balance of the note rather than the fair market value of the property--that is, the maximum amount realized when a recourse obligation is satisfied. Therefore, no CODI results to a taxpayer satisfying a nonrecourse obligation with property. [FN91] Because there is no CODI, a taxpayer with nonrecourse debt will not have an opportunity to exclude the gain from income under the CODI exclusion rules. [FN92]

However, if a taxpayer's debt is switched from nonrecourse to recourse and the taxpayer transfers property to the creditor to satisfy the debt, the transfer to the creditor may result in CODI and gain. [FN93] Consider the Riches who owe ***19** $1,000,000 to Easy Loan on a recourse loan. If the Riches transfer their land and building, with a fair market value of $400,000 and an adjusted basis of $100,000, to satisfy the $1,000,000 loan, the Riches will have a gain of $300,000 [FN94] and CODI of $600,000. [FN95] The Riches may exclude the CODI from gross income if one of the CODI exceptions applies; [FN96] however, the gain is usually included in gross income. If the loan were nonrecourse, the reportable gain would have been $900,000 without CODI to exclude from gross income. [FN97]

E. Plan 4--Other Alternatives with Less Potential for Practical Success

1. Like-Kind Exchange

Instead of transferring property to the creditor, a taxpayer should consider an exchange, for like-kind property, of the property subject to liabilities. Normally, an exchange of properties will result in recognition of realized gain or loss. [FN98] However, if properties of like-kind are exchanged, no gain or loss is recognized. An exception exists in that gain may be recognized to the extent that property, which is not of like-kind, is received. [FN99] If a taxpayer transfers property which is ***20** subject to more liabilities than those on the property which the taxpayer/transferor receives, the excess liabilities, less any money paid by the transferor, may result in gain

recognized to the transferor. [FN100]

Even though the possibility of a like-kind exchange exists for a taxpayer in financial trouble, as a practical matter a like-kind exchange may not solve the taxpayer's financial problems. This is because the debt on the property received by the taxpayer/transferor will have to be repaid with after-tax dollars. [FN101]

2. Incorporation

Some taxpayers might consider transferring their business assets to a corporation in exchange for the corporation's stock. [FN102] The corporation could then transfer the assets to its ***21** creditors, and the cancellation of indebtedness income and gain would be reported by the corporation rather than by the shareholder. [FN103]

Two problems may result from the incorporation. First, the taxpayer/transferor will recognize gain to the extent that the nondeductible liabilities transferred to the corporation exceed the adjusted bases of the transferred assets. [FN104] Obviously, the taxpayer can avoid this result by balancing the liabilities transferred to the corporation against the adjusted bases of assets transferred to the corporation. [FN105]

Secondly, the IRS may argue that the step transaction doctrine applies to the transfer of assets to the corporation and the subsequent transfer of assets by the corporation to ***22** creditors. [FN106] Under this analysis, the income from the corporate transfer to creditors, including gains, would be reported by the taxpayer/shareholder rather than by the corporation. The feasibility of incorporating the business with the liabilities in order to avoid gain to the taxpayer/shareholder will depend upon the specific fact situation.

3. Termination of S Corporation Election

If the taxpayer/debtor is an S Corporation, [FN107] prior to the transfer of assets to a creditor in satisfaction of the debt, the taxpayer/debtor should consider terminating its S Corporation election. [FN108] After the S Corporation election has been terminated, the organization could transfer the assets to its creditor(s) to satisfy the corporation's liability. In most cases, due to the S Corporation termination, the gain and CODI will be reported and taxed at the corporate level and not at the shareholder level. [FN109]

***23** 4. Transfer to Trust

Some taxpayers may attempt to transfer the assets and liabilities to an irrevocable trust with the hope that the trust will have to report the gain and CODI upon the transfer of assets to the creditor(s). [FN110] Contrary to the taxpayer's goal to have the gain so reported, gain results from the transfer of assets and liabilities to an irrevocable trust if the liabilities exceed the taxpayer's adjusted basis in the assets. [FN111] Thus, such a transfer to avoid gain and CODI to the transferor does not appear to be a viable alternative.

An equally undesirable result is achieved by a transfer of a taxpayer's assets and liabilities to a revocable or grantor trust with a subsequent transfer of the assets by the revocable trust to satisfy the liabilities. The gain and/or CODI resulting from the asset transfer by the revocable or grantor trust, under the grantor trust tax rules, will be reported by the taxpayer/settlor creating an undesirable result in most cases. [FN112]

***24** IV. SANITY (OR CLARITY, IF POSSIBLE) AND RELIEF

A. Introduction

The present income taxation system, which in many cases substantially increases the tax burden of financially troubled taxpayers, creates traps for the unwary and has resulted in a search by knowledgeable taxpayers and advisors for maneuvers, as discussed in Section III, which will avoid income taxes from debt restructuring. This

tax system should be revised to avoid inequities and additional problems for financially distraught taxpayers. [FN113]

B. Inequities

The transfer of appreciated assets by insolvent or bankrupt taxpayers to satisfy liabilities creates an inconsistent result when compared with the straight reduction in debt by bankrupt or insolvent taxpayers without a transfer of assets. In the former case, the debtor/taxpayer has gain and, usually, CODI. [FN114] The CODI may be excluded from gross income, whereas the gain must generally be reported by the debtor/taxpayer. [FN115] In contrast, the debtor/taxpayer with straight debt reduction and no transfer of appreciated property will have only CODI and may have no income to report due to the statutory exclusions. [FN116] Such an inconsistency is simply not justifiable. A better result would provide similar tax treatment of both transaction types.

C. Congressional Relief

1. Proposed Subsection (h)

In its earliest stages, this article contemplated a new, ***25** complex Internal Revenue Code section to resolve the tax problems of restructuring debt and the inequities which result from inconsistent treatment of gain and CODI. However, after drafting several proposed Code sections to resolve the tax problems of inconsistent treatment of those taxpayers who resolve their debts with money or nonappreciated assets compared to those taxpayers who use appreciated assets to settle their debts, [FN117] it became evident that additional sections would only add further complexity to the Code. [FN118]

Therefore, in order to give statutory relief to the affected taxpayers, [FN119] to reduce complexity, to add further certainty, to avoid the mental and transactional gymnastics described in Sections II and III, and to ensure consistent treatment, Congress should consider amending Code section 108 to add the following subsection (h):

Subsection (h) Gain--Discharge of Indebtedness Income

(1) Excludable Gain--For purposes of this Chapter, gain realized from the transfer of property to a seller or lender in partial or full satisfaction of an obligation of the transferor shall be regarded as discharge of indebtedness income to the extent the gain realized would be excluded from gross income under this section if the gain realized were classified as discharge of indebtedness income.

(2) Excess Gain--Gain realized which is not excludable from gross income under paragraph (1) of this subsection shall be treated as gain realized for purposes of section 1001 and other gain provisions of this Chapter.

(3) Allocation--Unless otherwise allocated by the transferor and lender in writing, the fair market value of the property transferred to a lender or seller in partial or full satisfaction of the transferor's obligation shall be allocated first to the principal amount of the outstanding debt and any excess shall be allocated to accrued interest.

***26** (4) Coordination with Discharge of Indebtedness Income--If some discharge of indebtedness income and/or gain realized are to be included in gross income even after the application of subsection (a), then the amount of gain realized to be excluded from gross income under subsections (a) and (h)(1) shall bear the same relationship to excluded discharge of indebtedness income (including gain realized to be excluded) as the total gain realized on the transfer described in paragraph (1) of this subsection bears to the total discharge of indebtedness income (including total gain realized).

2. Explanation of Proposed Subsection (h)

When a taxpayer transfers property to a lender or seller, in full or partial satisfaction of an obligation, gain realized, if any, on the transfer will be subject to the exclusionary rules of Code subsections 108(a), (d), and (e). In addition, to the extent excluded from gross income, the gain realized will be regarded as discharge of indebtedness income. [FN120] The gain realized, to the extent not excluded from gross income under the Code section 108 exclusionary rules, will retain its status as gain realized [FN121] and will be subject to capital gain, nonrecognition, depreciation recapture, and other gain rules and analyses. [FN122]

For taxpayers who are not in bankruptcy, if gain realized and CODI exceed the amount of the taxpayer's insolvency, some of the gain realized and CODI will be subject to exclusion while other gain realized and CODI will be included in gross income during the same taxable year. [FN123] In this case, in order to determine the amount of gain realized excluded from gross income, the gain realized will be proportionately excluded from gross income based upon the following formula:

> Total Gain Realized/Total Gain Realized and CODI = Gain to be excluded under Code § 108/Income to be excluded under Code § 108

***27** For example, if the Riches, who are not in bankruptcy, transfer an asset with a fair market value of $400,000 and an adjusted basis of $100,000 to satisfy a recourse obligation of $1,000,000, the Riches will have gain realized of $300,000 ($400,000 fair market value less $100,000 adjusted basis) [FN124] and CODI of $600,000 (difference between $1,000,000 obligation and $400,000 fair market value of property transferred to satisfy the obligation). [FN125] Assume that the Riches are insolvent to the extent of $796,000. The Riches can only exclude the gain realized ($300,000) and CODI ($600,000) to the extent of insolvency ($796,000). [FN126] Paragraph (4) of proposed subsection (h) would allocate the exclusionary amount as follows:

> Total Gain Realized ($300,000)/Total Gain Realized ($900,000) and CODI = ($265,000) Gain Realized to be excluded/($796,000) Income (Gain Realized and CODI to be excluded)
>
> Gain Realized to be excluded = $265,000
>
> CODI to be excluded = $531,000 ($796,000 - $265,000)

The remainder of the gain realized [$300,000 (total gain realized) less $265,000 (gain realized excluded) = $35,000] will be subject to the normal tax rules for gain realized--capital gain, section 1231, depreciation recapture, and nonrecognition provisions, [FN127] and the remaining CODI ($600,000 -$531,000 = $69,000) will be included in gross income under the general rule of the Kirby Lumber case. [FN128]

Without proposed subsection (h), the Riches would have $600,000 of CODI which would be totally excluded from ***28** gross income, and they would recognize gain of $300,000. Thus, unless the indebtedness is qualified farm indebtedness and the Riches meet the requirements of Code section 108(g), proposed subsection (h) would allow the Riches to exclude an additional $196,000 from gross income and, as a result, include only $104,000 in gross income as gain realized and/or CODI.

A taxpayer, who had cancelled the $1,000,000 debt with a $100,000 cash payment and was insolvent to the extent of $796,000, would be allowed to exclude $796,000 of the $900,000 in CODI from gross income. The same result would be achieved when appreciated property satisfies the $1,000,000 obligation, [FN129] thus providing more consistent treatment under proposed subsection (h) than under the present CODI/gain realized rules.

3. Implications of Proposed Subsection (h)

The enactment of subsection (h) would result in consistent treatment for CODI and gain realized for taxpayers who could exclude CODI and/or gain realized from gross income if one of the statutory exclusions in Code

section 108(a), (d), or (e) applies. Financially troubled taxpayers, under proposed subsection (h), obtain a new federal income tax start, thereby achieving one of the purposes behind the enactment of Code section 108. [FN130]

The effect on tax revenues should be minimal because the affected taxpayer must usually be in bankruptcy, be insolvent, or have status as a qualified farmer in order to exclude the gain from gross income under proposed subsection (h). [FN131] Thus, the IRS will be relieved of attempts to collect taxes from taxpayers who have few if any assets other than exempt assets and assets subject to security interests prior to the IRS tax lien. Consequently, taxpayers should be relieved from the ***29** financial and psychological burdens of owing taxes while lacking the funds to pay them.

Some tax purists could argue that subsection (h) would result in a double tax benefit to taxpayers who own depreciable property. The first benefit is represented by the depreciation deduction, [FN132] and a second tax benefit would be realized by excluding gain, as CODI, when the depreciable property is transferred to a creditor to satisfy the taxpayer's obligation. [FN133] However, a similar double tax benefit is available to taxpayers who borrow funds to pay business or production-of-income expenses and later have the loan reduced or cancelled. The taxpayer will first deduct business or production-of-income expenses [FN134] which reduce taxable income and later, when the loan is reduced or cancelled, the CODI may be excluded from gross income. [FN135]

Tax administrators may argue that subsection (h) will result in income tax avoidance by a plethora of tax shelter investors when a tax shelter partnership is insolvent. Accordingly, most gain would be excluded from gross income under the proposed subsection. Practically, however, because the exclusionary tests of Code section 108 are applied at the partner level and not at the partnership level [FN136] and because many tax shelter investors are required to meet certain net worth requirements before committing funds to the tax shelter, [FN137] few tax shelter investors should be insolvent or able to file for bankruptcy. Thus, most of these investors would not qualify under the exclusionary requirements of Code section 108. Therefore, gain from the transfer of the property by a tax shelter or other partnership to a creditor, in partial or full satisfaction ***30** of an obligation, will be included in a partner's gross income.

V. CONCLUSION

The inequities created by the difference in treatment between gain realized, which is included in gross income, and cancellation of indebtedness income, which can or may be excluded in many cases, may be alleviated through creative and proper tax planning. Enactment of a statutory provision where gain realized is subject to similar exclusionary rules as CODI should result in more consistent treatment for financially troubled taxpayers. Because most of these taxpayers are arguably levy-proof, no substantial loss of revenue would result.

Furthermore, enactment of the proposed legislation to treat gain realized as CODI for some taxpayers will give financially troubled taxpayers a fresh tax start, similar to the fresh start obtained in bankruptcy, and relief from a tremendous emotional burden. The effect of changing the tax rules on gain realized in debt restructuring transactions should also be minimal to the United States Treasury because collection of the taxes levied against these taxpayers is frequently impracticable.

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FN1. The Uniform Commercial Code contains three definitions of insolvency:

(a) a person is unable to pay his, her, or its debts as they become due. 11 U.S.C. § 303(h)(1) (1986).

(b) a person fails to pay his, her, or its debts in the ordinary course of business.

(c) a person's liabilities exceed the fair market value of a person's assets, I.R.C. § 108(d)(3) (1986); 11 U.S.C. §

101(31) (1986).

U.C.C. § 1-201(23).

The latter definition is used to calculate the insolvency or negative net worth of the Riches, although the Riches are probably also insolvent under the other insolvency definitions. See also Kreps v. Comm'r, 351 F.2d 1 (2d Cir. 1965).

FN2. Debtors have asserted various causes of action against creditors, including, but not limited to, the following:

a. breach of a confidential relationship;

b. breach of a covenant of fair dealing; K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); see also Annotation, Bank's Liability for Breach of Implied Contract of Good Faith and Fair Dealing, 55 A.L.R. 4th 1026 (1987).

c. economic duress;

d. fraud (actual and constructive);

e. intentional interference with a business relationship (existing and potential);

f. intentional misrepresentation;

g. negligent misrepresentation;

h. breach of contract;

i. negligence;

j. reduction in value of assets--breach of fiduciary duty/breach of contract.

The Wall Street Journal reported that lender liability has risen dramatically in the last few years. Wall St. J., April 7, 1988, at 7, col. 1. For a discussion of theories farm debtors may have against their lenders, see Bahls, Termination of Credit for the Farm or Ranch: The Theories of Lender Liability, 48 MONT. L. REV. 213-66 (1987).

FN3. The following table shows that bankruptcy filings have increased by more than 50% in the last five years.

Filings, by Chapter of the Bankruptcy Code June 30, 1982 through June 30, 1987

Year	Total	7	11	Chapter 12 [FN*]	13	Other
1982	367,866	255,095	14,058		98,705	8
1983	374,734	251,319	21,206		102,201	8
1984	344,275	232,778	20,023		91,460	13
1985	364,536	244,647	21,420		98,452	17
1986	477,856	332,675	24,442		120,726	13

1987	561,278	397,548	22,564	4,824	136,300	42

FN* Chapter 12, which deals with family framer debt adjustment, became effective November 26, 1986.
Source: 1987 ANN. REP. OF THE ADMIN. OFF. OF THE UNITED STATES CTS. 10, 100-01.

For a discussion of the farm crisis and its effects on families, see, In Iowa, Mental Anguish Still Racks Families, Taxes Social Workers, Even as Farm Crisis Abates, Wall St. J., May 18, 1988, at 70, col. 1.

FN4. See infra notes 75 and 77 and accompanying text (discussing tax collection activities of the Internal Revenue Service (IRS)).

FN5. References to the Internal Revenue Code are to the Internal Revenue Code of 1986 (as amended).

FN6. United States v. Kirby Lumber Co., 284 U.S. 1 (1931) (held that a taxpayer who had purchased bonds for less than the face amount had gross income to the extent that the face amount of the bonds exceeded the amount paid for the bonds).

FN7. Id.

FN8. See infra notes 13-17 and accompanying text (discussing the exceptions to the general rule).

FN9. The Riches owe Easy Loan principal of $1,000,000 and interest of $150,000. The transfer of the land and building with a fair market value of $400,000 to Easy Loan in satisfaction of the $1,150,000 debt will result in CODI of $750,000 (difference between debt and fair market value of asset transferred to the creditor), assuming the interest is included in the $1,150,000 debt for CODI purposes. Accrued interest is excluded from gross income if the interest would be deductible to the debtor if paid. I.R.C. § 108(e)(2) (1986). If this accrued interest is eliminated from gross income, then the interest should be excluded from both the CODI and insolvency calculations.

FN10. The Riches owe Friendly Bank principal of $500,000 and interest of $75,000. The payment of $200,000 in cash to Friendly Bank in full satisfaction of the $575,000 debt will result in CODI of $375,000. See supra note 9 (analysis of the effect of interest on the CODI and insolvency calculations).

FN11. United States v. Kirby Lumber Co., 284 U.S. 1 (1931).

FN12. Astoria Marine Constr. Co. v. Comm'r, 12 T.C. 798 (1949); Lakeland Grocery Co. v. Comm'r, 36 B.T.A. 289 (1937).

FN13. Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926) (United States Supreme Court held that no income resulted when a taxpayer, who had borrowed German marks and lost money on the transaction, repaid the loan with German marks which cost less than the original German marks borrowed). The Ninth Circuit Court of Appeals has refused to follow Kerbaugh-Empire. Vukasovich, Inc. v. Comm'r, 790 F.2d 1409 (9th Cir. 1986).

FN14. Edwards v. Comm'r, 19 T.C. 275 (1952); Clem v. Campbell, 62-2 USTC (CCH) ¶9786 (N.D. Tex. 1962); Bosse v. Comm'r, 29 T.C.M. 1772 (1970).

FN15. Helvering v. American Dental Co., 318 U.S. 322 (1943). The American Dental Co. case was subsequently limited to its facts by the United States Supreme Court. Comm'r v. Jacobson, 336 U.S. 28 (1949).

FN16. The Senate Finance Committee stated that I.R.C. § 108 (1986) was amended because the tax rules contained in the Bankruptcy Act were repealed by Pub. L. No. 95-598, 92 Stat. 2549-2688 (1978). Furthermore, the Committee intended to give bankrupt and insolvent taxpayers a fresh start. S. REP. NO. 1035, 96th Cong. 2d Sess. 620, 624

(1980).

FN17. Prior to the 1980 amendment, I.R.C. § 108 (1954), (as amended), read as follows:

> No amount shall be included in gross income by reason of the discharge, in whole or in part, within the taxable year, of any indebtedness for which the taxpayer is liable, or subject to which the taxpayer holds property, if--
>
> (1) the indebtedness was incurred or assumed--
>
> (A) by a corporation, or
>
> (B) by an individual in connection with property used in his trade or business, and
>
> (2) such taxpayer makes and files a consent to the regulations prescribed under section 1017 (relating to adjustment of basis) then in effect at such time and in such manner as the Secretary by regulations prescribes.
>
> In such case, the amount of any income of such taxpayer attributable to any unamortized premium (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be included in gross income, and the amount of the deduction attributable to any unamortized discount (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be allowed as a deduction.
>
> The 1980 amendment to section 108 under Pub. L. No. 96-589, § 2(a), 94 Stat. 3389 (1980) divided section 108 into five subsections. The general exclusion rules are in subsection (a). Subsection (b) contains the reduction of tax attributes. Under subsection (c), a taxpayer could elect to exclude qualified business indebtedness from gross income (this exclusion was repealed by the Tax Reform Act of 1986). Subsection (d) defines the terms and contains special rules, and subsection (e) explains the application of the discharge of indebtedness exceptions.

FN18. I.R.C. §§ 108(a)(1)(A) and (d)(2) (1986).

FN19. I.R.C. §§ 108(a)(1)(B), (a)(3), (d)(1), and (d)(3) (1986).

FN20. I.R.C. § 108(e)(2) (1986). This exception generally applies to cash basis taxpayers because in order for no CODI to result to the taxpayer under I.R.C. § 108(e)(2) (1986), the taxpayer must have received a deduction if the discharged item had been paid. Examples of items which, if paid by a cash basis taxpayer, will result in a deduction to a taxpayer include compensation, interest and rent. Query whether the result would be the same for discharge of personal interest which is no longer deductible, subject to phase out rules. I.R.C. § 163(h)(1) and (6) (1986). If an accrual basis taxpayer has deducted an item and the item is subsequently cancelled or forgiven, the item should be subject to the tax benefit rule, I.R.C. § 111 (1986), and not the CODI rules of I.R.C. § 108 (1986). In situations where the accrued item has been added to the principal owed by the taxpayers and the loan is nonrecourse, the Tax Court has held that the amount realized includes the accrued item and that the tax benefit rule is inapplicable. Allan v. Comm'r, 86 T.C. 655 (1986).

FN21. I.R.C. § 108(e)(5) (1986).

FN22. I.R.C. § 108(g) (1986) which was added by the Tax Reform Act of 1986; Pub. L. No. 99-514, § 405(a), 100 Stat. 2224 (1986), effective for discharge of indebtedness occurring after April 9, 1986. In order to apply the solvent farmer exclusion rules, the lender must be a qualified person, which, now includes federal, state or local governments as well as agencies and instrumentalities of such governments. I.R.C. § 108(g)(3) (1986). The Technical and Miscellaneous Revenue Act of 1988 expands the definition of 'qualified person' to include federal, state or local governments or affiliates and limits the exclusion from CODI for qualified farmers to the tax attributes and adjusted basis in depreciable property, farm land, or other business or investment property. § 1004 of the Technical and

Miscellaneous Revenue Act of 1988, H. Rep No. 4333, 100th Cong., 2d Sess. (1988).

FN23. Id.

FN24. I.R.C. §§ 108(b) and 1017 (1986).

FN25. Asofsky & Tatlock, Bankruptcy Tax Act Radically Alters Treatment of Bankruptcy and Discharging Debts, 54 J. TAX'N 106-11 (1981); Bibler & Bloethe, Discharge of Indebtedness--Tax Planning Alternatives for the Individual Taxpayer, 7 J. OF AGRIC. TAX'N AND LAW 233-56 (1985).

FN26. See Section III of this article.

FN27. See calculations at supra notes 9 and 10. The amount of federal income taxes on this income of $1,125,000 will depend upon a variety of factors including, but not limited to, net operating losses available to offset this income, other deductions, other income, and filing status.

FN28. See supra notes 13-18 and accompanying text.

FN29. Nichols v. Comm'r, 141 F.2d 870 (6th Cir. 1944); Helvering v. Missouri State Life Ins. Co., 78 F.2d 778 (8th Cir. 1934).

FN30. I.R.C. § 108(e)(2) (1986). See discussion supra note 20.

FN31. Compare I.R.C. § 111 (1986) (unpaid interest of an accrual basis taxpayer which is cancelled should be included in gross income under the tax benefit rule) with Allan v. Comm'r, 86 T.C. 655 (1986) (accrued interest added to principal should be included in the amount realized for nonrecourse loans and is not subject to the tax benefit rule).

FN32. The liability for the interest excluded under I.R.C. § 108(e)(2) (1986) should not be included in the insolvency calculations because this interest is not included in the CODI calculations and, thus, could result in a double benefit to the taxpayer: one benefit because the interest is not CODI and a second benefit from increasing the amount of the taxpayer's insolvency and potential CODI exclusion.

FN33. 'Insolvency' is defined as 'the excess of liabilities over the fair market value of assets.' I.R.C. § 108(d)(3) (1986). See also supra note 1 for definitions of 'insolvency.' Assets, such as the Riches' personal residence, which are exempt from levy by creditors are excluded from the asset side of the insolvency calculation. Rufus S. Cole, 42 B.T.A. 1110 (1940); Estate of B. M. Marcus, 44 T.C.M. (P-H) ¶75,009 (1975).

FN34. The insolvency exclusion is limited to the amount of the insolvency which is calculated before the discharge occurs. I.R.C. §§ 108(a)(1)(B) and (3), and (d)(3) (1986).

FN35. United States v. Kirby Lumber Co., 284 U.S. 1 (1931).

FN36. See Kenan v. Comm'r, 114 F.2d 217 (2d Cir. 1940). The creditor must report the acquisition or abandonment to the Internal Revenue Service (IRS) on Form 1099-A. See I.R.S., Sales and Other Disposition Assets, 1987 Pub. 544 (IRS position on abandonments and acquisitions of property by creditors to satisfy a debt obligation).

FN37. See supra note 9 and accompanying text for an analysis of the CODI effect.

FN38. Nonrecourse means that the creditor (lender) is not entitled to a personal judgment (recourse) against the debtor but can only recover the property which secures the loan; thus, the debtor has no personal liability. Treas. Reg. § 1.1001-2(a) and (c) (1980).

FN39. The gain realized is equal to:

Amount realized	=	$1,150,000	(amount of the nonrecourse debt--I.R.C. s 7701(g) (1986); Comm'r v. Tufts, 461 U.S. 300 (1983))
Less Adjusted Basis	=	$ 100,000	(I.R.C. ss 1011, 1012, and 1016 (1986))
Gain Realized	=	$1,050,000	

The amount realized may be reduced by the accrued interest if the fair market value of the land and building is less than the principal amount of debt. See supra note 29 and accompanying text. Even if the gain includes the interest, the interest should be deductible subject to the personal interest deduction limitation (I.R.C. § 163(h) (1986)), investment interest deduction limitation (I.R.C. § 163(d) (1986)), and the passive loss rules of I.R.C. § 469 (1986).

FN40. Recourse means the debtor has personal liability. U.C.C. § 3-414(1) (1987). The lender may obtain a personal judgment against the debtor. For examples of tax effects of recourse liability, see Treas. Reg. § 1.1001-2(a) and (c) (1980).

FN41. Treas. Reg. §§ 1.1001-2(a)(2), (b), and (c) ex. 8 (1980).

FN42. Id. But see supra notes 5 and 33 for a discussion of the interest adjustment which may reduce the amount of gain realized.

FN43. Texas Gas Distrib. Co. v. Comm'r, 3 T.C. 57 (1944).

FN44. Evidently, in order to avoid the CODI exclusions and a conflict with other court decisions and Treasury Department regulations, the Treasury Department withdrew its acquiescence on June 15, 1987 in Texas Gas Distrib. Co. v. Comm'r, 3 T.C. 57 (1987) (revised action on decision, dated June 15, 1987). The amount realized upon the transfer of property to satisfy a nonrecourse note is not less than the amount of the debt even if the fair market value of the property is less than the debt. I.R.C. § 7701(g) (1986).

FN45. Frank C. Davis, Jr., 88 T.C. 122 (1987).

FN46. See supra notes 18-23 and 38-41 and accompanying text.

FN47. I.R.C. §§ 1001(a) (realization) and (c) (recognition of gain), 1222 (capital gains), 1(j) (capital gains tax rates), 1245 and 1250 (depreciation recapture), 1231 (ordinary or capital gains), 1031 (like kind exchanges), 1033 (involuntary conversions), 1034 (rollover of gain on principal residence), and 121 (1986) (exclusion of gain on sale of principal residence by some taxpayers).

FN48. For a discussion of installment payment agreements, see SALTZMAN, IRS PRACTICE AND PROCEDURE ¶15.05 (1981) [hereinafter, SALTZMAN].

FN49. 11 U.S.C. §§ 507(a)(6), 524(a), 523(a)(1)(A) and (B). See SALTZMAN, supra note 48, ¶16.11, for further discussion of bankruptcy effects on income tax liabilities and liens. Some individual taxpayers file for bankruptcy primarily to trap in the bankruptcy estate, which is a separate taxpayer, the income tax resulting from the gain recognized and/or CODI on the transfer of property to a creditor to satisfy the taxpayer's debt. I.R.C. §§ 1398(a) and (c) (1986). However, if there is no equity in an asset, the bankruptcy trustee may abandon the asset to the debtor who subsequently transfers the asset to the creditor. Some taxpayers believe that the abandonment results in gain to the bankruptcy estate and an adjusted basis in the abandoned property to the taxpayer equal to the amount of the

indebtedness against the abandoned property. This argument is based upon the negative implication of I.R.C. § 1398(f)(2) (1986) that a transfer from the bankruptcy estate to the debtor in the termination of the bankruptcy estate is not a disposition which will result in gain or loss recognized; thus, an abandonment by the bankruptcy trustee, which is not a termination, should result in gain or loss recognition to the bankruptcy estate subject to other nonrecognition provisions. The fallacy of this argument is that an abandonment for bankruptcy purposes does not result in a disposition or transfer for income tax purposes.

FN50. I.R.C. § 7122 (1986).

FN51. See SALTZMAN, supra note 48, ¶15.07 (discussing offers in compromise).

FN52. See supra note 49.

FN53. I.R.C. § 104(a)(2) (1986). The excludable recovery for personal damages may be either through a judgment or settlement. Id.

FN54. Rev. Rul. 75-45, 1975-1 C.B. 47.

FN55. Rev. Rul. 84-108, 1984-2 C.B. 32.

FN56. See supra note 2.

FN57. Threlkeld v. Comm'r, 87 T.C. 1294 (1986).

FN58. Id.

FN59. Vincent v. Comm'r, 219 F.2d 228 (9th Cir. 1955).

FN60. No gain will be realized if the damages incurred are less than the debtor's adjusted basis. I.R.C. § 1001(a) (1986). The adjusted basis in the property will be reduced by the damages received. I.R.C. § 1016(a) (1986).

FN61. Id.

FN62. Rev. Rul. 85-98, 1985-2 C.B. 51.

FN63. Priv. Ltr. Rul. 85-47-025 (1985). Although under I.R.C. § 6110(j)(3) (1986) private letter rulings have no precedential effect, these rulings may be given some weight if the IRS attempts to take a contrary position. Rowan Cos., Inc. v. United States, 452 U.S. 247 (1981).

FN64. Rev. Rul. 85-98, 1985-2 C.B. 51.

FN65. Id.

FN66. Id.

FN67. If no allocation of damages is pled or contained in the settlement agreement, a judge's decision, or in a jury verdict, then the allocation will be based upon the facts established in the case. See supra note 63.

FN68. I.R.C. § 61 (1986). Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955) (everything received is includable in gross income except to the extent that a statutory or judicial exclusion exists).

FN69. I.R.C. § 1001(a) (1986). Gain realized from settlements or lawsuits will be included (recognized) in gross

income unless a nonrecognition provision applies. I.R.C. § 1001(c) (1986). Nonrecognition I.R.C. sections include § 1031 (like-kind exchange), § 1033 (involuntary conversion), § 1034 (sale of principal residence), and § 121 (election by taxpayer, aged 55 or over, to exclude up to $125,000 of gain from gross income).

FN70. See supra notes 47-63 and accompanying text.

FN71. For a discussion of possible gain, see supra notes 37-41 and accompanying text.

FN72. See supra notes 13-20 and accompanying text (CODI exclusions).

FN73. Capital losses can be used to offset capital gains plus the lesser of $3,000 or taxable income. I.R.C. § 1211(b) (1986). Thus, capital losses in excess of capital gains will offset a maximum of $3,000 of ordinary gain or CODI each year. Capital losses not used are carried forward. I.R.C. § 1212 (1986).

FN74. Tax credits which may be used to reduce taxes from the gain or CODI include carryovers of investment tax credit. I.R.C. § 39(d) (1986). An investment tax credit is generally not available for property placed in service after December 31, 1985. I.R.C. § 49(a) (1986).

FN75. After the federal income tax is assessed under I.R.C. § 6203 (1986), the IRS will send a notice and demand for payment of the tax. I.R.C. § 6303 (1986). If the taxpayer fails to pay the tax within 10 days after the notice and demand is sent, the IRS may levy on all of the taxpayer's property or rights to property, unless the property or right is exempt. I.R.C. §§ 6331, 6334 (1986) (for levy and exempt property, respectively).

FN76. 11 U.S.C.A. § 507(a)(7)(A)(i) (West Supp. 1987).

FN77. See supra note 75.

FN78. I.R.C. § 1041(a) (1986).

FN79. I.R.C. § 1041(b) (1986).

FN80. If the loan is nonrecourse, then the transferee will have only gain to report and no CODI. If the loan is recourse, then there may be gain or loss and/or CODI. See supra notes 38-41 and the accompanying text (discussion of the tax consequences to the transferee spouse).

FN81. See supra notes 18-25 and accompanying text (discussing of these exceptions).

FN82. A spouse is not liable for the other spouse's federal income taxes unless a joint federal income tax return is filed. I.R.C. § 6013 (1986). However, even if a joint return is filed, an innocent spouse may not be liable for unreported items. I.R.C. § 6013(e) (1986). A transfer of property by one spouse to the other spouse after tax liability has accrued may result in transferor liability to the transferee spouse. See SALTZMAN, supra note 48, at ¶¶17.01-17.06.

FN83. Because the transferor is not liable for federal income taxes, except to the extent of federal income taxes on his or her share of CODI which is not excluded from gross income under I.R.C. § 108 (1986), the IRS will be unable to levy on the transferor's assets unless the step-transaction doctrine applies. See supra note 75 and accompanying text (discussion of the tax collection procedures).

FN84. For a complete discussion of the different theories behind the step transaction doctrine, see McDonald's Restaurants, Inc. v. Comm'r, 688 F.2d 520 (7th Cir. 1982). See also Gutkin, Step Transactions, 9 N.Y.U. INST. ON FED. TAX'N 1219 (1951).

FN85. Glenn E. Edgar, 56 T.C. 717, 738-39 (1971). If a tax return is timely filed for the transfer between the two spouses and more than 3 years has expired since the latter of the filing of the tax returns or the due date of the returns, the statute of limitations has expired for the transaction between the two spouses unless there is fraud or a substantial omission from gross income. I.R.C. §§ 6501(a) and (c) (1986).

FN86. Id.

FN87. Id.

FN88. If a debt is recourse, then the transferor may have gain or loss and/or CODI. See supra notes 40 and 41 and accompanying text. Satisfaction of nonrecourse debt may result in gain or loss, but no CODI, because the amount realized on nonrecourse debt satisfaction is never less than the amount of the debt. See supra notes 38 and 39 and accompanying text.

FN89. See supra notes 40 and 41 and accompanying text. This factor only influences recourse debt since there may be CODI if the FMV is less than the debt.

FN90. If the adjusted basis is less than the FMV and debt, the transferor will have gain to the extent of the excess. The amount of the gain will depend upon whether the debt is recourse or nonrecourse. See supra notes 38-41 and accompanying text and infra note 91 and accompanying text. Loss will result if the fair market value (recourse) or debt (nonrecourse) is less than the adjusted basis. See supra notes 38-41 and accompanying text.

FN91. I.R.C. § 7701(g) (1986) requires the amount realized to be not less than the amount of the unpaid debt. See also Comm'r v. Tufts, 461 U.S. 300 (1983).

FN92. CODI may be excluded under one of the various CODI exceptions. See supra notes 18-22 and accompanying text. Gain may be excluded only if a nonrecognition provision of the I.R.C. applies. See supra note 69 (some of the nonrecognition provisions).

FN93. See supra notes 40 and 41 and accompanying text. The change from nonrecourse to recourse liability could increase the risk to the taxpayer since the note holder could pursue the taxpayer's other assets if the property subject to the liability did not satisfy the taxpayer's obligations.

FN94. Id. Gain is equal to the difference between the fair market value of $400,000 and an adjusted basis of $100,000. I.R.C. § 1001(a) (1986). A contract seller may have gain to report if the seller reported the sale on the installment method. I.R.C. § 453B(a) (1986). But see I.R.C. § 1038 (1986) for nonrecognition rules on all or part of the gain. A lender may have a bad debt deduction for any tax loss incurred due to the transfer of property and/or cancellation of debt. I.R.C. § 166(a) (1986).

FN95. See supra note 9 for a discussion of CODI.

FN96. See supra notes 18-22 and accompanying text.

FN97. I.R.C. § 1001(a) and (c) (1986).

FN98. The gain realized of $900,000 equals the amount realized ($1,000,000) which is not less than the amount of the debt, less the adjusted basis of $100,000. See supra notes 88-91.

FN99. I.R.C. § 1031(a) (1986). 'Like-kind' refers to the 'nature or character of the property and not to its grade or quality.' Treas. Reg. § 1.1031(a)-1(b) (as amended in 1967). Thus, unimproved real estate for improved real estate will qualify as like-kind property. Treas. Reg. § 1.1031-(a) (as amended in 1967). The amount of liabilities assumed by the transferee, or the amount of liabilities to which the property is subject, is treated as money received by the

transferor. I.R.C. § 1031(d) (1986). Thus, if the transferor realized a gain on the like-kind exchange and receives nonlike-kind property, the transferor will have to recognize gain to the extent of the lesser gain or the amount treated as money received unless the transferor transfers money to the transferee and/or assumes liabilities on the property received in the exchange (or takes property subject to liabilities) at least equal to the liabilities on the property transferred. Treas. Reg. § 1.1031(d)-2 (1956).

FN100. I.R.C. § 1031(d) (1986). See also Treas. Reg. § 1.1031(d)-2 (1960).

FN101. For example, if the Riches exchanged their land and building (FMV = $400,000, adjusted basis = $100,000, subject to First Credit Union's mortgage of $300,000) for a parking lot with a fair market value of $800,000 and subject to a mortgage of $700,000, the Riches will pay the principal on the mortgage over a period of years with after-tax dollars unless the parking lot is depreciable. Assuming that the Riches are in a 28% tax bracket and the parking lot is not depreciable, the Riches will need $972,222 before federal income taxes to pay off the mortgage. If the Riches are in the 28% tax bracket and the Riches can depreciate $650,000 of the parking lot cost, only $719,444 in before-tax dollars will be required to fully pay the Riches' $700,000 mortgage.

FN102. A transfer of assets is tax free to the transferor if property is transferred in exchange for stock and securities and the transferor controls the corporation immediately after the transfer. I.R.C. § 351(a) (1986). Numerous pitfalls to a tax free incorporation may occur. For example:

a. Services are not property; thus, stock and securities issued for services will not be received tax free by the transferor. I.R.C. §§ 351(d)(1), 83(a) (1986).

b. If the corporation is an investment company and the transfer results in diversification to the transferor, then the transfer will not be subject to the nonrecognition provisions of I.R.C. § 351(a). I.R.C. § 351(e)(1) (1986); Treas. Reg. § 1.351-1(c) (1967).

c. If the transferor incorporates a going concern and has prepaid expenses and/or accumulated accounts receivable prior to incorporation, the IRS may reallocate the income and/or deduction items. Rev. Rul. 80-198, 1982-2 C.B. 113.

d. If the corporation is an existing corporation, the transferor may not have control of the corporation immediately after the transfer. Control is defined as 80% of the voting power of the corporation plus 80% of each class of non-voting stock. I.R.C. § 368(c) (1986); Rev. Rul. 59-259, 1959-2 C.B. 115.

See BITTKER & EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ch. 3 (5th Ed. 1987), (thorough discussion of tax-free incorporations).

FN103. The corporation has the same adjusted basis that the shareholder had in property transferred to the corporation, plus any gain recognized to the transferor/shareholder. I.R.C. § 362(b) (1986). Therefore, when the corporation transfers the property to the creditor, the analysis of the tax effects to the corporation will be similar to the Riches' analysis of their transfer to creditors. See supra notes 38-44 and accompanying text.

FN104. The general rule of I.R.C. § 357(a) (1986) results in the liabilities not being treated as money or other property; thus, the liabilities would not trigger the recognition of gain under I.R.C. § 351(b) (1986). However, I.R.C. § 357(c) (1986) requires a taxpayer to report the excess of the nondeductible liabilities over the adjusted basis of transferred properties as gain. The transferor's adjusted basis in the stock or securities received in the exchange is reduced by the amount of the liabilities which the corporation takes subject to, or by the amount which the corporation assumes. I.R.C. § 358(d)(1) (1986). If the principal purpose of the assumption of liabilities by the corporation was not a business purpose or was to avoid federal income tax liability on the transfer, then all of the liabilities assumed or acquired by the corporation would be regarded as money received by the transferor. I.R.C. § 357(b) (1986). The latter rule takes precedence over the liabilities in excess of basis rule. I.R.C. § 357(c)(2)(A) (1986).

FN105. The balancing of liabilities and adjusted bases of assets can occur in one of several ways. For example:

a. The transferor may retain the liabilities instead of transferring them to the corporation.

b. The transferor may contribute money or assets with sufficient adjusted bases to offset the liabilities acquired by the corporation. The contribution of the transferor's promissory note to the corporation will not increase the transferor's basis since the transferor has a zero basis in that promissory note. Rev. Rul. 68-629, 1968-2 C.B. 154.

c. The transferor may withhold property which is subject to liabilities in excess of basis and lease such property to the corporation.

FN106. See supra notes 84-87 and accompanying text (discussion of the application of the step-transaction doctrine).

FN107. The income and deduction items of an S Corporation, in most cases, flow through the S Corporation to its shareholders in proportion to their percentage of stock ownership; thus, an S Corporation is not subject to income tax unless it has built-in gains (I.R.C. § 1374) (1986) or excess net passive income (I.R.C. § 1375) (1986). An S Corporation is a small business corporation, as defined in I.R.C. § 1361(b) (1986), which, with its shareholders, has elected under I.R.C. §§ 1362(a) and (b) (1986) to be treated as an S Corporation. For a thorough discussion of S Corporations, see EUSTICE & KUNTZ, FEDERAL INCOME TAXATION OF S CORPORATIONS (2d ed. 1985).

FN108. If the S Corporation election is not terminated, then the gain and CODI upon the transfer of assets to the creditor will be passed through the S Corporation and reported by the S Corporation's shareholders. See supra note 107. The exclusionary tests of I.R.C. § 108(a) and (b) are applied at the corporate level and not at the shareholder level. I.R.C. § 108(d)(7) (1986). An S Corporation election continues until the election is terminated through revocation (I.R.C. § 1362(d)(1) (1986)); the corporation ceases to be a small business corporation (I.R.C. § 1362(d)(2) (1986)); or for three consecutive years the corporation has subchapter C earnings and profits and more than 25% of the corporation's gross receipts are passive investment income (I.R.C. § 1362(d)(3) (1986)).

FN109. See supra notes 37-43 and accompanying text. But see supra note 77 and accompanying text (discussing the step-transaction doctrine). If the transfer to the creditor occurs after the S Corporation election is terminated, but during the same taxable year as the corporation's termination is effective, the gain and CODI will be allocated on a daily basis. I.R.C. §§ 1362(e)(1) and (2) (1986). Thus, the shareholders will be required to report the portion of the gain and CODI allocated to the short S Corporation taxable year. However, if the corporation and shareholders agree, the S Corporation taxable year will end on the date of termination; therefore, the CODI and gain will be trapped on the regular corporation's tax return because the transfer of assets and debt restructuring occurred in a taxable year when the S Corporation election was not in effect. I.R.C. § 1362(e)(3) (1986). The regular corporation may exclude the CODI if one of the section 108 exceptions applies (see supra notes 18-23) and the gain may be excluded if a nonrecognition section applies (see supra note 69) or if the transaction can be structured to avoid gain. See section III of this article. Query whether the IRS may argue that if the debt is nonrecourse, then a sale or disposition occurs when the S Corporation election is terminated. See infra note 112 (discussion of the occurrence of a sale or disposition when a revocable trust is converted to an irrevocable trust).

FN110. The IRS may argue that the step-transaction doctrine applies or that the transfer to the trust lacks substance. The Tax Court rejected these arguments in Glenn E. Edgar, 56 T.C. 717 (1971); however, if the transaction has no purpose except to avoid income taxes, a court might find that the transfer did lack substance or might apply the step-transaction doctrine. See McDonald's Restaurants, Inc. v. Comm'r, 688 F.2d 520 (7th Cir. 1982) (discussion of the step-transaction doctrine).

FN111. The trust will report and be taxed on the gain realized unless the trust is a grantor trust (I.R.C. §§ 671-78) (1986); the trust is required to distribute its income to the beneficiaries; or it does distribute the income to its

beneficiaries and the gain is allocable to the income beneficiaries rather than the trust. I.R.C. §§ 652, 662 (1986); Treas. Reg. § 1.1001-2(a) (1980); Diedrich v. United States, 457 U.S. 191 (1982) (held that taxpayer who transferred assets to children who in turn paid taxpayer's gift taxes recognized gain to the extent that gift taxes exceeded transferor's adjusted basis). If the transfer to the creditors occurs within two years after the taxpayer's transfer of assets to the trust and the trust is taxable on the gain realized, then the trust may pay an income tax on its transfer at the taxpayer's maximum rate. I.R.C. § 644 (1986). The transferor may avoid recognition of gain through proper tax planning. See supra note 105 (ways to balance liabilities and adjusted bases).

FN112. A transfer of assets and liabilities to a revocable trust will not trigger tax consequences to the transferor because the transferor/taxpayer is regarded as the owner of the trust for most tax purposes. Rev. Rul. 77-402, 1977-2 C.B. 222; Madorin v. Comm'r, 84 T.C. 667 (1985). Furthermore, when the revocable trust transfers assets to satisfy liabilities, the gain and CODI will pass through to the settlor (transferor) of the trust. I.R.C. § 674 (1986). If the transferor releases the power(s) which makes the transferor the owner of the trust, the transferor may report a gain under the recourse (see supra notes 40-42) or nonrecourse (see supra note 39) debt rules. Treas. Reg. § 1.1001-2(c) ex. (5) (1980).

FN113. See supra note 3.

FN114. If the debt is recourse, see supra notes 40-42 and accompanying text. If the debt is nonrecourse, see supra notes 38 and 39 and accompanying text.

FN115. See supra notes 18-25 and 36-47 and accompanying text.

FN116. Id.

FN117. See supra notes 115 and 116 and accompanying text.

FN118. For a discussion of tax simplification to alleviate complexity, see Peel, Tax Simplification: A Critique of the President's Proposals, 27 S. TEX. L.J. 27, 28 (1985).

FN119. See supra note 3.

FN120. For example, if a taxpayer who is not in bankruptcy transfers property to a creditor to satisfy debt, has gain of $100 on the transfer, and is insolvent to the extent of $60, then the taxpayer will exclude $60 of the gain from gross income under I.R.C. § 108(a) (1986). The remainder of the gain ($40) will be subject to the normal tax rules for gain. See supra note 47 and accompanying text.

FN121. I.R.C. § 108(h)(2) (Proposed Code 1986).

FN122. See supra note 45 and accompanying text.

FN123. I.R.C. § 108(h)(4) (Proposed Code 1986).

FN124. See supra notes 39 and 40 and accompanying text.

FN125. Id.

FN126. I.R.C. §§ 108(a)(1)(B) and (3) (1986), unless the Riches' debt is qualified farm indebtedness. I.R.C. § 108(g) (1986).

FN127. See supra note 45 and accompanying text.

FN128. See supra note 6.

FN129. Note that even if a taxpayer transferred only $1 to the creditor to satisfy a $1,000,000 debt and the taxpayer was insolvent before and after the transaction, then the taxpayer would have no CODI or gain.

FN130. See supra note 16.

FN131. The IRS would collect few federal income taxes from bankrupt or insolvent taxpayers.

FN132. I.R.C. §§ 167(a) and 168(a) (1986). Depreciation lowers a taxpayer's basis in the depreciable property by the amount of depreciation allowed but not less than the amount allowable. I.R.C. § 1016(a)(2) (1986).

FN133. See supra pp. 26-27 (proposed subsection 108(h)).

FN134. I.R.C. §§ 162(a) and 212 (1986).

FN135. I.R.C. § 108(a) (1986).

FN136. I.R.C. § 108(d)(6) (1986).

FN137. The United States Securities and Exchange Commission has promulgated rules which permit limited partnership interests (securities) to be sold to an unlimited number of accredited investors (investors with a net worth in excess of $1,000,000 or with net income of $200,000) and avoid most of the public registration provisions. 17 C.F.R. § 230.501(a) and (b) (1988) under the Securities Act of 1933, 15 U.S.C.A. §§ 77a-77aa (West Supp. 1981).

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American Bankruptcy Law Journal

Summer, 1992

*323 ESSENTIALS OF BANKRUPTCY TAX LAW

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Bankruptcy lawyers' decisions and advice can profoundly affect their clients' tax liability. Unfortunately, these tax consequences are often unpremeditated. Perhaps because bankruptcy practice requires a hard-earned familiarity with its own complicated statutes and procedures, bankruptcy professionals tend to rely on others for tax advice rather than tackle the intricacies of the Internal Revenue Code themselves. Nevertheless, it is essential for bankruptcy attorneys and judges to establish a sound foundation in insolvency and bankruptcy tax law. Every attorney practicing in or around bankruptcy cases, whether representing debtors, creditors or trustees, individuals, corporations or partnerships, must understand certain tax rules without reference to manuals or experts, in order to practice competently in the field. Bankruptcy judges must likewise comprehend the tax consequences of various actions by debtors if they are to understand the method and motives behind much of the daily fare presented in their courts. The following is an analysis of the most commonly encountered bankruptcy tax issues, with an emphasis on current developments and emerging trends in the case law.

Duty to File Returns and Pay Taxes

Upon the commencement of a chapter 7 or chapter 11 case, an individual debtor's assets are deemed to be transferred to the estate. [FN1] This transfer of assets, as well as the revesting of assets in the debtor upon the closing of the case or confirmation of the plan, are not "dispositions" and, therefore, do not trigger tax liabitity. [FN2]

The estate of an individual chapter 7 or 11 debtor is a separate taxable entity, which must file tax returns and pay taxes. [FN3] The trustee of an individual's chapter 7 or 11 estate must file a federal income tax return if the estate's gross income for the taxable year is higher than the personal exemption amount plus ***324** the basic standard deduction. [FN4]

In contrast to chapter 7 and 11 cases, no separate taxable entity is created by an individual's filing of a chapter 13 case. [FN5] The distinction results from the fact that in chapter 13, unlike chapters 7 and 11, the estate includes property and income received by the debtor after commencement of the case. [FN6] Because no taxable entity is created, a chapter 13 trustee is not responsible for filing federal income tax returns.

The filing of a chapter 7 or 11 case by a corporation likewise does not create a new taxable entity. [FN7] However, a chapter 7 or 11 trustee of a corporate debtor's estate is expressly charged with the duty of filing tax returns on behalf of the corporation. [FN8] This is true whether or not the debtor's property or business continues in operation. [FN9]

Nor does the filing of a bankruptcy case by a partnership create a new taxable entity. [FN10] The provisions of Internal Revenue Code §§ 1398 and 1399, dealing with the treatment of taxable entities in individual and corporate bankruptcy cases, are expressly inapplicable at the partnership level. [FN11] A partnership interest owned by an individual debtor is treated in the same manner as any other interest owned by the debtor. [FN12]

Because the Bankruptcy Tax Act of 1980 [FN13] was enacted prior to the creation of chapter 12 in 1986,

[FN14] uncertainty has always existed as to the tax treatment of a chapter 12 estate. Internal Revenue Code § 1399 states that no separate taxable entity results from the commencement of a bankruptcy case except a case to which § 1398 applies, and § 1398 applies by its terms only ***325** to chapter 7 and chapter 11 cases. Furthermore, like chapter 13, chapter 12 provides that property of the estate includes property and income received by the debtor after the commencement of a case. [FN15] In contrast, however, a chapter 12 trustee is required to file state and local tax returns for the estate in precisely the same manner required under chapter 11. [FN16] This inconsistency has caused much debate, since it seems unfair to deny the family farmer, typically more of a businessman than a consumer, the favorable tax planning techniques available to an individual debtor in a chapter 7 or a chapter 11 case. Nevertheless, the plain meaning of §§ 1398 and 1399 seems to require the conclusion that a chapter 12 estate is not a separate taxable entity, and the Internal Revenue Service has expressly taken this position in a private letter ruling. [FN17]

Whenever a trustee must file a tax return, he or she is also required to pay the tax as determined by the return. [FN18] This duty exists without need for assessment, notice or demand from the Internal Revenue Service. [FN19] A trustee who fails to prepare tax returns and pay taxes may be personally "surcharged" for penalties and interest accruing as a result. [FN20]

In Holywell Corporation v. Smith [FN21] the United States Supreme Court recently ruled that the trustee of a liquidating trust formed under a chapter 11 plan of reorganization had a duty to file federal income tax returns and pay taxes. The court held that the trustee was an "assignee" of the bankruptcy estate, and was, therefore, required to file returns and pay taxes under Internal Revenue Code § 6012(b)(3). The trustee argued that the liquidating trust was a "grantor trust" and the debtor a "grantor" as defined in Treasury regulations, in which case the debtor would be obliged to pay taxes on any income of the trust applied in discharge of the debtor's obligations. [FN22] But the Court ruled that in this case the property of the estate never revested in the debtor upon confirmation. Rather, it was assigned directly to the liquidating trust, so the debtor could not have been a grantor. [FN23]

***326** Priority of Tax Claims

Taxes incurred by the estate subsequent to commencement of the case are first priority administrative expenses. [FN24] Most other tax claims receive seventh priority treatment under Bankruptcy Code § 507(a)(7). [FN25] These include:

(a) Pre-petition income and gross receipt taxes to the extent the tax return was due either after the petition date or three years before the petition was filed, including any requested extensions.

(b) Income and gross receipt taxes assessed any time within 240 days before the commencement of the case, plus any extensions, or assessed after the filing of the case under applicable law or by agreement.

(c) Real and personal property taxes assessed pre-petition and payable without penalty within one year prior to the filing of the case.

(d) Taxes required to be collected or withheld by the debtor, e.g., employee withholding taxes, regardless of age.

(e) An employer's share of employment taxes on wages and salaries, whether or not the wages were actually paid, if the return for these was last due within three years before the petition was filed or after the petition was filed.

(f) Federal, state and local excise taxes, for which a return is due in the three years prior to the filing of the case, or after the case is filed.

(g) Customs duties on imports, subject to certain age restrictions.

(h) Penalties related to any of the above tax claims, but only if in compensation for actual pecuniary loss, as opposed to fines. [FN26]

An interesting twist is added by Bankruptcy Code § 724(b)(2). [FN27] Under this section secured tax claims are subordinated to unsecured claims given priority under § 507(a)(1)-(6). [FN28] This has the curious effect of "securing" priority unsecured claims up to the amount of the tax lien in chapter 7 cases. If priority unsecured claims equal or exceed the amount of the tax lien, the tax is completely unsecured, which allows junior lienholders to be paid to the exclusion of an apparently senior tax lien. [FN29]

***327 Discharge** of Tax **Indebtedness**

The tax liability of a corporate debtor in a chapter 7 case or a liquidating chapter 11 case is never discharged. [FN30] However, an individual debtor may receive a discharge from any tax claims not granted priority under Bankruptcy Code § 507(a)(2) ("gap" claims in involuntary cases) or § 507(a)(7). [FN31] Therefore, subject to the exceptions set forth below, federal income tax claims against individuals are discharged if they were incurred with regard to returns for which the due date, including extensions, is more than three years before the bankruptcy petition is filed, and for which no assessment has been made within the 240 days prior to the filing of the case. [FN32]

It is quite possible for taxes more than three years old to be non-dischargeable because they have been assessed within 240 days of the bankruptcy case. For example, a tax otherwise dischargeable under the three-year rule could be unassessed pending an audit, or due to litigation in the U.S. Tax Court, during which time the debtor is not required to pay the disputed tax. If the audit results in liability, or the debtor loses the Tax Court case, the Internal Revenue Service will assess the tax, and then has 240 days to perfect its liens and collect the tax before the claim becomes dischargeable in bankruptcy. [FN33] If the taxpayer makes an offer in compromise within the 240-day period prior to filing the bankruptcy case, this 240 day period is tolled during the time that the offer is pending. Once the offer terminates, the Service is given an additional 30 days to conduct its lien perfection and collection activities before the tax becomes dischargeable. [FN34]

Exceptions to the discharge apply if no return was filed, [FN35] a fraudulent return was filed, the debtor willfully attempted to evade or defeat the tax, [FN36] or if a late return was filed within two years prior to the filing of the bankruptcy petition. [FN37]

Balances remaining due on taxes after successful completion of a confirmed chapter 13 plan are discharged. [FN38]

Determination of Tax Liability of the Estate

Generally, the bankruptcy estate is entitled to the same deductions the ***328** debtor had on assets transferred to the estate. [FN39] The estate also succeeds to most of the debtor's tax attributes for the last full taxable year, as follows: (a) net operating loss carryovers, (b) charitable contribution carryovers, (c) recovery of tax benefit items, (d) tax credit carryovers, (e) capital loss carryovers, and (f) **basis,** holding period and character of pre-petition assets. [FN40]

The cancellation of debt received by an individual debtor upon discharge in a bankruptcy case does not result in taxable income. [FN41] However, the estate's tax attributes will be reduced by the amount of the debtor's discharge, [FN42] in the following order:

(a) Net operating losses [FN43]

(b) General business credit

(c) Capital loss carryovers

(d) **Basis** in assets

(e) Foreign tax credit carryovers [FN44]

Section 505 of the Bankruptcy Code [FN45] provides a trustee or debtor-in-possession an opportunity to seek determination of any tax liability from the bankruptcy court. [FN46] This determination may be made even if the tax has previously been assessed, although a previously contested and adjudicated tax may not be relitigated before the bankruptcy court. [FN47]

A trustee may also request a taxing authority to determine any unpaid tax liability of the estate by submitting a tax return and a request for such determination. [FN48] If the tax shown on the return is paid by the trustee, and the taxpaying authority does not notify the trustee within sixty days after a request for ***329** determination that the return has been selected for examination, the trustee, the debtor and any successor to the debtor are discharged of any further tax liability. [FN49]

Two courts have recently decided that, although Bankruptcy Code § 505(b)(1)(A) discharges the trustee and the debtor from personal liability for estate taxes after expiration of the statutory 60-day period, the estate does not receive the same protection. The courts reasoned that, because the bankruptcy estate is not a "trustee, debtor or successor to the debtor," it is not discharged under § 505(b)(1)(A) and must pay the tax claims so long as the estate remains open. [FN50]

Debtor's Short Tax Year Election

Individual debtors in chapter 7 or 11 cases may elect to treat the year in which the bankruptcy petition is filed as two taxable years, the first of which ends on the day before the petition is filed ("the short year"), and the second of which begins on the day the petition is filed. [FN51] The election is irrevocable, and may be made only if the debtor owns non-exempt assets. [FN52] The deadline for making the election, and for filing the tax return for the short year, is the fifteenth day of the fourth full month following the end of the short year. [FN53] If a chapter 7 or 11 case is dismissed, a previously- made short year election is extinguished and all taxes incurred by the estate pass back to the debtor. [FN54]

If the short year election is made, the debtor's tax liability for the short year becomes an allowable pre-petition claim against the estate. Therefore, assets of the estate must be used to pay any tax liability for that period. If the estate cannot pay the taxes for lack of available funds, the debtor remains liable for any non-dischargeable taxes not paid by the estate. [FN55]

A myriad of bewildering hypothetical situations have been used over the years to confuse bankruptcy lawyers about the applicability of the short year election to a given set of facts. Complex financial statements and transactions, of course, can always make the determination of tax liability difficult. The deciphering of these transactions for tax return purposes is perhaps best left to a tax expert. But once the expert has determined taxable income or loss for the proposed two taxable years, the bankruptcy lawyer's work is reduced to ***330** a relatively simple evaluation of the proposed tax return for the short year. If the short year return would result in a tax liability, the election should probably be made since this would become a liability of the estate. If, however, the short year return would result in a net loss, i.e., a tax attribute, by foregoing the election the debtor should be able to use the loss to offset post-petition income. [FN56]

Directed Application of Tax Payments

Responsible officers or employees of corporations, or partners or employees of partnerships, who willingly fail to collect and pay employee withholding taxes are personally liable for a penalty equal to the total amount of the

tax evaded. [FN57] To avoid this 100% penalty, officers or partners of financially troubled business organizations often cause the entity to make payments to the Internal Revenue Service with directions to apply the payments to these "trust fund" taxes. [FN58] So long as the payment is entirely voluntary, the taxpayer has the right so to direct the application of the payment to whatever type of liability it chooses. [FN59]

Involuntary payments by the taxpayer, however, may be applied by the Service as it sees fit. [FN60] A payment is generally deemed involuntary if it is received as a result of distraint or levy, or from a legal proceeding where the government files a claim or seeks to collect delinquent taxes. [FN61] Payments made by the estate in chapter 7 bankruptcy cases are almost always held to be involuntary. [FN62]

Until recently, the Service took the position that payments received during chapter 11 cases were likewise involuntary. [FN63] This issue divided the circuits until the case of United States v. Energy Resources Company, [FN64] in which the United States Supreme Court ruled that a bankruptcy court may order the Internal Revenue Service to apply chapter 11 payments to trust fund taxes as directed under a confirmed plan of reorganization "if necessary for the success *331 of the plan," whether or not the payments are considered involuntary. [FN65] The Court pointed out that the Service could still collect the 100% penalty from responsible officers and employees under Internal Revenue Code § 6672. [FN66]

Abandonment of Property by the Trustee

A problem frequently arises when a bankruptcy estate holds property with a low tax **basis** which is subject to debt in excess of its fair market value. Although there is clearly no value in the property for creditors, if the trustee allows the automatic stay to lift and the secured creditor to foreclose, the transfer of title will trigger taxable gain to the estate if the **basis** in the property is less than the foreclosure price. [FN67]

The abrupt rise in real property foreclosures in the latter half of the 1980's spawned creative attempts by debtors to avoid recapture of accelerated depreciation by filing a bankruptcy petition just prior to foreclosure, in order to trap the recapture liability in the estate. Trustees reacted by abandoning the property back to the debtor [FN68] before the stay could be lifted and the property foreclosed while in the estate, which rendered the debtor liable for any tax consequences resulting from a subsequent disposition of the property, including foreclosure. [FN69]

The debtor bears a heavy burden as a result of this strategy by the trustee. Although the debtor is fully liable for the taxes, the debtor's non-exempt assets and tax attributes are owned by the estate and are not available to pay the tax liability. In addition, the adjusted **basis** in the property may have been further reduced while in the estate by the reduction in tax attributes resulting from the debtor's discharge.

One district court recently decided that Internal Revenue Code § 1398(f)(2), [FN70] relied upon by trustees to shield the abandonment from the usual taxable event rules, does not apply to § 554 abandonments under the *332 Bankruptcy Code. [FN71] Under this case the abandonment by the trustee generates a tax liability which the estate must bear. The court reasoned that this is not an unfair burden because the estate succeeds to the tax attributes of the debtor upon commencement of the case, which it can use to offset all or part of the tax liability. [FN72]

Conclusion

Knowledge of these tax rules will not convert bankruptcy lawyers into tax lawyers, but it will provide a sound **basis** for advising financially troubled clients of the major tax consequences of their actions, and will help identify the dividing line between expert insolvency advice and inexpert tax advice. By no means does this synopsis provide an exhaustive review of all bankruptcy tax issues, but a thorough familiarity with these key concepts could at least save some potential embarrassment, and perhaps much more.

FNa1. Director and shareholder, Creel & Atwood, P.C., Dallas, Texas.

FN1. 11 U.S.C.A. § 541 (West 1979 & Supp.1992).

FN2. 26 U.S.C.A. § 1398(f)(1) (West 1988). Title 26 of the United States Code is the Internal Revenue Code. The Bankruptcy Code is contained in title 11.

FN3. 26 U.S.C.A. § 1399 (West 1988). As a fiduciary of the new entity, a chapter 7 or 11 trustee must obtain a new taxpayer identification number and file Form 1041-U.S. Fiduciary Income Tax Return.

FN4. 26 U.S.C.A. §§ 6012(a)(9) & (b)(4) (West 1989). Currently the sum of the personal exemption amount plus the basic standard deduction (for bankruptcy estates, deemed to be equal to the deduction for married individuals filing separately) is $5,300.

FN5. 26 U.S.C.A. § 1399 (West 1988). This should be distingished from the separate treatment of a chapter 13 estate for bankruptcy purposes.

FN6. 11 U.S.C.A. § 1306(a) (West 1979 & Supp.1992).

FN7. 26 U.S.C.A. § 1399 (West 1988).

FN8. 26 U.S.C.A. § 6012(b)(3) (West 1989). Because no separate taxable entity is created, a chapter 7 or 11 trustee's corporate tax return is not a fiduciary return, but is filed on behalf of the corporation on the same forms used if no bankruptcy case were involved.

FN9. Trustees of operating estates must withhold income and social security taxes from payment of wages or wage claims of employees of the estate. 26 U.S.C.A. § 3401(d) (West 1989); 26 U.S.C.A. § 3402(a) (West 1989 & Supp.1992). Under currently pending S. 1985, 102d Cong., 2d Sess. § 404(a) (1991) (sponsored by Senators Hefflin and Grassley), a trustee would be required to maintain a separate bank account for post-petition withholding and social security taxes, deposit all such taxes therein, and remit the taxes to the appropriate governmental unit in a timely manner.

FN10. 26 U.S.C.A. § 1399 (West 1988).

FN11. 26 U.S.C.A. § 1398(b)(2) (West 1988). Consequently, partnership debtors in possession and trustees report on the usual partnership information return forms.

FN12. Id.

FN13. Pub. L. No. 589, 94 Stat. 3389 (1980), reprinted in 1980 U.S.C.C.A.N. (94 Stat.) 3389.

FN14. Chapter 12 was promulgated in the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 554, reprinted in 1986 U.S.C.C.A.N. (100 Stat.) 3114.

FN15. 11 U.S.C.A. § 1207(a) (West Supp.1992).

FN16. 11 U.S.C.A. § 1231 (West Supp.1992). This "special tax provisions" section of chapter 12 is identical to § 1146 of chapter 11, 11 U.S.C.A. § 1146 (West 1978 & Supp.1992). Neither section addresses federal tax treatment.

FN17. Priv. Ltr. Rul. 89-280-12 (July 14, 1989).

FN18. 26 U.S.C.A. § 1398(c)(1) (West 1988); 26 U.S.C.A. § 6151(a) (West 1989).

FN19. 26 U.S.C.A. § 6151(a) (West 1989).

FN20. Lopez-Stubbe v. Rodriguez-Estrada (In re San Juan Hotel Corp.), 847 F.2d 931, 946 (1st Cir.1988).

FN21. 112 S.Ct. 1021 (1992).

FN22. Treas. Reg. § 1.677(a)-1(d) (1991).

FN23. 112 S.Ct. at 1027. The Court implied that the trustee's argument would have been successful if the plan of reorganization had allowed the property of the estate to revest in the debtor prior to assignment to the liquidating trust, the normal state of affairs under Bankruptcy Code § 1141(b). Debtor's counsel can avoid this possibility by drafting the plan and confirmation order to effect a "deemed" assignment directly from the estate to the liquidating trust.

FN24. 11 U.S.C.A. § 507(a)(1) (West 1979); 11 U.S.C.A. § 503(b)(1)(B) (West 1979 & Supp.1992). A trustee is generally held personally liable for penalties and interest on unpaid administrative taxes. Lopez-Stubbe v. Rodriguez-Estrada (In re San Juan Hotel Corp.), 847 F.2d 931, 946 (1st Cir.1988). MICHAEL L. COOK, ROBERT D'AGOSTINO & KENNETH N. KLEE, 4 COLLIER ON BANKRUPTCY ¶ 704.04 at 704-12 (Lawrence P. King ed.) (15th ed. 1992). Therefore if a taxing authority fails to file a valid administrative claim, the trustee should file the claim as authorized under Bankruptcy Code § 501(c), file a return and pay the tax.

FN25. 11 U.S.C.A. § 507(a)(7) (West Supp.1992).

FN26. Id.

FN27. 11 U.S.C.A. § 724(b)(2) (West Supp.1992).

FN28. 11 U.S.C.A. § 507(a)(1)-(6) (West 1979 & Supp.1992).

FN29. COLLIER, supra note 24, at ¶ 724.03 at 724-8. Tax claims which are oversecured by federal tax liens continue to accrue interest after the filing of a bankruptcy case, up to the amount of the lien. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989).

FN30. 11 U.S.C.A. § 727(a)(1) (West 1979); 11 U.S.C.A. § 1141(d)(3) (West 1979).

FN31. 11 U.S.C.A. § 507(a)(7) (West Supp.1992).

FN32. The controlling date for this three-year rule is the due date of the return, plus extensions, not the date the tax was paid or the return was filed. 11 U.S.C.A. § 507(a)(7)(A)(i) (West 1979 & Supp.1992).

FN33. 11 U.S.C.A. § 507(a)(7)(A)(ii) (West 1979 & Supp.1992).

FN34. Id. Debtor's counsel should be careful in timing the offer-in-compromise to avoid extension of the 240-day period if bankruptcy is under consideration.

FN35. 11 U.S.C.A. § 523(a)(1)(B)(i) (West 1979).

FN36. 11 U.S.C.A. § 523(a)(1)(C) (West 1979). An exception to this exception applies in chapter 13 cases if the debtor completes payments under the plan of reorganization. 11 U.S.C.A. § 523(a) (West 1979 & Supp.1992); 11 U.S.C.A. § 1328(a) (West 1979 & Supp.1992).

FN37. 11 U.S.C.A. § 523(a)(1)(B)(ii) (West 1979).

FN38. 11 U.S.C.A. § 1328(a) (West 1979).

FN39. 26 U.S.C.A. §§ 1398(e)(3) & (f)(1) (West 1988).

FN40. 26 U.S.C.A. § 1398(g) (West 1988). Under this sub-section the transfer of tax attributes to the estate is determined as of the first day of the debtor's tax year in which the bankruptcy case is filed, i.e., January 1 for calendar-year debtor/taxpayers. Tax attributes accruing after that date remain property of the debtor.

FN41. **26** U.S.C.A. **§108(a)(1)(A)** (West 1988 & Supp.1992).

FN42. The debtor's discharge reduces the estate's tax attributes: in a chapter 7 or 11 case the estate, not the individual, is treated as the taxpayer for purposes of reducing attributes under § 108(b)(1) and (2). **26** U.S.C.A. § **108(d)(8)** (West 1988 & Supp.1992). In this manner the government avoids the loss in tax revenue which would result from separating the favorable tax treatment of the debtor's discharge from the estate's tax attributes.

FN43. The trustee may avoid reduction of net operating losses by electing instead to reduce **basis** in depreciable property. **26** U.S.C.A. § **108(b)(5)** (West 1988 & Supp.1992).

FN44. **26** U.S.C.A. § **108** (b)(1) & (2) (West 1988 & Supp.1992). The reduction is dollar-for-dollar, except on general business and foreign tax credit carryovers, which are reduced 33 1/3 cents for each dollar of cancellation-of-debt income excluded from gross income. **26** U.S.C.A. § **108(b)(3)** (West 1988 & Supp.1992).

FN45. 11 U.S.C.A. § 505 (West 1979 & Supp.1992).

FN46. The policy behind § 505 is to allow a prompt resolution of the debtor's tax liability and to avoid the dissipation of the estate's assets which could result if the debtor failed to challenge a tax assessment prior to commencement of the case City Vending v. Oklahoma Tax Comm'r, 898 F.2d 122, 124 (10th Cir.1990).

FN47. 11 U.S.C.A. § 505(a) (West 1979). For example, the trustee may litigate a previously assessed but unlitigated ad valorem property tax claim if the claim was based on an alleged over-valuation of the property.

FN48. 11 U.S.C.A. § 505(b) (West 1979).

FN49. 11 U.S.C.A. § 505(b)(1)(A) (West 1979). An identical discharge results if the government, having undertaken an examination of the return, fails to complete the examination and notify the trustee of any tax due within 180 days of the trustee's request for a determination. 11 U.S.C.A. § 505(b)(1)(B) (West 1979).

FN50. In re Fondiller, 125 B.R. 805 (N.D. Cal. 1991); In re Rode, 119 B.R. 697 (Bankr. E.D. Mo. 1990).

FN51. 26 U.S.C.A. § 1398(d)(2)(A) (West 1988). The debtor's spouse may join in this election if a joint return is filed for the short year. 26 U.S.C.A. § 1398(d)(2)(B) (West 1988).

FN52. 26 U.S.C.A. §§ 1398(d)(2)(C) & (E) (West 1988).

FN53. 26 U.S.C.A. § 1398(d)(2)(E) (West 1988).

FN54. 26 U.S.C.A. § 1398(b)(1) (West 1988). In this situation the tax attributes previously transferred to the estate will also revest in the debtor.

FN55. 11 U.S.C.A. § 523(a)(1) (West 1979 & Supp.1992).

FN56. This offset is subject to rules governing use of certain losses.

FN57. 26 U.S.C.A. § 6671(b) (West 1989); 26 U.S.C.A. § 6672(a) (West 1989 & Supp.1992).

FN58. Such payments made just prior to commencement of a bankruptcy case are not preferential transfers, because amounts required to be withheld for payment of trust fund taxes are not property of the debtor. Begier v. IRS, 496 U.S. 53 (1990). Even post-petition transfers of this nature are not recoverable by the trustee in an adversary proceeding seeking monetary recovery, because of the sovereign immunity of the United States, pursuant to the recent decision in United States v. Nordic Village, Inc., 112 S.Ct. 1011 (1992).

FN59. Muntwyler v. United States, 703 F.2d 1030, 1032 (7th Cir.1983). If both the debtor and the IRS fail to allocate pre-petition voluntary payments, the bankruptcy court may allocate the payments under 11 U.S.C.A. § 505 (West 1979). In re Vermont Fiberglass, Inc., 76 B.R. 358, 368 (Bankr. D.Vt. 1987), rev'd on other grounds, 88 B.R. 41 (D.Vt. 1988).

FN60. U.S. v. De Beradinis, 395 F.Supp.944, 952 (D.Conn. 1975), aff'd 538 F.2d 315 (2d Cir.1976).

FN61. Amos v. Commissioner, 47 T.C. 65 (1966).

FN62. In re Looking Glass, Ltd., 113 B.R. 463, 466-67 (Bankr. N.D. Ill. 1990).

FN63. The Internal Revenue Manual, used to guide revenue agent procedures, states that any payments received from bankruptcy estates should be applied per court order, or if no order is entered, should be credited in a manner "as to give maximum benefit to the United States insofar as future collections are probable" IRM § 57(13)4.3(1).

FN64. 495 U.S. 545 (1990).

FN65. Id. at 548.

FN66. This does not solve the problem presented when the corporation has just enough funds available to pay the trust fund taxes, but no more. In this situation an alternate source of recovery for the IRS, i.e., the responsible officer, could be eliminated, since stated IRS policy is to refrain from collecting the 100% penalty if the underlying tax is paid. I.R.S. Policy Statement P-5-60.

FN67. For example: An estate holds property with an adjusted **basis** of $100 which has a fair market value of $200 and is subject to secured recourse debt of $300. If the trustee allows the stay to lift and the property is foreclosed at $200, a taxable gain of $100 accrues to the estate.

FN68. A trustee is authorized to abandon property by 11 U.S.C.A. § 554 (West 1979 & Supp.1992).

FN69. **26** U.S.C.A. §§ **108(b)(2)** & (b)(5) (West 1988 & Supp.1992). A possible planning device allowing the debtor to avoid this problem is to identify property likely to be abandoned and dispose of it in a non-fraudulent manner prior to filing the bankruptcy petition. Once the bankruptcy case is filed and the short tax year is elected, any liability arising from the disposition is a liability of the estate, although excess liability after the estate's funds are exhausted, is a non-dischargeable liability of the debtor.

FN70. 26 U.S.C.A. § 1398(f)(2) (West 1988).

FN71. In re A.J. Lane & Co., 133 B.R. 264 (Bankr. D.Mass. 1991). The court pointed out that § 1398(f)(2) is applicable by its terms only to deemed transfers from the estate to the debtor upon the closing of the case, not to an abandonment of specific property during the case. Contra, Samore v. Olson (In re Olson), 930 F.2d 6, 8 (8th Cir.1991).

FN72. In re A.J. Lane & Co., 133 B.R. 264, 274 (Bankr. D.Mass. 1991).

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THE TAX CONSEQUENCES OF STOCK-FOR-DEBT EXCHANGES

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Spring, 1992

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I. INTRODUCTION

Corporate debt restructurings and bankruptcies are reaching a level in the 1990s not approached since the Great Depression. [FN1] Due to the economic slowdown and the aftermath of the leveraged buyouts of the 1980s, many corporations find it necessary to restructure their debt. Often these companies cancel their outstanding debt in exchange for either a new debt interest or an equity interest in the corporation. (This latter exchange is referred to as a "stock-for-debt exchange.") The stock-for-debt exchange is an exception to the general rule that corporations recognize income when they cancel outstanding debt at a discount. This "stock-for-debt exception," however, has been significantly limited by both Congress and the Internal Revenue Service in 1990, at a time when it has been needed most. The author will discuss cancellation of indebtedness income ("COD income") and the exclusion of COD by insolvent and bankrupt companies under Internal Revenue Code s 108 [FN2] and will then analyze the creation and justification of the stock-for-debt exception. Lastly, the author will focus on the limitations placed upon the exception by Congress and the Internal Revenue Service (the "Service").

II. CANCELLATION OF INDEBTEDNESS INCOME

Cancellation of a debt for less than the amount borrowed produces income for the debtor. Thus, if a corporation borrows $1000 and later discharges the debt for $750, the debtor will have $250 of cancellation of indebtedness income. This result is justified by two separate theories. [FN3]

The first approach, the balance sheet test, looks at the debtor's position in balance sheet terms. If the debtor borrows $1000, its balance sheet would reflect an asset (cash) of $1000 and a corresponding liability (the loan obligation) of $1000. The debtor's net worth is zero. When the corporation later discharges the debt for $750, the corporation's assets are reduced by $750 ($1000 - $750 = $250). The liability, however, is eliminated ($1000 - $1000 = $0). At this point the debtor has an increase in net worth of $250. This increase in net worth is income.

The second approach focuses on the fact that at the time the corporation borrows money the corporation receives cash, but is not required to include that cash in income. Borrowing money is not a realization event. Until a realization event occurs, the taxpayer does not include the borrowed money in

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income. When the debt is discharged at a discount, however, the tax deferral on the cash ends because the cash proceeds of the initial loan are no longer burdened by the repayment obligation. The **discharge** of **indebtedness** is a realization event triggering income to the taxpayer. Courts following this approach require the debt to be issued for cash or property. [FN4] Since this approach to COD income seeks to tax the original cash received that is not later repaid, there must be an original receipt of cash or property.

A. Inclusion of COD Income

1. The Common Law Approach

The principle that gross income includes cancellation of indebtedness has been long established. [FN5] Although Treasury regulations adopted this principle as early as 1918, [FN6] the concept of COD income derived from the well-known Kirby Lumber [FN7] decision of the Supreme Court in 1931.

In Kirby Lumber, the taxpayer issued its own bonds receiving $12,126,800. The bonds were not issued for cash, but in exchange for Kirby Lumber's preferred stock, on which there were dividend arrearages. [FN8] The same bonds were repurchased later in the year at a discount of $137,521.30. The Court held the discount was taxable income in the year of the repurchase, stating that: "[a]s a result of its dealings, [a taxpayer] made available $137,521.30 assets previously offset by the obligation of bonds now extinct. [The taxpayer] has realized within the year an accession to income, if we take words in their popular meaning...." [FN9]

2. The Statutory Approach

The Kirby Lumber "freeing of assets" concept is codified in section 61(a)(12), which provides that "gross income means all income from whatever source derived, including income from **discharge** of **indebtedness.**" The regulations state that a taxpayer may realize income "by the payment or purchase of his obligations at less than their face value." [FN10]

B. The Exclusion of COD Income

1. Common Law Exceptions

Numerous common law exceptions developed excluding COD from income. COD income was excluded from gross income where the taxpayer was insolvent before and after the debt discharge. [FN11] The courts reasoned that the discharge of debts cannot "free" assets of a debtor that remained insolvent even after the discharge, since the debtor still had a negative net worth. If the discharge made the taxpayer solvent, COD income was included to the extent of such solvency. [FN12]

The insolvency exception is justified today by reference to bankruptcy policy. Although cancellation of a debt improves the balance sheet, the debtor does not have any more cash after the discharge. The debtor needs to be shielded from tax on economic income that it is unable to currently pay.

2. Statutory Exclusion of COD Income

Congress determined that relief from COD income was necessary in bankruptcy proceedings. Bankruptcy laws would be frustrated if relief from debt created

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income tax liabilities jeopardizing the debtor's recovery. [FN13] To protect debtors, Congress enacted the Bankruptcy Tax Act of 1980 codifying the judicial insolvency exception. [FN14] The Senate Report stated:

> The rules of the bill concerning income tax treatment of debt discharge in bankruptcy are intended to accommodate bankruptcy policy and tax policy. To preserve the debtor's 'fresh start' after bankruptcy, the bill provides that no income is recognized by reason of debt discharge in bankruptcy, so that a debtor coming out of bankruptcy (or an insolvent debtor outside bankruptcy) is not burdened with an immediate tax liability. [FN15]

Thus, **26** U.S.C. s **108(a)(1)** provides that COD income is excluded from gross income if the discharge occurs in a title 11 case or when the taxpayer is insolvent. [FN16] Section 108(a)(3) limits the amount of COD income excluded to the amount of the debtor's insolvency. The term "title 11 case" means a case under title 11 of the Bankruptcy Code, but only if the taxpayer is under the jurisdiction of the Bankruptcy Court and the discharge is granted by the court or is pursuant to a plan approved by the court. [FN17] "Insolvent" is defined as "the excess of liabilities over the fair market value of assets" [FN18] and is determined on the **basis** of the taxpayer's assets and liabilities immediately before the discharge. [FN19]

Taxpayers under title 11 have a significant advantage over other insolvent taxpayers because title 11 taxpayers need not prove their net worth. Outside of bankruptcy, a taxpayer must demonstrate its insolvency by valuation of assets. Some authorities suggest that contingent liabilities should be considered in measuring insolvency. [FN20] The courts have held that insolvency valuation requires a computation of any goodwill or going concern values inherent in the taxpayer's business. [FN21] The fair market value of such assets may be difficult to determine in a troubled company restructuring.

> Example 1: D, a financially distressed corporation not under title 11 has assets valued at $75x and liabilities of $100x. An out of court restructuring of D's debt results in $50x of COD income. Under current law, D may only exclude $25x of COD under section 108(a), the amount of D's insolvency prior to the discharge. D will recognize $25x of COD income. Had D been a title 11 debtor, D could exclude the entire $50x, without regard to D's insolvency.

In cases of insolvency, the debt and equity structure of the debtor may be scrutinized. If the debt of a thinly capitalized corporation is recharacterized as equity, the corporate debtor may become solvent. The result of such a recharacterization may be recognition of COD income. [FN22]

C. Attribute Reduction

1. Under Section 108(b)

Although section 108(a) excludes COD income from gross income, the taxpayer must pay a price for such exclusion. Although bankruptcy may be an inappropriate occasion to tax COD income, the debtor should not be able to enjoy both tax-free relief from debts and carryover of the losses created by the borrowed funds. [FN23] The debtor is entitled to a "fresh start, not a head start." [FN24] Section 108(b) therefore provides that the debtor's tax attributes will be reduced when COD income is excluded under section 108(a).

Section 108 is a deferral provision. The COD income excluded reduces certain

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specified tax attributes of the debtor, eliminating tax savings in the future. [FN25] The attributes are reduced in the following order:

(1) Net operating loss (NOL) for the taxable year of the discharge and any net operating loss carryover to such taxable year.

(2) Any carryover to or from the taxable year of a discharge of an amount for purposes of determining the amount allowable as a credit under section 38 (relating to general business credit).

(3) Net capital loss for the taxable year of the discharge, and any capital loss carryover to such taxable year under section 1212.

(4) The **basis** of the property of the taxpayer as provided in section 1017.

(5) Any carryover to or from the taxable year of the discharge for purposes of determining the amount of the foreign tax credit. [FN26]

Except for the general business credit and the foreign tax credit, all of the tax attributes are reduced dollar for dollar. The credits are reduced 33 1/3 cents for each dollar of income excluded. [FN27] If the taxpayer has insufficient tax attributes to absorb the excluded COD income, the excess is disregarded and is never considered income to the debtor. [FN28]

After reducing NOLs, business credits and capital losses, section 108(b)(2)(D) provides that the taxpayer must reduce the **basis** of all the taxpayer's depreciable and nondepreciable property to the extent of the remaining COD income. The **basis** of the depreciable and nondepreciable property is reduced under the rules of section 1017. [FN29] An important limitation on section 108(b) is section 1017(b)(2), under which the reduction of asset **bases** cannot exceed the excess of (i) the aggregate of the **basis** of the property held by the taxpayer immediately after the discharge over (ii) the aggregate of the liabilities of the taxpayer immediately after the discharge. Thus, the tax **basis** of the debtor's assets after the discharge will not be less than its undischarged liabilities. [FN30]

Example 2: B is involved in a title 11 proceeding. B's creditors agree to accept 50x cash for their 100x debt. B has 25x in NOLs, 5x in capital losses, 1x in investment tax credits and 60x **basis** in depreciable property. B has 55x of nondischarged liabilities. B's discharge of 100x debt for 50x cash would produce COD income of 50x which would be excluded from B's gross income under section 108(a). Under section 108(b), B would make the following reductions:

50x COD income
(25x) NOL eliminated
(5x) capital losses eliminated
(3x) investment tax credit is eliminated to offset 3x COD income
(5x) **basis** reduction, limited to aggregate asset **bases** less undischarged liabilities of the taxpayer after discharge (60-55 = 5)
12x (Remaining untaxed COD income. This amount escapes taxation entirely.)

2. Election to Reduce **Basis** in Depreciable Property

Under section 108(b)(5), a taxpayer may elect to reduce the **basis** of its depreciable assets in accordance with section 1017 rather than reducing its other tax attributes. If a taxpayer makes the section 108(b)(5) election, it may reduce the entire **basis** of the property (unlike **basis** reduction under section 108(b)(2)(D) where the **basis** may not be reduced below

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the remaining undischarged liabilities). If depreciable **basis** reduction is elected, no other attributes need be reduced. [FN31] The election can only be made in the year of discharge on the taxpayer's return. [FN32] Consent of the service is required to revoke the election. [FN33]

Depreciable property is defined as property subject to an allowance for depreciation, but only if a permitted **basis** reduction would reduce the depreciation otherwise allowable for the period following such reduction. [FN34] Further, the taxpayer may elect to treat certain property interests as depreciable. A partnership interest may be treated as depreciable under section 1017. [FN35] Under certain circumstances, a parent may treat stock in a subsidiary as depreciable property. [FN36] Inventory may also be treated as depreciable. [FN37] Gain upon the disposition of section 1017 property will be treated as ordinary gain under section 1017(d).

Example 3: Assume the same facts as example 2. Instead of reducing its attributes, B elects under section 108(b)(5) to reduce **basis** on depreciable property:

50x COD income
(50x) depreciable **basis** reduction (10x adjusted **basis** remains)
(0x) NOL reduction (25x remains)
(0x) capital loss reduction (5x remains)
(0x) investment credit (1x remains)
0 COD remaining

A debtor would prefer the section 108(b)(5) election if future income was anticipated. The use of the future carry forward of NOLs to offset income is generally more beneficial than future tax benefits resulting from depreciation. [FN38] Because of the time value of money, the ability to shield $25x of income in year one with an offsetting NOL is more valuable than receiving $5x of depreciation deductions for years one through ten (using the straight line depreciation method). A reduction in **basis** is only attractive if B does not intend to sell his assets for several years, deferring possible gain on the disposition indefinitely.

III. THE STOCK-FOR-DEBT EXCEPTION TO COD

Often, a debtor would like to completely avoid COD income and section 108. If **discharge** of **indebtedness** does not result in COD income, then section 108(b) would be inapplicable and the debtor would not have to reduce any attributes or **basis.** Without the reduction of NOLs under section 108(b) a debtor can use those NOLs to offset future income and reduce future taxes in the early years after reorganization. Thus, debtors frequently strive to qualify cancellation of indebtedness under the "stock-for-debt" exception. [FN39] The ability of the debtor to cancel indebtedness without attribute reduction by means of the stock-for-debt exception can be critical to the debtor's reorganization. [FN40]

A. The Creation of the Stock-For-Debt Exception

The stock-for-debt exception was judicially created in Capento Securities Corp. v. Commissioner. [FN41] In that case, Raytheon Production Corporation (Raytheon), a wholly owned subsidiary of the Raytheon Manufacturing Co., issued $500,000 in face value bonds in 1929. In 1933, Raytheon Manufacturing Co. organized a second wholly owned subsidiary, Capento Securities Corporation (Capento), for the purpose of purchasing Raytheon's $500,000 bonds from the

(Publication page references are not available for this document.)
bondholders. Capento purchased all of the bonds at a cost of $15,160. The bonds were Capento's only assets.

American Bankruptcy Law Journal

Winter, 1992

*55 FEDERAL TAXATION OF CORPORATE REORGANIZATIONS

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This article analyzes the taxation of corporate reorganizations in bankruptcy including cancellation of indebtedness income under section 108 of the Internal Revenue Code, tax free reorganizations under section 368(a)(1)(G) of the Internal Revenue Code, net operating losses under section 382 of the Internal Revenue Code, and the procedure for determining the tax consequences of bankruptcy reorganization. The article focuses on the collision of the Internal Revenue Code and the Bankruptcy Code and the ambiguities that result in bankruptcy tax law. It concludes that both tax policy and bankruptcy policy would be promoted by enabling the bankruptcy courts to make binding advance determinations of the tax effects of bankruptcy reorganizations under section 1146 of the Bankruptcy Code.

INTRODUCTION: BANKRUPTCY TAX POLICY

The following bankruptcy principles govern chapter 11 reorganizations: (i) fresh start for debtors; (ii) fair and equitable treatment of creditors; (iii) debtor rehabilitation favored over liquidation; and (iv) economy of administration.

Bankruptcy law gives the debtor a "fresh start" by permitting the debtor to reorganize its affairs and permitting many debtors a discharge of debt. As stated by the Supreme Court in Local Loan Co. v. Hunt, "One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him a start afresh free from the obligations and responsibilities consequent upon business misfortunes."' [FN1]

Bankruptcy law protects creditors by requiring the orderly and fair collection and distribution of the debtor's estate. [FN2] In a reorganization case, the ***56** Bankruptcy Code requires the following for confirmation of a plan: (i) the plan must be proposed in good faith and not by any means forbidden by law; and (ii) the plan must be feasible and not likely to be followed by a liquidation or another reorganization. [FN3]

The Bankruptcy Code encourages reorganization over liquidation in the interest of economic stability. Congress has determined that rehabilitating a corporation is in the best long-term interest of creditors, shareholders and the public: it is more productive to use assets in the business for which they are designed than to sell assets on a liquidation **basis.** [FN4] In NLRB v. Bildisco the Supreme Court explained, "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." [FN5]

A bankruptcy petition gives debtors "breathing space" from creditors. All collection activity, including tax collection by the Internal Revenue Service is stayed. [FN6] Bankruptcy law [FN7] further protects the interests of creditors by requiring that expenses incurred by the debtor in furtherance of reorganization be kept to a minimum, "so as to preserve as much of the estate as possible." [FN8]

Bankruptcy tax law does not pervasively contradict these bankruptcy principles. Indeed, legislative history reveals that many bankruptcy tax provisions are intended to encourage reorganization over liquidation. The

Treasury Department, however, does not consider only debtor rehabilitation. The Treasury sees itself as an involuntary creditor that cannot refuse to extend credit, cannot demand collateral, and therefore operates at a disadvantage to creditors generally. [FN9]

Several of the advantages enjoyed by taxpayers in bankruptcy contradict tax theory. With increasing success the Treasury has chipped away those advantages. In general, the Treasury maintains that the purpose of tax law is to ensure that all taxes are paid regardless of inconvenience to the taxpayer. [FN10] The Treasury would therefore prefer that any subsidies to business be direct and not at the cost of tax collection. [FN11]

***57** A Treasury statement submitted to the House Committee on Ways and Means during consideration of the Bankruptcy Tax Act of 1980 contains this concise summary of the Treasury's bankruptcy tax policy: [FN12]

> (1) Clarification of the law. Many bankruptcy and insolvency tax provisions are "obscure" and should be clarified.
>
> (2) Equal treatment in and out of bankruptcy. Recognizing that "there is the desire to afford special tax rules for those who appear to be in need," the insolvent debtor in bankruptcy should have no advantage over the insolvent debtor who has not filed a petition for bankruptcy.
>
> (3) Fresh start but no head start. Debtors should not be entitled to reduce pre-bankruptcy tax liabilities while simultaneously retaining certain built-in tax benefits post-bankruptcy, such as a deduction for net operating loss carryovers from pre-petition tax years.
>
> (4) Minimizing tax shelter abuse. Insolvency should not be a means to avoid recapture of tax shelter deductions for depreciation, investment tax credits, and similar items. [FN13]
>
> (5) Simplicity and "administrability." Where there is a choice among reasonable alternatives, the simpler and more administrable approach should be adopted.
>
> (6) Fairness and equity.

Among the stated policies, Bankruptcy policy and tax policy conflict most directly over the question of whether debtors should be allowed to reduce pre-bankruptcy tax liabilities and retain built-in tax benefits such as deductions against post-petition income for net operating loss carryovers from pre-petition years. The Treasury argues that such a policy constitutes an unwarranted subsidy, and gives debtors in bankruptcy a "head start" over similarly situated tax-payers not in bankruptcy. Congress permits some debtors this slight "head start" apparently because it views such tax advantages as a convenient way to promote rehabilitation over liquidation.

Congress' generosity to debtors has not been constant. The tax provisions governing net operating loss carryovers, corporate reorganizations in bankruptcy, and cancellation of indebtedness income have changed as the political will swings between the competing interests of rehabilitating troubled businesses and raising revenue. The uncertainty and confusion created by frequent changes to the ***58** tax law are compounded by the imperfect fit of tax law and bankruptcy law. Consequently, ambiguity is ingrained in bankruptcy tax law. Unfortunately, that ambiguity cannot be resolved in advance by the bankruptcy court considering approval of a debtor's plan of reorganization. Both tax law and bankruptcy law would be promoted by enactment of a provision in the Bankruptcy Code allowing bankruptcy courts to make advance determinations of the tax consequences of bankruptcy plans of reorganization.

CANCELLATION OF INDEBTEDNESS INCOME

Historical Background

In bankruptcy reorganizations the debtor typically pays a percentage of its obligations to creditors, and is forgiven the balance - thus the debtor continues to operate its business with a fresh-start. [FN14] Generally, debt forgiveness creates income for taxpayers; [FN15] however, a debtor in bankruptcy obtains certain tax advantages. This section traces the history of the taxation of cancellation of indebtedness income in bankruptcy, with emphasis on the development of the present law. Professor Eustice has described the history of cancellation of indebtedness income as "at best complex and at worst nearly inscrutable." [FN16]

In U.S. v. Kirby Lumber [FN17] the Supreme Court ruled that retirement of debt at less than its face amount results in taxable income. In 1923 Kirby Lumber had issued bonds, which it repurchased the same year at a discount. Holding that the difference between the issue price and the discount price was taxable income, Justice Holmes observed that the taxpayer had realized an "accession to income," and that "there is not a shrinkage of assets to the taxpayer." [FN18]

In the midst of the Great Depression, several courts recognized an "insolvency" exception to Kirby Lumber: no income arose from a **discharge** of **indebtedness** ***59** if the debtor were insolvent both before and after the transaction. [FN19] In 1938, Congress amended the Bankruptcy Act of 1898 to provide a statutory insolvency exception which exempted cancellation of indebtedness income in a bankruptcy case from all income taxes, provided the debtor elected to reduce the **basis** of its assets. [FN20] To implement these changes in bankruptcy law, in 1939 Congress amended the tax code to exclude cancellation of indebtedness income from recognition in certain corporate reorganizations and to require **basis** reduction instead. [FN21] Thus, by 1940 the Bankruptcy Act and the Internal Revenue Code deferred cancellation of indebtedness income until the debtor's **reduced-basis** property was sold.

In 1940, the Bankruptcy Act again was amended to enhance the tax benefits of the insolvency exception by providing that a debtor in bankruptcy need only reduce the **basis** of its assets to the assets' fair market value. [FN22] No further reduction would be required for cancellation of indebtedness in bankruptcy, even though assets often have a tax **basis** lower than fair market value due to factors such as inflation and depreciation. More significantly, a debtor in bankruptcy did not have to reduce net operating loss carryovers or other tax attributes as a consequence of tax-free treatment. [FN23]

In 1943 Congress gave bankrupt corporations another helping hand by freeing assets from any **basis** reduction upon a debtor's receipt of cancellation of indebtedness income in an acquisitive reorganization under Chapter X of the Bankruptcy Act. Specifically, former sections 371 and 372(a) [FN24] provided that **basis** would not be reduced as a consequence of realization of cancellation of indebtedness income if a debtor's plan of reorganization called for a transfer of assets to a successor corporation (net operating losses, however, did not carryover). Even if the debtor's reorganization did not involve a successor corporation, **basis** reduction under Chapter X could be avoided under the stock for debt exception described below. [FN25]

Cancellation of Indebtedness Under The Bankruptcy Tax Act of 1980 and the Tax Reform Act of 1986

Concerned that debtors in bankruptcy be entitled to a fresh-start, but not ***60** to defer tax forever, [FN26] the Bankruptcy Tax Act of 1980 marked the end of the more liberal treatment of **discharge** of **indebtedness** income and specifically repealed the "judicial insolvency exception". [FN27]

Generally, § 108(a) excludes cancellation of indebtedness income from gross income for insolvent debtors in bankruptcy. [FN28] Section 108(b) reduces the debtor's tax attributes by the amount of the canceled debt. [FN29] Most significant, deductions against income for net operating loss carryovers must be reduced.

A debtor may elect instead to apply all or any portion of the cancellation of indebtedness income to reduce the **basis** of depreciable property before reducing deductions such as net operating losses. [FN30] These rules apply to debtors in bankruptcy and to other debtors to the extent they are insolvent. [FN31]

In the absence of an election to reduce **basis,** tax attributes are reduced in the following order:

(1) Net operating losses for the taxable year of the discharge and any net operating loss carryovers; [FN32]

(2) Carryovers of tax credits, including the research credit [FN33] and the general investment tax credit [FN34] (at the rate of 33 1/3 cents for each dollar of debt cancellation) [FN35] but not the employee's stock ownership plan credit; [FN36]

(3) Net capital loss for the taxable year of discharge [FN37] and any capital loss carryover; [FN38]

(4) **Basis** of the debtor's depreciable and non-depreciable assets in accordance with regulations; [FN39] and

(5) Foreign tax credit carryovers [FN40] at the rate of 33 1/3 cents for each dollar of debt cancellation. [FN41]

***61** Note that passive activity loss credit and credit carryovers [FN42] and the minimum tax credit [FN43] are not reduced. [FN44]

At least one spokesman suggested during the hearings on the Bankruptcy Tax Act of 1980 that the order of attribute reduction should be geared more to the rehabilitation of debtors. [FN45] If a debtor were allowed to choose the order in which attributes are reduced, the debtor could ensure full use of expiring attributes. This would be especially helpful in the case of net operating losses which must be reduced on a last in - first out (LIFO) **basis** rather than first in - first out (FIFO).

Debtor/taxpayers who elect to reduce the **basis** of depreciable property before reducing tax attributes must reduced the full amount of the adjusted **basis** of depreciable property, but not below zero. [FN46] After the **basis** of depreciable property is reduced to zero, any remaining cancellation of indebtedness income is subject to the rules for reducing tax attributes. [FN47] If, after all these adjustments, some amount of discharged debt has not yet been offset, no tax is imposed on the excess. [FN48]

"Depreciable property" means any property subject to depreciation, including real property held as inventory. [FN49] Adjusted **basis** of depreciable property is reduced in the following order:

(1) **Basis** of property acquired with purchase money debt is reduced by the canceled amount of such debt;

(2) **Basis** of property subject to a lien securing a debt is reduced by the canceled amount of such debt;

(3) **Basis** of each property item of the debtor is reduced pro rata by an amount equal to the proportion that the **basis** of each property item bears to the sum of the **basis** of all the debtor's property; and

(4) **Basis** of inventory, notes and accounts receivable are reduced in the proportion that the **basis** of each item bears to the sum of the **basis** of all of those items. [FN50]

***62** In deciding whether to reduce tax attributes or to reduce **basis,** the debtor must weigh (a) the advantages of using loss and credit carryovers to offset immediate post-petition income against (b) the disadvantages of (1) exhausting additional tax attributes; (2) foregoing depreciation reductions, thus increasing taxes in later years; and (3) (especially under the pre-1986 Code) losing the opportunity to offset capital loss carryovers against ordinary income. [FN51] Further, net operating losses have a useful life of fifteen years, and must be used or they are lost.

For example, if a debtor has net operating loss carryover deductions which are about to expire, but does not anticipate sufficient short term income to exhaust those deductions, the debtor must use those deductions immediately to offset cancellation of indebtedness income, because the net operating losses carryovers will

otherwise expire before they can be used as a deduction against income. On the other hand, if the debtor does not anticipate losing net operating loss carryovers through non-use, the debtor should elect to reduce the **basis** of its assets first to offset cancellation of indebtedness income, because such reduction will not be recaptured until the assets are sold, and the debtor's net operating losses can be used freely in the meantime to offset earned income.

Any gain on subsequent transfers of assets with **basis** reduced under § 108 [FN52] is subject to recapture [FN53] as ordinary income under §§ 1245 and 1250, [FN54] which are designed to prevent conversion of ordinary income into capital gains. [FN55] Because the Tax Reform Act of 1986 eliminated any reduction of tax liability for capital gains, as opposed to ordinary income, the concern whether ordinary income is converted into capital gains is reduced after the Tax Reform Act of 1986. This is not to say that the ordering rules serve no purpose; to the extent the ordering rules limit reductions to **basis** of intangible assets, such as goodwill, the rules prevent indefinite deferral of taxes. [FN56]

The Stock for Debt Exception

Exchanges of stock for debt are an historical exception to the cancellation of indebtedness rules. It has long been the case law that no cancellation of indebtedness income is realized by an insolvent corporate debtor if stock is issued ***63** in exchange for debt, even if the stock is worth less than the face amount of the obligation satisfied. [FN57] The stock for debt exception was based on the theory that the substitution of stock for debt constitutes a creditor's continued investment in the corporate debtor, and recognition of cancellation of indebtedness income would be inappropriate. [FN58]

The Bankruptcy Tax Act of 1980 codified in § 108(e)(8) the stock for debt exception to cancellation of indebtedness income recognition. [FN59] In 1984 the stock for debt exception was narrowed to include only debtors in bankruptcy, and other insolvent debtors to the extent a debtor is not made solvent by the stock for debt exchange. [FN60]

Stock for Debt Limitations

The Bankruptcy Tax Act of 1980 imposed two limitations on the common law stock for debt exchange exception. Under the "de minimis" rule, the stock for debt exception does not apply if, considering "all the facts and circumstances," the stock issued consists of a nominal or token amount of shares. [FN61]

Where stock and other consideration is issued to a creditor, the legislative history to the Bankruptcy Tax Act of 1980 from the House of Representatives suggested that the stock should be treated as satisfying "a proportion of the debt equal to its proportion of the value of the total consideration." [FN62] In contrast, the legislative history in the Senate suggests that the stock should be treated as satisfying the debt remaining after first offsetting the other consideration against the debt. [FN63] The greater the amount of debt offset by stock, the ***64** less the debtor must reduce tax attributes and **basis** of assets. Thus, the Senate approach is more favorable to debtors. Comments by Congressman Ullman, Chairman of the House Ways and Means Committee, upon introducing the Bankruptcy Tax Act of 1980 indicate that the House accepted the Senate approach. [FN64] Further, the Senate approach is consistent with pre-1980 law. [FN65]

To satisfy the de minimis rule, at least two commentators suggest by analogy to the regulations under § 351 [FN66] that the value of stock exchanged for debt should equal at least 10% of the debt. [FN67] The Internal Revenue Service has confirmed that stock exchanged for debt with a value of 10% of the debt is acceptable. In a letter ruling [FN68] the Service applied the Senate approach to a case in which the debtor distributed both cash and stock, and approved the debtor's use of the stock for debt exception where the fair market value of the stock distributed represented 10% of the amount by which the claims exceeded the cash component of the distribution.

The Service considered the following factors in determining whether the stock transferred in exchange for debt was "nominal or token": (i) the presence of arms length bargaining involving adverse economic interests between

debtor and creditors; (ii) the value of the stock relative to the face amount of the debt canceled; and (iii) the value of the stock relative to the value of other consideration received in discharge of the debt. The Service found that creditors received twice the liquidation value of the debtor and (i) that adverse interests existed inasmuch as creditors released their right to force a liquidation, and the debtor had to convince creditors "that the stock used in the exchange represented the greatest economic value available to the creditors"; (ii) the stock amounted to about 10% of the debt canceled in the exchange; and (iii) the stock represented about 15% of the total consideration received.

In general, adverse economic interests between the debtor and creditors is an easy element to satisfy in any bankruptcy case. The Service's second test-that the value of stock received by creditors be measured against the face amount of debt discharged-can be problematic. If all creditors are receiving a very small distribution in a case, creditors who are receiving stock with a value of less than 10% of the debt discharged in exchange for debt may appear to be violating the nominal or token rule requirement. For example, if a bankruptcy plan pays certain creditors nine cents cash on the dollar, and certain other creditors receive stock with a value of nine cents for each dollar of claim, ***65** both groups of creditors are treated equally; however, the Service may nonetheless consider that the creditors with stock obtained a "nominal" or "token" distribution.

The better view compares the value of stock exchanged for debt to the value of other consideration received by similarly situated creditors for their debt. In other words, the value of stock exchanged for debt should be at least one-tenth of the value of other consideration received by similarly situated creditors. [FN69] In the letter ruling, all general unsecured creditors were treated alike, leaving no **basis** for comparison. If under a bankruptcy plan certain creditors are paid thirty cents cash on the dollar, payment in stock to similarly situated creditors should not be considered nominal or token unless the value of that stock is less than one tenth of thirty cents on the dollar, or 3 cents per each dollar of claim.

The third requirement is new: the Service measured the value of stock received by a creditor against the value of other consideration received by that creditor. For example, if a debtor proposes to establish one class of general unsecured creditors who are to be paid $.75 cash for each dollar of debt, the debtor will have to reduce either its asset **basis** or tax attributes by $.25 of canceled debt. If on the other hand, the debtor proposes to pay general unsecured creditors $.72 cash and stock valued at $.03 for each dollar of debt, the debtor will argue that it realizes no cancellation of indebtedness income under the stock for debt exception. The debtor will have satisfied the 10% rule under the Senate approach because the value of the stock ($.03) is more than 10% of the value of the debt discharged therefor ($.25). Thus the debtor will not have to reduce its asset **bases** nor reduce tax attributes. The Service might nonetheless disallow the stock for debt exception treatment because the consideration representing stock ($.03) is only 4% of the total consideration creditors receive ($.75). In the letter ruling, the Service approved consideration representing stock in the amount of 15% of total consideration but the Service did not set forth any bright line test.

Proposed Treasury Regulation § 1.108-1 would adopt the reasoning set forth in the letter ruling, and would create the following measurements for applying the de minimis rule:

(i) Stock to debt ratio - ratio of the fair market value of stock transferred to a creditor to the amount of **discharged indebtedness** allocable to that stock;

(ii) Stock to total consideration ratio - ratio of the fair market value of stock transferred to a creditor to the fair market value of the total consideration received by that creditor; and

***66** (iii) Stock to total stock ratio - ratio of the fair market value of the stock transferred to all creditors to the total fair market value of all the corporation's outstanding stock after the bankruptcy or insolvency workout.

For example, assume that a plan of reorganization provides for each dollar of debt $.20 in cash, $.20 in new

debt and $.05 of stock, and that former creditors collectively obtain 25% of the debtor's stock. The stock to debt ratio is 5%, the stock to total consideration ratio is 11%, and the stock to total stock ratio is 25%.

The proposed regulations provide for the following safe harbors:

(i) 10 percent stock to debt ratio and 25 percent stock to total consideration ratio;

(ii) 25 percent stock to total consideration ratio and 25 percent stock to total stock ratio; and

(iii) With respect to unsecured creditors, 100 percent stock to total consideration ratio and 90 percent stock to total stock ratio.

In addition to the de minimis rule, the stock for debt exception is not applicable to debt held by an unsecured creditor unless the ratio of (1) the value of the stock received by the creditor to (2) the amount of debt canceled in exchange for the stock is at least 50% of a similar ratio computed for all unsecured creditors receiving stock in the reorganization. [FN70] This is the "proportionality rule."

Violation of the proportionality rule creates a "cliff effect" triggering substantial realization of income by the debtor. For example, if creditor A held $1,000 of unsecured debt of the corporation and in a workout the corporation fully satisfied $10,000 of its unsecured debt with $6,000, A must receive 50% of the pro rata distribution received by the other creditors - in this case, 50% of the 60% pro rata distribution, i.e. 30% of his claim in stock, with a value of $300. If A receives stock with a value of only $250, the corporation realizes cancellation of indebtedness income equal to the difference between A's claim ($1,000) and the value of the stock ($250). Thus the corporation would recognize $750 of income as a consequence of underpaying $50 in stock. [FN71]

The Revenue Reconciliation Act of 1990 added another limitation on the stock for debt exception to the cancellation of indebtedness income rules. Preferred stock issued under a plan of reorganization does not qualify for the stock for debt exception under § 108(e)(10) if: (i) such stock has a fixed liquidation amount, (ii) the issuer of such stock has the right to redeem such stock at one ***67** or more times, or (iii) the holder of such stock has the right to require its redemption at one or more times.

The outright prohibition on the use of preferred stock with such attributes is puzzling. Presumably, the intent behind the legislation is to limit the use of preferred stock to discharge debt to the extent that the preferred stock could be redeemed at less than the amount of the debt discharged. Indeed Revenue Ruling 90-87 and the new proposed regulations interpreting the "nominal or token" limitation to the stock for debt exception announce this more reasonable position. The contradiction between the new statute and the proposed regulations may require judicial or legislative resolution.

Recapture

A creditor that receives stock of a debtor corporation in exchange for debt is subject to the recapture rules on subsequent disposition of the stock of § 1245 [FN72], a controversial provision now partially obsolete in light of the Tax Reform Act of 1986, and the elimination of the deduction for capital gains. To the extent creditors can recognize capital losses because of capital gains, the provision remains important.

Timing of Stock for Debt Exchanges

The tax stakes riding on the timing of stock for debt exchanges require identification of:

1. the year creditors owning securities realize gain or loss;

2. the date that an ownership change occurs for net operating loss carryover purposes;

3. the year cancellation of indebtedness income arises;

4. the year interest on old debt ceases to accrue; and

5. for consolidated returns, the year ownership of the debtor falls below the necessary 80% level. [FN73]

Timing of stock for debt exchanges could be affected by the Bankruptcy Code. [FN74] Upon confirmation of a chapter 11 plan of reorganization, claims against the debtor are discharged. [FN75] The "effective date of the plan", however, usually occurs sometime after confirmation, to allow for passage of the time for appeals. The date of discharge could be separated in time from the date of the exchange. No authority prescribes the tax significance of this separation in time. [FN76]

***68** The Contribution To Capital Exception

The contribution to capital exception to recognition of **discharge** of **indebtedness** income, which also arises from case law, applies to creditors who are shareholders. [FN77] If a creditor/shareholder's debt is contributed to the capital of the debtor corporation, the corporation is deemed to have satisfied the debt with money equal to the shareholder's adjusted **basis** in the debt. [FN78] If the shareholder's **basis** in the debt is less than the amount due, the corporation realizes cancellation of indebtedness income equal to the difference.

The contribution to capital exception raises a number of issues. First, should a corporate debtor's tax consequences be dependent upon the accounting practices of its creditors? In General Utilities [FN79] and Moline Properties [FN80] the Supreme Court held that a corporation is a separate entity for tax purposes. The contribution to capital exception appears to contradict General Utilities and Moline Properties insofar as it couples the "outside" recognition by creditors to the "inside" recognition of debtors. Determining recognition by creditors could be an onerous if not impossible compliance burden to impose upon corporate debtors. [FN81]

Commentators raise additional issues: Does it matter if the ownership of stock by a creditor is so unrelated to the cancellation of debt that the cancellation should not be considered a contribution to capital? Can the Service recharacterize a stock for debt exchange as a contribution to capital to force realization? If all the stock of a debtor corporation is held by its sole shareholder, will the contribution to capital rule apply if the creditor cancels the debt without having the corporation issue additional shares? Will the stock for debt exception apply if additional shares are issued? [FN82]

Debt Security for Debt Security Changes

Generally, in any debt security exchange in an insolvency situation, the new debt security has a lower face amount than the old debt security. Ordinarily, the difference between the issue price of an old and a new debt security would be treated under the cancellation of indebtedness provisions of Internal Revenue Code § 108. Due to inadvertence, however, until very recently, Internal Revenue Code § 1275(a)(4) essentially deemed the issue price of the new debt security to be the same as the old debt security. Thus, no cancellation of indebtedness income arose.

***69** The Revenue Reconciliation Act of 1990 repealed § 1275(a)(4). Section 108(e)(11) now provides that cancellation of indebtedness income is created upon the exchange of a debt security for a debt security to the extent that the adjusted issue price of the old debt exceeds the issue price of the new debt. To determine the "issue price", adjustments are made to account for that portion of the debt security which the Service deems to be interest rather than principal. That portion is called "original issue discount," and is calculated under §§ 1273 and 1274.

The repeal of § 1275(a)(4) was occasioned in part by In re Chateaugay Corp., [FN83] in which the court applied original issue discount principles to fix the amount of secured claims.

The House Ways and Means Committee Report accompanying the 1990 Revenue Reconciliation Act illustrates the treatment of an exchange of publicly traded debt:

> A corporation issued for $1,000 a bond that provided for annual coupon payments based on a market rate of interest. The bond is publicly traded. Some time later, when the old bond is worth $600, the corporation exchanges the old bond for a new bond that has a stated redemption price at maturity of $750. The exchange is treated as a realization event under section 1001. Under the bill, the new bond will have an issue price of $600 (the fair market value of the old bond) and deductible OID of $150 ($750 stated redemption price at maturity less $600 issue price) and the corporation will have COD of $400 ($1,000 adjusted issue price of the old bond less $600 issue price of the new bond). Such results will occur whether or not the exchange qualifies as a reorganization. [FN84]

It should be noted that section 108(e)(11) does not apply to bankruptcy cases filed on or before October 9, 1990, or to transactions before that date.

Bankruptcy Tax Policy

Background

The insolvency exception to cancellation of indebtedness income has been criticized for its logical inconsistencies. Kirby Lumber, which requires recognition of cancellation of indebtedness income, is premised on the principle that taxpayers enjoy a "net accretion to wealth". Subsequent relaxation of the Kirby Lumber doctrine presupposes that insolvent debtors do not enjoy a net accretion to wealth through debt cancellation. Better economic analysis would look ***70** to the benefits taxpayers obtain when a loan is issued (no includible income) and the need to balance that noninclusion of income with a corresponding recognition of income upon loan forgiveness. [FN85] Simply stated, the economic benefit derived from debt forgiveness is no different than the economic benefit derived from other sources of income, such as salary. This economic analysis is especially pertinent if the debtor has obtained a tax deduction for the expenditure of the amount forgiven, or if the creditor can take a tax loss for the debt forgiveness. [FN86]

Nonetheless, the insolvency exception in general and the stock for debt exception in particular are very important to debtor rehabilitation. To the extent that a debtor can persuade creditors to take stock instead of cash as part of a plan, the debtor is better able to maintain adequate cash flow to finance operations and capital expenditures, and to secure credit. [FN87] Despite the inconsistency between tax policy and bankruptcy policy, the insolvency exception persists to promote debtor rehabilitation.

The inevitable byproduct of the mixture of bankruptcy and tax law, as well as the constant changes to that mixture, is uncertainty. For example, the timing of a stock for debt exchange is governed by a variety of bankruptcy considerations not present in nonbankruptcy transactions. The changes made by the Bankruptcy Tax Act of 1980 were superseded by the Tax Reform Act of 1986, before the 1980 changes were fully understood by lawyers. Uncertainty is a hindrance to debtor reorganizations, and supplies one argument to permit advance determination of tax consequences of bankruptcy reorganizations.

Tax Policy

Clarification of the Law. Under the Bankruptcy Tax Act of 1980 and subsequent legislation, the rules for treatment of cancellation of indebtedness income have been clarified, but confusing issues still arise under the stock for debt exception: (i) whether solvent debtors in bankruptcy qualify; (ii) how much debt must be exchanged for stock to qualify; (iii) how much debt is deemed satisfied for stock when a creditor is given both stock and

cash; (iv) when the exchange of stock for debt is deemed completed; (v) whether stock for debt exchanges can be recharacterized as a contribution to capital, and (vi) how to treat debt security for debt security exchanges.

Equal Treatment In and Out of Bankruptcy. Generally, the insolvency exception and the stock for debt exception apply to insolvent debtors and debtors in bankruptcy. However, § 108 of the Internal Revenue Code allows solvent and *71 insolvent debtors in bankruptcy the same tax advantages (although the stock for debt exception may not apply to solvent debtors). The Treasury would probably sense unfairness in allowing solvent debtors in bankruptcy to enjoy tax advantages relating to cancellation of debt not enjoyed by debtors struggling to avoid bankruptcy.

Fresh Start But No Head Start. The rules governing cancellation of indebtedness income give debtors in bankruptcy a "head start" in the following ways: (i) the election to reduce **basis** of assets in lieu of reducing tax attributes as a consequence of realization of cancellation of indebtedness income allows debtors in bankruptcy and insolvent debtors to retain built-in tax attributes while reducing tax liabilities; (ii) the stock for debt exception goes further and does not even require that the **basis** of assets be reduced as a consequence of realization of **discharge** of **indebtedness** income (although net operating loss carryovers could be reduced); (iii) the contribution to capital exception permits debtors to retain tax attributes but potentially realize little income upon the cancellation of indebtedness.

Simplicity and Administrability. As described more fully below, [FN88] the Internal Revenue Service has many opportunities to assert its position in a bankruptcy reorganization. The Service can object to a debtor's plan. The Service can also seek a bankruptcy court decision regarding the propriety of the debtor's treatment of **discharge** of **indebtedness** income and other tax issues. If the Service disagrees with the bankruptcy court, the Service can deny the debtors the treatment approved by the bankruptcy court. Debtors cannot, however, obtain a binding ruling prospectively. That the Service has its cake and eats it too with respect to bankruptcy tax determinations seems eminently "administrable" from the Service's point of view, but repetitive administrative reviews following the bankruptcy court's decision are wasteful and unnecessary.

Fairness and Equity. The fairness and equity of the **discharge** of **indebtedness** provisions ultimately turns on one's view of the policy balance between orthodox tax theory and the rehabilitation of troubled businesses. The provisions are unfair, however, to the extent that the Service has a procedural advantage over debtors in obtaining binding preconfirmation rulings upon the tax treatment of the debtor's plan.

Bankruptcy Policy

Fresh Start. The debtor's fresh start is promoted because debtors may elect to reduce **basis** of assets instead of reducing net operating loss carryovers as a consequence of **discharge** of **indebtedness** income. In this way, net operating losses are preserved for the use of the debtor.

*72 Fair and Equitable Distribution Among Creditors. In general, the insolvency exception does not affect the debtor's ability to distribute its assets fairly among creditors. Arguably, however, the proportionality rule limits the ability of creditors to agree to certain distributions of the debtor's assets. For example, there is no economic reason why a creditor should not be permitted to accept consideration for its claim in the form of stock, which stock is valued at less than 50% of the value of non-stock consideration to which similarly situated creditors are entitled.

Rehabilitation Favored Over Liquidation. The insolvency exception clearly promotes rehabilitation over liquidation to the extent that debtors are entitled to reduce **basis** of assets instead of losing tax attributes such as net operating loss carryovers. The stock for debt exception promotes rehabilitation even more effectively by allowing debtors to discharge debt without reducing the **basis** of assets or tax attributes. Rehabilitation is hindered by the debtor's inability to determine conclusively whether it qualifies for the stock for debt exception, how much debt is deemed satisfied for stock, the timing of the exchange, and the tax characterization of the exchange.

Economy of Administration. As argued more fully below, [FN89] it is not economical to administer bankruptcy tax law in the bankruptcy court if the findings of the bankruptcy judge do not bind the Service. The current procedure frustrates confirmation of plans and fosters repetitious litigation.

"G" REORGANIZATION

Historical Background

Under conventional tax principles, the sale or disposition of all of a corporation's assets to a successor corporation is a taxable transaction which should result in the recognition of taxable gain or deductible loss, [FN90] and the disappearance of loss carryovers of the former corporation. [FN91] In 1918, however, Congress provided for non-recognition of gain and loss if such sales were structured as exchanges of stock for stock, [FN92] and followed in 1924 with a provision for the inheritance of **basis,** [FN93] and finally in 1954 with the preservation of loss carryovers in the hands of the surviving corporation. [FN94]

Prior to 1934 the term "reorganization" was defined for tax law purposes as:

> A merger or consolidation (including the acquisition by one corporation of . . . substantially all the properties of another corporation). [FN95]

***73** Courts soon narrowed the definition to make outright sales taxable, but preserved tax-free treatment for mere adjustments of existing ownership interests. To distinguish sales from tax-free reorganizations, the courts prescribed that for reorganizations, pre-change shareholders must retain a substantial stock interest in the post-change corporation. [FN96] This became known as "continuity of interest," and in 1934 the rule was incorporated into the Internal Revenue Code. [FN97]

Continuity of interest was difficult to achieve in bankruptcy reorganization of cases under the tax rules requiring shareholders to retain a substantial stock interest, because shareholders are usually entitled to little or no consideration in the reorganization of an insolvent corporation as they are last in the "priority" line. Creditors effectively control the reorganization and assume the shareholders' position. As described more fully below, [FN98] the courts have allowed tax-free reorganizations for bankrupt corporations, if creditors obtain the stock which would otherwise remain in the hands of shareholders.

In 1942 the Supreme Court added a new element to continuity of interest. In Southwest Consolidated Corp. [FN99] the court denied tax free treatment for the reorganization of an insolvent corporation that distributed some cash to creditors and former shareholders in addition to voting stock. A year later, Congress added the Southwest Consolidated rule to the predecessor to §§ 371 and 372 of the 1954 Internal Revenue Code. For bankruptcy reorganizations, only stock could constitute consideration for tax free treatment, and net operating losses did not carry over.

"G" Reorganizations Under The Bankruptcy Tax Act of 1980

The Bankruptcy Tax Act of 1980 freed insolvency reorganizations from the "solely for stock" provisions of the 1954 Code, and, with a few exceptions, debtors in bankruptcy now enjoy the same tax-free reorganization rules generally applied to solvent corporations. [FN100] Specifically, Congress created the "G" reorganization. [FN101] Legislative history indicates that the "G" reorganization rules are intended "to facilitate the rehabilitation of corporate debtors in bankruptcy, and to eliminate many requirements which have effectively precluded financially troubled companies from utilizing the generally applicable tax-free reorganization provision of present law." [FN102]

***74** Continuity of Interest

Notwithstanding the enactment of the "G" reorganization under the Bankruptcy Tax Act of 1980, and the repeal of §§ 371 and 372 of the 1954 Internal Revenue Code, the continuity of interest doctrine persists. The legislative history states:

> [T]he "continuity of interest" requirement which the courts and the Treasury have long imposed as a prerequisite for non-recognition treatment for a corporate reorganization must be met in order to satisfy the requirements of new category "G". [FN103]

To satisfy the continuity of interest requirement, and thereby realize treatment as a reorganization rather than a sale, not all of the consideration has to be stock, but a substantial percentage of the consideration to the selling stockholders (creditors) must be qualifying equity interests rather than cash or debt instruments. [FN104] The Internal Revenue Service has stated that it will not issue a private letter ruling regarding any transaction where stock represents less than 50% of the consideration received by old stockholders (creditors). [FN105] Although case law allows less than 50%, [FN106] prudence dictates that debtors strive for 50% continuity of interest.

A pre-1980 regulation for non-recognition treatment provides that in bankruptcy reorganizations creditors stand in shareholders' shoes for purposes of calculating the percentage of consideration received as equity:

> [F]or the purpose of determining whether the requisite continuity of interest exists, the interests of creditors who have by appropriate legal steps, obtained effective command of the property of an insolvent corporation is considered as the equivalent of a proprietary interest . . . . The determinative and controlling factors are the corporation's insolvency and the effective command by the creditors over its property. [FN107]

Treatment of creditors as shareholders for continuity of interest purposes in bankruptcy reorganizations dates from Helvering v. Alabama Asphaltic Limestone Company. [FN108] In Alabama Asphaltic creditors of an insolvent corporation created a new corporate entity to acquire the assets of the involuntary corporate debtor in bankruptcy. With the approval of the bankruptcy court, the creditors acquired the stock of the new corporation in exchange for their claims, ***75** and the shareholders' interest was eliminated. The Service argued that the series of transactions could not fit within the statutory definition of a "reorganization" because the former shareholders were eliminated and therefore had no continuing interest in the surviving corporation. The court held that, by initiating the involuntary bankruptcy proceedings, creditors "stepped into the shoes" of the shareholders and were the true owners of the debtor's equity.

In a "G" reorganization, stock received by both shareholders and creditors counts for continuity of interest compliance. More support is found in the legislative history to the Bankruptcy Tax Act of 1980:

> [S]hort term creditors who receive stock for their claims may be counted toward satisfying the continuity of interest rule, although any gain or loss realized by such creditors will be recognized for income tax purposes. [FN109]

The legislative history also addressed exactly which creditors should be counted towards the required continuity. Under pre-1980 law the "absolute priority" [FN110] rule applied, and claims with the most seniority or security had to be satisfied in cash before claims with less seniority or security. Holders of claims that could be satisfied in full with cash therefore did not count toward continuity of interest. Thus, continuity of interest was measured by the stock received by the most senior class of creditors that could not be paid in full in cash. [FN111]

Legislative history suggests that measurement of continuity after the Bankruptcy Tax Act of 1980 should account for all classes of creditors and shareholders that take distribution below and including the most senior class obtaining shares of stock as part of the debtor's plan of reorganization - the "relation back" approach. [FN112] Payment in both cash and stock to senior creditors does not destroy continuity of interest.

For example, if a reorganization plan provides for (i) payment in cash to senior secured creditors, (ii) payment in stock to certain junior secured creditors and payment in cash to certain junior creditors, (iii) payment in cash and stock to all general unsecured creditors and (iv) payment in stock to shareholders, the plan will satisfy the relation back approach. The class of creditors with at least one member receiving stock is the class of junior secured creditors, and all members of all classes junior to the junior secured creditors will receive some stock.

***76** The only other source of authority for the relation back approach is two private letter rulings concerning non-bank "G" reorganizations. In the more pertinent ruling, the Service applied the relation back approach and approved a distribution of stock to creditors and shareholders. The measuring group included "all members of any of those classes of creditors having a priority in bankruptcy (as set forth in the Bankruptcy Code) equal to or lower than that of the highest class of creditors to have at least one member acquiring preferred stock." [FN113]

The second private letter ruling involved the acquisition of a debtor by the guarantor of the largest claim against the debtor. [FN114] The guarantor paid all of the debtor's creditors in cash, and exchanged stock for the debt that the corporation had guaranteed. The transaction appears to be a reorganization in lieu of a foreclosure. The Service approved the transaction because the value of the stock distributed under the plan of reorganization was equal to 50% of the value of all of the claims. The Service treated the creditor as if it were a shareholder and treated the creditor's claim as shareholder equity.

The most obvious drawback to the relation back approach is that it limits the mix of consideration that plans of reorganization can provide. For example, the issuance of stock to a very senior class of creditors means that all (not some) junior classes must be counted as equity holders for continuity of interest purposes. In the interest of rehabilitation, debtors and creditors would prefer that stock be distributed to creditors on the **basis** of a plan negotiated among the parties without regard to the relation back approach or strict priority. Economically it makes little difference which creditor takes stock and which does not. [FN115] The only danger to the Treasury in allowing unrestricted distribution of stock to creditors is that a class of creditors (perhaps a class with only one member) could effectively buy the debtor and take a carryover **basis** in its assets. The problem is easily remedied by statute. Notwithstanding its shortcomings, the relation back approach has generally been a practical and workable solution to the problem of determining how to treat creditors as shareholders for continuity of interest purposes.

Business Purpose and Continuity of Business Enterprise

A "G" reorganization must also have a "business purpose" [FN116] and must involve a "continuity of the business enterprise under the modified corporate form. [FN117] With regard to business purpose, the reorganization should not be a step toward a sale or liquidation. [FN118] With regard to continuity of business ***77** interest, the successor corporation does not have to engage in the same business, so long as there is continued use of the transferor's "historic business" or a "significant part" for a sufficient period. [FN119] The "G" Reorganization private letter rulings typically state that the debtor's business will continue "in a substantially unchanged manner" after consummation of the transaction.

Distribution Requirement

To qualify as a "G" reorganization, a debtor corporation must distribute stock or securities in exchange for its assets in a transaction qualifying under §§ 354, 355 or 356 of the Internal Revenue Code. [FN120] This distribution requirement assures that "either substantially all of the assets of the financially troubled corporation, or assets which consist of an active business" will be transferred to the acquiring corporation. [FN121]

Section 354. Section 354 provides that no gain or loss shall be recognized in an exchange of "stock or securities" for "new stock or securities". [FN122] Hence, the continuity of interest problem reappears. Tax law considers tax-free corporate reorganizations to involve the exchange of stock for stock. In bankruptcy reorganizations, debtors often seek to satisfy the claims of creditors with stock. That manner of exchange does not

generally give rise to a tax-free reorganization under the tax law.

The same reasoning that gives debtors in bankruptcy an exception to the continuity of interest rule, however, gives debtors in bankruptcy an exception to § 354(a). The legislative history indicates that compliance with § 354 was not intended to have the same meaning for bankruptcy tax reorganizations as it does for other corporate tax reorganizations. [FN123] In bankruptcy cases the creditors of a debtor are deemed to have stepped into the shoes of shareholders. Thus an exchange of creditors' claims for the debtor's stock is deemed to be an exchange of stock for stock under § 354.

Further, the private letter rulings cited above suggest that creditors can stand in the shoes of shareholders for purposes of § 354(a) continuity. For example, in a recent letter ruling a "G" Reorganization was approved despite the fact that former shareholders obtained no stock or other consideration on account of their shareholder status. [FN124]

One letter ruling suggests, however, that "at least one person or entity" should exchange stock for stock to qualify. [FN125] This limitation, if imposed ***78** rigorously, would restrict "cram down" "G" reorganizations. Cram down under § 1129(b)(1) of the Bankruptcy Code allows debtors to confirm a plan over the dissent of an "impaired" class of interests provided, among other things, that no junior class takes any consideration. If a shareholder must take stock in a "G" reorganization, insolvent debtors would be unable to cram down any class of interests senior to shareholders.

The requirements of § 354(b) must also be satisfied: the debtor must distribute "substantially all of the assets" to the acquiring corporation, and the "stock, securities, and other properties" received by the debtor must be distributed in "pursuance of the plan of reorganization." [FN126] In effect, the debtor must liquidate. For advance ruling purposes, the Internal Revenue Service requires that the transferor (debtor) corporation transfer at least 70% of its gross assets and 90% of its net assets. [FN127] The cases interpreting the "substantially all" test have allowed smaller percentages. [FN128]

Fixed percentages and "bright line" tests for the application of the "substantially all" test to bankruptcy reorganizations conflict with the reality of an insolvent corporation. In many instances unprofitable divisions must be disposed of even before a plan of reorganization is proposed. In other cases, individual assets must be sold during the bankruptcy case to raise cash. [FN129] The 1980 legislative history recognized these problems and suggested a case by case approach:

> The "substantially all" test in the "G" reorganization provision is to be interpreted in light of the underlying intent in adding the new "G" category, namely, to facilitate the reorganization of companies in bankruptcy or similar cases for rehabilitative purposes. Accordingly, it is intended that facts and circumstances relevant to this intent, such as the insolvent corporations need to pay off creditors or to sell assets or divisions to raise cash, are to be taken into account in determining whether a transaction qualifies as a "G" reorganization. For example, a transaction is not precluded from satisfying the "substantially all" test for purposes of the new "G" category merely because, prior to the transfer to the acquiring corporation, payments to creditors and asset sales were made in order to leave the ***79** debtor with more manageable operating assets to continue its business. [FN130]

To some degree the Service apparently accepts a relaxed interpretation of § 354(b) for bankruptcy reorganizations. In one of the private letter rulings discussed above, the Service approved the debtor's disposal of assets to finance its operations and minimize its losses, until the time, the "Trustee first determined that Target could not be viably operated as an independent going concern, concluding that an internal reorganization was impractical." [FN131]

The letter ruling determination of whether "substantially all" of the debtors assets were transferred turned on when the debtor's management decided that the debtor could not survive as an independent entity. If applied

broadly, this analysis requires that a debtor be circumspect about when it decides to reorganize:

> [I]t becomes extremely important to cut square corners regarding the time at which such an intent is formulated. The failing company and its trustee should avoid contingency planning speculations about the possibilities of two-company reorganizations until the last moment at which it becomes necessary to abandon the thought of rescuing the company through a one-company internal recapitalization. [FN132]

The Treasury's interest in simplicity is promoted by its measurement of "substantially all" from the date that a debtor cannot survive independently. On the other hand, the bankruptcy policy of encouraging rehabilitation is deterred. Disposing of assets after deciding that a company cannot survive independently does not, of itself, mean that less than substantially all of the assets of a corportion will be transferred in a subsequent disposition. Nor does it suggest a failure to transfer assets which consist of an active business to the acquiring corporation. [FN133] The determination of whether sufficient operating assets to continue the debtor's business are transferred as part of a "G" reorganization [FN134] can be better based on a facts and circumstances test. For example, whether a pre-transfer disposition of assets resulted from a debtor's business judgment or whether the disposition was the result of prompting from the acquiring corporation is a question of fact which can only be decided on a case-by-case **basis.** [FN135]

***80** Section 355. Generally, a reorganization under § 355 involves the reshuffling of corporate stock ownership to permit the consolidation or division of related corporate entities. Section 355 imposes a number of restrictive requirements to ensure that corporate earnings, which would normally be included in a shareholders tax return as regular income, cannot be included in a shareholder's tax return as capital gains by virtue of the distribution of stock in a divisive reorganization.

Since the Tax Reform Act of 1986 phases in the elimination of preferred capital gains tax rates, the strict standards of § 355 of the Internal Revenue Code are difficult to justify. In any event, bankruptcy reorganizations typically involve the dilution of equity rather than a reshuffling of equity, and therefore § 355 has little relevance to the taxation of bankruptcy reorganizations.

Section 356. Generally, in a tax-free reorganization a corporation does not recognize gain or loss on the receipt of boot (property other than stock or securities), if the corporation distributes the boot to its shareholders as part of the plan of reorganization. [FN136] Shareholders who obtain boot in a tax-free reorganization must recognize gain. [FN137] Shareholders cannot, however, recognize loss on the transaction.

Since creditors step into the shoes of shareholders in a "G" reorganization, applying tax principles strictly, creditors would logically be treated the same as shareholders and denied the business loss deduction to which creditors are otherwise entitled. However, this is not the case - trade creditors and short term lenders do obtain a loss deduction since their losses do not stem from the loss of worthless securities.

Bankruptcy Tax Policy

Background. The conflict between bankruptcy and tax policy is evident in the "G" reorganization provisions. For example, bankruptcy policy encourages the survival of businesses through new investment, mergers and acquisitions. Tax policy does not permit tax-free mergers and acquisitions where the original investment is liquidated. In violation of tax policy, bankruptcy reorganizations allow old tax attributes to attach to new equity, despite the disappearance of the old equity holders. The tax law requirement that continuity of interest be maintained contradicts the bankruptcy reality that shareholder interests are often extinguished.

Further, the cornerstone of the "G" reorganization rules is the notion that shareholders stand in the shoes of creditors. From a bankruptcy prospective, creditors of an insolvent corporation may have the same economic interests as the shareholders. However, the tax implications of being a shareholder are much different than the tax implications of being a creditor. The failure to reconcile ***81** the contradiction between a creditor's status as a

creditor and a creditor's tax treatment as a shareholder makes the "G" reorganization option inherently ambiguous.

Tax Policy

Clarification of the Law. The "G" reorganization rules simplified the complex case law and statutes which previously crippled tax reorganizations in bankruptcy. The "G" reorganization rules, though not models of clarity, are intentionally simple in some important respects. For example, the relation back approach to identification of creditors who count as shareholders simply looks to the most senior creditors obtaining stock. To determine whether substantially all of the debtor's assets have been transferred as part of a "G" reorganization, the Internal Revenue Service looks only to the date that the debtor first contemplated tax reorganization. Unfortunately, simplicity in these contexts sometimes limits creative strategies that debtors in bankruptcy need to survive.

Equal Treatment In and Out Bankruptcy. The "G" reorganization rules apply to debtors in bankruptcy and to debtors in workout situations. Insolvent debtors in bankruptcy enjoy no tax advantage over insolvent debtors reorganizing outside of bankruptcy. However, solvent debtors in bankruptcy do enjoy an advantage over solvent debtors not in bankruptcy.

Fresh Start But No Head Start. The "G" reorganization rules give corporate debtors a fresh start by deeming creditors to be shareholders and thus permitting tax-free reorganizations in bankruptcy. A debtor corporation is entitled to non-recognition of gain and carryover of corporate tax attributes such as net operating losses. In the absence of bankruptcy a corporation would lose those benefits when shareholders' interests are terminated and worthless security deductions taken. Thus, debtors in bankruptcy enjoy a "head start."

Simplicity and Administerability. The Service has an unfair advantage over debtors because the Service is not bound by bankruptcy court orders addressing the tax consequences of a proposed plan of reorganization. [FN138]

Fairness and Equity. The fairness of the "G" reorganization rules depends on the extent to which one believes that economic policy should be effected by tax laws. [FN139] Having enacted the law, it is unfair to make the tax incentives pertaining to debtors in bankruptcy uncertain and unpredictable. A debtor in bankruptcy should be allowed to obtain an advance ruling from the bankruptcy court deciding whether the "G" reorganization rules have been satisfied.

Bankruptcy Policy

Fresh Start. The "G" reorganization rules give debtors in bankruptcy a fresh start by deeming creditors to be shareholders and thus permitting tax-free ***82** reorganizations. The debtor's fresh start is compromised to the extent the "G" reorganization rules are unclear, especially in the areas of continuity of interest, the relation back doctrine, and the measurement of substantially all of the debtor's assets under § 354 of the Internal Revenue Code.

Equality of Distribution Among Creditors. Equality of distribution is limited by the "G" reorganization rules to the extent that the relation back doctrine limits the mix of consideration that certain creditors can take. In bankruptcy reorganizations the debtor's various assets can be distributed to creditors on any **basis** on which the debtor and creditors agree. Stock is one "asset" that can be distributed. To ensure equality among creditors, all creditors should have the same right to take equity in satisfaction of claims. The relation back doctrine limits the right to take stock in a "G" reorganization because creditors receiving stock do not count toward satisfying continuity of interest unless all classes below those creditors have at least 50% of their claims satisfied by stock. There is no good reason either to (i) limit which creditors can be counted as taking stock, or (ii) require for continuity of interest that creditors have more than 50% of their claims satisfied by stock.

Rehabilitation Favored Over Liquidation. Obviously, "G" reorganizations further debtor rehabilitation. While

stock for debt exchanges permit a debtor to generate capital from within, the "G" reorganization rules allow a debtor to recapitalize by combining with another entity. Rehabilitation is restricted to the extent that the Service suggests that § 354(b) of the Internal Revenue Code requires that at least one shareholder takes stock in exchange for stock, because cramdown under § 1129(b) of the Bankruptcy Code becomes problematic. In a "G" reorganization at cram down, the debtor cannot confirm a plan over the objection of a class of creditors if any creditor with less priority than the objecting class obtains property under the plan. Since shareholders generally have the lowest priority, no cram down confirmation could occur if a shareholder had to receive stock for a "G" reorganization to be effective.

Rehabilitation is further compromised by the requirement that a debtor dispose of substantially "all" of its assets to consummate a "G" reorganization, insofar as the Service measures substantially all of the debtor's assets from a point in time before the debtor has disposed of its non-performing assets.

Economy of Administration. Economic administration of bankruptcy cases is frustrated to the extent the debtor cannot predetermine the tax consequences of its proposed plan.

IMPACT OF BANKRUPTCY REORGANIZATION ON NOL'S

Historical Background

Generally, tax theory condemns transactions where the tax consequences alone create economic viability. Tax rules dating back to 1918 have discouraged ***83** buying and selling tax losses. Taxpayers, however, condemn a tax system that requires sharing of gain when a company makes money, but, "if it loses money, the government may, in effect, just walk away . . . . [I]t is an example of tax policy taking off on a conceptural flight of its own . . . . " [FN140] Taxpayers view net operating loss carryovers as an appropriate averaging device, and condemn the government view that "deems the averaging of tax benefits between tax years acceptable as a matter of tax policy, but the averaging of such benefits between taxpayers unacceptable." [FN141]

Over the years, provisions of the Internal Revenue Code have permitted very limited carryovers and carrybacks of net operating losses. [FN142] At one time, corporate reorganizations presented non-statutory possibilities for carryover of tax attributes, and the propriety of those carryovers reached the Supreme Court as early as 1934. In New Colonial Ice [FN143] the Court adopted an "entity" approach and held in the merger of a "loss" and a "gain" corporation that, if the gain corporation survived, it was not the same taxpayer that sustained the losses. Deductions of the old loss corporation's net operating loss were denied against current income of the surviving gain corporation.

Similarly, under the Internal Revenue Codes of 1938 and 1954 a successor corporation to a debtor corporation in bankruptcy was deemed a separate entity and therefore net operating losses could not be carried over. The rule came to be known as the "clean slate doctrine." [FN144] As a result of the entity theory and clean slate doctrine, form prevailed over substance as taxpayers soon learned that, if the loss corporation survived a merger in form, corporate attributes could be preserved. "Minnows swallowing whales" were fairly common during the period. [FN145]

The predecessor to § 269 of the Internal Revenue Code, [FN146] enacted in 1943, authorized the Internal Revenue Service to disallow any deduction, including net operating loss carryovers, if the "principal purpose" of corporate acquisition was the evasion of federal income tax. Section 269 authorizes the commissioner to disallow deductions, based on a subjective consideration of the purpose of an acquisition. The simplicity of § 269 is attractive. The courts usually ***84** allow the taxpayer the benefit of the doubt concerning the subjective purpose and intent of a transaction. [FN147]

In 1957, in Lisbon Shops v. Koehler, [FN148] the Supreme Court abandoned earlier tests, and (applying the 1954 Code) considered "continuity of business enterprise" to determine whether net operating losses carry over.

Lisbon Shops involved sixteen commonly owned brother-sister corporations (which owned sixteen stores), that merged into one corporation. The surviving corporation attempted to offset the pre-merger losses of three of the stores against the post-merger income of all of the stores. The court denied the post-merger loss deduction because the post-merger income was not earned by "substantially the same business which incurred the losses." The Lisbon Shops rule was not repealed until the enactment of the Tax Reform Act of 1986. [FN149]

By regulation the Treasury further restricted net operating loss carry-overs in 1966. Specifically, the "consolidated returns change in ownership" regulations provide that, if a common parent of a consolidated return group experiences a larger than 50% change of stock ownership, pre-change net operating loss carryovers may only offset income earned by pre-change members of the consolidated return group. The single return limitation year regulations provide that, when an acquired corporation becomes a member of a consolidated return group, the acquired corporation's pre-acquisition net operating loss carryovers can offset only the acquired corporation's post-acquisition income. [FN150]

The Bankruptcy Tax Act of 1980, which included the special "G" reorganization rules for debtors in bankruptcy, made the general rules governing carryover of net operating losses from one year to another applicable to bankruptcy plans of reorganization. Those rules continue to apply to plans of reorganization in bankruptcy, provided the initial petition for bankruptcy was filed before August 14, 1986. [FN151] The 1980 rules disallowed the carryover of net operating losses as a deduction against corporate income in years following the realization of such income if (i) there is a 50% change in ownership of the corporation's stock by the debtor's ten largest shareholders, and (ii) the corporation's business is not carried on substantially the same following such change of ownership. In addition, the 1980 rules disallow or reduce the carryover net operating losses in the case of a tax reorganization if following the reorganization the ***85** shareholders of the loss corporation do not own 20% of the stock of the reorganized corporation.

Tax Reform Act of 1986

After many studies and many legislative efforts, the Tax Reform Act of 1986 introduced in § 382 the "neutrality principle" for net operating loss carryovers. The policy goal of the neutrality principle is to allow net operating losses to be freely transferable and usable after an acquisition to the extent that the net operating losses would likely have been usable to the loss corporation if no acquisition had occurred. [FN152]

The key to the neutrality principle is estimating the value of net operating losses in the hands of the loss corporation, and carrying those losses over to the hands of the surviving corporation without enhancement or diminution. [FN153] The neutrality principle distinguishes incidental carryovers from carryovers so large as to be the main object of a corporate acquisition.

Section 382 has three distinctive features. First, no differentiation is made between tax-free and taxable reorganizations. Second, the trigger for reducing carryover is an objective measurement of 50% change in stock ownership. Third, tax "neutrality" is achieved by limiting net operating loss carryovers to the amount of money that would have been earned had the value of all of the stock of the old loss corporation been invested in tax exempt bonds.

In other words, prior to an ownership change, Corporation X can use net operating loss carryovers only to the extent that it has income against which the loss carryovers can be deducted. The amount of income is the product of Corporation X's operations. Following an ownership change, the Internal Revenue Code deems the amount of income Corporation X earns to be the amount of money that the value of all of Corporation X's stock would earn if that value was invested in tax exempt bonds. Thus, following an ownership change, Corporation X can use its pre-change net operating loss carryovers as a deduction against post-change income only up to the amount of income that the service deems to represent interest on the pre-change value of Corporation X.

Ownership Change

The limitation on net operating loss carryovers is triggered by an ownership ***86** change. An ownership change occurs if within a three-year testing period, 50% of a corporation's stock is transferred to shareholders who hold at least 5% of the corporation's stock. [FN154] The code aggregates less than five-percent shareholders into a single five-percent shareholder. [FN155]

An ownership change may be created by a taxable purchase of stock, a disposition of stock, a conversion of debt to stock, a contribution of capital to the loss corporation, a decrease in the outstanding stock of the loss corporation, or an issuance of stock by the loss corporation. [FN156] A "G" reorganization is described in § 382 as an equity structure shift, [FN157] which would trigger an ownership change. [FN158]

Thus, in order to determine whether an ownership change will occur as a consequence of a distribution of stock, it is necessary to identify who the debtor's 5% shareholders are, and to measure how much their ownership has increased. If 5% shareholders' ownership increased by 50%, an ownership change will have occurred, and net operating losses will be reduced. Five percent shareholders include all shareholders who at any time during the three-year period prior to the testing date held 5% of the debtor's stock, warrants, or options. The shareholders who never held more than 5% of the debtor's stock are deemed to aggregate into a single 5% shareholder.

For debtors in bankruptcy, all increases in ownership within three years of confirmation (including changes caused by confirmation) must be aggregated to see whether the increases exceed 50 percent. Increases are based on the value of shares. Unfortunately, it is impossible to predict prior to confirmation the percentage increase unless trading of shares is halted.

***87** Ownership Change and Preferred Stock. In determining whether an ownership change has occurred, "stock" does not include preferred stock as defined in § 1504(a)(4) of the Internal Revenue Code. [FN159] Preferred stock under § 1504(a)(4) does not have voting rights. This definition works as a hindrance to debtors in bankruptcy because § 1123 of the Bankruptcy Code prohibits distribution of nonvoting equity securities following a debtor's bankruptcy plan of reorganization. Therefore, a debtor not in bankruptcy could raise capital without triggering an ownership change by distributing preferred stock, but a debtor in bankruptcy cannot at confirmation. [FN160]

Effect of Ownership Change

For any taxable year ending after the date of an ownership change, the amount of a loss corporation's taxable income that can be offset by pre-change losses cannot exceed the "§ 382 limitation" for that year. [FN161] This limitation is determined by multiplying the value of the loss corporation immediately before the ownership change by the long-term tax exempt rate. [FN162] The long-term tax exempt rate is published by the Treasury monthly. The value of the loss corporation is the fair market value of the loss corporation's stock immediately before the ownership change. [FN163] For example, if the value of a loss corporation's stock immediately before the ownership change is $1,000,000, and the tax exempt rate is 10%, a corporation can only take $100,000 of carryover net operating loss deductions per year following the ownership change.

The value of the stock of a loss corporation in bankruptcy is determined immediately after rather than before the ownership change in either a stock-for-debt exchange or a "G" reorganization. [FN164] Because the value of the loss corporation ***88** stock is determined after the ownership change, arguably, the value of the loss corporation can include fresh capital contributed as part of a stock-for-debt exchange or as part of a "G" reorganization, which thereby increases the annual limitation. The Internal Revenue Service would probably look unfavorably on such a result as an unfair advantage to debtors in bankruptcy. Generally, contributions to capital made in the two years before an ownership change are treated as part of the overall plan and disallowed. [FN165] In short, Congress has enacted measures to stop taxpayers from infusing a corporation with capital shortly before an ownership change in order to increase the yearly net operating loss carryover deduction the corporation will enjoy after an ownership change. It is unlikely, therefore, that the Service would look favorably upon debtors in bankruptcy seizing on the literal language of the statute to avoid the restrictions on eleventh hour infusions of capital.

The Continuity of Business Enterprise Test

The Tax Reform Act of 1986 introduced the "continuity of business enterprise" test to replace the old "change in business" test. The continuity of business enterprise test presumably follows the standards set forth for corporate reorganizations under § 368. [FN166] Thus, the surviving corporation must continue at least one "significant" line of the old corporation's "historic business," or use in any business a "significant" portion of the old corporation's business assets. [FN167]

In light of the neutrality principle that tax benefits should neither encourage nor discourage an acquisition, [FN168] the requirement of a continuity of business enterprise test is puzzling. The neutrality principle, which purportedly underlies the 1986 Tax Act net operating loss carryover rules, was supposed to simplify the rules and treat all changes of ownership on a single objective **basis.** As noted above, the net operating losses of a pre-ownership change corporation can be carried over and set off against income of the post-ownership change corporation to the extent that the pre-change corporation could have earned income if it had invested its value in tax exempt bonds.

Since Congress has set forth an objective measure of income that can be set off by net operating loss carryovers, there is no reason to require that the post-change business engage in the same business as the pre-change business. Thus, the continuity of business enterprise test denies attribute utilization to the surviving corporation in some circumstances, and makes those attributes less valuable to the surviving corporation than they were to the old loss corporation. Therefore, the continuity of business enterprise restrictions of the Tax ***89** Reform Act of 1986 violate the neutrality principle by imposing a tax disincentive upon certain corporation reorganizations. [FN169]

Similarly, § 382(1)(4)(A) [FN170] restricts net operating loss carryovers where one-third or more of the fair market value of a loss corporation's assets consist in non-business assets. In those instances, where the loss corporation undergoes an ownership change, the value of the loss corporation must be reduced by the excess of the value of non-business assets over the portion of the corporation's indebtedness attributable to such assets. Because the availability of net operating loss carryovers is the product of the value of the loss corporation's stock multiplied by the tax exempt bond rate, reduction of the value of the loss corporation will translate into a reduction of net operating loss carryovers. Once again, if the tax benefit of net operating loss carryovers is deemed by statute to be the "neutral" economic benefit, tax policy is retarded by reducing that tax benefit for particular taxpayers based upon the value of non-business assets owned by those taxpayers.

Built-In Losses and Built-In Gains

"Built-in loss" refers to any tax loss that would be recognized for tax purposes upon the sale of assets following an ownership change. "Built-in gain" refers to any tax gain that would be recognized for tax purposes upon the sale of assets following an ownership change.

For example, if a debtor owns land purchased for $100, and on the date the debtor experiences an ownership change, the land is worth only $50, the debtor has a built-in loss of $50. By the same token, if a debtor owns land purchased for $50, and on the date the debtor experiences an ownership the land is worth $100, the debtor has a built-in gain of $50.

Section 382 treats all built-in loss recognized during the five years after an ownership change as pre-change loss subject to the § 382 limitations described above. By the same token, built-in gains increase the § 382 limitation for the taxable year by the amount of the recognized built-in gain. [FN171] If the aggregate built-in gain or loss does not exceed twenty-five percent of the fair market value of the pre-change corporation's assets, however, the built-in gain or loss is deemed to be zero. [FN172] The Omnibus Budget Reconciliation Act of 1987 added § 384 to the Internal Revenue Code to preclude the use of net operating carryovers to offset built-in gains of an acquired corporation.

*90 Special Bankruptcy Rules

Before the enactment of the Tax Reform Act of 1986, net operating losses carried over following an ownership change of a debtor in bankruptcy provided (a) the former shareholders (and creditors in the case of a "G" reorganization) received at least 20% of the stock of the surviving corporation; [FN173] and (b) the surviving corporation did not change its business within 2 years. [FN174] Both old and new § 382 deemed creditors to be shareholders for purposes of determining whether an ownership change has occurred. Thus, § 382 incorporates the continuity of interest principle that creditors succeed shareholders of debtors in bankruptcy. [FN175]

Under new § 382, if the pre-ownership-change creditors and shareholders of a debtor in bankruptcy own at least 50% of the value and voting power of the stock of the loss corporation after the ownership change, at the election of the debtor, neither the annual limitation on the amount of income that can be sheltered by the carryover of built-in losses, nor the continuity of business enterprise requirements apply; provided the ownership change is part of a court-approved plan of reorganization. [FN176] For these purposes, stock received by a creditor in exchange for debt counts towards the 50% threshold only if the creditor held the debt for at least 18 months before the filing of the debtor's bankruptcy, or if the debt arose in the ordinary course of the loss corporation's trade or business, and was held by the same creditor to whom the debt was initially owed. [FN177]

The restriction on transfer of creditor claims is intended to subject creditors to the same rules as shareholders. Thus, if 50% of the "old and cold" creditors sell their claims, full reduction of net operating losses could be the consequence. As stated by the Treasury:

> In our view, only the historic creditors are fairly assumed to be parties who economically suffered the loss and who are thus analogous to loss corporation shareholders. [FN178]

*91 The Treasury's statement makes no sense. The fact that an historic creditor transfers its claim tells us nothing about whether it has suffered an economic loss and therefore stepped into the shoes of shareholders. An historic creditor's desire to liquidate its claim quickly should not, therefore, inhibit the reorganization of debtors in bankruptcy by causing a restriction on the use of net operating loss carryovers. Worse, the tax penalty is retroactive and penalizes trades of claims made when there was little reason to anticipate the impact upon net operating losses. [FN179] The tax restrictions on trading in claims has little justification and should be repealed.

The "toll charge" for the bankruptcy exception is a reduction of the net operating losses of the old loss corporation equal to one-half of the amount of cancellation of indebtedness income hypothetically realized in stock for debt exchanges. [FN180] Effectively, net operating loss carryovers are reduced by 50% of the difference between the amount of debt canceled by creditors and the value of the shares they receive in the reorganized debtor.

For example, if a debtor with $100 of debt and $100 of net operating losses confirms a bankruptcy plan of reorganization which provides for payment to creditors of $.50 per dollar of debt, no reduction of net operating losses will result, and $100 of net operating losses will survive. If, on the other hand, a debtor with $100 of debt and $100 of net operating losses confirms a reorganization plan which provides for payment to creditors with shares of the debtor's stock worth $.50 per dollar of debt, then net operating losses will be reduced by 50% of the difference between the amount of debt canceled ($100) and the value of the shares creditors receive ($50). Thus $75 of net operating losses will survive. Net operating losses are also reduced by the interest on any debt that was paid or accrued during the three-year period preceding the bankruptcy ownership change, if that interest was converted into stock in the reorganization. [FN181]

Finally, if a loss corporation taking advantage of the bankruptcy exception changes ownership within two years, net operating losses after that second ownership change are eliminated. [FN182] The two-year limitation rule is intended to prevent debtors from making large capital contributions during the measuring period to obtain large net operating loss carryovers that might enable shareholders to sell the stock immediately at a higher price. The

rule has been criticized, because in bankruptcy cases the price paid for the stock in a second change of ownership is typically attributable to earnings and the prospect of future earnings, not "stuffing" of capital into the business. [FN183] Apparently the ***92** Treasury shares this concern, [FN184] and therefore taxpayers might successfully seek relaxation of this all-or-nothing limitation.

In order to avoid inadvertently triggering an ownership change, a number of chapter 11 plans confirmed under the new net operating loss carryover rules contain provisions limiting the transfer of stock issued under the plan for two years. Such plans provide for an initial distribution of stock to a trust, followed by ultimate distribution to the various classes of claimants from the trust over a period of two years. [FN185] The initial distribution of stock to the trust causes an ownership change. By delaying ultimate distributions to claimants no owner-ship change within two years will occur as a consequence of claimants transferring shares. Although no hard data is available, such jumping through hoops can only impede creditor's acceptance of plans, and detract from the clear congressional mandate to provide debtors in bankruptcy relief from the new limitations on net operating loss carryovers.

Recently Proposed Reg. 1.269-3(d) adds yet another obstacle to the use of the bankruptcy exception: the debtor must prove that ownership change was not made to avoid tax in any case in which the new active trade or business requirement is not met. As noted above, § 269 of the Internal Revenue Code authorizes the Internal Revenue Service to deny the tax benefits flowing from a tax reorganization where the principal purpose of the transaction is to evade tax. The proposed regulations state that, absent evidence to the contrary, where the bankruptcy exception to § 382 applies, the principal purpose of the reorganization is deemed to be evasion of federal taxes unless the corporation carries on more than an insignificant amount of an active trade or business during and subsequent to the bankruptcy case. Open issues include the definition of what constitutes an active trade or business, and, more importantly, whether the proposed regulations will survive the anticipated avalanche of negative comment letters.

Significantly, the proposed regulation also seeks to undermine the power of the bankruptcy courts to rule under Bankruptcy Code § 1129(d), which provides that upon the request of a party in interest (such as the Service) the bankruptcy court must deny confirmation of a plan, the principal purpose of which is to avoid taxes. The proposed regulations provide that any bankruptcy court determination under § 1129(d) of the Bankruptcy Code will not control a subsequent challenge by the Service under § 269 of the Internal Revenue Code.

The proposed regulations are yet another example of the uncertainty created for taxpayers by the conflicts between the Internal Revenue Code and the Bankruptcy Code.

*93 THE INTERPLAY OF NET OPERATING LOSS CARRYOVERS AND THE STOCK FOR DEBT EXCEPTION TO CANCELLATION OF INDEBTEDNESS INCOME

Assume that Corporation X is considering a plan of reorganization that will distribute (i) small cash payments plus 90% of "new" X stock to creditors, and (ii) 10% of new X stock to shareholders. An ownership change will be triggered by virtue of a change of ownership of more than 50% of X stock, and X must decide whether to exercise the stock for debt exception to cancellation of indebtedness income.

On the one hand, because the confirmation of the plan triggers an ownership change, the stock for debt exception causes a $.50 reduction in net operating losses for each dollar of debt forgiven. Thus, if $10 of debt is satisfied with $5 of stock, net operating losses must be reduced by $2.50.

On the other hand, failure to exercise the stock for debt exception will cause no reduction of net operating losses. Instead, the **basis** of X's assets will be reduced one dollar for each dollar of debt forgiven, and, when A has no **basis** in its assets, then net operating loss carryovers will be reduced by one dollar for each dollar of debt discharged. Thus, if X's **basis** in its assets is $10, and X does not exercise the stock for debt exception, X's **basis** will be reduced by the value of the stock ($5), and X will be left with a $5 **basis** in its assets.

At the very least, the following factors must be considered to determine which option is better:

1. X's **basis** in its assets. If X has a very low **basis** in its assets, the failure to exercise the stock for debt exception means net operating loss suicide, because after that **basis** has been reduced to zero, net operating loss carryovers will be reduced dollar for dollar of debt forgiveness;

2. X's intentions regarding sale of assets. If X intends to sell its assets soon after confirmation, use of the stock for debt exception is probably better.

Example: Assume X has $10 of claims, $10 in net operating loss carryovers and $10 **basis** in its assets. Assume X were to exchange stock valued at $5 for its claims. Such an exchange would cause a $.50 on the dollar reduction in net operating loss carryovers. The $10 of loss carryovers must be reduced by one-half of the $5 of debt discharged, leaving $7.50 in net operating loss carryovers. If subsequently, X were to sell its assets for $17.50, X would realize a $7.50 gain, ($17.50 minus $10 **basis)** and that gain would be offset by the $7.50 net operating loss. No gain would be recognized. If X failed to exercise the stock for debt exception (or if X exchanged $5 in cash for the claims), X's **basis** in its assets would drop dollar for dollar for the $5 of debt discharged, from $10 to $5, and the net operating loss would remain at $10. When X sold its assets for $17.50, X would realize $12.50 gain ($17.50 minus $5), only $10 of which could be offset by its net operating loss. Thus, X would recognize $2.50 gain.

***94** 3. The Likelihood of large earnings shortly after confirmation. If X can anticipate large earnings, the waiver of the stock for debt exception is probably better.

Example: Assume again $10 of claims, $10 net operating loss and a $10 **basis** in assets. If X exchanged $5 of stock for $10 of claims and did not elect the stock for debt exception (or if X exchanged $5 cash) X will reduce its **basis** in its assets dollar for dollar of debt discharged from $10 to $5, and leave the $10 net operating loss carryover undisturbed. If the next year X earns $10, the $10 net operating loss will offset the gain. Assuming X exercised the stock for debt exception, however, if $5 of stock was exchanged for $10 of claims, net operating loss carryovers would be reduced by $.50 on the dollar of the $5 of debt discharged, from $10 to $7.50. If the next year's earnings were $10, X could only offset $7.50 with its net operating loss and would recognize $2.50 in income.

Bankruptcy Tax Policy

Background

The treatment of net operating loss carryovers in bankruptcy again illustrates the conflict between bankruptcy and tax policy. Under § 541(c)(1) of the Bankruptcy Code, all property interests of the debtor become property of the debtor's bankruptcy estate, "notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law." Bankruptcy lawyers, accustomed to defining property of the estate very broadly, presume that net operating loss carryovers are included. [FN186]

As a matter of tax policy, however, transferability of net operating loss carryovers is not tenable, because net operating losses carry much more value for solvent taxpayers than they do for insolvent taxpayers. The following analogy to a vacation-exchange illustrates the difference in value:

> Suppose you are an employer who grants all your employees vacations of one month each year. Under your vacation rules, at the end of each year each employee must take her vacation or receive one month's pay in lieu of her vacation. Alternatively, if the employee chooses, she can transfer her vacation rights to another employee, who can then either use the vacation or turn in the vacation right to her employer in exchange for pay equal to one month of her pay. Would any enlightened employer adopting a vacation program permit an employee earning $12,000 a year to convey her $1,000 vacation right to a fellow employee earning $60,000 a

year, who promptly remits the vacation right and receives $5,000 cash? As improbable as that sounds, it is the Internal Revenue Code's present vacation - tax vacation - policy.

*95 Corporate taxpayers possessing NOL tax vacation entitlements, to them worth $1,000 or zero, may transfer those entitlements to other corporate taxpayers who cash them in as deductions on their Forms 1120, receiving cash tax savings of $5,000, $50,000, or millions of dollars. [FN187]

In summary, tax policy is violated by relaxing the general restrictions on net operating loss carryovers while bankruptcy policy is violated by imposing any restrictions on net operating loss carryovers.

Although the special bankruptcy rules appear to offer advantages to debtors in bankruptcy, upon closer examination the advantages diminish. In the event of an ownership change, net operating loss carryovers are reduced by one-half of the amount of the debt discharged in exchange for stock, and the cost imposed upon debtors in bankruptcy to qualify for special net operating loss carryover treatment may outweigh the benefits.

For example, if within two years of bankruptcy the debtor undergoes a second ownership change, the special bankruptcy treatment is retroactively revoked. A public company with little control over the exchange of its stock does not know at the time of reorganization whether it will ultimately enjoy the benefits of the special bankruptcy treatment. Similarly, the special bankruptcy treatment does not apply if the debtor emerges from bankruptcy with shareholders and former creditors holding less than 50% of the debtor's stock. For these purposes, stock obtained through claims transfers does not count towards the 50% threshold. Thus, trading in claims, an increasingly popular Wall Street investment strategy, could inhibit the debtor's ability to carry over net operating losses, notwithstanding that trading is beyond the control of debtors in bankruptcy.

Finally, corporations not in bankruptcy can issue non-voting preferred stock without triggering an ownership change. Debtors in bankruptcy, however, are prohibited by the Bankruptcy Code from issuing non-voting preferred stock.

The extraordinary measures that debtors may have to take to preserve the special bankruptcy treatment of net operating loss carryovers (for example, prohibiting trades of stock for two years following bankruptcy) make it problematic whether the special bankruptcy tax treatment offers any advantage over the regular treatment of net operating loss carryovers.

Tax Policy

Clarification of the Law. The tax treatment of net operating loss carryovers has always been unclear, and the Tax Reform Act of 1986 only compounded the confusion.

*96 Equal Treatment In and Out of Bankruptcy. The net operating loss provisions for insolvent debtors apply only to corporations under the formal jurisdiction of a bankruptcy court, and expressly exclude informal workouts (although the conference report directs the Treasury to study the informal workout situation). [FN188] Exclusion of informal workouts under the current law could encourage filing bankruptcy. [FN189]

The bankruptcy exception gives preferential treatment to solvent debtors in bankruptcy over insolvent debtors not in bankruptcy. Granting to solvent taxpayers benefits not enjoyed by insolvent taxpayers is especially offensive to tax policy:

> The Treasury's argument against an informal workout provision was "to ensure that [the bankruptcy exceptions] cannot be used by solvent corporations to avoid application of the general limitations." [FN190]

Fresh Start But No Head Start. Carryover of net operating losses in bankruptcy despite loss of shareholder equity allows debtors to keep built-in tax benefits while simultaneously reducing pre-bankruptcy tax liabilities.

Therefore, in principle debtors in bankruptcy obtain a head start.

Simplicity and Administrability. Once again, simplicity and administrability are compromised because the debtor can obtain no advance ruling regarding how the Service will treat the debtor's plan. Even if advance rulings were allowed, the requirement that no ownership change occur for two years following bankruptcy complicates the administration of the tax law for no apparent tax advantage.

Fairness and Equity. Restricting the carryover of net operating losses for distressed businesses is an unhealthy use of tax law to implement economic policy. The fairness of carryover of net operating losses for distressed businesses is easily articulated if divorced from its tax implications.

Bankruptcy Policy

Fresh Start for Debtors. The net operating loss carryover rules promote the debtor's fresh start by allowing the debtor to offset future income against past losses.

Fair and Equitable Treatment of Creditors. The net operating loss carryover rules do not directly implicate the treatment of creditors.

Debtor Rehabilitation Favored Over Liquidation. The purpose of the special bankruptcy exception is to promote rehabilitation over liquidation. That ***97** result is accomplished by easing the debtor's future tax liabilities to make more money available to fund a plan of reorganization. That result is frustrated by the limitations imposed upon net operating loss carryovers under the 1986 Tax Act, including:

(i) retroactive revocation of the bankruptcy exception in the event of an ownership change within two years of bankruptcy;

(ii) revocation of the bankruptcy exception if more than 50% of the claims of creditors to be paid with stock under a plan of reorganization are transferred claims;

(iii) the restrictions upon issuance of preferred stock by debtors in bankruptcy, where such issuance would otherwise avoid any limitation on net operating loss carryovers.

Economy of Administration. That the net operating loss carryover rules are so complex, arbitrary, and unpredictable makes tax planning one of the most expensive and time-consuming elements of designing a plan of reorganization.

ADVANCE DETERMINATION OF TAX CONSEQUENCES OF BANKRUPTCY REORGANIZATIONS

The Present Law

The immediate and future tax burdens imposed by a proposed plan of bankruptcy reorganization may be critical to confirmation. Tax burdens are very important to valuation of the debtor, which bears directly on whether the plan is in the best interest of creditors, is "fair and equitable" to creditors [FN191] and whether reorganization is likely to be followed by liquidation or further financial reorganization. [FN192] The bankruptcy court must find that the plan is proposed in good faith and not by any means forbidden by law, including the tax law. [FN193] Upon request of "any governmental unit," the bankruptcy court must make an additional finding that the principal purpose of the plan is not tax avoidance. [FN194] Notwithstanding a bankruptcy court's findings for the debtor on all of these issues and confirmation of a plan, the Internal Revenue Service can then deny the expected tax benefits and relitigate the same issues after confirmation in non-bankruptcy forums.

Private letter rulings offer little useful relief. If the Service declines to issue a ruling, if a ruling is delayed, or if

a debtor disagrees with a ruling, the debtor has no redress and the plan of reorganization could be jeopardized.

Debtors considering a preconfirmation judicial determination of tax issues face two impediments: (1) the Internal Revenue Code prohibits suits "for the ***98** purpose of restraining the assessment of collection of any tax," [FN195] and (2) the Declaratory Judgment Act enforces the Internal Revenue Code restriction by excluding issues "with respect to Federal taxes." [FN196]

These problems are more than theoretical. In In re Inland Gas Corp. [FN197] the district court refused to confirm the debtor's plan of liquidation because the risk created by the Service's adverse private letter ruling pertaining to the imposition of gain under § 337 of the Internal Revenue Code rendered the plan not "feasible" and not "equitable." The circuit court affirmed, and held that the Declaratory Judgment Act precluded the debtor from seeking judicial review of the adverse letter ruling. In In re Wingree Co., [FN198] the Service refused to issue a letter ruling. The circuit court held under the Declaratory Judgment Act that the district court had no authority to order the Service to inspect the debtor's books and determine the nature and extent of any available loss carryovers.

Bankruptcy courts can make binding advance determinations of the tax consequences of reorganizations only with respect to state and local taxes. Under § 1146(d) of the Bankruptcy Code the bankruptcy court may authorize the proponent of a reorganization plan to request a state or local taxing authority to declare the tax effects of the plan. In the event of a controversy, the court may rule on those tax effects after the earlier of the date the taxing authority responds or 270 days after the request. [FN199] The bankruptcy court's ruling under § 1146 is limited however to "questions of law." [FN200] Thus, the bankruptcy court can declare whether a reorganization qualifies for tax-free status under state and local law, but the bankruptcy court cannot fix the dollar amount of any tax attributes that survive the reorganization.

Legislative History

Before enactment of the Bankruptcy Reform Act of 1978, both the House and Senate considered including in § 1146(d) bankruptcy court authority to determine federal as well as state and local tax consequences of plans of reorganization. Only the provision for state and local tax consequences survived.

Initially, the Service was "in favor of remedial legislation in this area," if it was given nine months from the time of a request to make a response. [FN201] Upon inclusion of the 270 day provision in § 1146 of the Bankruptcy Code, the Service ***99** "did not oppose" the provision, provided additional funds would be appropriated to carry the anticipated "increased administrative burdens." [FN202] The provision for advance determination of federal tax consequences was subsequently stricken from the House version of the Bankruptcy Reform Act and inserted into the proposed Bankruptcy Tax Act without a hearing, as a result of a "jurisdictional conflict" between the House Ways and Means Committee and the House Judiciary Committee. [FN203] (The provision for advance determination of state and local taxes was not stricken and was ultimately passed.)

Subsequently, the Senate Finance Committee considered whether to strike the provision for advance rulings on federal tax effects from the Senate version of the Bankruptcy Reform Act. At the hearing, Treasury argued that bankruptcy courts should not be permitted to make advance rulings because of the "serious administrative problems" the IRS would encounter if debtors submitted numerous alternative proposed plans for a single reorganization. [FN204] The American Bar Association, in opposition, argued that bankruptcy judges should be permitted to make advance federal tax rulings because uncertainty over tax consequences would adversely affect the structuring of plans of reorganization:

> Should the Service take an adverse position, its view would have undue finality since proponents of a plan might not want to risk subsequent tax litigation even where they believe their provision properly expresses the applicable law. In this situation, declaratory relief seems appropriate. [FN205]

Ultimately the Senate Finance Committee deleted from the Bankruptcy Reform Act the provision permitting the advance determination of tax consequences of bankruptcy reorganizations for reasons not foreseen by Treasury or the ABA:

> The committee believes that it is unfair to permit the bankruptcy court to issue a declaratory judgment, in effect, on tax matters for bankruptcy. [FN206]

That the tax law is so vague and confusing that the Senate committee considered it an "unfair" advantage for debtors in bankruptcy to be able to request bankruptcy court findings on tax matters is a sad commentary on congressional ***100** effort in this area. Congress should not perpetuate the incomprehensibility of bankruptcy tax laws by disabling the means for giving the laws meaning. In light of the strong policies favoring debtors in bankruptcy in the areas of **discharge** of **indebtedness,** reorganization and carryover of net operation losses, it is surprising that the marginal advantage of a declaratory judgment on tax questions in bankruptcy was enough to kill the proposal.

The advance determination provision was nominally revisited during the House consideration of the proposed Bankruptcy Tax Act of 1980, but the provision quickly disappeared from early drafts of the Act with no explanation. [FN207]

Bankruptcy Tax Policy

Background

Presently, the Declaratory Judgment Act and the Internal Revenue Code prohibit declaratory judgments with regard to federal taxes. This bar on tax determinations has been relaxed with respect to tax exempt organizations, [FN208] qualification of retirement plans [FN209] and interest on municipal bonds. [FN210] Advance determination for bankruptcy plans of reorganization is appropriate.

Tax Policy

Clarification of the Law. Given (i) the conflict between tax policy and bankruptcy policy in the areas of **discharge** of **indebtedness** income, "G" reorganizations, and carryover of net operating losses, (ii) the history of an evershifting balance between the two, and (iii) the imperfect fit of bankruptcy law and tax law, the tax law is improved to the extent the bankruptcy court can introduce clarity in particular cases.

Equal Treatment in and out of Bankruptcy. Notwithstanding the 1977 Senate Finance Committee conclusion that advance determination of tax issues would allow debtors in bankruptcy an unfair advantage, the advantage would not permit debtors in bankruptcy to pay less tax. Further, any such advantage is mitigated by the need for debtors in bankruptcy to obtain court approval for the transaction that gives rise to the advance determination. As demonstrated by Inland Gas Corp. and Wingreen, a debtor in bankruptcy may not be able to obtain bankruptcy court approval of a reorganization without an advance determination of tax consequences.

Fresh Start but no Head Start. The debtor's fresh start is hindered by the debtor's inability to determine the tax consequences of a plan of reorganization. Since the debtor would pay no less tax in or out of bankruptcy in most cases, no "head start" would result from procedural reform.

***101** Fairness and Equity. The administrative burdens upon the Service must be weighed against the lost benefits of reorganizations that fail or are frustrated by the ambiguity of tax law. The balance easily favors procedural reform.

Bankruptcy Policy

Fresh Start. Certainty of tax consequences will enable debtors to utilize more effectively the tax advantages that Congress has bestowed upon insolvent corporations. Plans of reorganization will not be frustrated by the inability of the bankruptcy court to determine tax advantages as in Inland Gas Corp. and Wingreen.

Fair and Equitable Distribution Among Creditors. Given the present uncertain state of bankruptcy tax law, reorganization plans may require contingencies such as "givebacks" by creditors in the event of post-confirmation denial of tax benefits. To the extent that tax consequences are certain, contingency givebacks will be unnecessary and the parties can more effectively ensure a fair and equitable distribution among creditors.

Rehabilitation Favored over Liquidation. Certainty of tax burdens favors rehabilitation by establishing the conditions for confirmation of a plan. The court can value the debtor to ensure that a proposed plan is in the best interests of creditors and is fair and equitable. The court can also decide whether a plan complies with tax law. In addition, upon request by the taxing authority, the court can decide whether a plan is proposed for the purpose of tax avoidance. Further, certainty of tax benefits allows debtors to make a more convincing proposal to creditors for reorganization, and allows creditors to make a more informed decision whether to support a proposed plan.

Economy of Administration. If the bankruptcy court's decision is final, judicial economy is promoted by eliminating subsequent tax court relitigation. The debtor's administrative burden already includes consideration of tax consequences. To the extent a measure of certainty is realized, the time and expense devoted to tax matters should be reduced, both pre- and post-confirmation.

CONCLUSIONS

Tax policy and bankruptcy policy conflict because the bankruptcy policy favoring rehabilitation of troubled businesses is often effected by Congress through tax advantages to debtors in bankruptcy. The Treasury argues for payment of taxes regardless of hardship, and opposes in principle tax advantages for financially troubled taxpayers. This conflict creates ambiguity in bankruptcy tax law because (i) tax advantages to debtors in bankruptcy change frequently as the political will of Congress changes, and (ii) the implementation of those tax advantages often involves an imperfect juxtaposition of tax law principles and bankruptcy policies.

In the area of cancellation of indebtedness income, the insolvency exception has shifted in emphasis in recent years from reduction of **basis** upon debt ***102** forgiveness to virtually no reduction of **basis** and back again to reduction of **basis.** Under the most recent changes, reduction of net operating losses is a mandatory consequence of stock for debt exchanges if more than 50% of corporate stock is transferred. Uncertainty in this area presently includes the following issues:

(i) the treatment of solvent corporations in bankruptcy.

(ii) the consequences of a mix of consideration in a stock for debt exchange;

(iii) the application of the "de minimis" and "proportionality" limitations on stock for debt exchanges;

(iv) the timing of stock for debt exchanges; and

(v) the tax effect of a debt security for debt security exchange.

In the area of tax-free reorganizations in bankruptcy, the "G" reorganization provisions cleared away years of confusing case law, but new issues have emerged largely because tax law does not fully acount for the consequences of deeming a creditor to be a shareholder. Specific issues include:

(i) the identification of creditors to be treated as shareholders;

(ii) cram down in a "G" reorganization; and

(iii) whether substantially all of the debtor's assets are transferred in a reorganization.

With respect to carryover of net operating losses, the law has shifted many times. Most recently the Tax Reform Act of 1986 sharply curtailed carryover and applied new criteria. Developing issues include:

(i) the effect of trading in claims by creditors;

(ii) the effect of a subsequent ownership change within two years of bankruptcy;

(iii) the effect of "single return limitation year" and "consolidated returns change in ownership" regulations;

(iv) the effect of issuance of non-voting preferred stock under the Bankruptcy Code;

(v) the effect of a fresh contribution of capital post-petition but pre-confirmation; and

(vi) the effect of worthless security deductions by fifty percent of former shareholders.

The uncertainty created by bankruptcy tax law is compounded by the inability of the debtor to obtain a binding advance determination of the tax consequences of reorganization. Section 1146 of the Bankruptcy Code should be amended to permit the bankruptcy courts to make advance determinations.

Advance determination of tax consequence will further the bankruptcy policies of (i) fresh start for debtors; (ii) equality of distribution among creditors; (iii) economy of administration, and most importantly (iv) favoring rehabilitation over liquidation. Tax policy would not be impeded, and may in fact be promoted, especially in the areas of (i) clarification of the law; and (ii) fairness and equity.

FNa1. Backenroth & Grossman, New York, New York. The author gratefully acknowledges the contributions of The Honorable Keith M. Lundin, United States Bankruptcy Judge for the Middle District of Tennessee, in preparing this article for publication.

FN1. 292 U.S. 234, 244 (1934) (quoting Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554-55 (1915)).

FN2. Report of the Commission on the Bankruptcy Laws of the United States, H.R. DOC. NO. 137, 93d Cong., 1st Sess. at I-75 (1973). H.R. REP. NO. 687, 89th Cong., 1st Sess. (1965); S. REP. NO. 1158, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2468; Gochenour v. George & Francis Ball Found., 35 F. Supp. 508, 518 (S.D. Ind.), aff'd., 117 F.2d 259 (7th Cir. 1940), cert. denied, 313 U.S. 566 (1941).

FN3. 11 U.S.C.A. § 1129 (West 1979 & Supp. 1991).

FN4. H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977), reprinted in 1978 U.S.C.C.A.N. 6179-80.

FN5. 465 U.S. 513, 528 (1984).

FN6. 11 U.S.C.A. § 362 (West 1979 & Supp. 1991). All references to the "Bankruptcy Code" are to title 11 of the United States Code, enacted as part of Pub. L. No. 95-598, 95 Stat. 2549.

FN7. See 11 U.S.C.A. § 503(6)(1)(A) (West 1979 & Supp. 1991).

FN8. Otte v. United States, 419 U.S. 43, 53 (1974).

FN9. Changes in Bankruptcy Tax Law: Hearing on H.R. 9973 Before the House Comm. on Ways and Means. 95th Cong., 2d Sess. 64 (1978) [hereinafter House Hearing, February 22, 1978] (testimony of Assistant Sec. of the Treas. Daniel I. Halperin).

FN10. House Hearing, February 22, 1978, supra note 9, at 74, 87 (testimony of M. Carr Ferguson).

FN11. Miscellaneous Tax Bills VII, Hearing on S. 2484, S. 2486, S. 2500, S. 2503, S. 2548, H.R. 5043, May 30, 1980, before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance, 96th Cong., 2d Sess. 413 (1980) (testimony of Robert A. Bergquist) [hereinafter Senate Hearing, May 30, 1980].

FN12. House Hearing, February 22, 1978, supra note 9, at 66-67 (testimony of Daniel I. Halperin).

FN13. The tax shelter abuse implications of bankruptcy tax law are beyond the scope of this paper.

FN14. 11 U.S.C.A. § 1141 (West 1979 & Supp. 1991).

FN15. 26 U.S.C.A. § 61(a)(12) (West 1988 & Supp. 1991).

FN16. J. Eustice, Cancellation of Indebtedness Redux: The Bankruptcy Tax Act of 1980 Proposals--Corporate Aspects, 36 TAX. L. REV. 1 (1980). For other excellent reviews of prior law, see J. Eustice, Cancellation of Indebtedness and the Federal Income Tax: A Problem of Creeping Confusion, 14 TAX L. REV. 225 (1959); B. Bittker & B. Thompson, Income From The **Discharge** of **Indebtedness:** The Progency of United States v. Kirby Lumber Co., 66 CAL. L. REV. 1159 (1978); R. Noffke, **Discharge** of **Indebtedness** Under the Bankruptcy Tax Act of 1980, 60 TAXES 635 (1982); P. Asofsky, Reorganizing Insolvent Corporations Today, 417 N.Y.U. INST. ON FED. TAX., ch. 40 (1989).

FN17. 284 U.S. 1 (1931).

FN18. Id. at 3; accord, Helvering v. American Chicle, 291 U.S. 426 (1934); Fifth Ave.-Fourteenth St. Corp. v. Comm'r, 147 F.2d 453, 456-57 (2d Cir. 1944); Commissioner v. Coastwise Transp. Corp., 71 F.2d 104, 105-06 (1st Cir.), cert. denied, 293 U.S. 595 (1934).

FN19. Dallas Transfer & Terminal Warehouse Co. v. Comm'r, 70 F.2d 95 (5th Cir. 1934); Lakeland Grocery Co., 36 B.T.A. 289 (1937); Astoria Marine Constr. Co. v. Comm'r, 12 T.C. 798 (1949); Madison Rys. v. Comm'r, 36 B.T.A. 1106 (1937); Fifth Avenue-14th St. Corp. v. Comm'r, 147 F.2d 453 (2d Cir. 1944) (defining a narrower insolvency exception: if an insolvent debtor retires its debts for less than what the creditor would receive under a liquidation analysis, the debtor recognizes as income the difference).

FN20. 11 U.S.C. §§ 670, 796, 922 (1938) (repealed).

FN21. 26 U.S.C. § 371 (1939) (repealed).

FN22. 11 U.S.C. §§ 270, 396, 522 (1940) (repealed).

FN23. 11 U.S.C. § 270 (1940) (repealed).

FN24. 26 U.S.C. §§ 371, 372 (1943) (repealed).

FN25. Commissioner v. Motormart Trust, 156 F.2d 122 (1st Cir. 1946); Alcazar Hotel Inc. v. Comm'r, 1 T.C. 872 (1943), acq., 1943 C.B. 1, 1947-1 C.B. 1; Rev. Rul. 59-222, 1959-1 C.B. 80.

FN26. S. REP. NO. 1035, 96th Cong., 2d Sess. 10 (1980) reprinted in 1980 U.S.C.C.A.N. 7225; H.R. REP. NO.

833, 96th Cong., 2d Sess. 8 (1980).

FN27. Pub. L. No. 95-598, 92 Stat. 2549, § 402(a) (1978).

FN28. **26** U.S.C.A. § **108(a)** (West 1988 & Supp. 1991).

FN29. **26** U.S.C.A. § **108(b)** (West 1988 & Supp. 1991).

FN30. **26** U.S.C.A. § **108(b)(5)** (West 1988 & Supp. 1991). Revocation of an election to reduce **bases** requires the consent of the Secretary under **26** U.S.C.A. § **108(d)(4)(B)** (West 1988 & Supp. 1991). H.R. REP. NO. 833, supra note 26, at 11; S. REP. NO. 1035, supra note 26, at 3.

FN31. **26** U.S.C.A. § **108(a)(1)** (West 1988 & Supp. 1991).

FN32. **26** U.S.C.A. § **108(b)(4)(B)** (West 1988 & Supp. 1991); net operating losses are defined at 26 U.S.C.A. § 172(c) (West 1988 & Supp. 1991).

FN33. 26 U.S.C.A. § 30 (West 1988 & Supp. 1991).

FN34. 26 U.S.C.A. § 38 (West 1988 & Supp. 1991).

FN35. **26** U.S.C.A. § **108(b)(2)(B),** (3)(B), (4)(C) (West 1988 & Supp. 1991).

FN36. 26 U.S.C.A. §§ 41, 108(b)(2)(B) (West 1988 & Supp. 1991).

FN37. **26** U.S.C.A. § **108(b)(2)(A)** and (4)(B) (West 1988 & Supp. 1991).

FN38. **26** U.S.C.A. § **108(b)(4)(B)** (West 1988 & Supp. 1991).

FN39. **26** U.S.C.A. § **108(b)(2)(D)** (West 1988 & Supp. 1991); Treas. Reg. §§ 1.1016-7 and 8 (1991).

FN40. 26 U.S.C.A. § 27 (West 1988 & Supp. 1991).

FN41. **26** U.S.C.A. § **108(b)(1)(E),** (3)(B) and (4)(C) (West 1988 & Supp. 1991).

FN42. 26 U.S.C.A. § 469 (West 1988 & Supp. 1991).

FN43. 26 U.S.C.A. § 53 (West 1988 & Supp. 1991).

FN44. **26** U.S.C.A. § **108(b)** (West 1988 & Supp. 1991).

FN45. Bankruptcy Tax Act and Minor Tax Bills: Hearing on H.R. 5043 before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 52 (1979) [hereinafter House Hearing, September 27, 1979] (Testimony of David A. Berenson).

FN46. **26** U.S.C.A. § **108(b)(5)(B)** (West 1988 & Supp. 1991).

FN47. **26** U.S.C.A. § **108(b)(5)** (West 1988 & Supp. 1991).

FN48. H.R. REP. NO. 833, supra note 26, at 11; S. REP. NO. 1035, supra note 26, at 13.

FN49. 26 U.S.C.A. § 1017 (West 1988 & Supp. 1991).

FN50. H.R. REP. NO. 833, supra note 26, at 11; S. REP. NO. 1035, supra note 26, at 14; Treas. Reg. §§ 1.1016-7 and 1.1016-8 (1991). A debtor may be able to select certain assets for **basis** reduction upon a showing that the reduction of **basis** of numerous other items would be "burdensome and impractical." See Priv. Ltr. Rul. 88-40-006 (June 3, 1988); Priv. Ltr. Rul. 88-40-021 (June 3, 1988).

FN51. See H.R. REP. NO. 833, supra note 26, at 9; S. REP. NO. 1035, supra note 26, at 10 (1980); P. Asofsky & W. Tablock, Bankruptcy Tax Act Radically Alters Treatment of Bankruptcy and Discharging Debts, 54 J. TAX'N 109 (1981).

FN52. **26** U.S.C.A. § **108** (West 1988 & Supp. 1991).

FN53. Note that no recapture of investment tax credits is made. Rev. Rul. 84-134, 1984-2 C.B. 6; Rev. Rul. 81-206, 1981-2 C.B. 9.

FN54. 26 U.S.C.A. §§ 1017(d)(1)(A), 1245, 1250 (West 1988 & Supp. 1991).

FN55. S. REP. NO. 1035, supra note 26, at 16.

FN56. P. Asofsky, **Discharge** of **Indebtedness** Income in Bankruptcy after the Bankruptcy Tax Act of 1980, 27 ST. LOUIS U.L.J. 583, 594 (1983).

FN57. Comm'r v. Motor Mart Trust, 156 F.2d 122, 126-27 (1st Cir. 1946); Carpento Sec. Corp. v. Comm'r, 140 F.2d 382, 385 (1st Cir. 1944); Alcazar Hotel Inc. v. Comm'r, 1 T.C. 872 (1943) nonacq., 1943 C.B. 26, withdrawn, 1947-1 C.B. 1; Rev. Rul. 59-222, 1951-1 C.B. 80; Rev. Rul. 59-98, 1951-1 C.B. 76.

FN58. Tower Building Corp. v. Comm'r, 6 T.C. 125 (1946), acq., Gen. Couns. Mem. 25277, 1947-1 C.B. 44 (declared obsolete in Rev. Rul. 69-44, 1969-1 C.B. 312).

FN59. **26** U.S.C.A. § **108(e)** (8) (West 1988 & Supp. 1991). Stock that is attributable to accrued interest, however, is taxable under 26 U.S.C.A. §§ 354(a)(2)(B) and (3)(B) (West 1988 & Supp. 1991).

FN60. In 1984 Congress explicitly restricted the use of the stock for debt exception by solvent debtors not in bankruptcy. However, no mention was made of solvent debtors in bankruptcy. Arguably, the language of § 108 restricts the use of the stock for debt exception by a solvent debtor in bankruptcy as well. The 1984 amendment provides that the stock for debt exception "shall not apply in the event of a debtor in a title 11 case or to the extent the debtor is solvent" (emphasis added). Thus, the literal language of the statute suggests that solvency can be a bar to use of the stock for debt exception even for debtors in bankruptcy. On the other hand, the legislative history explicitly allows use of the stock for debt exception without qualification for all debtors in bankruptcy: "this rule will not apply to solvent corporations or to corporations in a title 11 case" (emphasis added). Although the legislative history is unambiguous, given the Treasury policies to encourage equal treatment of debtors in bankruptcy and debtors not in bankruptcy, and to encourage a fresh start but not a "head start," a Treasury challenge to stock for debt exchanges involving solvent corporations in bankruptcy is possible.

FN61. **26** U.S.C.A. § **108(e)(8)(A)** (West 1988 & Supp. 1991); S. REP. NO. 1035, supra note 26, at 17; H.R. REP. NO. 833, supra note 26, at 14.

FN62. H.R. REP. NO. 833, supra note 26, at 14.

FN63. S. REP. NO. 1035, supra note 26, at 17.

FN64. 126 CONG. REC. H12, 459; H12, 462 (1980).

FN65. Priv. Ltr. Rul. 80-14-091 (Jan. 11, 1990); Priv. Ltr. Rul. 80-21-144 (Feb. 29, 1980); Priv. Ltr. Rul. 81-10-139 (Dec. 12, 1980); Priv. Ltr. Rul. 78-21-047 (Feb. 23, 1978).

FN66. Treas. Reg. § 1.351-1(a)(1)(ii) (1991).

FN67. B. Mirskey & R. Willens, The Bankruptcy Tax Act of 1980, 59 TAXES 145, 149 (1981); CCH Tax Transactions Library, Failed and Failing Businesses ¶ 5.041 (1988).

FN68. Priv. Ltr. Rul. 88-37-002 (May 10, 1988).

FN69. Failed and Failing Businesses, supra note 67, at ¶ 5.041.

FN70. **26** U.S.C.A. § **108(e)(8)(B)** (West 1988 & Supp. 1991); S. REP. NO. 1035, supra note 26, at 17.

FN71. S. REP. NO. 1035, supra note 26, at 17.

FN72. **26** U.S.C.A. § **108(e)(7)(A),** (B) (West 1988 & Supp. 1991).

FN73. Failed and Failing Businesses, supra note 67, at ¶ 5.07 p. 532; G. Henderson, Developing a Tax Strategy for the Failing Company, 63 TAXES 952, 960 (1985).

FN74. Failed and Failing Businesses, supra note 67, at ¶ 5.07 p. 532.

FN75. 11 U.S.C.A. § 1141 (West 1979 & Supp. 1991).

FN76. Failed and Failing Businesses, supra note 67, at ¶ 5.07 p. 532; R. Witt & F. Albergotti, G Reorganizations Offers Simple, Effective Way to Acquire Bankruptcy Corporations, 63 J. TAX'N 90 n.28 (1985).

FN77. Carroll-McCreary Co. v. Comm'r, 124 F.2d 303, 305 (2d Cir. 1941); Comm'r v. Auto-Stop Safety Razor Co., 74 F.2d 226 (2d Cir. 1934); Hartland Associates, 54 T.C. 1580, 1585-87 (1970), nonacq. 1976-2 C.B. 3.

FN78. **26** U.S.C.A. § **108(e)(6)** (West 1988 & Supp. 1991).

FN79. General Utilities Operating Co. v. Helvering, 296 U.S. 200 (1935).

FN80. Moline Properties, Inc. v. United States, 319 U.S. 436 (1943).

FN81. House Hearing, September 27, 1979, supra note 45, at 54 (testimony of David A. Berenson); Senate Hearing, May 30, 1980, supra note 11, at 322 (testimony of Robert H. Lipsey).

FN82. P. Asofsky, supra note 56, at 613, 615; G. Henderson, supra note 73, at 959.

FN83. 109 B.R. 51 (Bankr. S.D.N.Y. 1990) See also, C. Coombs, Original Issue Discount in Debt-for-Debt and Debt-for-Stock Exchanges, 65 AM. BANKR. L.J. 649 (1991).

FN84. H.R. REP. NO. 881, 101st Cong., 2d Sess. 355 (1990), reprinted in 1990 U.S.C.C.A.N. 2017, 2357.

FN85. Senate Hearing, May 30, 1980, supra note 11, at 265 (testimony of David J. Shakow); M. CHIRLSTEIN, FEDERAL INCOME TAXATION ¶ 3.02 (4th ed. 1985); Treas. Reg. § 1.61-12(a) (1991).

FN86. See, e.g., Parkford v. Comm'r, 133 F.2d 249 (9th Cir. 1943); Home Builders Lumber Co. v. Comm'r, 165 F.2d 1009 (5th Cir. 1948).

FN87. Senate Hearing, May 30, 1980, supra note 11, at 20 (testimony of Charles M. Walker).

FN88. See infra notes 191-210 and accompanying text.

FN89. See infra notes 191-210 and accompanying text.

FN90. 26 U.S.C.A. § 1012 (West Supp. 1991).

FN91. New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934).

FN92. 26 U.S.C. § 202(6) (1918) (repealed).

FN93. 26 U.S.C. §§ 203(6)(3), 204(a)(7) (1924) (repealed).

FN94. 26 U.S.C. § 381 (1954) (repealed).

FN95. 26 U.S.C. § 112(i)(1)(A) (1932) (repealed).

FN96. Pinnellas Ice & Cold Storage Co. v. Comm'r, 287 U.S. 462 (1933).

FN97. W. Plumb, The Bankruptcy Tax Act, 33 U.S.C. LAW CENTER TAX INST. ¶ 801.1 (1981).

FN98. See infra note 107 and accompanying text.

FN99. Helvering v. Southwest Consolidated Corp., 315 U.S. 194 (1942).

FN100. The bankruptcy rules under § 368 apply not only to title 11 cases, but also to receiverships, foreclosures, and similar proceedings in state and federal court. 26 U.S.C.A. § 368(a)(3)(A) (West 1988 & Supp. 1991).

FN101. 26 U.S.C.A. § 368(a)(1)(G) (West 1988 & Supp. 1991).

FN102. S. REP. NO. 1035, supra note 26, at 35.

FN103. H.R. REP. NO. 833, supra note 26, at 31; S. REP. NO. 1035, supra note 26, at 36.

FN104. Helvering v. Minnesota Tea Co., 296 U.S. 378 (1935); Pinellas Ice & Cold Storage Co. v. Comm'r, 287 U.S. 462 (1933).

FN105. Rev. Proc. 77-37, 1977-2 C.B. 568.

FN106. See, e.g., Nelson Co. v. Helvering, 296 U.S. 374 (1935); Miller v. Comm'r, 84 F.2d 415 (6th Cir. 1936).

FN107. Treas. Reg. § 1.371-1(a)(4) (1991).

FN108. 315 U.S. 179 (1942).

FN109. S. REP. NO. 1035, supra note 26, at 37. This statement reflects the holding of Atlas Oil & Refining Corp. v. Comm'r, 36 T.C. 67 (1961).

FN110. Absolute priority in these circumstances refers generally to the seniority of creditors. However, no explicit ranking of seniority exists for tax purposes. In contrast, absolute priority for bankruptcy purposes is defined in § 726 of the Bankruptcy Code. See also 11 U.S.C.A. § 1129(b) (West 1979 & Supp. 1991).

FN111. P. Asofsky, Reorganizing Insolvent Corporations, 41 N.Y.U. INST. ON FED. TAX'N. § 5.02(2) (1982); Montgomery Bldg. Realty Co. v. Comm'r., 7 T.C. 417 (1946); Rex Mfg. Co. v. Comm'r., 102 F.2d 325 (7th Cir. 1939).

FN112. H.R. REP. NO. 833, supra note 26, at 31-32; S. REP. NO. 1035, supra note 26, at 36-37.

FN113. Priv. Ltr. Rul. 85-03-064 (Oct. 24, 1984).

FN114. Priv. Ltr. Rul. 85-21-083 (Feb. 27, 1985).

FN115. P. Asofsky, supra note 111, at § 5.02(2).

FN116. Gregory v. Helvering, 293 U.S. 465, 469 (1935).

FN117. Treas. Reg. § 1.368-a(b) (1991).

FN118. See Pridemark Inc. v. Comm'r, 345 F.2d 35 (4th Cir. 1965); Standard Realization Co., 10 T.C. 708 (1948).

FN119. Treas. Reg. § 1.368-1(d) (1991).

FN120. 26 U.S.C.A. § 368(a)(1)(G) (West 1988 & Supp. 1991).

FN121. S. REP. NO. 1035, supra note 26, at 35.

FN122. 26 U.S.C.A. § 354(a) (West 1988 & Supp. 1991).

FN123. S. REP. NO. 1035, supra note 26, at 35.

FN124. Priv. Ltr. Rul. 88-36-058 (June 16, 1988).

FN125. Priv. Ltr. Rul. 85-03-064 (Oct. 24, 1984) ("at least one person or entity which holds a security issued by Target will receive acquiring preferred stock in exchange for their security.")

FN126. 26 U.S.C.A. § 354(b) (West 1988 & Supp. 1991).

FN127. Rev. Proc. 77-37 § 3.02, 1977-2 C.B. 568, 569.

FN128. See, e.g., Atlas Tool Co. v. Comm'r, 70 T.C. 86 (1978), aff'd, 614 F.2d 860 (3d Cir. 1980), cert. denied, 449 U.S. 836 (1980) (25% of gross assets transferred); American Mfg. Co. v. Comm'r, 55 T.C. 204 (1970) (19.17% of gross assets transferred); Smothers v. United States, 79-1 U.S.T.C. ¶ 9216 (S.D. Tex. 1979), aff'd, 642 F.2d 894 (5th Cir. 1981) (15% of net assets transferred).

FN129. Such transfers might violate the "substantially all" test. See Helvering v. Elkhorn Coal Co., 95 F.2d 732 (4th Cir. 1938).

FN130. H.R. REP. NO. 833, supra note 26, at 31; S. REP. NO. 1035, supra note 26, at 35-36.

FN131. Priv. Ltr. Rul. 85-03-064 (Oct. 24, 1984).

FN132. G. Henderson, supra note 73, at 967.

FN133. New York State Bar Ass'n Tax Section Comm. on Bankruptcy, Report on Reorganizations under Section

368(a)(1)(G): Recommendations for Proposed Regulations 16 n.23 (Oct. 25, 1985) (available from the New York State Bar Ass'n) [hereinafter NYSBA].

FN134. S. REP. NO. 1035, supra note 26, at 36.

FN135. NYSBA, supra note 133, at 17 n.24.

FN136. 26 U.S.C.A. § 361(b)(1) (West 1988 & Supp. 1991).

FN137. 26 U.S.C.A. § 356 (West 1988 & Supp. 1991).

FN138. See infra notes 191-210 and accompanying text.

FN139. See infra notes 191-210 and accompanying text.

FN140. House Hearing, February 22, 1978, supra note 9, at 68 (testimony of Elmer Dean Martin III).

FN141. P. Rizzi, Section 382 and the Trigger Rules: Is Congress Beating a Dead Horse?, 14 J. OF CORP. TAX'N 99, 116 (1987) (emphasis in original).

FN142. 1918 Revenue Act, § 204, Pub. L. No. 254, 40 Stat. 1057; Revenue Act of 1950, § 215(a), Pub. L. No. 81-814, 64 Stat. 906; Small Business Tax Revision Act of 1958, §§ 172(b)(1)(A) and (B), 203, Pub. L. No. 85-866, 72 Stat. 2549; Trade Expansion Act of 1962, § 317(b), Pub. L. No.. 87-508, 76 Stat. 114.

FN143. 282 U.S. 435 (1934).

FN144. B. BITKER & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 16 02.2 (5th ed. 1988).

FN145. Id.

FN146. 26 U.S.C.A. § 269 (West 1988 & Supp. 1991).

FN147. VGS Corp. v. Comm'r, 68 T.C. 563 (1977); D'Arcy-Mac Manust Masius Inc. v. Comm'r, 63 T.C. 440 (1975); Clarksdale Rubber Co. v. Comm'r, 45 T.C. 234 (1965); Naeter Bros. Publishing Co. v. Comm'r, 42 T.C. 1 (1964); Baton Rouge Supply Co. v. Comm'r, 36 T.C. 1 (1961); Barclay Co. v. Comm'r, 23 T.M.C. 1965 (1964); See R. Rizzi, supra note 141, at 101-04.

FN148. 353 U.S. 382 (1957).

FN149. H.R. REP. NO. 841, 99th Cong., 2d Sess. II-194 (1986), reprinted in 1986 U.S.C.C.A.N. 4282.

FN150. Treas. Reg. §§ 1.1502-1 (g); 1.1502-21(d) (1991).

FN151. Tax Reform Act of 1986, Pub. L. No. 99-514, § 621(f)(5).

FN152. Carryover of Net Operating Losses and Other Tax Attributes of Corporations: Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means, 99th Cong., 1st Sess. (1985) [hereinafter House Hearing, September 30, 1985] (testimony of William D. Andrews).

FN153. R. Jacobs, Tax Treatment of Corporate Net Operating Losses and Other Tax Attribute Carryovers, 5 VA. TAX REV. 701 (1985). For discussion of the neutrality principle and related ideas, see Report of the Staff of the

Senate Finance Report, S. REP. NO. 47, 99th Cong., 1st Sess. (1985); New York State Bar Association, Tax Section Committee on Net Operating Losses, The Net Operating Loss Provisions of the House-Passed Version of H.R. 3838, 31 TAX NOTES 1217 (1986) [hereinafter "New York State Bar Report"]; R. Wooton, Section 382 After the Tax Reform Act of 1986, 64 TAXES 874 (1986); J. Eustice, Alternatives for Limiting Loss Carryovers, 22 SAN DIEGO L. REV. 149 (1985).

FN154. 26 U.S.C.A. § 382 (West 1988 & Supp. 1991).

FN155. 26 U.S.C.A. § 382(g)(A)(i) (West 1988 & Supp. 1991).

FN156. H.R. REP. NO. 841, 99th Cong., 2d Sess. II-174 (1985). Changes in percentage ownership may be disregarded if they are attributable solely to fluctuations in value. Rev. Rul. 87-73.

FN157. 26 U.S.C.A. § 382(g)(3)(A)(i) (West 1988 & Supp. 1991).

FN158. Under the provisions of the Omnibus Budget Reconciliation Act of 1987, if a worthless stock deduction is claimed by a shareholder who during the three-year testing period owned 50% or more of the stock of the loss corporation, no net operating loss carryovers can offset the corporation's post-change income. 26 U.S.C.A. § 382(g)(4)(D) (West 1988 & Supp. 1991). This provision is apparently intended to reverse the result of Textron, Inc. v. United States, 561 F.2d 1023 (1st Cir. 1977), which held that, in the context of a deduction claimed by a parent for worthless stock of a non-consolidated subsidiary, the net operating loss carryovers of the subsidiary survived to offset the subsidiary's future income. The 1987 Act avoids the whipsaw problem created by allowing the parent corporation a deduction and at the same time allowing the subsidiary corporation a deduction for the same economic loss. Since the statute is drafted more broadly than the problem it attempts to solve, new problems arise. First, taxpayers must ascertain the deduction taken by any 50% shareholder. It is arguably unfair, however, to have one taxpayer's tax burden dependent upon the treatment of items by another taxpayer. See Moline Properties Inc. v. United States, 319 U.S. 436 (1943); see also text accompanying note 80 supra. Second, the 1987 provision is inserted in § 382(g), the same subsection that aggregates all less-than-five-percent shareholders into one five-percent shareholder. In the context of a bankruptcy all shareholders who are wiped out can take worthless security deductions. Thus, if 50% of those shareholders take worthless security deductions, those shareholders might be aggregated under § 382(g), and net operating loss carryovers would be denied. Presumably, this result was not intended by the statute.

FN159. 26 U.S.C.A. § 382(k)(6)(A) (West 1988 & Supp. 1991); Treas. Reg. § 1.382-2T(f)(18)(i) (1991); Priv. Ltr. Rul. 89-40-006 (Apr. 20, 1989).

FN160. Despite a debtor's inability to issue nonvoting equity securities, the temporary regulations outline a procedure for excluding from the definition of "stock" interests that would otherwise qualify as stock. Temp. Treas. Reg. §§ 1.382(i)(6)(A) and (K)(6)(ii) (under authority of 26 U.S.C.A. § 382(k)(6)(A) (West 1988 & Supp. 1991)). If all three of the following tests are satisfied, stock does not count as "stock" for § 382 purposes:

1) participation in future growth of the corporation is "disproportionately small" relative to the value of the stock compared to the total value of outstanding stock;

2) treating the stock as non-stock would result in an ownership change; and

3) the amount of pre-change loss exceeds twice the amount obtained by multiplying the value of the loss corporation by the long-term tax-exempt rate.

The regulations provide no objective guideline or safe harbor provisions for measuring whether participation in future growth is "disproportionately small." Because the second element is mandatory and the Congressional intent in allowing the Regulations was to prevent avoidance of the § 382 limitation, H.R. REP. NO. 841, 99th Cong., 2d Sess. II-173 (1986), it is unlikely that debtors in bankruptcy can take advantage of the provisions.

FN161. 26 U.S.C.A. § 382(a) (West 1988 & Supp. 1991). See text accompanying notes 152-53 supra.

FN162. 26 U.S.C.A. § 382(b)(1) (West 1988 & Supp. 1991).

FN163. 26 U.S.C.A. § 382(e)(1) (West 1988 & Supp. 1991).

FN164. 26 U.S.C.A. § 382(1)(6) (West 1988 & Supp. 1991).

FN165. H.R. REP. NO. 841, supra note 149, at II-189.

FN166. 26 U.S.C.A. § 382(c) (West 1988 & Supp. 1991); S. REP. NO. 841, supra note 149, at II-194.

FN167. Treas. Reg. § 1.368-1(d) (1991).

FN168. House Hearing, September 30, 1985, supra note 152 (testimony of Richard Bacon).

FN169. R. Reynolds, Revision of NOL and Credit carryover Rules, 986 Tax Mgmt. (BNA) ch. 35 n.42 and accompanying text (1988). The same reason applies to the continued application of single return limitation year and consolidated returns change in ownership regulations. P. Asofsky, supra note 16, at § 40.07(5) and (6).

FN170. 26 U.S.C.A. § 382(1)(4)(A) (West 1988 & Supp. 1991).

FN171. 26 U.S.C.A. § 382(h)(1)(A) (West 1988 & Supp. 1991).

FN172. 26 U.S.C.A. § 382(h)(3)(B) (West 1988 & Supp. 1991).

FN173. 26 U.S.C. § 382(b) (1985) (repealed).

FN174. 26 U.S.C. § 382(d) (1985) (repealed).

FN175. Staff of Senate Finance Committee, 99th Cong., 1st Sess., "The Subchapter C Revision Act of 1985" 250 (1985).

FN176. 26 U.S.C.A. § 382(1)(5)(A) (West 1988 & Supp. 1991); H.R. REP. NO. 841, supra note 149, at II-192. Note that the same issues relevant to the timing of a stock for debt exchange apply with equal force to the timing of ownership change under the net operating loss carryover rules. See notes 73-76 supra and accompanying text. The Internal Revenue Service, in letter rulings, suggests that the "testing date" for determining an ownership change is the confirmation date of a chapter 11 plan. Priv. Ltr. Rul. 89-02-047 (Oct. 28, 1988); Priv. Ltr. Rul. 90-15-033 (Jan. 16, 1990); Priv. Ltr. Rul. 90-19-036 (Feb. 9, 1990). Deeming the confirmation date to be the date of ownership change could undermine reorganizations that are subject to appeal, insofar as additional claimants and additional purchasers of the debtor's equity may surface between the confirmation date and the date that the plan ultimately becomes effective, thus changing the identity of those entitled to stock. If the change in ownership is substantial, a second ownership change could be imminent.

FN177. 26 U.S.C.A. § 382(1)(5)(e) (West 1988 & Supp. 1991); H.R. REP. NO. 841, supra note 149, at II-192.

FN178. House Hearing, September 30, 1985, supra note 152 (testimony of Assistant Secretary of the Treasury Pearlman).

FN179. See R. Jacobs, supra note 153, at 729-36.

FN180. 26 U.S.C.A. § 382(1)(5)(C) (West 1988 & Supp. 1991).

FN181. 26 U.S.C.A. § 382(1)(5)(B) (West 1988 & Supp. 1991).

FN182. 26 U.S.C.A. § 382(1)(5)(D) (West 1988 & Supp. 1991).

FN183. R. Jacobs, supra note 153, at 723.

FN184. House Hearing, September 30, 1985, supra note 152 (testimony of Assistant Secretary of Treasury Pearlman).

FN185. See, e.g., Priv. Ltr. Rul. 89-02-047 (Oct. 28, 1988); Priv. Ltr. Rul. 89-04-040 (Sept. 11, 1989); Priv. Ltr. Rul. 90-19-036 (Feb. 9, 1990).

FN186. See Official Committee v. PSS S.S. Co. (In re Prudential Lines, Inc.), 928 F.2d 565 (2d Cir. 1991).

FN187. R. Jacobs, supra note 153, at 724.

FN188. H.R. REP. NO. 841, supra note 149, at II-192.

FN189. New York State Bar Report, supra note 153, at 1240.

FN190. House Hearing, September 30, 1985, supra note 152 (testimony of Assistant Secretary of the Treasury Pearlman).

FN191. 11 U.S.C.A. § 1129(b) (West 1979 & Supp. 1991).

FN192. 11 U.S.C.A. § 1129(a)(11) (West 1979 & Supp. 1991).

FN193. 11 U.S.C.A. § 1129(a)(3) (West 1979 & Supp. 1991).

FN194. 11 U.S.C.A. § 1129(d) (West 1979 & Supp. 1991).

FN195. 26 U.S.C.A. § 7421 (West 1988 & Supp. 1991).

FN196. 28 U.S.C.A. § 2201 (West 1984 & Supp. 1991).

FN197. 241 F.2d 374 (6th Cir.) cert. denied, 355 U.S. 838 (1957).

FN198. 412 F.2d 1048 (5th Cir. 1969).

FN199. H.R. REP. NO. 595, supra note 4, at 421; 124. Cong. Rec. H 11,115 (September 28, 1978); S 17,432 (Oct. 6, 1978).

FN200. The limitation on questions of fact may be appropriate given the necessity of a thorough audit to fix tax liabilities exactly.

FN201. Bankruptcy Reform Act, Hearings on S.235 and S.236 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 792 (1975) (testimony of Donald C. Alexander, Commissioner of Internal Revenue).

FN202. Bankruptcy Act Revision, Hearings on H.R. 31 and H.R. 32 Before the House Comm. on the Judiciary, 94th Cong., 2d Sess. 1964 (1976) (testimony of Donald C. Alexander, Commissioner of Internal Revenue).

FN203. H.R. REP. NO. 595, supra note 4, at 3; K. Klee, Legislative History of the New Bankruptcy Law, 28

DEPAUL L. REV. 941, 948 (1979).

FN204. Bankruptcy Reform Act of 1978, Hearing on Sections 346, 505, 507, 523, 728, 1146 and 1331 of § 2266 before the Subcomm. on Tax'n and Debt Management Generally of the Senate Comm. on Finance, 95th Cong., 2d Sess. 20 (1978) (testimony of Daniel I. Halperin, Deputy Assistant Secretary of the Treasury).

FN205. Id. at 30.

FN206. S. REP. NO. 110, 95th Cong., 2d Sess. 28 (1978).

FN207. House Hearing, September 27, 1979, supra note 45, at 187, 193.

FN208. 26 U.S.C.A. § 7428 (West 1988 & Supp. 1991).

FN209. 26 U.S.C.A. § 7476 (West 1988 & Supp. 1991).

FN210. 26 U.S.C.A. § 7478 (West 1988 & Supp. 1991).

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DATE AND TIME PRINTING STARTED:	05/11/95	10:16:15 am (Central)
DATE AND TIME PRINTING ENDED:	05/11/95	10:21:02 am (Central)
OFFLINE TRANSMISSION TIME:		00:04:47
NUMBER OF REQUESTS IN GROUP:	2	
NUMBER OF LINES CHARGED:	2521	

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Law Review Articles.
28 U.S.C. § 455(a)

Temple Law Quarterly

Fall, 1987

Comment

*697 QUESTIONING THE IMPARTIALITY OF JUDGES: DISQUALIFYING FEDERAL DISTRICT COURT JUDGES UNDER 28 U.S.C. § 455(a)

Susan B. Hoekema

INTRODUCTION

An impartial judiciary is an essential element of the system of justice in the United States. The right to a 'neutral and detached judge' in all proceedings is protected by the Constitution. [FN1] In addition, an impartial judiciary is essential to maintain public confidence in the integrity of the judicial system. [FN2] Throughout the history of our national government, Congress has sought to secure the impartiality of trial judges by requiring judges to disqualify themselves in various circumstances. [FN3]

Congress revised the federal disqualification law in 1974, and instituted an objective standard for disqualification in place of a subjective standard. [FN4] As stated in 28 U.S.C. § 455(a), the objective disqualification requirement mandates disqualification when a reasonable person would question a judge's impartiality. [FN5]

Since the objective standard was adopted, however, judicial interpretation of section 455(a) has narrowed the broad scope Congress intended for disqualification law. [FN6] Federal courts have limited the scope of the current statutory provisions *698 by requiring a high standard of proof of bias [FN7] and by applying judicially-created rules restricting the circumstances in which bias can be found. [FN8] In addition, the procedures for disqualification cast into doubt the objectivity of disqualification decisions. [FN9] The procedures allow the challenged judge to make the disqualification decision. If a judge refuses to disqualify himself, review is not always immediately available and appellate courts tend to defer to the initial judgment of the district court. [FN10]

This comment will review current standards and procedures required by statute and applied to judicial disqualification by the courts. It will assess the extent to which current interpretations conform to the objective standard set forth in section 455(a) and explore ways in which disqualification decisions may be made on a more objective basis.

I. STATUTORY PROVISIONS FOR DISQUALIFICATION

Two provisions of federal law furnish the means for disqualifying district court judges. [FN11] The paramount disqualification statute is 28 U.S.C. § 455. [FN12] Section 455(a) sets forth a general provision mandating disqualification whenever *699 a reasonable person would question a judge's impartiality. [FN13]

Section 455(b) requires disqualification in several specified circumstances. [FN14] A judge is disqualified if he or she has a financial interest in a case, [FN15] defined by the statute as 'ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.' [FN16] Section 455(b) also mandates disqualification if the persons involved in the litigation are related to the judge 'within the third degree of [blood] relationship.' [FN17] The statute also provides for disqualification if the

judge has a professional relationship with a party, including representation of a party by the judge or by a member of the judge's former firm. [FN18] Judges who have been in government employment must disqualify themselves from proceedings in which they had a role and from cases about which they have expressed an opinion on ***700** the merits. [FN19] Section 455(b) also requires disqualification when a judge has 'a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.' [FN20]

Parties cannot waive their right to disqualification when it is based on one of the grounds specified in section 455(b). [FN21] When the disqualification is based on section 455(a), however, waiver is permitted upon full disclosure of the basis for disqualification. [FN22]

Section 455 places responsibility for disqualification on the judge. [FN23] This action can be taken sua sponte. [FN24] Courts also permit disqualification to be prompted by a party either by motion or on appeal. [FN25]

Section 455 was significantly revised in 1974. [FN26] A major concern of Congress was to eliminate the subjective opinion of the judge as the basis for determining disqualification. [FN27] The superseded version of section 455 required ***701** disqualification if, 'in his opinion,' it was improper for a judge to sit during the proceedings. [FN28] Congress replaced this subjective standard with an objective standard that obliges judges to disqualify themselves when their impartiality 'might reasonably be questioned.' [FN29] In instituting this objective standard, Congress stressed that it was doing away with the 'duty to sit' rule, requiring that a judge should stay with the case when it doubt about disqualification. [FN30]

The general disqualification standard set forth in section 455(a) cannot be understood without analysis of two other disqualification provisions--section 455(b)(1) and 28 U.S.C. § 144, both of which disqualify a judge for personal bias and prejudice. [FN31] A party moving for disqualification under section 455(a) frequently seeks disqualification under both section 455(b)(1) and 144 as well. [FN32] Furthermore, interpretation of section 455(a) has been shaped by judicial interpretation of section 144, which predated the revised general disqualification ***702** statute. [FN33]

Section 144, first enacted in 1911, [FN34] focuses exclusively on bias and prejudice as grounds for disqualification. [FN35] It authorizes a litigant with the power to disqualify a district court judge by means of a 'timely and sufficient affidavit' alleging 'personal bias or prejudice' for or against a party. [FN36] The key to disqualification under section 144 is the sufficiency of the affidavit. As long as procedural rules regarding the form and timing of the affidavit are met, [FN37] the filing of a legally sufficient affidavit compels a judge to transfer the case to another district court judge. [FN38]

As the Supreme Court determined in Berger v. United States, [FN39] the challenged judge must take the initial step of evaluating the sufficiency of the affidavit, and may not automatically transfer the case when an affidavit is filed. [FN40] Thus, section 144 does not provide for peremptory challenge of the judge. [FN41] Instead, a judge is required to evaluate the legal sufficiency, but not the truth, of ***703** the allegations. [FN42] Standards for determining legal sufficiency have developed in case law, interpretating the meaning of 'personal' bias or prejudice. [FN43]

Section 455(b)(1) echoes the personal prejudice language of section 144, disqualifying where a judge 'has a personal bias or prejudice' concerning a party. [FN44] The vagueness of language in this provision contrasts sharply with the other sections of 455(b), in which Congress spelled out in detail the amount and type of financial interest, and the degree of relationship to a participant or prior involvement in a case that necessitates disqualification. [FN45] Section 455(b)(1) uses undefined terms and provides no concrete guidelines for determining bias or prejudice. [FN46] This vagueness reflects the difficulties inherent in providing standards for disqualification on grounds of bias or prejudice. Such standards are hard to state; when concrete phrases are substituted for a vague statement of objectives, they are subject to the criticism of being underinclusive. [FN47]

Both Congress and the American Bar Association ('ABA') encountered this difficulty in their attempts to frame

the bias and prejudice provisions of their respective codes. One of the earlier drafts of the Senate bill required disqualification when a judge 'has a fixed belief concerning the merits of the matter in controversy or personal knowledge of material facts.' [FN48] This language was later replaced with the language of section 455(b)(1), requiring disqualification where a judge 'has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.' [FN49] The change followed the alternations made in the ABA Code of Judicial Conduct. The 'fixed belief' language in the first ABA draft was abandoned in response to criticism that it would predispose judges to disqualification for having an understanding of the law and a commitment to uphold it. [FN50] The final draft of the Senate bill, like the final ABA draft, returned to the 'personal bias or prejudice' language ***704** of section 144, [FN51] and thus premitted courts to apply the judicial gloss built up over the years on section 144 to section 455. [FN52]

II. APPLYING THE DISQUALIFICATION STATUTES

Application of section 455(a), [FN53] the general federal disqualification statute, has been shaped in part by courts' concern to balance the advantages of disqualification with countervailing judicial interests. [FN54] On the one hand, disqualification of judges whenever reasonable doubt arises concerning their impartiality promotes public confidence in the judiciary. Conversely, disqualification may diminish the efficiency of the judicial system. [FN55] Transferring a case always creates some administrative costs, and when disqualification occurs in a complex case some time after the case has commenced in the court, the burden may be substantial. [FN56] Although courts may be tempted to give significant weight to efficiency, Congress' elimination of the duty to sit rule indicates that the goal of impartiality should be paramount whenever there are reasonable grounds for disqualification. [FN57] Congress and the courts also face the concern that litigants will manipulate disqualification to their advantage or to the disadvantage of their opponents by judge-shopping or by causing costly delays. [FN58]

***705** Courts have had the opportunity to shape disqualification standards under section 455(a) through their interpretation of the law in two areas of inquiry. One question facing the courts concerns what constitutes reasonable grounds for disqualification. The substantive requirements for disqualification which have been developed through this inquiry will be discussed in section B below. [FN59] Another question facing the courts is whether, and to what extent, the appearance of bias justifies disqualification. Is it appropriate to disqualify a judge on the appearance of bias or is it, at least in some cases, necessary to establish bias in fact? The interpretations offered in each of these areas determine the reach of federal disqualification, its availability in particular cases, and the appealability of the denial of disqualification.

A. Assessing Bias: Standards of Proof

The question whether disqualification should rest on the appearance or the fact of bias arises because the two objectives of disqualification law--promoting confidence in the judiciary and providing a fair trial to litigants--differ in focus. Protection of individual rights requires disqualification of judges who will not consider particular cases with impartiality. Protecting and promoting public confidence in the judiciary, in contrast, depends not only on actual fairness in particular cases but also on the appearance of fairness. [FN60] Disqualification based on the appearance of bias may be required to promote public confidence when, in fact, no actual partiality exists. [FN61]

In many circumstances where federal law requires disqualification, concerns for judicial appearance and individual fairness are both present. But some circumstances may involve only one of these objectives. On the one hand, fairness may require disqualification in situations where there is no appearance of partiality and the need for disqualification is not known to anyone but the judge. [FN62] Public appearances, on the other hand, may require assigning another judge even in cases where litigants are confident they would be treated fairly by the disqualified judge. [FN63]

***706** Analysis of the language of the disqualification statutes suggests that both 28 U.S.C. §§ 144 and 455(b)(1) can be interpreted as requiring bias in fact. [FN64] Section 144 requires that the affidavit state facts sufficient to

establish bias. [FN65] Section 455(b)(1) states that a judge 'shall . . . disqualify himself . . . [w]here he has a personal bias or prejudice. . . .' [FN66] The same objective standard applied to these statutes is also applied to section 455(a), [FN67] however, and thus bias in fact cannot be established by subjective assessment of the judge's state of mind. Instead, courts have required that a litigant seeking disqualification meet a higher standard of proof to show bias in fact. [FN68]

A higher standard of proof is firmly established as part of the disqualification process under section 144. When scrutinizing the affidavit to determine whether it is legally sufficient, [FN69] courts apply a 'clear and convincing' standard, and evaluate whether the facts 'would convince a reasonable man that bias exists.' [FN70] In contrast, courts have not asked whether the facts would cause a reasonable person to question the judge's impartiality under section 144. [FN71] Imposing a stricter standard of proof for disqualification under section 144 provides a reasonable counterbalance to the stipulation that the judge accept all the averments in a section 144 affidavit as true. [FN72] This more rigorous standard of proof does not, however, ensure that judges are disqualified under section 144 only where there is bias in fact. The requirement that the facts be taken as true, ***707** even where the judge knows them to be false, [FN73] delimits the court's assessment of the facts, making it inaccurate to describe section 144 as a statute that disqualifies only for a actual bias.

Whether the 'clear and convincing' standard of proof should be applied to section 455(b)(1) has seldom been addressed by the courts. Most courts treat section 455(a) as predominant, rest their decision on that section when bias or prejudice is alleged, and avoid the issue of whether they are required to make a finding of actual bias under section 455(b)(1). [FN74] Other courts interpret section 455(b)(1) as providing a specific example of grounds for disqualification under section 455(a) and apply to section 455(b)(1) the standard they apply to section 455(a). [FN75] In United States v. Balistrieri, [FN76] the United States Court of Appeals for the Seventh Circuit held that section 455(b)(1) requires that actual bias be found in order to meet that section's standard of proof. [FN77] The court applied the 'clear and convincing' standard, asking whether a reasonable person with knowledge of all the facts would be convinced that the judge was biased. [FN78]

***708** The language of section 455(a) suggests that it requires disqualification for the appearance of bias. [FN79] The section mandates disqualification when a reasonable person would question a judge's impartiality, regardless whether actual bias exists. [FN80] Clear and convincing evidence is not required by the language of the statute. [FN81] Moreover, disqualification when doubt about impartiality exists, rather than only when convincing evidence of bias is produced, is in keeping with the congressional aim to eliminate the duty to sit rule and replace it with the rule that judges, when uncertain, should disqualify themselves. [FN82]

Courts generally apply the reasonable doubt standard to section 455(a) disqualification and disqualify for the appearance of bias. [FN83] However, the standard of proof for disqualification under section 455(a) was subject to controversy for a time during which some courts of appeals' decisions were interpreted as equating section 455(a) with section 144 and requiring the same 'clear and convincing' standard of proof. [FN84] This position appears to have been abandoned. [FN85]

Recently, however, a new controversy has arisen. The Seventh Circuit has limited appellate review of disqualification under section 455(a) because that section disqualifies based on the appearance of bias or prejudice. [FN86] After requiring ***709** proof of bias in fact under section 455(b)(1) in Balistrieri, [FN87] the Seventh Circuit refused to consider whether the judge should have recused himself from the case under section 455(a). Rather, the court held that the denial of disqualification under section 455(a) is not reviewable on post-trial appeal because disqualification under that section does not rest on actual bias. [FN88] The court reasoned that because the standard in section 455(a) is the appearance of bias, in contrast to the actual bias standard of section 455(b), section 455(a) does not implicate the substantive rights of the parties. [FN89] The court characterized section 455(a) as aimed only at protecting against injury to the judicial system as a whole, and further suggested that a pretrial mandamus petition provides the only appropriate vehicle for review. [FN90]

This distinction could severely limit the number of disqualification denials that could be heard on appeal.

Courts tend to focus on section 455(a) when considering disqualification and thus may not develop a record that will permit full consideration of whether disqualification could be supported by clear and convincing evidence. [FN91] In addition, questions regarding the impartiality of judges do not only arise before trial, but instead may come to the attention of a party during or after trial. [FN92]

More fundamentally, the legislative history of section 455 does not support a bifurcation of the focus and reviewability of its subsections. Section 455(a) is not accurately characterized as directed solely toward appearances and thus does not compel the Balestrieri court's interpretation. Advocates of section 455(a) described it as a provision that would enhance public confidence, [FN93] but it was not proposed exclusively for that purpose. Instead, members of Congress and the ABA Judicial Conduct Committee viewed section 455(a) as a provision that would fill in gaps and provide a requirement for disqualification in circumstances not covered by the specific standards set forth in section 455(b). [FN94] The Senate committee, for example, regarded section 455(a) as a tool for disqualifying a judge for a close personal relationship not covered by section 455(b)(5), which requires disqualification in cases involving relatives up to the third degree of blood relationship. [FN95] The chairman of the ABA committee also regarded the general provision as a means for disqualifying judges for actual bias, and noted ***710** that there was no need for 'fixed opinion' language in section 455(b)(3) because a judge who had expressed an opinion on the merits of a controversy would be disqualified under 455(a). [FN96] These examples indicate that section 455(a) was directed toward actual bias as well as toward the appearance of bias.

Section 455(b) also serves this dual function. Some of the provisions in section 455(b) are clearly directed at promoting the appearance of impartiality rather than protecting parties from actual bias. For example, under section 455(b) a judge is disqualified if she has any financial interest in the case, no matter how small, without the possibility of waiver. [FN97] Concerns with both due process and the preservation of confidence in the judicial system thus permeate the entirety of section 455.

The Supreme Court's analysis of the due process right to an impartial judge provides yet another reason for rejecting an interpretation of the disqualification statutes that conditions review on a finding of actual bias. The due process criteria for judicial disqualification, as delineated by the Supreme Court, [FN98] is not as extensive as the federal statutory requirements mandating disqualification. The Court has focused on disqualification for interest, [FN99] leaving open the question whether a bias charge implicates due process. [FN100] Yet the Court has indicated that where due process requires disqualification, it is concerned with the appearance of justice.

***711** The Court's recent decision in Aetna Life Insurance Co. v. Lavoie [FN101] illustrates its approach to the due process implications of judicial bias. In Lavoie, an insurance company charged that its due process rights were violated because the chief judge on the state appellate court panel was suing other insurance companies on issues similar to those in the Lavoie case and because the other judges on the panel were class plaintiffs in one of the suits. [FN102] The Court found that due process required disqualification of the chief judge on the basis of interest because his decision in Lavoie could enhance the status of a case he had filed in a lower court. [FN103]

The Supreme Court declined to find due process violations based on other grounds of personal bias and interest alleged by the appellants. [FN104] Noting that the right to due process does not extend so far as to require disqualification under the fourteenth amendment whenever it is required under statute, the Court held that 'only in the most extreme of cases would disqualification . . . be constitutionally required' on the basis of bias or prejudice. [FN105] The Court also held that the Constitution does not require disqualification for only a slight pecuniary interest. [FN106]

Although the Lavoie Court held that the due process right to disqualification does not extend to all the circumstances in which Congress has required disqualification, the Court did not tie due process disqualification to a showing of actual fairness. Instead, the Court reiterated the position that due process requires disqualification on the basis of the appearance of partiality, stating:

> We made clear that we are not required to decide whether in fact Justice Emery was influenced, but only

> whether sitting on the case . . . 'would offer a possible temptation . . . to the average [judge] . . . [to] lead him not to hold the balance nice, clear, and true.' The Due Process Clause 'may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice." [FN107]

Thus, the Supreme Court established that whether the due process right to an ***712** impartial judge requires disqualification depends on reasonable inferences from facts that raise the possibility of bias, and not a finding of actual bias.

In instituting the objective standard, Congress made a similar choice regarding the extent of inquiry into bias. Investigation into the state of mind of a judge under the objective standard stops at the point where a reasonable inference of bias or prejudice can be made. This limitation of the inquiry permits, and indeed requires, higher courts to consider disqualification without establishing whether a party actually suffered a violation of the right to an independent adjudicator. Thus the restrictions on the appeal of section 455(a) imposed by the Seventh Circuit, [FN108] a court which refuses post-trial review unless actual bias is involved, are not justified.

B. Reasonable Grounds for Disqualification

1. Judicially-Created Requirements for Disqualification for Bias or Prejudice

The most significant way in which courts have limited the availability of disqualification is by placing restrictions on the types of evidence that can be considered in support of disqualification. Courts require that evidence of bias or prejudice have an extrajudicial source and refuse to consider disqualification for opinions on the law. [FN109] Some courts, however, have interpreted the requirement of 'personal' bias to preclude disqualification on grounds of bias toward an attorney. [FN110] The requirement of 'personal' prejudice is also used to refuse disqualification on the basis of general background and experience. [FN111]

These restrictions originally developed through courts' interpretations of 28 U.S.C. § 144. [FN112] The question whether the judicial gloss on section 144 should apply to 28 U.S.C. § 455 [FN113] was answered in the affirmative soon after section 455 was revised. In Davis v. Board of School Commissioners, [FN114] the United States Court of Appeals for the Fifth Circuit found 'no suggestion in the legislative history that [section 144] decisions were being overruled or in any way eroded.' [FN115] The court concluded that it should 'give [sections] 144 and 455 the same meaning legally . . . whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.' [FN116] Most courts agree ***713** that the judicial interpretation of section 144 applies fully to section 455. [FN117] In effect, these courts are finding that the judicial gloss on bias and prejudice defines the grounds upon which it is reasonable to question a judge's impartiality. [FN118]

Court-made restrictions developed under section 144 and carried over to disqualification under section 455 in part reflect the logic of the judicial decision-making process and promote efficiency. [FN119] The restrictions may, however, protect the efficiency of the system at the expense of fairness and public confidence in the judiciary. Unfortunately, the presumption that judges are impartial results in restrictions on evidence and the imposition of a heavy burden on a movant. [FN120] To surmount this presumption, a litigant generally must show clear evidence of personal bias. [FN121] Occasionally, courts have based disqualification on evidence of a level of emotional involvement that indicates 'pervasive prejudice.' [FN122] This heavy burden on the movant however, may not further the goals of disqualification law. [FN123]

***714** a. The extrajudicial source requirement

A fundamental principle of the judicially-created standards for disqualifying judges for bias and prejudice is that the evidence of bias must come from an extrajudicial source. Evidence of prejudice or bias that arises from or can

be linked to a judicial source, such as pretrial or trial proceeding or any aspect of case management, is excluded from consideration. [FN124] The Supreme Court stated this requirement in United States v. Grinnell: [FN125] 'The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' [FN126]

The extrajudicial source requirement is most frequently applied to reject disqualification on the basis of statements made by a judge in the course of a case. [FN127] Courts also apply the extrajudicial source requirement to reject disqualification based on adverse rulings by a judge, [FN128] whether in the trial of the party bringing the motion [FN129] or in previous trials. [FN130] In criminal trials, the extrajudicial source rule is used to prevent disqualification on the basis of allegations questioning a judge's impartiality merely because the judge, while presiding over a previous hearing, was exposed to or ruled on evidence. [FN131] The extrajudicial ***715** source requirement is also invoked to reject disqualification based on claims of bias resulting from hostile actions of a party or an attorney toward a judge or resulting from the judge's response to such actions. [FN132]

The extrajudicial source requirement protects the judicial system from unreasonable interference with judicial decision-making. If statements of opinion could generally disqualify a judge, adjudicators could be inhibited from carrying out the evaluative tasks required to move cases through the court and to reach decisions. [FN133] Use of the extrajudicial source requirement to avoid disqualification as a result of the provocation of a party or attorney serves to prevent litigants from manipulating the judicial system to their advantage by harrassing judges. [FN134]

Despite the important benefits of the extrajudicial source requirement, it could stand in the way of a fair, impartial trial if it were rigidly applied. An absolute refusal to consider as evidence of bias or prejudice any statement made in a judicial setting in response to information learned in the case gives judges a zone of immunity in which to voice personal prejudices. Courts do not, however, generally invoke the extrajudicial source rule to protect a judge from disqualification who has made statements within the judicial context that present clear evidence of personal bias for, or prejudice against, an individual in the case. ***716** Berger v. United States [FN135] presents a classic example of prejudicial statements made by a judge within the judicial context. In Berger, the judge allegedly delivered an anti-German diatribe in a case involving Germans and German-Americans as defendants. [FN136] Another example of a judicial remark revealing bias is found in Roberts v. Bailar, [FN137] a case which involved an employment discrimination suit against the Postal Service. In response to a motion to dismiss a party who had a supervisory role, [FN138] the district court judge said: 'I know Mr. Graves, and he is an honorable man and I know that he would never intentionally discriminate against anybody.' [FN139] Because the actions of this 'honorable man' were at issue in the discrimination suit, the court of appeals held that 'it is clear that a reasonable person would question the impartiality of the District Judge.' [FN140]

The statement at issue in a disqualification motion may not, however, clearly reveal personal bias or prejudice evidenced through an extrajudicial source, but rather may suggest that a bias toward or prejudice against a party has developed over the course of the proceeding or a prior proceeding. Disqualifying a judge in these circumstances requires making an exception to the extrajudicial source rule when a judge's statement or action reveal that he or she has not or is not likely to put aside personal feelings in conducting the trial or passing judgment. The United States Court of Appeals for the Fifth Circuit suggested the possibility of a 'pervasive prejudice' exception in Davis v. Board of School Commissioners [FN141] and applied this exception in United States v. Holland. [FN142] In Holland, a defendant sought disqualification of a district court judge after gaining a new trial on appeal because the judge stated that the defendant had 'broker faith' with the court by appealing and intended to increase the defendant's sentence. [FN143] The appellate court held that the district judge's statement showed pervasive prejudice and thereby satisfied the reasonable person standard for disqualification. [FN144]

In Nicodemus v. Chrysler Corp., [FN145] the Sixth Circuit Court of Appeals disqualified a judge for bias on the basis of his 'vilification' of the defendant in an employment discrimination suit. [FN146] The court indicated that the development of ***717** some degree of bias over the course of court proceedings is a normal part of the judicial process, [FN147] but declared that "if . . . a judge's bias appears to have become overpowering, we think it disqualifies him." [FN148]

In a situation in which the judge was directly or deliberately provoked by a participant in the case, an emotional response by a judge generally will not disqualify her. [FN149] Nevertheless, even in circumstances in which the judge has been deliberately provoked, an extreme reaction to a party or attorney may necessitate disqualification. [FN150] The appropriate focus under section 455(a) is not whether the judge's statement springs from an extrajudicial source but instead whether the judge's statement or action would lead a reasonable person to question whether the judge would remain impartial.

b. Opinion on law or policy

A second fundamental principle of disqualification law articulated by the courts is that judges cannot be disqualified for their knowledge of, or opinions on, the legal issues in a case. [FN151] The policy concerns underlying this rule are ***718** clear: disqualification on grounds of previously developed legal opinion would wreak havoc within the judicial system. As the United States Court of Appeals for the Third Circuit recently observed: 'If [j]udges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worse-prepared lawyers could be appointed to the bench.' [FN152]

Although the judicially-created rule against considering disqualifying judges on the basis of their legal knowledge is a sound one, application of the rule may be problematic when a judge has been personally involved in instituting a particular policy or when a judge has emphatically expressed support for, or opposition to, a policy position. The best-known case involving the issue of disqualification of a judge for his involvement in instituting a policy is Laird v. Tatum, [FN153] a case in which the plaintiffs challenged army surveillance of anti-war protestors. [FN154] Plaintiffs moved to disqualify Justice Rehnquist, who had cast the deciding vote in a five to four decision dismissing the case, [FN155] on the grounds that he had been involved in defending the surveillance program before a Senate committee as assistant attorney general in the Nixon administration. [FN156] Justice Rehnquist determined that he was not obliged to disqualify himself because he 'did not have even an advisory role in the conduct of the case of Laird v. Tatum.' [FN157] He also declined to disqualify himself through an exercise of discretion, reasoning that opinions on the law and policy were necessary and inevitable, [FN158] and that having publicly expressed these opinions was not sufficient grounds for disqualification. [FN159]

***719** In its revision of section 455, Congress included a specific provision, section 455(b)(3), [FN160] to address issues raised in Tatum. [FN161] Section 544(b)(3) does not, however, clearly require disqualification where a judge is ruling on the applicability or constitutionality of laws or executive policies that he had a significant hand in shaping. Section 455(b)(3), on its face, seems to be applicable only in those cases in which a judge had been involved in, or expressed an opinion about, a particular case. Disqualification in circumstances like those presented in the Tatum case would fall, instead, under the general provision of section 455(a), which requires the court to ask whether the judge's participation in lawmaking raises reasonable doubts concerning his impartiality. It is reasonable to believe that one who has had a significant part in formulating a policy may have difficulty maintaining impartiality when that policy is challenged.

The disqualification issue may also arise when a judge has not played a significant role in formulating policy but rather has expressed an opinion on an issue, either by casting a vote in a legislature, or by publicly expressing an opinion. Courts have generally refused to disqualify judges in these circumstances. [FN162] Nevertheless, evidence of strongly held opinions can raise reasonable doubts about a judge's impartiality.

In Southern Pacific Communications v. American Telephone & Telegraph Co., [FN163] the United States Court of Appeals for the District of Columbia considered the issue of disqualification based on emphatic policy statements in post-trial review of an antitrust case against American Telephone & Telegraph Co. ('AT&T'). The district court judge, in his memorandum opinion, [FN164] forcibly stated his belief that the public interest was better served by an AT&T monopoly rather than by competition in the telecommunications industry. [FN165] The court of appeals, noting that views on the law and policy do not ordinarily disqualify a judge, [FN166]

allowed for the possibility of disqualification if the court prejudged a case. [FN167] The court set forth an 'irrevocably closed mind' test for determining ***720** when a judge's actions overcome the presumption of impartiality. [FN168]

The Southern Pacific Communications 'irrevocably closed mind' test cannot be applied to pretrial disqualification, however. Pretrial application of the test would conflict with the presumption that a judge will maintain an open mind toward a case, and follow precedent faithfully. [FN169] In a section 455(a) pretrial disqualification challenge, this presumption would preclude challenge of a judge's impartiality prior to trial because it would not be possible to prove that an upcoming presentation of an issue would not sway the judge. [FN170] A litigant cannot make a pretrail showing of an 'irrevocably closed' mind sufficient to overcome the presumption when such a showing depends on evidence of bias in the proceedings. [FN171]

Although in general a judge may not be disqualified for an opinion on the law, a judge may be disqualified for holding a fixed opinion regarding sentencing. [FN172] This exception was established in United States v. Thompson, [FN173] the case in which the defendants had allegedly violated the Selective Service Act. [FN174] The district court judge, in a previous case, had announced that it was his policy to sentence all Selective Service Act violators to at least thirty months in jail. [FN175] ***721** The appellate court determined that this allegation provided grounds for disqualification because it 'was not an allegation of judicial bias in favor of a particular legal principle,' but rather of personal bias 'directed against the appellant as a member of a class.' [FN176] The court also noted, however, that a fixed policy as to sentencing was inconsistent with the trial judge's authorized discretion to tailor sentences appropriately. [FN177]

The Thompson court's consideration of the judge's violation of his official duties suggests a framework for a narrow exception permitting disqualification for opinions on the law or public policy. Courts could adopt the rule that while policy statements should not generally provide grounds for disqualification, an exception will be made when a statement or action would lead a reasonable person to conclude that the judge is predisposed to violating his or her oath or ignoring a mandate. [FN178] Such a rule would not interfere with the present practice of refusing disqualification when the judge's statement expresses an enthusiastic commitment to enforce the law, [FN179] or when a judge previously voted in favor of a law applicable in the case. [FN180] Simple disagreement with existing law would also not disqualify. [FN181] Under the proposed exception, however, the presumption of impartiality could be overcome if a judge's action provided evidence of intense disagreement with a particular policy or law. [FN182] The critical issue would be whether the judge could reasonably be expected to put aside his or her personal feelings, rather than allow them to dominate the decision-making process. [FN183]

c. Bias or prejudice toward an attorney

Some courts have required that judicial bias be directed toward the party as an individual, rather than toward that party's attorney, before disqualifying a ***722** judge. [FN184] Under section 455(a), however, bias or antipathy directed at counsel may justify disqualification, but only if this bias or prejudice could affect the outcome of the case to the detriment of a party. [FN185] As the United States Court of Appeals for the Tenth Circuit noted in United States v. Ritter, [FN186] 'if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party.' [FN187]

Yet, as the Ninth Circuit has noted, when a judge is charged with prejudice against an attorney, the court must take into account tensions between judge and attorney inherent in the adversarial system. [FN188] A disqualification motion based on bias for or prejudice against an attorney thus should be evaluated in context, like other charges of prejudice arising from a judge's statements or actions within the judicial process.

d. General background and experience

Reviewing courts also refuse to disqualify judges on the basis of their general background, education, and experience. [FN189] In Blank v. Sullivan & Cromwell, [FN190] a sex discrimination case against a law firm, the

defendant sought to disqualify the judge because she was female and as a lawyer had worked on behalf of minorities who had suffered from discrimination. [FN191] The Blank court refused to disqualify, reasoning that if background, race, or sex were in themselves grounds for removal, 'no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, [and] often with distinguished law firm or public service backgrounds.' [FN192]

***723** Rejection of recusal for general background or experience is sensible because evidence of general associations does not provide a reasonable basis for an inference of bias. [FN193] Courts must, however, carefully distinguish between general evidence of background or associations and specific evidence that may provide a basis for disqualification under section 455(a) if an interest or relationship is not specified under section 455(b). [FN194]

2. Grounds for Disqualification Under Section 455(a) Other Than Bias or Prejudice

Disqualification under section 455(a) is not limited to circumstances where bias or prejudice is explicitly alleged; section 455(a) also applies when an interest or relationship, not among those defined by section 455(b), raises doubt about a judge's impartiality. [FN195] It is evident from the record of the Senate committee hearing on the proposed revision of section 455 that Congress envisioned the use of section 455(a) as a tool for disqualification on grounds not specified in section 455(b). [FN196]

Recognizing the scope of the general provisions, courts have made use of section 455(a) to disqualify judges for interests or relationships not covered by section 455(b). [FN197] Several courts have used section 455(a) as their framework for examining disqualification motions that allege that a judge's law clerk or former law clerk had a role or an interest in a case. [FN198] The United States Court of Appeals for the Third Circuit has held that judges are required under section 455(a) to disqualify themselves from criminal actions if they have a substantial interest in the victim of the crime. [FN199] The Fifth Circuit, in Potashnick v. Port ***724** City Construction Co., [FN200] relied on section 455(a) to disqualify a judge who had extensive business dealings with the plaintiff's attorney. [FN201] More recently, the Fifth Circuit used section 455(a) in Health Services Acquisition Corp. v. Liljeberg [FN202] to disqualify a judge who claimed he had no knowledge of information that, if known, would have disqualified him under section 455(b)(4). [FN203]

In each of these cases, the respective appellate court determined that a relationship or interest in itself raised questions regarding impartiality. The courts did not evaluate the extent of the relationship or interest to determine whether the judge in each case was actually biased. Rather, the courts disqualified due to the appearance of bias. [FN204]

Casting disqualification questions in terms of relationships or interests, instead of in terms of bias, has several advantages. Stating the disqualification motion in terms of a questionable relationship can bring into clearer focus the grounds for objecting to the participation of a particular judge. [FN205] In addition, relationships and interest are easier for courts to ascertain because the evidence is more concrete and accessible. Such decisions are also easier to review, since the court can consider, as a matter of law, whether a particular interest or relationship should be added to the list of those that disqualify. [FN206] Furthermore, resting the need for disqualification on the existence of a relationship is less personal and may be easier for a judge to view objectively than a direct charge of bias.

Nevertheless, litigants and courts tend to treat any relationship or interest not specifically enumerated in Section 455(b) as presenting a question of disqualification for bias or prejudice, requiring the more difficult showing of personal prejudice, rather than considering the relationship under section 455(a). The opinion issued by the Fifth Circuit in United States v. Harrelson [FN207] provides an ***725** example of this tendency. The Harrelson defendants were convicted of murder and conspiracy to murder a federal judge. [FN208] Pursuant to section 455(a), the defendants had sought to disqualify the trial judge, who had known and worked with the murder victim for eight or nine years, served as an honorary pallbearer at his funeral, and eulogized him at several

memorial ceremonies. [FN209] The court analyzed section 455(a) as requiring disqualification on the basis of conduct that shows personal prejudice, insisting that 'recusal is not warranted absent specific instances of conduct indicating prejudice against a defendant.' [FN210] Because such evidence was lacking, the court held that disqualification was not required. [FN211]

The Harrelson court then considered the question of relationship briefly and superficially. [FN212] The court reasoned that a trial judge in this position may harbor hostility toward the actual killers but would presume the innocence of persons pleading not guilty. [FN213] The court did not consider the possible impact of this hostility if the judge reached a conclusion regarding guilt before the end of the trial or its possible impact upon sentencing. [FN214] The court concluded that absent a stronger showing of personal prejudice, a reasonable person would not presume that the 'careful and seasoned trial judge' was biased. [FN215] By requiring a showing of personal prejudice, [FN216] the court lost sight of the objective 'appearance of bias' standard established in section 455(a) as applied to questions of disqualifying relationship or interest.

Other courts have given questions involving a relationship equally short shrift. For example, in United States v. Balistrieri, [FN217] disqualification was sought ont he grounds that the judge, when he was Wisconsin Attorney General, identified the defendant as the head of an organized crime family and targeted the defendant's family business for investigation in his efforts against organized crime. [FN218] The court denied disqualification on the grounds that there was no showing of personal animus [FN219] and did not ask whether a reasonable person would consider the relationship of the judge to the defendant one which called into doubt the impartiality of the judge. [FN220]

***726** The tendency of courts to focus on personal prejudice suggests that a subjective element remains in disqualification decisions under section 455(a) despite the congressional emphasis on an objective standard. The next section will examine the disqualification decision-making process and consider means for achieving greater objectivity in disqualification under section 455(a).

III. DISQUALIFICATION PROCEDURE

A. Disqualification Decision-Making

Objective disqualification can be promoted by clarifying the process of evaluating evidence for disqualification. The inherently subjective nature of evidence of personal bias and prejudice may make objective evaluation difficult. [FN221] Yet even when disqualification is based on bias or prejudice, courts are required by Congress to apply the objective standard of section 455(a). [FN222]

The decision-making process followed when disqualification is based on an interest or relationship defined under section 455(b) [FN223] is simple to describe and provides a framework for a more objective approach to disqualification under section 455(a). In deciding whether to disqualify for interest or relationship, the first question a court poses is: does the interest or relationship exist? If it does, the court must arrive at an accurate description of the relationship and ask: does the judge's interest or relationship fall within those specified under section 455(b)? If so, disqualification is automatic. [FN224] The statute imposes the presumption that the particular interest or relationship would reasonably result in bias. [FN225]

If the interest or relationship is not one specified under section 455(b), the next question posed is whether this interest or relationship reasonably raises questions regarding a judge's impartiality. [FN226] Once the factual determination is ***727** made regarding the existence of an interest or relationship, the question whether it provides reasonable grounds for disqualification is one an appellate court can determine as a matter of law. [FN227]

In cases seeking disqualification on the basis of personal bias or prejudice, the judge's statements and other expressive actions provide the evidence for disqualification. [FN228] To make an objective assessment of this evidence, the court must first test its accuracy, and question whether the event or statement occurred as reported.

Once the court has obtained an accurate description of the expressive act that may reveal bias, that evidence must be evaluated using the reasonable person standard to determine whether the expressive acts reasonably raise doubts regarding the judge's impartiality. [FN229] Under the objective standard, it is inappropriate for the court to inquire further and attempt to determine the judge's actual state of mind. The court is limited to assessing outward manifestations and to making a reasonable inference as to whether the typical judge would be biased under those circumstances. [FN230]

The task of applying the objective standard to the facts grants the judge a degree of discretion in disqualification decisions under section 455(a) that is not present in section 455(b) decisions. The scope of that discretion is limited, however, because Congress established a low threshold when it eliminated the duty to sit. [FN231] Judges are required to recuse themselves if they perceive any grounds for disqualification. [FN232] The discretion of district court judges can be limited further by the courts of appeals if they respond to disqualification cases by establishing clearer guidelines for disqualification. [FN233]

***728** B. Evaluation by the Challenged District Court Judge

Federal law provides that the decision-making process described above be carried out by the judge who is under challenge. Under section 144, which provides for disqualification upon filing of a sufficient affidavit, [FN234] the challenged judge is charged with determining whether the affidavit is legally sufficient. [FN235] Although the judge is required to assume the truth of the allegations and the good faith of the attorney regardless of any knowledge to the contrary, [FN236] the judge exercises significant power over disqualification. The requirement of convincing evidence of bias, [FN237] and the restrictions on disqualification evidence such as the extrajudicial source rule, [FN238] give the challenged judge the responsibility of making an extensive evaluation of the charges. [FN239]

Under section 455, judges have more latitude in reaching the decision whether to disqualify themselves. Judges are not required to accept the veracity of the factual averments in a motion, but rather are free to make credibility determinations, weigh the evidence, and contradict it with facts drawn from their own personal knowledge. [FN240]

Giving the challenged judge this role in the disqualification process has the advantage of allowing the judge with the best knowledge of the issue to resolve it speedily. But when the judge denies disqualification, questions regarding that judge's impartiality are compounded rather than settled. Moreover, the appearance of impartiality is not advanced when a challenged judge proceeds to try a case and there has been no outside assessment of the challenge to that judge's impartiality. [FN241]

***729** C. Other Means for Determining Disqualification

Commentators have proposed several ways of changing or supplementing disqualification procedures to better ensure an impartial adjudicator. One proposed alternative to the current disqualification procedure is to eliminate judicial decision-making from the process by instituting the peremptory challenge of judges. [FN242] reliance on peremptory challenge, however, may lead to judge-shopping [FN243] and inefficiency. [FN244] Furthermore, the introduction of a peremptory challenge would not actually address the problem of ensuring impartial judges. The proposals limit litigants to one use of a peremptory challenge. [FN245] Litigants could face a biased judge after reassignment and the need for a statute disqualifying judges for cause would remain, as would the problems of achieving disqualification on an objective standard under such a statute.

The other two proposed alternatives, which would bring judges other than the challenged judge into the disqualification process, deserve more extensive consideration. One proposal is to transfer the decision to another judge at the district court level. A second alternative is to allow full and immediate appellate review of denials of disqualification.

1. Transfer to Another District Judge

Commentators have recommended that independent adjudication of disqualification motions be assured by requiring that a district court judge presented with a disqualification motion transfer the motion to another judge for decision. [FN246] Such a transfer would, according to commentators, address the problem presented by having judges decide their own cases, provide a more disinterested forum, and thus promote the appearance of impartiality. [FN247] The major objection commentators have leveled against this proposal is that transfer of ***730** the disqualification motion to another judge for a hearing, or for review of affidavits, [FN248] would delay litigation and impose an administrative burden. [FN249] Those advocating this alternative argue that an independent review of disqualification is worth the delay and burden on the courts. [FN250]

2. Appellate Review

Another means for insuring independent assessment of disqualification decisions is to afford litigants immediate and comprehensive review of disqualification denials. Immediate appellate review would clearly further the goals of judicial disqualification. Without interlocutory review, trials proceed before judges whose impartiality is in question, thereby imposing upon litigants a possibly unfair trial and undermining the public perception of the impartiality of judges. [FN251]

Nevertheless, routine interlocutory consideration of disqualification would impose a burden on the courts. Timely appeal may, however, reduce the burden imposed on the judicial system when a new trial is necessitated following reversal based on disqualification. [FN252] Moreover, resolution of a disqualification issue at pretrial is less complex than resolution of the disqualification question as part of a completed case. In post-trial review, a new trial may be required even though everything but the disqualification issue appears to have been correctly decided. [FN253] In this position, a court may be reluctant to apply the liberal standards instituted by Congress which address the disqualification question.

Unfortunately, timely review of disqualification denials is impeded by statutory limitations on interlocutory review. Disqualification motions are usually raised and decided before the trial. [FN254] A final decision on the merits of a case is ***731** generally required, however, before an issue in a case can be reviewed on appeal. [FN255]

Review under a writ of mandamus, however, provides a vehicle by which the courts may hear disqualification denials. [FN256] Mandamus is a writ used to ***732** command an official to perform a specific act that arises from a public duty, [FN257] or to confine a court to lawful exercise of its prescribed jurisdiction. [FN258] Issuance of the writ is traditionally limited to extraordinary circumstances, [FN259] however, and several conditions governing mandamus limit its use for review of disqualification denials and the comprehensiveness of review under the writ.

One limitation on use of the writ of mandamus is that the writ can be used only to 'compel an officer to perform a purely ministerial duty.' [FN260] A writ of mandamus may be issued to confine judges to their jurisdictional powers or to compel them to exercise their judicial authority, but it cannot be used to compel action within judicial discretion. [FN261] Mandamus may be issued, however, where the discretionary duty is limited and the official has abused that discretion by transgressing those limits. [FN262]

'Abuse of discretion' is the standard of review that is generally applied to section 455 motions on appeal. [FN263] Thus, this requirement of mandamus raises questions, which are also present in post-trial review of disqualification denials, regarding the amount of discretion judges actually have over disqualification and what constitutes abuse of this discretion. If the judge's discretion is limited, review is possible under a writ of mandamus and more comprehensive at any stage.

Establishment of abuse of discretion as the standard of review for section 455 decisions occurred prior to the

1974 decision when disqualification was completely discretionary. [FN264] When Congress revised section 455, it made disqualification mandatory, rather than discretionary, when a reasonable person would question the judge's impartiality. [FN265] Yet the House of Representatives' commentary on the revised bill suggested that section 455 decisions would continue to be reviewed under the abuse of discretion standard. [FN266] The House report ***733** stated that '[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.' [FN267]

On the basis of the House report, appellate courts generally have applied the abuse of discretion standard to section 455 questions with little consideration of what discretion the district court should exercise. [FN268] Occasionally, appellate courts have displayed discomfort with broad discretion by focusing on the substantive issue in a case, thoroughly evaluating the evidence, independently assessing reasonableness, and stating their conclusions without any reference to abuse of discretion. [FN269]

Recently, the Seventh Circuit directly questioned the abuse of discretion standard in United States v. Balistrieri, [FN270] and rejected it as an inappropriate standard for appellate evaluation of section 455(b)(1) decisions. [FN271] The court held that review of a disqualification denial should not be deferential because a disqualification motion 'puts into issue the integrity of the court's judgment' and places adjudicators in the role of judges of their own cause. [FN272]

The Balistrieri court's position has appeal because it addresses the most troublesome aspect of the disqualification process, the requirement that a judge under attack make an 'objective' assessment of his personal, emotional involvement. In addition, the Balistrieri court's position rests on the argument frequently used to support mandamus jurisdiction--the responsibility of the courts of appeals to supervise and maintain the integrity of the judicial system. [FN273] The court did not, however, address the fact that plenary review of disqualification is in conflict with the congressional commentary on the standard of review, [FN274] and contrary to the general practice of the courts. [FN275]

Although the position taken by the Balistrieri court is extreme, consideration of the congressional statement in context suggests that appellate courts should not be wholly deferential to district court judges who have denied a disqualification motion. The House Report called on appellate courts to assess 'all the facts and circumstances' of a disqualification issue at the same time that it ***734** referred to 'sound judicial discretion,' [FN276] thus suggesting that the court's review should be comprehensive. Furthermore, Congress severely constricted judicial discretion over disqualification in revising section 455. This is evidenced by the fact that there is no discretion if the circumstances of a case fit within one of the categories in section 455(b), which mandates disqualification without exception. [FN277] Although judges have some discretion in their evaluation of the evidence under the objective standard of section 455(a), their evaluation is limited by the low threshold of proof set by Congress and by guidelines set by the appellate courts. [FN278] Moreover, when reasonable grounds for disqualification exist disqualification is mandatory. [FN279] The discretion of the district court is thus narrowly circumscribed and subject to the supervision of the courts of appeals.

Other limitations on issuance of the writ of mandamus restrict its availability. One limitation is that the writ is generally not available when appeal from final judgment provides an adequate remedy. [FN280] The Fifth Circuit has denied the writ on the grounds that appeal provided an adequate remedy for failure to disqualify. [FN281] The majority of courts have held, however, that review of disqualification denials prior to final judgment is critical to the judicial system, if not to the litigant. [FN282]

A more significant barrier to obtaining disqualification by means of a writ of mandamus is that litigants are required to show that their right to issuance of the writ is 'clear and indisputable.' [FN283] It is possible to interpret this requirement as necessitating no more than a finding of abuse of discretion. [FN284] But the ***735** need to show a clear and indisputable right has also been interpreted as imposing a higher standard of review. [FN285] Following disqualification denials, courts of appeals generally require a non-frivolous claim for

disqualification [FN286] and require that bias be 'clearly and indisputably' established. [FN287]

The limited scope of discretion in disqualification decisions and the courts' general interpretation of mandamus requirements suggest that limitations on mandamus do not preclude interlocutory review of disqualification motions in federal courts. Courts have, in fact, advocated liberal interpretation of their powers of review under the writ in disqualification matters as a measure essential to preserving the integrity of the court. [FN288] Actual disqualification by means of the writ is subject to the clear and indisputable right requirement, however. Thus the writ can be used to correct clearly wrongful refusals but it may not be available for routine review. As a result, mandamus review cannot be relied on to ensure the participation of an adjudicator other than the challenged judge in the disqualification decision.

CONCLUSION

The goals of fairness and public confidence in the judiciary are not fully met by current disqualification practices. Mandamus provides a means for courts of appeals to supervise and set standards for clear abuse of discretion, but it does not provide for the routine involvement of an independent adjudicator in the disqualification process. [FN289] To make objective disqualification more meaningful, Congress should act either to amend section 455 to provide for transfer of the disqualification motion to another adjudicator at the district court level [FN290] or provide for immediate and comprehensive appellate review of disqualification denials without the restrictions imposed on review under the writ of mandamus. [FN291]

***736** In addition to congressional action to ensure independent adjudication of disqualification issues, realization of the goals of judicial disqualification require the commitment of the courts. Congress struck a balance when it revised section 455 and decided that, despite the burdens disqualification imposed, it would be mandated where a judge's impartiality might reasonably be questioned. [FN292] Congress has appropriately left to the courts the responsibility of interpreting this standard. The courts, however, have not always held fast to the objectives Congress established. [FN293] Instead, courts have avoided the burden of disqualification by failing to focus on the congressionally mandated objective standard, and by showing deference at the appellate level to the decisions of the challenged judges. One circuit has gone so far as to impose the requirement of a high standard of proof of bias as a prerequisite to post-trial review. [FN294]

To establish the proper balance, courts of appeals should reexamine the restrictions they have placed on disqualification. As supervisors of the district courts, they should use the available review procedures to set forth more explicit guidelines for disqualification based on an objective standard and thus hold district court judges to the appropriate high level of accountability.

FN1. Ward v. City of Monroeville, 409 U.S. 57, 61-62 (1972). See also Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980) ('powerful' constitutional interest in fair adjudicative procedure); Redish & Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 YALE L.J. 455, 457 (1986) (independent adjudicator necessary to satisfy due process requirements).

FN2. See Judicial Disqualification: Hearing on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 1, 75 (1971 and 1973) [hereinafter Senate Hearing] (statement of Senator Burdick) (disqualification ensures that judicial decision is not tainted with partiality and thus 'enhances public confidence in the judicial system').

FN3. The first federal disqualification statute disqualified judges from cases in which the judge was 'concerned in interest,' or had been of counsel for either party. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278 (1872) (amended and recodified 1911). 28 U.S.C. § 455(b) (1982) requires judges to disqualify themselves on several specified grounds, including financial interest, personal or professional relationships with persons involved in the litigation, or prior involvement in the litigation. See infra note 12 for the text of § 455(b). In addition, federal law disqualifies judges in circumstances where a reasonable person would question a judge's impartiality, 28 U.S.C. § 455(a), and specifically

disqualifies a judge for bias or prejudice. 28 U.S.C. §§ 144 & 455(b)(1); see infra note 35 for the text of § 144, and infra note 12 for the text of § 455.

FN4. Senate Hearing, supra note 2, at 74 (statement of Senator Burdick); H.R. REP. NO. 1453, 93d Cong., 2d Sess. 1, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6354 [hereinafter House Report].

FN5. 28 U.S.C. § 455(a) (1982). See infra note 12 for the text of § 455(a).

FN6. See infra notes 26-30 and accompanying text for a discussion of the congressional intent behind the revision of § 455.

FN7. See infra notes 83-108 and accompanying text for a discussion of the standards of proof of bias under §§ 455(a), 455(b)(1) and 144.

FN8. See infra notes 109-94 and accompanying text for a discussion of the judicially-created substantive rules for disqualification.

FN9. See infra notes 23-25, 228-32 and accompanying text for a discussion of disqualification procedures.

FN10. See infra notes 51-88 and accompanying text for a discussion of the availability and standards of review on appeal.

FN11. 28 U.S.C. §§ 144, 455 (1982). Appellate courts as well as district courts are subject to § 455, while § 144 applies only to district courts. The only other federal disqualification statute applies to appellate courts and provides that '[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.' 28 U.S.C. § 47 (1982).

FN12. 28 U.S.C. § 455 (1982) states:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> >
> > (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> >
> > (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
> >
> > (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is know by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civil organization is not a 'financial interest' in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

FN13. Id. § 455(a).

FN14. Id. § 455(b).

FN15. Id. § 455(b)(4).

FN16. Id. § 455(d)(4).

FN17. Id. § 455(b)(5).

FN18. Id. § 455(b)(2).

FN19. Id. § 455(b)(3).

FN20. Id. § 455(b)(1).

FN21. Id. § 455(e).

FN22. Id. The waiver provision is an inversion of the waiver provisions of the American Bar Association ('ABA') Code of Judicial Conduct. In the final draft of the ABA Code, waiver of disqualification on grounds of interest or relationship is allowed after full disclosure. CODE OF JUDICIAL CONDUCT Canon 3D (1972). Waiver is not permitted under the general provision that disqualifies the judge whose impartiality is reasonably questioned. Id. The ABA's rule was based on the premise that parties should not be permitted to waive a provision designed to promote public confidence in the judiciary. Senate Hearing, supra note 2, at 109 (Professor Thode, Reporter of the ABA's Special Committee on Standards for Judicial Conduct). The ABA allowed waiver where public confidence in the judiciary would not be affected, and safeguarded the parties by requiring that the waiver be made in writing, rather than orally in the presence of the judge. Id. The Senate framers, on the other hand, rejected any waiver of disqualification based on § 455(b) grounds, but allowed waiver of § 455(a) disqualification on the rationale that a judge should be permitted to discuss with the attorneys involved in a case whether the objective standard required disqualification. Id. at 112 (Mr. Westphal, chief counsel to the Senate Committee on the Judiciary).

FN23. 28 U.S.C. § 455(a) ('Any judge . . . shall disqualify himself. . . .'); id. § 455(b) ('He shall also disqualify himself. . . .').

FN24. See Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (party need not follow particular procedure under § 455(a); federal judges must observe § 455 guidelines sua sponte).

FN25. Davis v. Board of School Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

FN26. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609 (codified as amended at 28 U.S.C. § 455 (1982)).

FN27. Senate Hearing, supra note 2, at 74 (statement of Senator Burdick); House Report, supra note 4, at 6355. The revisions were also motivated, in part, by a perceived need for clarification of standards that arose from the confirmation hearings for Judge Haynsworth, a Nixon nominee to the Supreme Court who was rejected by the Senate. Senate Hearing, supra note 2, at 10, 25 (statements of Senators Burdick, Bayh, and Hollings).

Congress also acted to coordinate federal law with revisions in the Canon of Judicial Conduct being developed by the American Bar Association. A tentative draft of the proposed ABA revisions was circulated two months prior to the first Senate hearings on the revisions to § 455, and the bill was delayed until the ABA completed its process of revision. Senate Hearing, supra note 2, at 2, 74, 78-79 (statements of Senator Burdick and Judge Traynor). The bill's sponsors wanted to minimize discrepancies between federal disqualification law and ABA standards. Id. at 74 (Senator Burdick).

The bill's sponsors were also motivated by their perception of heightened public standards of impartiality, id. at 10 (statement of Senator Bayh), and noted that the increased number of federal judges gave them the freedom to require stricter standards. Id. at 26 (statement of Senator Hollings).

FN28. The superseded statute read in full:

Any justice or judge of the United States shall disqualify himself in any case in which he was a substantial interest, has been of counsel, is a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908.

FN29. 28 U.S.C. § 455(a); see supra note 12 for the text of § 455(a).

FN30. Senate Hearing, supra note 2, at 2, 74 (Senator Burdick); House Report, supra note 4, at 6255. The chairman of the Senate Judiciary Committee described the 'duty to sit' rule as a rule that clouded a judge's judgment on disqualification. Senate Hearing, supra note 2, at 74 (Senator Burdick). The House, however, added the caution that elimination of this rule 'should not be used by judges to avoid sitting on difficult or controversial cases.' House Report, supra note 4, at 6355; see also New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976, 980 (7th Cir. 1986) (judge disqualified himself unnecessarily when his holdings did not constitute § 455(b)(4) financial interest). The court stated: 'A judge may decide close calls in favor of recusal. But there must first be a close call.' Id.

FN31. See supra note 12 for the text of § 455(b)(1); see infra note 35 for the text of § 144.

FN32. Courts have determined that a motion for disqualification under one of the sections--455(a), 455(b)(1), or 144--requires the consideration of disqualification under the other sections as well. See Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (judge has duty to consider disqualification under § 455 when § 144 affidavit does not require disqualification); United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980) (judge who declines to grant recusal under § 455 must still consider sufficiency of affidavit under § 144).

Courts have coordinated the statutes procedurally by charting various paths that reach, if necessary, all three provisions. One approach is to begin by evaluating the affidavit under § 144 and to proceed to assessment of the situation under § 455 only if the affidavit is untimely or insufficient. See United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985) (after determining § 144 affidavit legally insufficient, court considered disqualification under § 455(b)(1)), cert. denied, 106 S. Ct. 3284 (1986); Bailar, 625 F.2d at 128 (judge disqualified under § 455(a) although § 144 affidavit was technically insufficient); Sibla, 624 F.2d at 868 (finding that § 144 affidavit is legally insufficient triggers duty to evaluate circumstances under § 455).

Alternatively, judges may begin with § 455(a) and evaluate the § 144 affidavit only if they do not disqualify themselves under § 455. See Sibla, 624 F.2d at 868 (judge who declines to grant recusal under § 455 must still consider the sufficiency of the affidavit under § 144). A judge beginning at § 455(a) would need to consider § 144 only if the allegations of bias where false and thus would not lead a reasonable person to question the judge's impartiality.

FN33. See infra notes 112-18 and accompanying text for a discussion of courts' application of the § 144 judicial gloss to § 455(a).

FN34. Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090 (amended by Act of June 25, 1948, ch. 646, § 144, 62 Stat. 898) (amendment added the words 'timely and sufficient' to modify 'affidavit').

FN35. 28 U.S.C. § 144 (1982) provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

FN36. Id.

FN37. A § 144 affidavit must 'state the facts and reasons for the belief that bias or prejudice exists,' 28 U.S.C. § 144, and must be signed. See Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (court need not consider § 144 motion where party had not signed affidavit). A court may consider only one affidavit filed pursuant to § 144. See United States v. Merkt, 794 F.2d 950, 961 (5th Cir. 1986), cert. denied, 107 S. Ct. 1603 (1987); United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985), cert. denied, 106 S. Ct. 3284 (1986).

Section 144's timeliness provision has been interpreted to require filing of the motion within a reasonable time of discovery of the bias. See United States v. Gigax, 605 F.2d 507, 511 (10th Cir. 1979) (file § 144 motion promptly after facts become known); Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. 1978) (timeliness measured not in absolute and arbitrary way from date of discovery but with consideration of future stages of case).

FN38. See Berger v. United States, 255 U.S. 22, 36 (1921).

FN39. 255 U.S. 22 (1921).

FN40. Id. at 35-36.

FN41. Until the Supreme Court decided Berger, it was possible to interpret § 144 as providing a peremptory challenge. The chief sponsor of the bill indicated that it would function as a form of peremptory challenge of judges, 46 Cong. Rec. 2627 (1911) (statements of Rep. Cullop), and the wording of the original provision would have permitted it to be so used. Prior to amendment it 1948, the word 'sufficient' did not appear as a modifier of 'affidavit.' Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090. The 1911 version required the judge to transfer the case when 'an affidavit' was filed. Id.

FN42. Berger, 255 U.S. at 36. The Court explained: 'To commit to the judge a decision on the truth of the facts gives chance for the evil against which the section is directed.' Id.

FN43. See infra notes 109-94 for a discussion of judicial rules for disqualification on the basis of personal bias or prejudice.

FN44. 28 U.S.C. § 455(b)(1).

FN45. Compare § 455(b)(2)-(5) with § 455(b)(1).

FN46. See supra note 12 for the text of § 455(b)(1).

FN47. Courts seldom offer a definition of bias or prejudice. The Supreme Court provided a general, but tautological, definition of bias or prejudice in Berger v. United States, describing it as 'a bent of mind that may prevent or impede impartiality of judgment.' 255 U.S. at 33-34. In case law, positive definitions tend to be fact-specific. For example, in Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976), a prisoners' rights suit in which the judge was accused of bias toward state prisoners, the court defined personal bias 'as an attitude toward petitioner that is significantly different from and more particularized than the normal, general feelings of society at large against convicted wrongdoers.' Id. at 417.

FN48. S. 1553, 92d Cong., 1st Sess. (1971), reproduced in Senate Hearing, supra note 2, at 3.

FN49. 28 U.S.C. § 455(b)(1).

FN50. Senate Hearing, supra note 2, at 85. As the chairman of the ABA committee explained, 'There are many things on which it may be good for judges to have fixed opinions, like fixed opinions on freedom under the first amendment, fixed opinions that racial discrimination is invidious, and so on.' Id.

FN51. See supra note 35 for the text of § 144. The ABA commentator indicated that despite the change in language, '[i]t was intended that a judge disqualify himself if he had made up his mind on the merits before he heard the case.' Senate Hearing, supra note 2, at 93 (Professor Thode).

FN52. See infra notes 12-18 and accompanying text for a discussion of the judicial gloss on disqualification for bias or prejudice.

FN53. 28 U.S.C. § 455(a) (1982).

FN54. See Redish & Marshall, supra note 1, at 472-75 (analysis and critique of balancing test applied to procedural due process rights).

FN55. See Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 CASE W. RES. L. REV. 662, 664-65 (1985) (excessive disqualification would damage efficient administration of justice).

FN56. See In re Cement Antitrust Litig., 688 F.2d 1297, 1313 (9th Cir.) (judge disqualified in complex class action suit because his wife had minimal stock holdings in plaintiff companies), aff'd mem. sub nom., Arizona v. United States Dist. Ct., 459 U.S. 1191 (1982). This case has attracted critical comment as an example of the high burden imposed by the expansive definition of financial interest in § 455(b)(4) and the impossibility of waiver under § 455(e) for § 455(b) cases. See Bloom, supra note 55, at 702-05 (disqualification for de minimis financial interest without possibility of waiver disrupts litigation and wastes judicial resources); Note, Bias and Interest: Should They Lead to Dissimilar Results in Judicial Qualification Practice?, 27 ARIZ. L. REV. 171, 189-92 (1985) (per se disqualification for minimal financial interests harmful to public perception of judiciary).

FN57. Statements from both the Senate and the House of Representatives suggested that Congress found that the large numbers of federal judges permitted liberal standards for disqualification and sharp restrictions on waiver of disqualification. Senate Hearing, supra note 2, at 74; House Report, supra note 4, at 6357. See supra note 30 and accompanying text for a discussion of congressional elimination of the duty to sit.

FN58. Concern for judge-shopping is evident in the House Report which stated: 'Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.' House Report, supra note 4, at 6355. See also In re International Business Machs. Corp., 618 F.2d 923, 929 (2d Cir. 1980) (adverse ruling cannot disqualify judge).

FN59. See supra notes 109-94 and accompanying text for a discussion of the judicial development of substantive grounds for disqualification under § 455(a).

FN60. See Note, Disqualification of Judges and Justices in the Federal Courts, 86 HARV. L. REV. 736, 746-47 (1973) (concern for appearances necessary because judicial authority rests ultimately on public acceptance of judicial decisionmaking).

FN61. See Hall v. Small Business Admin., 695 F.2d 175, 178-79 (5th Cir. 1983) (to satisfy appearance of impartiality test of § 455(a), disqualification must be based on reasonable conclusion from objectively ascertainable facts, not on subjective assessment of judge's state of mind).

FN62. The language of 28 U.S.C. § 455 (1982), which gives judges the responsibility to disqualify themselves in several specified circumstances, provides for disqualification where no one but the judge knows the reason. Disqualification of this sort is generally not documented by written opinion. An instance of this use of § 455 may be seen in United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986) (judge's unexplained voluntary recusal in prior case involving defendant is not sufficient grounds for disqualification in subsequent case involving defendant), cert. denied,

107 S. Ct. 1603 (1987).

FN63. See supra notes 21-22 and accompanying text for a discussion of waiver requirements in § 455(e), prohibiting waiver where disqualification is based on § 455(b).

FN64. 28 U.S.C. §§ 144, 455(b)(1) (1982). See supra note 12 for the text of § 455(b)(1); see supra note 35 for the text of § 144.

FN65. 28 U.S.C. § 144.

FN66. Id. § 455(b)(1) (emphasis added).

FN67. For the standard applied to § 144, see Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982) (§ 144 affidavit sufficient if it alleges facts which, if true, would convince reasonable person that bias exists), cert. denied, 464 U.S. 814 (1983); see also United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985), cert. denied, 106 S. Ct. 3284 (1986); United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973).

Courts tend to treat § 455 as a unit when setting forth the standard, rather than treating § 455(b)(1) separately from § 455(a). See Story, 716 F.2d at 1091 (reasonable person standard applied to § 455 as a whole); Chitimacha, 690 F.2d at 1167 (charges of partiality based on §§ 455(a) and (b) resolved by application of reasonable person standard).

FN68. See Chitimacha, 690 F.2d at 1165 (§ 144 affidavit must convince a reasonable person); Balistrieri, 779 F.2d at 1202 (requirement that facts convince a reasonable person of bias applied to both § 455(b)(1) and § 144).

FN69. Courts generally apply a three-part test for legal sufficiency, requiring that the facts set forth in the affidavit (1) be material and stated with particularity (2) be such that, if true, they would convince a reasonable person that bias exists; and (3) show personal rather than judicial bias. United States v. Merkt, 794 F.2d 950, 960 n.9 (5th Cir. 1986), cert. denied, 107 S. Ct. 1603 (1987); see also Phillips v. Joint Legislative Comm'n., 637 F.2d 1014, 1019 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); Thompson, 483 F.2d at 528.

FN70. Thompson, 483 F.2d at 528 (emphasis added); accord Balistrieri, 779 F.2d at 1199; United States v. Serrano, 607 F.2d 1145, 1150 (5th Cir. 1979), cert. denied, 446 U.S. 910 (1980). The standard has become more rigorous over they years. In Berger v. United States, the Supreme Court demanded only that the affidavit 'give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.' 255 U.S. at 33-34.

FN71. See infra note 83 and accompanying text for discussion of the § 455(a) standard.

FN72. Berger, 255 U.S. at 36.

FN73. Balistrieri, 779 F.2d at 1199 (judge must assume facts are true, even if judge knows them to be false); Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976) (judge must accept truth of allegations and good faith of pleader even if judge has knowledge to the contrary).

FN74. See, e.g., In re Yagman, 796 F.2d 1165, 1181-82 (9th Cir. 1986) (§ 455 treated as unit in setting forth reasonable doubt standard for disqualification); United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) (single reasonable doubt standard established for § 455).

Focus on § 455 is not surprising. Judges can save face by disqualifying themselves under § 455(a), on grounds that a reasonable person could question their impartiality, rather than admitting they are actually biased by disqualifying themselves under § 455(b)(1). See Balistrieri, 779 F.2d at 1203 (judges may be especially reluctant to recuse themselves when doing so requires admission that actual bias or prejudice has been proved). Likewise, it is logical for one to surmise that courts of appeals support that focus, because they may then avoid directly impugning the

integrity of district court judges by using § 455(a) instead of § 455(b)(1).

FN75. See, e.g., United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980) (§ 455(b)(1) simply provides specific example of situation in which a judge's 'impartiality might reasonably be questioned' pursuant to § 455(a)); United States v. Conforte, 624 F.2d 869, 881 (9th Cir.) (same test for subsections (a) and (b) which disqualifies on a reasonable person standard for either the appearance or the fact of bias) cert. denied, 449 U.S. 1012 (1980).

Bloom, supra note 55, at 675, suggests that the Ninth Circuit Court of Appeals applies the bias in fact requirement of § 455(b)(1) to both § 455(a) and § 455(b)(1). But the court made clear in Conforte that both sections would be a evaluated under the standard requiring disqualification for the appearance of bias set forth in § 455(a). 624 F.2d at 881.

The Fifth Circuit Court of Appeals, soon after § 455 was revised, issued an ambiguous holding that could be interpreted as imposing a bias in fact requirement on both § 455(a) and § 455(b)(1). Parrish v. Board of Comm'rs, 524 F.2d 98, 103-04 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976). See Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U. CHI. L. REV. 236, 248 n.66 (1978) (Parrish holding ambiguous but compatible with appearance of bias rule). But cf. Bloom, supra note 55, at 675 (Parrish and subsequent cases require bias in fact). More recent Fifth Circuit decisions clearly apply the § 455(a) requirements to both § 455(a) and § 455(b)(1). See United States v. Merkt, 794 F.2d 950, 960 n.8 (5th Cir. 1986) (test of whether reasonable person would 'harbor doubts' applied to both sections), cert. denied, 107 S. Ct. 1603 (1987).

FN76. 779 F.2d 1191 (7th Cir. 1985), cert. denied, 106 S. Ct. 1490 (1986).

FN77. Id. at 1202. The Balistrieri court apparently based its holding on a literal reading of the statute. The court stated that actual bias was required after simply reciting the statutory language and offered no other support for this position. Id.

FN78. Id. at 1202. The court reasoned that '[t]he disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by compelling evidence.' Id. The court found no actual bias on the part of the judge who had previously worked as a prosecutor and allegedly targeted the defendant as the head of an organized crime family. Id. at 1196-97.

FN79. See supra note 12 for the text of § 455(a).

FN80. Hall v. Small Business Admin., 695 F.2d 175, 178-79 (5th Cir. 1983) (test under § 455(a) is appearance of partiality, not actual prejudice); see also Balistrieri, 779 F.2d at 1204; United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

FN81. 28 U.S.C. § 455(a).

FN82. Senate Hearing, supra note 2, at 2, 74 (Senator Burdick); House Report, supra note 4, at 6354. See Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980) (disqualification required even where question is close).

FN83. See, e.g., United States v. Nobel, 696 F.2d at 235-36 (3d Cir. 1982) (§ 455(a) disqualifies on appearance of bias standard), cert. denied, 462 U.S. 1118 (1983); Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982) (standard is whether reasonable person would harbor doubts about judge's impartiality; appearance of impartiality is required), cert. denied, 464 U.S. 814 (1983).

FN84. See Idaho v. Freeman, 507 F. Supp. 706, 723-725 (D. Idaho 1981) (Fifth and Ninth Circuits interpret § 455(a) as requiring bias in fact) (citing United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978) (§ 455(a) should be interpreted as setting up same test for disqualification as § 455(b)(1) and § 144) and Parrish v. Board of Comm'rs, 524 F.2d 98, 101-02 (5th Cir. 1975) (en banc) (gloss on § 144 applies fully to § 455), cert. denied, 425 U.S. 944 (1976));

see also Bloom, supra note 55, at 675 (Fifth Circuit and Ninth Circuit cases require bias in fact).

FN85. The Fifth Circuit, which may have required bias in fact at one time, has more recently stated clearly that the standard under § 455(a) is the appearance of bias. Hall v. Small Business Admin., 695 F.2d 175, 178-79 (5th Cir. 1983) (test under § 455(a) is appearance of partiality rather than actual bias). See also Comment, supra note 74, at 248 n.66 (majority opinion in Parrish ambiguous; can be read as acknowledging appearance of bias standard for § 455(a)).

The Ninth Circuit backed away from the bias in fact requirement in United States v. Conforte, 624 F.2d 869 (9th Cir. 1980). The Conforte court interpreted its Olander holding to mean that the same substantive rules regarding bias or prejudice would apply whether the court was determining the appearance or the fact of bias. Conforte, 624 F.2d at 880 (citing Olander, 584 F.2d at 882).

FN86. United States v. Balistrieri, 779 F.2d 1191, 1204 (7th Cir. 1985), cert. denied, 106 S. Ct. 1490 (1986). Accord New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976, 979 (7th Cir. 1986); Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 713 (7th Cir. 1986).

FN87. See supra notes 76-78 and accompanying text for a discussion of the Balistrieri court's analysis of § 455(b)(1).

FN88. 779 F.2d at 1204.

FN89. Id.

FN90. Id. at 1204-05.

FN91. See supra notes 73-74 and accompanying text for a discussion of the courts' tendency to focus on § 455(a).

FN92. See, e.g., Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 983 (D.C. Cir. 1984) (disqualification issue arose as a result of opinions expressed in judge's memorandum opinion), cert. denied, 470 U.S. 1005 (1985).

FN93. House Report, supra note 4, at 6355.

FN94. Id.

FN95. Senate Hearing, supra note 2, at 112 (statements of Prof. Thode and Mr. Westphal).

FN96. Id. at 87-88. Judge Traynor, chairman of the ABA Special Committee of Standards of Judicial Conduct, objected to what is now § 455(b)(3), and argued that the last part of that provisions, not found in the ABA Code, was unnecessary. Id.

FN97. See supra note 12 for text of §§ 455(b)(4) and 455(d)(4). But see Note, supra note 56, at 189-92 (per se disqualification for minimal financial interests harmful to public perception of judiciary).

FN98. See infra notes 99-107 and accompanying text for a discussion of Supreme Court cases setting forth the due process standards.

FN99. See, e.g., Ward v. Village of Monroeville, 409 U.S. 57, 60-61 (1972) (due process right violated where judge is mayor of town receiving benefit of fines); In re Murchison, 349 U.S. 133, 136-37 (1955) (due process right violated where trial judge also acted as prosecuting judge); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (due process right violated where judge's salary paid in part by fines judge imposed).

FN100. See, e.g., Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1585 (1986) (only in extreme cases would

disqualification on basis of personal bias or prejudice be constitutionally required); Tumey, 273 U.S. at 523 (not all questions of judicial disqualification are constitutional questions). These cases involved disqualification of state court judges.

Other due process decisions dealing with adjudicative impartiality have involved administrative decisionmakers. See Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980) (decision by regional administrator in Department of Labor not required to meet impartiality standards applied to judges); FTC v. Cement Inst., 333 U.S. 683, 701-02 (1948) (FTC's expressed opinions on points of law neither evidence of bias nor violative of due process).

In the few federal judicial disqualification cases heard by the Supreme Court, the Court has not reached the question of due process but rather has confined itself to interpreting the federal statute at issue. See United States v. Grinnell Corp., 384 U.S. 563, 580-83 (1966) (applying § 144 where judge's personal bias alleged); Berger v. United States, 255 U.S. 22, 34-35, (1921) (applying Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090, precusor to § 144). The Court's focus on statutory interpretation is consistent with its practice of resolving cases on statutory grounds if possible before reaching constitutional questions. See Wood v. Strickland, 420 U.S. 308, 314 (1975) (Court practice is to deal with dispositive statutory issue before considering constitutional construction issues).

FN101. 106 S. Ct. 1580 (1986).

FN102. Id. at 1582-83.

FN103. Id. at 1586-87.

FN104. Id. at 1585, 1588.

FN105. Id. at 1585. The Court determined that the appellant's allegation of bias based on the chief judge's expressions of general frustration with insurance companies did not rise to the level of a constitutional question. Id. The Court did not, however, indicate what circumstances or what evidence of bias would rise to the level of a due process violation.

For a critique of the judicial reluctance to find violations of due process where bias or prejudice is alleged, see Redish & Marshall, supra note 1, at 500-02 (distinction in constitutional treatment between personal bias and interest unjustified).

FN106. Lavoie, 106 S. Ct. at 1587-88. The Court ruled that the alleged interest of the other judges on the panel, who were members of the plaintiff class in a suit against another insurance company, was 'highly speculative and contingent,' and thus did not meet the due process test that an interest be direct, personal, substantial, and pecuniary. Id. at 1588.

FN107. Id. at 1587 (quoting Ward v. Village of Monroeville, 409 U.S. 57, 60-61 (1972) and In re Murchison, 349 U.S. 133, 136 (1955) respectively).

FN108. See supra notes 86-90 and accompanying text for a discussion of the Seventh Circuit position concerning appellate review of disqualification decisions.

FN109. See infra notes 124-50 and accompanying text for a discussion of the extrajudicial source requirement. See supra notes 51-83 and accompanying text for discussion of disqualification for opinions on the law.

FN110. See infra notes 184-88 and accompanying text for a discussion of disqualification for bias toward an attorney.

FN111. See supra notes 89-94 and accompanying text for discussion of courts' refusal to disqualify on the basis of general background and experience.

FN112. 28 U.S.C. § 144 (1982).

FN113. Id. § 455 (1982).

FN114. 517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

FN115. Id. at 1052.

FN116. Id.

FN117. See, e.g., United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) (well settled that §§ 144 and 455 'must be construed in pari materia') (quoting City of Cleveland v. Kruppansky, 619 F.2d 576, 578 (6th Cir.), cert. denied 449 U.S. 834 (1980)); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980) (§§ 455(a) & (b)(1), like § 144, require recusal only if bias or prejudice is directed against party and stems from extrajudicial source); In re International Business Machs. Corp., 618 F.2d 923, 928-29 (2d Cir. 1980) (§§ 455(a) and 455(b)(1) require that bias be personal and from extrajudicial source).

FN118. See United States v. Haldeman, 559 F.2d 31, 132 n.297 (D.C. Cir. 1976) (judicial understanding of § 144 applies to revised § 455, which requires disqualification when impartiality may reasonably be questioned), cert. denied, 431 U.S. 933 (1977).

A few courts have disagreed, stating that the judicial interpretation of § 144 does not carry over to § 455(a). United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982). See also United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978) (§ 455(a) permits disqualification on evidence from judicial source). The minority view does not, however, produce results significantly different from the results reached by courts which apply the § 144 judicial gloss to § 455(a). The courts that limit the applicability of the § 144 judicially-created rules take them as being without exception or nuance. In contrast, courts that apply the §§ 144 requirements to § 455(a) include exceptions within the standards they apply to each of the sections. Compare Coven, 662 F.2d at 168-69 (information from a judicial source relevant but not sufficiently prejudicial to disqualify without any other basis in record for questioning judge's impartiality) with Nicodemus v. Chrysler Corp., 596 F.2d 152, 156-57 (6th Cir. 1979) (emotional response by judge within judicial context sufficiently prejudicial to warrant disqualification).

FN119. See infra notes 127-34 and accompanying text for a discussion of the advantages of the extrajudicial source requirement.

FN120. See, e.g., United States v. Lee, 648 F.2d 667, 669 (9th Cir. 1981) (nature of judicial system is such that judges must rise above impermissible influences); United States v. Sinclair, 424 F. Supp. 715, 718 (D. Del. 1976) (affidavit must be strictly construed because judge presumed impartial), aff'd, 566 F.2d 1171 (3d Cir. 1977); see also infra notes 169-71 and accompanying text for a discussion of the presumption of impartiality in the context of disqualification for judges' opinions on the law.

FN121. See infra notes 135-40 and accompanying text for a discussion of the requirement for clear evidence of personal prejudice.

FN122. See infra notes 178-83 for a discussion of a proposal to permit disqualification based on strongly-felt disagreement with the law.

FN123. See infra notes 141-44 and accompanying text for a discussion of the pervasive prejudice exception to the extrajudicial source requirement.

FN124. See, e.g., United States v. Haldeman, 559 F.2d 31, 133 (D.C. Cir. 1976) (§ 144 does not disqualify judges on basis of prior judicial rulings or in-court comments prompted by legal proceedings), cert. denied, 431 U.S. 933

(1977).

FN125. 384 U.S. 563 (1966).

FN126. Id. at 583.

FN127. Id. at 580-83 (judge's comments critical of attorney's handling of case are not grounds for disqualification). See also Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) ('intemperate' statements in settlement conference based on perception of case are not grounds for disqualification), cert. denied, 450 U.S. 999 (1981).

FN128. See Ex parte American Steel Barrel Co., 230 U.S. 35, 44 (1913) (adverse rulings not grounds for disqualification).

FN129. In re International Business Machs. Corp., 618 F.2d 923, 927-30 (2d Cir. 1980) (statistical evidence of pattern of adverse ruling not grounds for disqualification under §§ 144 or 455).

FN130. See Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1020 (5th Cir. 1981) (outmoded and improper racial remarks incorporated in prior rulings do not disqualify judge in subsequent civil rights case), cert. denied, 456 U.S. 960 (1982); United States v. Jackson, 627 F.2d 1198, 1207 n.20 (D.C. Cir. 1980) (prior judicial exposure to same type of case inadequate basis for showing personal bias).

FN131. For application of the extrajudicial source requirement to bail hearings, see, e.g., United States v. Archbold-Newball, 554 F.2d 665, 681-82 (5th Cir.) (judge's bail denial based on stated belief of police testimony that defendants were in conspiracy not grounds for recusal), cert. denied, 434 U.S. 1000 (1977).

For application of the extrajudicial source requirement to other pretrial proceedings, see, e.g., United States v. Porter, 701 F.2d 1158, 1166 (6th Cir.) (judge's comment during preliminary hearing that defendants were 'apparently caught red-handed' not grounds for disqualification absent pervasive bias), cert. denied, 464 U.S. 1007 (1983); United States v. Cepeda Penes, 577 F.2d 754, 756-58 (1st Cir. 1978) (judge who heard aborted attempt to plead nolo contendere not disqualified from presiding over trial).

For application of the extrajudicial source requirement to trials, see, e.g., Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985) (judge who presided over denaturalization hearing need not disqualify himself from extradition hearing or from considering habeas corpus relief), cert. denied, 106 S. Ct. 1198 (1986); In re Corrugated Container Antitrust Litig., 614 F.2d 958, 963-66 (5th Cir.) (judge who presided over criminal trial not disqualified from hearing subsequent civil trial), cert. denied, 449 U.S. 888 (1980); United States v. Partin, 552 F.2d 621, 637 n.20 (5th Cir.) (judge not disqualified from presiding over retrial), cert. denied, 434 U.S. 903 (1977).

FN132. See, e.g., United States v. Studley, 783 F.2d 934, 939-40 (9th Cir. 1986) (fact that defendant publically denounced and filed lawsuit against judge not grounds for disqualification); United States v. Phillips, 664 F.2d 971, 1000-04 (5th Cir. 1981) (no extrajudicial source of bias to disqualify judge who learned of and discussed defendant's plans to disrupt trial and his threats against judge's life), cert. denied, 457 U.S. 1136 (1982).

FN133. See In re International Business Machs. Corp., 618 F.2d 923 (2d Cir. 1980), in which the court stated: 'A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias.' Id. at 929. See also Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) (extrajudicial source rule extended to statements in settlement conference to avoid unduly hampering judge's ability to effectuate settlement), cert. denied, 450 U.S. 999 (1981).

The use of this rationale in Phillips v. Joint Legislative Comm., 637 F.2d 1014 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982), in response to allegations of racism, raises the question whether the protection afforded by the extrajudicial source requirement extends too far. The court stated:

> We would be reluctant, in any but an extreme case, to base a disqualification order on . . . allegations [of a pattern of racism in prior opinions]. It is a district judge's duty to conduct trials, weigh evidence, consider the law, exercise his discretion, and reach decisions in the cases on which he sits. If he understands that a seemingly harsh comment toward a party or an attorney, or a perceived tendency to give severe sentences to some class of offenders, or an aggregate imbalance in victories for plaintiffs or defendants in a particular class of cases may subject him to a train of successful recusal motions in future cases, he may consciously or subconsciously shape his judicial actions in ways urelated to the merits of the cases before him.
>
> Id. at 1020.

FN134. See, e.g., Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (allowing defendant's assault of judge to support disqualification would encourage unruly courtroom behavior and result in disruption of judicial administration), cert. denied, 449 U.S. 1086 (1981).

FN135. 255 U.S. 22 (1921).

FN136. Id. at 28-29. See also Connelly v. United States Dist. Ct., 191 F.2d 692, 694-95 (9th Cir. 1951) (judge disqualified who publicly stated that Communists hid behind Bill of Rights and who said to counsel, 'I'm sorry to see you get mixed up with these Commies.').

FN137. 625 F.2d 125 (6th Cir. 1980).

FN138. The party was the local postmaster for whom the Postmaster General was substituted. Id. at 127.

FN139. Id. at 127.

FN140. Id. at 129.

FN141. 517 F.2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

FN142. 655 F.2d 44 (5th Cir. 1981).

FN143. Id. at 45 & n.2.

FN144. Id. at 47.

FN145. 596 F.2d 152 (6th Cir. 1979).

FN146. Id. at 157. The district judge stated:

> This thing is the most transparent and the most blatant attempt to intimidate witnesses and parties that I have seen in a long time. I don't believe anything that anybody from Chrysler tells me because there is nothing in the record that is before me and in my experience in dealing with this case that gives me reason to believe that they are worthy of credence by anybody. They are a bunch of villains and they are interested only in feathering their own nests at the expense of everybody they can, including their own employees, and I don't intend to put up with it.
>
> Id. At a later point in the trial, the judge indicated that the award he granted was shaped by his negative assessment of the defendant. Id. at 156-57.

In Shank v. American Motors Corp., 575 F. Supp. 125 (E.D. Pa. 1983), a district court judge reacted in similar fashion to the defendant automobile manufacturers. The judge refused to disqualify himself, alleging that his statement arose out of judicial experience and did not indicate extrajudicial bias. Id. at 129. He said, 'Automobile manufacturers

are among the most devious groups of defendants that I have seen in twenty-one years on the Bench.' Id. The defendants did not appeal this denial of disqualification.

FN147. Id. at 156. The court stated: "Often some degree of bias develops inevitably during a trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself." Nicodemus, 596 F.2d at 156 (quoting Whitaker v. McLean, 118 F.2d 596, 596 (D.C. Cir. 1941)).

FN148. Nicodemus, 596 F.2d at 156 (quoting Whitaker v. McLean, 118 F.2d at 596).

FN149. See, e.g., Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971) ('A judge cannot be driven out of a case'); Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (judge not disqualified for response toward defendant who had assaulted him), cert. denied, 449 U.S. 1086 (1981).

FN150. See Mayberry, 400 U.S. at 465-66 (judge became 'personally embroiled' with defendant, and therefore defendant given public trial before another judge). Compare In re Jafree, 741 F.2d 133, 136-37 (7th Cir. 1984) (in non-summary contempt proceeding for defamatory actions toward district court judges in which court did not follow proper procedure, judges disqualified for being personally embroiled in the controversy) with United States v. Greer, 714 F.2d 358, 360 (4th Cir. 1983) (judge who objected to attorney's accusation that he sentenced on racial basis and then called a recess, permitting time for emotions to cool, not disqualified for bias) and Wilks, 627 F.2d at 36-37 (although judge responded to assault, reaction did not disqualify him because he claimed down and conducted fair trial).

FN151. This rule is mitigated somewhat by 28 U.S.C. § 455(b)(3), which provides that judges who had been government employees are disqualified from a case if they previously served as counsel, adviser, or material witness concerning the proceedings, or if they expressed an opinion on the merits of the case. Id.

FN152. Cipollone v. Liggett Group, Inc., 802 F.2d 658, 659-60 (3d Cir. 1986) (judge's prior knowledge of issues in products liability suit against tobacco companies not grounds for disqualification), cert. denied, 107 S. Ct. 907 (1987).

FN153. 408 U.S. 1 (1972) (suit against army surveillance dismissed); 409 U.S. 824 (1972) (memorandum of Rehnquist, J., rejecting motion for disqualification).

FN154. 408 U.S. at 2.

FN155. 409 U.S. at 824-25.

FN156. Id.

FN157. Id. at 829. The revised version of § 455 has not yet been enacted. For the text of the disqualification statute in effect at the time, see supra note 28.

During the hearing process prior to Justice Rehnquist's confirmation as Chief Justice, information regarding his role in formulating the surveillance program became public and prompted criticism of his failure to disqualify himself in Tatum. Members of Congress and the legal community maintained that his involvement in policy-making required disqualifications. See Rehnquist's Critics Press Charges That He Was Unethical on Court, N.Y. Times, Sept. 11, 1986, p. B12, col. 1 (statements of Hazard, an expert on judicial ethics and a Republican, to the effect that Rehnquist should have disqualified himself in Tatum); Rehnquist Acted Improperly by Ruling On Surveillance Case, Ethics Expert Says, Wall St. J., Sept. 11, 1986, at 64, col. 1 (Yale Law School Professor Geoffrey Hazard statements that Rehnquist should not have participated in Tatum because of direct involvement in events that culminated in suit); New Questions Raised About Rehnquist's Role in Army Surveillance of Protestors, Wall St. J., Sept. 10, 1986, at 64, col. 1 (Senate Democrats state that information regarding Rehnquist's involvement in formulating surveillance policy

raises questions regarding his ethical judgment and sensitivity to the appearance of impropriety).

FN158. 409 U.S. at 835.

FN159. Id. at 836. Justice Rehnquist also argued that federal judges have a 'duty to sit' if not disqualified. Id. at 837. Congress specifically rejected this rule when it passed the revised disqualification statute later that same year. See supra note 30 and accompanying text for a discussion of the duty to sit.

FN160. See supra note 12 for text of § 455(b)(3).

FN161. See Senate Hearings, supra note 2, at 88-89 (need for § 455(b)(3) explained by reference to Laird v. Tatum).

FN162. See, e.g., Shaw v. Martin, 733 F.2d 304, 315-16 (4th Cir.) (vote for death penalty no more significant than oath binding judges to apply laws of legislature; it is not grounds for disqualification), cert. denied, 469 U.S. 873 (1984); United States v. Allen, 675 F.2d 1373, 1385 (9th Cir. 1980) (statement that marijuana importation is a serious crime with cancer-like effect on society is restatement of congressional purpose and cannot be grounds for disqualification), cert. denied, 454 U.S. 833 (1981); Smith v. Danyo, 585 F.2d 83, 87 (3d Cir. 1978) (statement that diversity cases do not belong in federal court is statement of legal principle and does not disqualify judge); see also Lawton v. Tarr, 327 F. Supp. 670, 671-72 (E.D.N.C. 1971) (judge who had publicly expressed his strong objection to Vietnam war refused to disqualify himself from Selective Service case).

FN163. 740 F.2d 980 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

FN164. Southern Pacific Communications Co. v. American Tel. & Tel. Co., 556 F. Supp. 825 (D.D.C. 1982), aff'd, 740 F.2d 980 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

FN165. 740 F.2d at 983, 988 n.7.

FN166. Id. at 990.

FN167. Id. at 991.

FN168. Id. The court suggested that judges should not be disqualified if they are 'capable of refining' their views in the process of the case, but they should be disqualified if their minds are 'irrevocably closed.' Id. Applying this test to the district court judge's handling of the AT&T case, the court found that the judge did not hold a fixed opinion at the outset of the case, as evidenced by his denial of a motion to dismiss the case on the basis of antitrust immunity, and that his evenhanded administration of the case provided no evidence of a 'closed mind' during trial. Id. at 991-92.

FN169. See id. at 993 (evidence must be weighed against strong presumption that judges do not substitute their personal views for controlling law).

FN170. Cf. Bloom, supra note 55, at 689 (previously stated opinion on important issue in case could lead reasonable person to question judge's impartiality).

Bloom addressed this issue prior to the circuit court decision in Southern Pacific Communications. He perceived the policy against disqualifying judges for opinions on the law as a blanket prohibition, rather than as a policy giving rise to a strong presumption of impartiality. Id. at 688. Bloom advocated replacing the blanket prohibition with a case-by-case analysis that would disqualify judges for the appearance of bias, and that would take into account 'whether and how widely the judge's views are publicly known, how strongly the views are held, whether the proper resolution of the legal issue is unsettled, and whether his views relate to the legal issue as applied in the specific factual context of the case . . ..' Id. at 697.

FN171. See Southern Pacific Communications, 740 F.2d at 991 (each new case confronts judge with new factual context, new evidence, and new efforts at persuasion; test is whether judge's mind is irrevocably closed with respect to issues as they arise in context of specific case).

FN172. See United States v. Clements, 634 F.2d 183, 187 (5th Cir. 1981) (fixed sentencing policy, established through judge's statement or prior record in similar cases, may disqualify); United States v. Thompson, 483 F.2d 527, 528-29 (3d Cir. 1973) (judge's statement showing policy of imposing stiff sentences for Selective Service violations grounds for disqualification).

FN173. 483 F.2d 527 (3d Cir. 1973). Although the Thompson court held that a litigant can disqualify a judge through a pretrial § 144 affidavit alleging a fixed sentencing policy, the court was evaluating a case in which the judge had declined to disqualify himself, id. at 528, and had actually imposed the thirty-month sentence he had indicated was his minimum. Id. The court, however, focused on the allegations in the affidavit, rather than the judge's conduct in the case. Id. at 528-29.

FN174. Id. at 528.

FN175. Id. See United States v. Townsend, 478 F.2d 1072, 1074 (3d Cir. 1973) (judge disqualified for statement showing fixed opinion on sentencing).

FN176. 483 F.2d at 529. One member of the circuit court panel filed a dissent in which he argued that the class was a judicial one, defined merely by their violation of the Selective Service Act, and not by a 'trait extraneous to the judicial process.' Id. at 530 (Adams, J., dissenting).

FN177. Id. at 529.

FN178. See Reserve Mining Co. v. Lord, 529 F.2d 181, 188-89 (8th Cir. 1976) (judge disqualified for disregarding appeals court mandate regarding district court jurisdiction).

FN179. See United States v. Allen, 675 F.2d 1373, 1385 (9th Cir. 1980) (anti-drug statement not grounds for disqualification in drug smuggling trial), cert. denied, 454 U.S. 833 (1981).

FN180. See Shaw v. Martin, 733 F.2d 304, 316 (4th Cir.) (judge who as legislator had voted for death penalty not disqualified), cert. denied, 105 S. Ct. 230 (1984).

FN181. Courts have shown an appropriate reluctance to disqualify on the basis of disagreement with applicable law. The Southern Pacific Communications court articulated the reason for this reluctance when it stated:

> It is well established . . . that a judge is not disqualified merely because he personally disagrees with the policy underlying a law that he is bound to apply in a case [since] . . . '[i]n fulfilling the functions of applying or considering the validity of a statute, or a government program, the judge endeavors to put aside personal views as to the desirability of the law or program . . ..'
>
> 740 F.2d at 993 (quoting Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1175 (D.C. Cir. 1979) (Leventhal, J., concurring), cert. denied, 447 U.S. 921 (1980)).

FN182. For example, a judge who had previously campaigned for political office on an anti-abortion platform could be disqualified from abortion cases.

FN183. See Southern Pacific Communications, 740 F.2d at 993 (allegation that judge allowed feelings to dominate considered but rejected on basis of record).

FN184. See Davis v. Board of School Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975) (disqualification should be based on judicial bias toward a party rather than counsel), cert. denied, 425 U.S. 944 (1976); cf. Gilbert v. City of Little Rock, 722 F.2d 1390, 1298-99 (8th Cir. 1983) (judge who voluntarily disqualified herself from cases involving certain attorney not required to disqualify herself from case in which that attorney had previously represented party because antipathy to attorney insufficient grounds for disqualification on personal prejudice), cert. denied, 466 U.S. 972 (1984).

FN185. See, e.g., In re International Business Machs. Corp., 618 F.2d 923, 932 (2d Cir. 1980) (court considered incidents of intemperate behavior toward attorneys and concluded they did not show bias toward party).

FN186. 540 F.2d 459 (10th Cir. 1976), cert. denied, 429 U.S. 951 (1976).

FN187. Id. at 462.

FN188. In re Yagaman, 796 F.2d 1165, 1178 (9th Cir. 1986) (tension between court and attorney did not create bias toward party). The court described this tension as a normal component of the judicial process, stating that '[b]ecause the nature of our system is adversarial, parties will occasionally be uncooperative, both with each other and with the court, and courts will sometimes be exacting.' Id. See also In re International Business Machs. Corp., 618 F.2d at 932 (incidents of intemperate behavior 'endemic to a trial of this dimension').

FN189. See Paschall v. Mayone, 454 F. Supp. 1289, 1300-01 (S.D.N.Y. 1978) (judge not disqualified for experience as an NAACP attorney).

FN190. 418 F. Supp. 1 (S.D.N.Y. 1975).

FN191. Id. at 4.

FN192. Id. Disqualification sought on the basis of a judge's background and experience was also rejected in Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 182 (E.D. Pa. 1974), aff'd, 552 F.2d 498 (3d Cir. 1977). The defendants, who were charged with discriminating against a class of black plaintiffs on the basis of race, sought to disqualify Judge Higginbotham by means of a § 144 affidavit alleging that he was black and had identified himself with black causes. Id. at 157-58. The defendant's central allegation was that Judge Higginbotham's recent speech before a black history organization revealed his identification with civil rights cases. Id. at 159-60, 163. In addition to refusing disqualification on the grounds that background and associations could not be used to prove bias, the judge noted that dedication to upholding the law also could not be used to disqualify a judge. Id. at 159.

See also Brody v. President & Fellows of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981) (fact that judge graduated from Harvard College does not disqualify him from hearing suit against Harvard), cert. denied, 455 U.S. 1027 (1982).

FN193. See Note, Meeting the Challenge: Rethinking Judicial Disqualification, 69 CALIF. L. REV. 1445, 1461 (1981) (simplistic allegations of bias based on implications from background rightfully given short shrift).

FN194. See infra notes 195-220 and accompanying text for a discussion of disqualification for an interest or relationship under § 455(a).

FN195. See supra note 12 for the text of 28 U.S.C. § 455.

FN196. See Senate Hearing, supra note 2, at 112 (relationship not specified under § 455(b) may raise question of impartiality under § 455(a)).

FN197. See infra notes 207-20 and accompanying text for a discussion of cases in which § 455(a) disqualification was based on an interest or relationship.

FN198. See Patzner v. Burkett, 779 F.2d 1363, 1372 (8th Cir. 1985) (disqualification not mandated where defense attorney had served judge as law clerk more than a year before in light of circuit rule that prohibited law clerks from appearing before their judge within a year of their service); Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (judge disqualified because current law clerk had interest in case).

FN199. United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982) (judge disqualified for holding stock in corporate victim of fraud), cert. denied, 462 U.S. 1118 (1983).

FN200. 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820 (1980).

FN201. Id. at 1110-12; see also Pepsico, Inc., 764 F.2d at 461 (disqualification required where judge indirectly sought employment in firm of attorney appearing before him).

FN202. 796 F.2d 796 (5th Cir. 1986).

FN203. Id. at 800-02. 28 U.S.C. § 455(b)(4) requires disqualification if a judge 'knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy . . ..' The court held that the judge, who was a trustee of Loyola University, had 'constructive knowledge' of an interest in the case because he had attended a meeting at which financial information was disseminated that revealed the university's interest. 796 F.2d at 803. The court concluded that the judge's claimed forgetfulness could not provide a defense against disqualification under the objective standard of § 455(a) and thus held that the judge's recusal was necessary. Id. at 802-03. Cf. Davis v. Xerox, 811 F.2d 1293 (9th Cir. 1987) (if reasonable person would conclude that judge had no knowledge of interest at time rulings made, § 455(a) does not require that rulings be vacated).

FN204. See, e.g., Nobel, 696 F.2d at 235 (disqualification depends on appearance of bias); Hall v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983) (inappropriate under § 455(a) to inquire into actual bias of judge).

FN205. See, e.g., United States v. Story, 716 F.2d 1088, 1090-91 (6th Cir. 1983) (personal bias charged but court addressed as real issue whether judge should be disqualified for prior association with charity which was victim of crime).

FN206. See Nobel, 696 F.2d at 234 (question of whether judge is disqualified for financial interest in corporate victim of crime is a question of law).

FN207. 754 F.2d 1153 (5th Cir. 1985), cert. denied, 106 S. Ct. 277 (1985).

FN208. Id. at 1158-59.

FN209. Id. at 1164-65.

FN210. Id. at 1165.

FN211. Id. at 1166.

FN212. Id.

FN213. Id.

FN214. The question whether a personal relationship with the victim of a crime constitutes a disqualifying relationship

is not settled. Compare United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982) (concern for maintaining public confidence in judicial integrity, which 'depends on a belief in the impersonality of judicial decisionmaking,' requires disqualification of judge with financial interest in corporate victim of crime), cert. denied, 462 U.S. 1118 (1983) with United States v. Sellers, 566 F.2d 884, 887 (4th Cir. 1977) (fact that judge owned stock in bank that was victim of robbery did not create reasonable apprehension that judge would be partial).

FN215. 754 F.2d at 1166.

FN216. Id.

FN217. 779 F.2d 1191 (7th Cir. 1985), cert. denied, 106 S. Ct. 1490 (1986).

FN218. Id. at 1200.

FN219. Id. at 1201.

FN220. Compare id. at 1201-02 (disqualification not required of judge who, as Attorney General, allegedly focused on defendant as organized crime figure) with Bradshaw v. McCotter, 785 F.2d 1327, 1329 (5th Cir. 1986) (habeas corpus relief granted because appellate judge, who had been state prosecuting attorney at time party was prosecuted and whose name appeared on state's brief, should have disqualified himself even though name appeared on brief as a matter or protocol and judge had not participated in prosecution), modified on reh'g, 796 F.2d 100, 101 (5th Cir. 1986) (although judge disqualified, habeas corpus relief not granted because judge's vote on appeal not controlling). See also Idaho v. Freeman, 507 F. Supp. 706, 731-33 (D. Idaho 1981) (in case in which plaintiffs sought extension of deadline for ratification of ERA, disqualification on basis of judge's holding responsible office in Mormon Church, which had taken stand and engaged in lobbying efforts against ERA, denied by challenged judge on grounds that he had never participated in anti-ERA lobbying nor made his personal position known).

FN221. Cf. Moore, Appellate Review of Judicial Disqualification Decisions in the Federal Courts, 35 Hastings L.J. 829, 846 (1984) (disqualification on the basis of bias or prejudice inherently subjective, requiring different treatment on review).

FN222. 28 U.S.C. § 455(a) (1982).

FN223. Id. § 455(b).

FN224. See supra notes 14-20 and accompanying text for a discussion of the statutory provisions mandating disqualification for interest or relationship.

FN225. Id.

FN226. See supra notes 195-220 and accompanying text for a discussion of disqualification under § 455(a) on the basis of interest or relationship. See also Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1587 (1986) (reviewing court not required to decide whether judge is actually biased by interest but only whether normal average judge would be biased in circumstances).

FN227. See Pepsico, Inc. v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985) (disqualification mandated where judge in negotiation for employment with law firm or party appearing before him); United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982) (court adopted rule that judge is disqualified for financial interest in victim of crime), cert. denied, 462 U.S. 1118 (1983).

FN228. See supra notes 109-93 and accompanying text for a discussion of judicial requirements for disqualification for bias or prejudice.

FN229. See, e.g., Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980) (remark undisputedly made by judge must be evaluated on objective standard that asks whether a reasonable person with knowledge of all the facts would doubt judge's impartiality).

FN230. See Hall v. Small Business Admin., 696 F.2d 175, 179 (5th Cir. 1983) (inquiry into the state of mind of a judge not part of the objective test); Roberts v. Bailar, 625 F.2d at 129-30 (judge's statement regarding his assessment of supervisor's character in employment discrimination suit disqualified him under the objective standard; court did not consider and explicitly rendered no opinion regarding existence of actual bias).

FN231. See supra note 30 and accompanying text for a discussion of the elimination of the duty to sit.

FN232. Id.

FN233. See, e.g., Roberts v. Bailar, 625 F.2d at 129-30 (judge's statement assessing character of key person in lawsuit disqualifies judge); Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-56 (6th Cir. 1979) (outburst against party unsupported by record grounds for disqualification); United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973) (fixed opinion on sentencing disqualified judge).

FN234. 28 U.S.C. § 144 (1982). See supra notes 35-43 and accompanying text for a discussion of § 144 requirements.

FN235. Berger v. United States, 225 U.S. 22, 36 (1921).

FN236. Id.

FN237. See supra notes 69-73 and accompanying text for a discussion of the standard of proof under § 144.

FN238. See supra notes 109-94 and accompanying text for a discussion of the judicial limitations on disqualification.

FN239. To determine the legal sufficiency of a § 144 affidavit, a judge must consider whether it is definite enough in its pleadings, whether the kind of prejudice it alleges is judicially recognized as grounds for disqualification, and, if so, whether the facts it alleges would convince a reasonable person that the judge is biased. See supra note 69 for the three-part test for legal sufficiency generally applied by the courts.

FN240. United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985), cert. denied, 106 U.S. 1490 (1986); see also Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (judge must evaluate disqualification motion from perspective of reasonable person with knowledge of all objective facts); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir.) (disqualification required if reasonable person with knowledge of circumstances would harbor doubts about judge's impartiality), cert. denied, 449 U.S. 820 (1980); Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979) (disqualification required if reasonable person would have factual grounds for doubting judge's impartiality).

FN241. See, e.g., In re International Business Machs. Corp., 618 F.2d 923, 927 (2d Cir. 1980) (intolerable to judicial system to allow challenged judge to terminate inquiry of prejudice until ultimate review on merits).

FN242. See Comment, Disqualification of Federal District Judges--Problems and Proposals, 7 SETON HALL L. REV. 612, 633-36 (1976) (automatic disqualification upon filing of motion recommended as efficient method that protects judges' reputations since it avoids discussion of actual or apparent bias); Note, Disqualification of Federal District Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455, 45 FORDHAM L. REV. 139, 159-63 (1976) (disqualification by peremptory challenge 'best way to rectify the existing deficiencies' in disqualification process).

FN243. See Note, supra note 193, at 1471-72 (judge-shopping most common abuse of California peremptory challenge provision).

FN244. Id. at 1472-73 (delays and judicial waste in California results from peremptory challenge rule).

FN245. See Senate Hearing, supra note 2, at 7-8, 13 (S. 1886, introduced by Senator Bayh, allowed one peremptory challenge per side).

FN246. To make transfer of disqualification decisions mandatory would require amendment of the current statute, 28 U.S.C. § 455, which explicitly places the responsibility for disqualification on the challenged judge. See supra note 12 for the text of § 455. See also Comment, supra note 75, at 266 n.172, for a discussion of creative ways to circumvent the current requirement that judges disqualify themselves.

FN247. See Bloom, supra note 55, at 697, 706 (decision should be referred to another district court judge to enhance appearance of impartiality); Redish & Marshall, supra note 1, at 503 n.180 (to make right to non-biased adjudicator meaningful, parties should be afforded opportunity to present their case for disqualification before judge other than the person challenged); Comment, supra note 75, at 265-67 (courts should encourage transfer at discretion of challenged judge); Note, supra note 193, at 1484 ('mini-hearing review' of affidavits on district court level best solution to problems with disqualification process).

FN248. See Note, supra note 193, at 1484 (refer disqualification questions to presiding judge to decide solely on basis of affidavits).

FN249. See Comment, supra note 75, at 265-66 (transfer policy could be used for delay and could be disruptive in states or territories with only one or two federal judges).

FN250. See Bloom, supra note 55, at 697 (administrative burden may be worth paying to enhance appearance of judicial impartiality); Comment, supra note 75, at 265-66 (transfers would produce more disinterested decision and spare judge embarrassment of ruling; best to make practice of transferring except where delay or disruption substantial).

FN251. See Redish & Marshall, supra note 1, at 504 n.180 (to allow litigant to go through trial with biased judge is at odds with Supreme Court pronouncement that due process affords right to impartial judge at all stages of process); see also Moore, supra note 226, at 851 (permitting trial before judge who is or appears to be biased constitutes enormous encroachment of fundamental value of impartiality).

FN252. See, e.g., Roberts v. Bailar, 625 F.2d 125, 126 (6th Cir. 1980) (remanded for new trial because disqualification required under § 455); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1104 (5th Cir.) (reversed because judge should have disqualified himself; remanded for new trial before different judge).

FN253. See, e.g., United States v. Harrelson, 754 F.2d 1153 (5th Cir.) (court faced with whether to grant new trial to person convicted of murdering district court judge), cert. denied, 106 S. Ct. 599 (1985).

FN254. Section 144 contains a timeliness requirement. See supra note 37 for discussion of the timeliness requirement under § 144. Section 455 does not contain any such requirement. In SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam) the Seventh Circuit held that no time limits may be imposed. Since then, the Seventh Circuit has questioned, but not altered, this ruling. See Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 716 (7th Cir. 1986) (Morgan decision repeatedly questioned, recently undermined by court of appeals; reconsideration unnecessary here). Several courts have rejected the Morgan analysis and imposed a timeliness requirement on § 455. See Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1164 n.3 (5th Cir. 1982) (§§ 144 and 455 both require timely motion), cert. denied, 464 U.S. 814 (1983); In re International Business Machs. Corp., 618 F.2d 923, 932 (2d Cir. 1980) (court can impose timeliness requirement despite lack of statutory provision). Timeliness may also be encouraged by treating failure to move for disqualification at an appropriate moment as an implicit waiver, as the Third Circuit did in United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

FN255. 28 U.S.C. § 1291 (1982). A decision is considered final only when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-74 (1981) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

Courts seldom review disqualification issues under the exception to the finality rule provided by federal law, 28 U.S.C. § 1292(b) (1982), which allows review prior to a decision on the merits only in narrowly circumscribed instances. Under § 1292(b), a district judge must certify an order asking for review and the appellate court must agree to hear the appeal. Id. The issue in question must involve 'a controlling question of law as to which there is substantial grounds for difference of opinion,' and where 'immediate appeal from the order may materially advance the utlimate termination of the litigation.' Id.

The certification process is seldom available for a disqualification motion grounded in either § 144, 455(b)(1) or 455(a), since such a motion generally hinges on interpretation of facts and is unlikely to present a question involving a controlling issue of law as to which there is substantial grounds for difference of opinion. See 13A C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3553 at 659 (1984) (§ 1292(b) standard not often met in disqualification decisions).

Reviewed by certification has been employed occasionally. See, e.g., Davis v. Board of School Comm'rs, 517 F.2d 1044, 1047 (5th Cir. 1975) (review allowed under 28 U.S.C. § 1292(b) to determine whether prejudice against attorney disqualifies under § 144), cert. denied, 425 U.S. 944 (1976).

Another means for interlocutory review is the collateral order rule, a common law rule that an interlocutory order is immediately appealable if it is 'in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Appellate courts have proved unwilling to exercise this common law doctrine to review disqualification motions. See, e.g., In re Corrugated Container Antitrust Litig., 614 F.2d 958, 960-61 (5th Cir.) (disqualification motions not reviewable under collateral order doctrine because fully reviewable on appeal from final judgment), cert. denied, 449 U.S. 888 (1980); accord United States v. Gregory, 656 F.2d 1132, 1136 (5th Cir. 1981); United States v. Washington, 573 F.2d 1121, 1122 (9th Cir. 1978). But see Moore, supra note 226, at 862-63 (arguments supporting review for mandamus also support review under collateral order rule; review under collateral order rule preferable because mandamus may impose higher standard).

FN256. See, e.g., Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985) (mandamus appropriate where judge fails to step down when required to by § 455(a)); In re United States, 666 F.2d 690, 694 (1st Cir. 1981) (mandamus jurisdiction appropriate where issue is judicial disqualification); In re International Business Machs. Corp., 618 F.2d 923, 927 (2d Cir. 1980) (court has power to issue writ of mandamus when disqualification has been denied). See generally Berger, The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control, 31 BUFF. L. REV. 37 (1982). See also Moore, supra note 221, at 839-54 (analysis of mandamus review of disqualification denials).

FN257. Work v. United States ex rel. Rives, 267 U.S. 175, 177 (1925).

FN258. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Courts have the power to issue writs of mandamus under a statutory provision which allows courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C. § 1651(a) (1982).

FN259. Will v. United States, 389 U.S. 90, 95 (1967).

FN260. Work, 267 U.S. at 177.

FN261. Roche, 319 U.S. at 27. See also Moore, supra note 221, at 842-43 (analysis of use of mandamus to direct judges).

FN262. La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957); Work, 267 U.S. at 177-78.

FN263. See United States v. Harrelson, 754 F.2d 1153, 1165 (5th Cir.) (disqualification decision committed to sound discretion of trial judge; denial of disqualification will be overturned only if discretion is abused); cert. denied, 106 S. Ct. 599 (1985); United States v. Nobel, 696 F.2d 231, 234 (3rd Cir. 1982) (accepted standard for review of disqualification denial is abuse of discretion), cert. denied, 462 U.S. 1118 (1983); accord In re Ibrahim Khan, 751 F.2d 162, 165 (6th Cir. 1984); In re Federal Skywalk Cases, 680 F.2d 1175, 1183 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

FN264. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908. See supra note 28 for text of this predecessor section.

FN265. 28 U.S.C. § 455(a). See supra note 12 for text of § 455(a).

FN266. House Report, supra note 4, at 6355.

FN267. Id.

FN268. See infra notes 270-75 and accompanying text for cases applying abuse of discretion standard.

FN269. See, e.g., McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 100 (3d Cir. 1985) (scrutiny of record, which yielded no evidence of bias, decisive factor in upholding decision); United States v. Porter, 701 F.2d 1158, 1166 (6th Cir.) (court's scrutiny of record showed no evidence of personal prejudice), cert. denied, 464 U.S. 1007 (1983).

FN270. 779 F.2d 1191 (7th Cir. 1985), cert. denied, 106 S. Ct. 1490 (1986).

FN271. 779 F.2d at 1203. The court did not review the motion on the basis of § 455(a); it held that this section could not be raised on post-trial review. Id. at 1205.

FN272. Id. at 1203.

FN273. Id. at 1203.

FN274. See infra notes 276-77 and accompanying text for the House statement on the standard of review.

FN275. The Balistrieri decision cited no cases in support of its holding. See Balistrieri, 779 F.2d at 1202-03. Other courts have consistently applied the abuse of discretion standard. See United States v. Nobel, 696 F.2d 231, 234 (3d Cir. 1982) (abuse of discretion is accepted standard), cert. denied, 462 U.S. 1118 (1983).

FN276. House Report, supra note 4, at 6355.

FN277. 28 U.S.C. § 455(b) & (e).

FN278. See supra notes 222-33 and accompanying text for a discussion of the decision-making process for disqualification determinations under section 455(a).

FN279. 28 U.S.C. § 455(a).

FN280. Kerr v. United States Dist. Ct., 426 U.S. 394, 403 (1976).

FN281. In re Corrugated Container Antitrust Litig., 614 F.2d 958, 962 (5th Cir.), cert. denied, 449 U.S. 888 (1980). The Corrugated Container court also considered the merits of the claim for disqualification, 614 F.2d at 963-68, and refused to issue a writ on the merits. Id. at 968. The court apparently modified its position later. See United States v. Gregory, 656 F.2d 1132, 1136-37 (5th Cir. 1981) (Fifth Circuit followed Corrugated Container in holding that review not available under collateral order rule because claim was reviewable on appeal; ignored this argument in considering whether to issue a writ of mandamus).

FN282. See In re United States, 666 F.2d 690, 694 (1st Cir. 1981) (public confidence in judiciary requires that substantial claim of bias be addressed at earliest possible opportunity) (citing In re Union Leader Corp., 292 F.2d 381, 384 (1st Cir.), cert. denied, 368 U.S. 927 (1961)); In re International Business Machs. Corp., 618 F.2d 923, 927 (2d Cir. 1980) (intolerable to judicial system to delay consideration of disqualification denial to final appeal).

The Seventh Circuit has settled the issue of whether appeal provides an adequate remedy by denying the post-trial appealability of § 455(a) disqualification motions and making mandamus the only remedy. United States v. Balistrieri, 779 F.2d 1191, 1205 (7th Cir. 1985), cert. denied, 106 U.S. 1490 (1986).

FN283. Bankers Life and Casualty Co. v. Holland, 346 U.S. 379, 384 (1953); see also United States v. Gregory, 656 F.2d 1132, 1136 (5th Cir. 1981) (question of disqualification reviewable on mandamus but party seeking writ must prove 'clear and indisputable right' to writ).

FN284. See La Buy v. Howes Leather Co., 352 U.S. 256, 257 (1957) (writ granted where judge clearly abused discretion in referring case to master); Pepsico, Inc. v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985) (writ granted to disqualify judge in circumstances where reasonable people could disagree whether disqualification was mandated).

FN285. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 & n.7 (1978) (mere showing of abuse of discretion not sufficient for issuance of writ of mandamus) (Rehnquist, J.) (plurality opinion).

FN286. In re United States, 666 F.2d at 694. See also Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 712 (7th Cir. 1986) (writ will be denied in frivolous and even routine cases).

FN287. In re International Business Machs. Corp., 618 F.2d at 934. The clear and indisputable right requirement arguably puts a higher burden on the litigants seeking mandamus than on those seeking final review and leaves open the possibility that the issue could be raised again on final review. Moore, supra note 226, at 854 & n.154 & 155.

FN288. See Union Carbide Corp. v. United States Cutting Serv., Inc., 782 F.2d 710, 712 (7th Cir. 1986) (refusal to disqualify in the face of a substantial challenge casts shadow over individual litigation and over integrity of federal judicial process which should be dispelled as soon as possible by authoritative judgment; therefore, court should be liberal in use of writ of mandamus to insure timely review).

FN289. See supra notes 256-62 for a discussion of the use of a writ of mandamus to assure the integrity of the disqualification process.

FN290. See supra notes 246-50 for a discussion of the proposed transfer of the disqualification decision to an adjudicator other than the challenged judge.

FN291. See supra notes 251-55 for a discussion of the proposal for immediate and comprehensive appellate review of a disqualification motion.

FN292. See supra note 57, notes 93-97 and note 108 and accompanying text for a discussion of the balance struck by Congress in § 455(a).

FN293. See supra notes 109-241 and accompanying text for a copy of judicial interpretation and application of §

455(a).

FN294. See supra notes 76-100 for a discussion of the Seventh Circuit's opinion in Unites States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985), cert. denied, 106 S. Ct. 1490 (1986).

END OF DOCUMENT

Chapter 64

CHANGE OF JUDGE BECAUSE OF BIAS, PREJUDICE OR INTEREST

[Relating to Federal Rules of Civil Procedure, Rule 63]

Analysis

	Sections
A. Personal Bias or Prejudice	**5151–5160**
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A. PERSONAL BIAS OR PREJUDICE

Sec.
5151. Affidavit of Bias or Prejudice—General Form.
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B. INTEREST OR RELATIONSHIP

5161. Order of Judge Disqualifying Oneself Because of Previous Relationship.
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5163. Affidavit of Interest of Judge—General Form.
5164. Motion for Judge's Disqualification Because of Interest.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide preceding the Summary of Contents.

Library References:

C.J.S. Judges §§ 35–38, 62–107, 108, 119 et seq., 161 et seq.
West's Key No. Digests, Judges ⇐13 et seq., 21, 25, 39 et seq., 41 et seq., 45, 46, 49.

A. PERSONAL BIAS OR PREJUDICE

§ 5151. Affidavit of Bias or Prejudice—General Form

[*Title of Court and Cause*]

[*Venue*]

———, being duly sworn, deposes and says:

1. I am the defendant [*or* plaintiff] in the above-entitled cause.

2. The Honorable ———, Judge of the court in which this action was commenced and is now pending, and before whom it is to be tried or heard, has a personal bias [*or* prejudice *or* bias and prejudice] against me [*or* in favor of ———, the ——— (*opposing party*)]. The facts and reasons for such belief are as follows: ——— [*state facts and reasons for belief that bias or prejudice exists*].

Wherefore affiant prays that the Honorable ——— proceed no further in this cause and that another judge be designated in this cause.

Dated: ———

———
Defendant [*or* Plaintiff]

[*Jurat*]

COMMENT

Analysis

1. **Governing Rule and Statutes**
2. **Time of Objection on Ground of Personal Bias or Prejudice**
3. **Affidavit and Certificate Requirements for Disqualification on Ground of Personal Bias or Prejudice**
4. **Disqualification of Judge for Interest**

1. Governing Rule and Statutes

Rule 63 provides:

> If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in

the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

The Advisory Committee Note explains the 1991 amendment as follows:

The revision substantially displaces the former rule. The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons. Cf. *United States v. Lane*, 708 F.2d 1394, 1395–1397 (9th Cir.1983). Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.

The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge. *E.g., Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4th Cir.1982, en banc), *cert. denied*, 459 U.S. 910 (1982) (jury trial); *Arrow–Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir.1977) (non-jury trial). *See generally* Comment, *The Case of the Dead Judge: Fed.R.Civ.P. 63: Whalen v. Ford Motor Credit Co.*, 67 MINN.L.REV. 827 (1983).

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to F.R.Ev. 804, being equivalent to a recorded deposition available for use at trial pursuant

to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. Cf. *Anderson v. City of Bessemer City NC*, 470 U.S. 564, 575 (1985); *Marshall v. Jerrico Inc*, 446 U.S. 238, 242 (1980). See also *United States v. Radatz*, 447 U.S. 667 (1980).

With respect to the disqualification of a judge on the ground of bias or prejudice, 28 U.S.C.A. § 144 provides as follows:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is being made in good faith.

With respect to disqualification of a judge for interest, 28 U.S.C.A. § 455 provides as follows:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

2. Time of Objection on Ground of Personal Bias or Prejudice

Under 28 U.S.C.A. § 144 an affidavit of prejudice must be timely. The provision that it be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, in the absence of a showing of good cause for failure to file it by that time, no longer can be applied, since terms of court were abolished in 1963. A party requesting the disqualification of a judge must now proceed with due diligence. A request to disqualify can be dismissed if the party has unduly delayed in filing the affidavit. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3551.

3. Affidavit and Certificate Requirements for Disqualification on Ground of Personal Bias or Prejudice

When a party seeks to disqualify a judge for personal bias or prejudice under 28 U.S.C.A. § 144, the judge must examine the affidavit or declaration and accompanying certificate to determine whether they are timely and legally sufficient. Only if the documents meet strict scrutiny does disqualification become mandatory. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3551. If the affidavit or declaration is presented in time and in proper form, the court must take as true the facts set out in the affidavit or declaration. Only questions of law are presented and there can be no dispute about the truth or falsity of the allegations of the affidavit or declaration. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3551. See also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3542 with respect to what constitutes personal bias.

The affidavit or declaration must state facts and reasons for the belief that bias exists. The affidavit or declaration must be definite as to the time, place, persons, and circumstances. Mere conclusory allegations are not sufficient. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3551.

Section 144 permits the filing of only one affidavit or declaration of prejudice in any case. However, a judge is under a continuing duty to disqualify himself or herself at any time the judge is satisfied that he or she is disqualified under § 455.

The affidavit or declaration must be accompanied by a certificate of counsel stating that the affidavit is made in good faith. The certificate must be signed by counsel of record, who must be an attorney admitted to the bar of the particular court. While § 144 appears to contemplate that the certificate attest to the good faith of the affiant or declarant, some courts have ruled that the certificate must state that counsel is acting in good faith. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3551.

See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §§ 3542–3549 with respect to grounds for disqualification.

An unsworn declaration under penalty of perjury may be used in lieu of an affidavit. 28 U.S.C.A. § 1746. The form for an unsworn declaration under Section 1746 executed within the United States is as follows: "I declare [or certify, verify, or state] under penalty of perjury that the foregoing is true and correct. Executed on [*date*]."

However, local practice should be consulted. Some courts may still prefer affidavits to declarations under penalty of perjury. See Moynihan, *Affidavit Evidence*, 14 Litigation 43 (Spring 1988).

4. Disqualification of Judge for Interest

28 U.S.C.A. § 455 is directed to the judges themselves and says nothing about procedure. Although no action by a party is required to invoke the provision of the statute, a party can suggest to the judge that grounds for disqualification exist. When a judge learns that grounds for his or her disqualification exist under § 455, the judge should disqualify himself or herself regardless of the source of the information. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3550.

There can be waiver under § 455(a) only if the facts of the basis of the disqualification have been fully disclosed by the judge on the record. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3552.

§ 5152. Affidavit of Bias or Prejudice—Another Form

[*Title of Court and Cause*]

[*Venue*]

_____, being first duly sworn, upon oath deposes and says: _____ is one of the defendants in the case of _____ against _____, numbered _____, now pending in the United States District Court for the _____ District of _____. _____ believes and charges that his honor, Judge _____, has a personal bias and prejudice against _____ and the codefendants _____ and _____, and each of them, and in favor of the government, by reason of which the judge is unable impartially to exercise his

functions as judge in this cause. By reason of this personal bias and prejudice neither of these defendants can have a fair and impartial trial before him. The grounds for the defendant's beliefs are as follows:

The defendants state upon information and belief that Hon. _____, in the city of _____, after the organization of the United States District Court for the _____ District of _____, created and organized pursuant to the act of Congress of _____, made addresses before certain civic clubs and churches of that city on the subject of law enforcement. In all these addresses he told his audiences in substance, and through them the general public, that he intended to bear down with heavy hands on all offenders against federal criminal laws. During the course of his address before one of the clubs, namely, the _____ club, on or about [*date*], he stated that the higher the law violator's collar and the whiter his shirt, the longer his sentence would be in his court, and that, the longer his list of witnesses, the heavier his sentence would be.

_____ has been informed that Hon. _____, has expressed a willingness to assist the _____ officers in apprehending this affiant in the commission of a violation of the _____ law, by permitting prisoners of the United States government to be used as undercover agents for the purpose of obtaining evidence against this affiant, and this affiant has been further informed that Hon. _____, did, at least upon one occasion, permit a prisoner of the United States government to be placed in the custody of _____ officers, for the purpose of using the prisoner in the obtaining of evidence against this affiant.

Affiant further states that on [*date*], he was tried before the court upon a charge of violating the _____ laws, and was in the cause acquitted. However, during the progress of the trial, one of the state's witnesses testified to a state of facts which the district attorney contended was contradictory to sworn written statement, furnished by the witness to the district attorney; and over the objections of the attorney for this affiant, his honor, _____, judge of the court, permitted the district attorney to conduct a rigid cross-examination of the state's own witness. And Hon. _____, judge of the court, did at that time and in open court, state in substance that the witness had been tampered with, and from his demeanor cast reflection upon this affiant, and caused this affiant and his friends to believe that Hon. _____ believed that this affiant had in some manner stifled the testimony of the witness. And the court did at that time, in the presence of the jury, order the witness held for perjury, and did instruct the district attorney to file perjury charges against the witness; it was apparent from

the testimony that the witness had been tampered with by some one.

Affiant further states that he had prior to the trial, and during the trial, conducted himself properly, and was without fault and did not have anything to do with the witness whatsoever.

Affiant further states that his son, _____, one of the defendants named in the indictment with this affiant, was tried before his honor, _____, and that on [*date*], in the case of United States against _____, No. _____ in that court, passed sentence upon _____, and while passing the sentence the court stated in substance, as this affiant is informed and believes, as follows: "The _____ tribe seem to believe that they have the privilege as a matter of right to sell _____, but it has got to stop in the _____ district, if I can prevent it."

Affiant further states that he is informed that Hon. _____ further stated, or commented upon the fact, that this affiant, father of _____, had been tried before him, and that an uncle of _____ had been tried and convicted before him.

Affiant further states that on [*date*], this affiant obtained the attached affidavit of _____, which supports the statements made by this affiant upon information and belief, as to the fact that his honor, _____, had interested himself in obtaining evidence against this affiant.

Affiant further states that on several occasions he has requested his attorneys to prepare and file application to disqualify his honor, _____, from trying this affiant or either of his sons, _____ and _____, but that his attorneys have disagreed with this affiant, until [*date*], when this affiant received new information, which was imparted to attorneys for this affiant and set out above. The information could not have been obtained at an earlier date, as it was not known to any of the parties defendant that it existed until this affiant was so informed as stated above.

Affiant further states that he believes that Hon. _____ has impressions or prejudices in his mind and against this defendant, and against his family, including his codefendants, sons of this affiant, which it would take evidence to remove, and that he cannot have a fair and impartial trial before Hon. _____, and that he is entitled to have a trial before another United States judge.

Subscribed and sworn to before me this [*date*]

_____

Notary Public
My Commission expires _____

COMMENT

An unsworn declaration under penalty of perjury may be used in lieu of an affidavit. 28 U.S.C.A. § 1746. The form for an unsworn declaration under Section 1746 executed within the United States is as follows: "I declare [or certify, verify, or state] under penalty of perjury that the foregoing is true and correct. Executed on [*date*]."

However, local practice should be consulted. Some courts may still prefer affidavits to declarations under penalty of perjury. See Moynihan, *Affidavit Evidence*, 14 Litigation 43 (Spring 1988).

See § 5151, Comment.

§ 5153. Affidavit of Bias or Prejudice—Recitation of Specific Facts and Reasons for Belief That Judge Is Biased or Prejudiced

[*Venue*]

Petitioners [*defendants*] represent that they jointly and severally believe that Judge _____ has a personal bias and prejudice against certain of the defendants, namely, _____, _____, and _____, defendants in this cause, and impleaded with _____ and _____, defendants in this case. The grounds for the petitioners' beliefs are the following facts:

[*State specific facts showing bias or prejudice*]

_____

Subscribed and sworn to before me this [*date*].

_____

Notary Public
My commission expires [*date*].

COMMENT

An unsworn declaration under penalty of perjury may be used in lieu of an affidavit. 28 U.S.C.A. § 1746. The form for an unsworn declaration under Section 1746 executed within the United States is as follows: "I declare [or certify, verify, or state] under penalty of perjury that the foregoing is true and correct. Executed on [*date*].

However, local practice should be consulted. Some courts may still prefer affidavits to declarations under penalty of perjury. See Moynihan, *Affidavit Evidence*, 14 Litigation 43 (Spring 1988).

See § 5151, Comment.

§ 5154. Allegation of Affidavit Stating Cause of Delay in Filing

Affiant further states that she did not file this or any affidavit of prejudice until this date for the reason that the first knowledge she had that Hon. _____ has a personal bias and prejudice

against her was on [*date*], and subsequent to that, and this affiant has filed this affidavit of prejudice at the first opportunity.

COMMENT

An unsworn declaration under penalty of perjury may be used in lieu of an affidavit. 28 U.S.C.A. § 1746. The form for an unsworn declaration under Section 1746 executed within the United States is as follows: "I declare [or certify, verify, or state] under penalty of perjury that the foregoing is true and correct. Executed on [*date*]."

However, local practice should be consulted. Some courts may still prefer affidavits to declarations under penalty of perjury. See Moynihan, *Affidavit Evidence*, 14 Litigation 43 (Spring 1988).

See § 5151, Comment.

§ 5155. Allegation of Affidavit Stating Cause of Delay in Filing—Another Form

Defendant says that he did not file this affidavit until this date for the reason that knowledge of such bias and prejudice did not come to him until this date, and the absence of knowledge is good cause for his failure to file the affidavit prior to this date.

COMMENT

See § 5151, Comment; and § 5154, Comment.

§ 5156. Certificate of Counsel Supporting Affidavit

We, the undersigned, _____ and _____, counsel of record in the above-entitled cause, hereby certify that the above affidavit made by _____ is made in good faith.

Dated: _____

_____
Attorney for _____
Address: _____

_____
Attorney for _____
Address: _____

COMMENT

See § 5151, Comment.

§ 5157. Certificate of Counsel Supporting Affidavit—Another Form

I hereby certify that I am counsel of record for _____, defendant [*or* plaintiff] in the above-entitled cause, and that the above affidavit is made in good faith.

Dated: _____

_____
Attorney for _____
Address: _____

COMMENT

See § 5151, Comment.

§ 5158. Certification of Disqualification Upon Filing of Affidavit of Prejudice

[*Title of Court and Cause*]

_____ plaintiff [*or* defendant] in the above-entitled cause has made and filed an affidavit [*or* declaration] that I have a [personal] bias or prejudice against her, and asks that another judge be designated in the cause.

I do hereby, in accordance with the provisions of Section 144 of Title 28 of the United States Code, proceed no further in this motion.

Dated: _____

_____
United States District Judge

COMMENT

See § 5151, Comment.

§ 5159. Order Designating Another Judge

[*Title of Court and Cause*]

Upon the affidavit [*or* declaration] of _____, the certificate of _____, counsel for _____, and certificate of the Honorable _____, District Judge of the _____ District of _____, which have been examined by me;

I, _____, Chief Judge of the _____ Circuit do hereby designate and appoint the Honorable _____, District Judge of the District of _____, to hear and dispose of the above-entitled cause within the _____ District of _____, with all the powers of a judge of the _____ District of _____.

[*Date*]

_____
Chief Judge, _____ Circuit

Counsel for the respective parties may communicate with Judge _____, who will inform them at what time or times it may be convenient to hold court in the _____ District.

_____
Chief Judge, _____ Circuit

COMMENT

See § 5151, Comment.

§ 5160. Order Designating Another Judge—Another Form

[*Title of Court and Cause*]

The plaintiff _____ has made an affidavit [*or* declaration] of personal bias touching the judge before whom the above-entitled cause is pending, and I hereby designate Honorable _____, District Judge of the _____ District of _____, to try and dispose of the cause.

_____
Chief Judge, _____ Circuit

COMMENT

See § 5151, Comment.

B. INTEREST OR RELATIONSHIP

§ 5161. Order of Judge Disqualifying Oneself Because of Previous Relationship

[*Title of Court and Cause*]

The undersigned Judge, to whom the above-entitled case was assigned pursuant to Local Rule _____, is of the opinion that I should not try this case, by reason of the fact that I was the attorney who incorporated the City of _____ and was its City Attorney from _____ until _____ when I was appointed to the bench. I participated in meetings with the City Manager, City Council and the then Chief of Police with reference to the employment of the defendant _____ as a police officer. The Court hereby orders the case reassigned by the Clerk in accordance with Local Rule _____ or other applicable rule or order of this Court.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order by United States mail on counsel for all parties appearing in this cause.

Dated: _____

_____
United States District Judge

COMMENT

See § 5151, Comment.

§ 5162. Order of Judge Disqualifying Oneself Because of Relationship

[*Title of Court and Cause*]

On [*date*], the plaintiff presented its application for a preliminary injunction. And it appeared that the manager of the plaintiff company is a son of the presiding judge. The judge is of the opinion that it is not proper for the judge to sit in the case and on the judge's own motion declines to hear the application, and orders that the facts with respect to it be entered of record.

Dated: _____

_____
United States District Judge

COMMENT

See § 5151, Comment.

outside the judicial district of this court and is not subject to service of process therein], and the motion having been heard and submitted to the court, and the court being fully advised; therefore,

IT IS ORDERED that this action be and it is dismissed without prejudice, with costs allowed to such defendant.

Dated __4__, 19__5__.

[Signature and title]

NOTES

(See notes in § 1:2321)

§ 1:2323 Order—Directing joinder of indispensable party or, alternatively, dismissal of action [FRCP 12(b)(7), 19(a)]

[Caption, see § 1:2321]

ORDER

On the motion of defendant __1__ *[name]* to dismiss the above-entitled action on the ground that __2__ *[name]* is an indispensable party and has not been joined herein, and the motion having been fully heard and submitted to the court for its decision and it appearing to the court that __3__ *[indispensable party]* is an indispensable party to the award of relief to the present parties of the action, and good cause appearing; therefore,

IT IS ORDERED:

1. That __4__ *[indispensable party]* be joined herein as a party plaintiff, or, if he refuse to be joined as such plaintiff, as __5__ [an involuntary plaintiff *or* a defendant]; and that such joinder shall be effected by plaintiff by appropriate process.

2. That if __6__ *[indispensable party]* cannot be joined as hereinabove directed within __7__ days after the date of this order, this action shall without further order be dismissed by the clerk without prejudice.

Dated __8__, 19__9__.

[Signature and title]

NOTES

(See notes in § 1:2321)

XI. TRIAL

A. DISQUALIFICATION OF JUDGE OR OTHER JUDICIAL OFFICER; JUDICIAL MISCONDUCT OR DISABILITY

1. INTRODUCTION

§ 1:2331 Scope of division

This division consists of forms and material pertaining to the disqualification of a judge or other judicial officer to preside in a civil action in a United States District Court; and complaints to a Federal Court of Appeals concerning alleged judicial misconduct or disability. Treated elsewhere are forms relating to disclosure as to corporate affiliations, financial interests, and interested parties, which disclosure may be used to determine the need for recusal of a judge,[15] and relief from a judgment.[16]

GENERAL REFERENCES

Federal statutes and court rules that specifically apply to the disqualification of a judge or other judicial officer to preside in a civil action in a United States District Court, or to complaints to a Federal Court of Appeals concerning alleged judicial misconduct or disability, are listed below. **Note:** The General Index to the United States Code Service (USCS) should also be checked.

Statutes:

28 USCS § 144 [disqualification of judge due to personal bias or prejudice].

28 USCS § 372(c) [complaint to Court of Appeals concerning alleged judicial misconduct or disability].

28 USCS § 455 [disqualification of judge, magistrate judge, etc.].

28 USCS § 458 [ineligibility of relative of judge for office or duty in court].

28 USCS § 460 [application of statutes including 28 USCS §§ 455 and 458 to judges of territorial court invested with jurisdiction of District Court].

Court Rules:

Federal Rules of Civil Procedure, Rule 63 [inability of judge to proceed].

Reminder: Always check the advance sheets to the United States Code Service (USCS) for latest court rule changes, and be certain to examine local Court of Appeals and District Court rules in Federal Procedure Rules Service to determine whether any additional or special procedural requirements exist.

RESEARCH REFERENCES

Sources of collateral material related to the disqualification of a judge or other judicial officer to preside in a civil action in a United States District

15. See §§ 1:548-1:552, supra.

16. See §§ 1:3451-1:3480, infra.

Court, or to complaints to a Federal Court of Appeals concerning alleged judicial misconduct or disability, are listed below.

Texts:

7A FED PROC, L ED, Courts and Judicial System §§ 20:17, 20:25, 20:29, 20:41-20:151, 20:193, 20:339-20:363.

33 FED PROC, L ED, Trial §§ 77:183-77:185.

15A AM JUR 2d, Clerks of Court § 9.

16 AM JUR 2d, Constitutional Law § 331.

16A AM JUR 2d, Constitutional Law §§ 855, 856.

27 AM JUR 2d, Equity § 227.

46 AM JUR 2d, Judges §§ 86-236.

Annotations:

ALR INDEX: Attorney or Assistance of Attorney; Bias or Prejudice; Conflict of Interest; Contempt; Due Process; Financial Interest and Benefit; Judges; Magistrates; Prior Acts and Matters; Recusal; Time and Date; Trial by Court.

Trial Aids:

2 AM JUR POF 495, Bias or Prejudice.

20 AM JUR POF 223, Religious Prejudice.

Digests:

L ED DIGEST: Constitutional Law §§ 746, 767, 778.5; Evidence §§ 947, 948; Judges §§ 6-11; Statutes §§ 101.5, 108.4, 164.6; United States § 17.

ALR DIGEST: Constitutional Law §§ 605, 615; Judges §§ 3, 13-25; Reference § 6.

FEDERAL RULES DIGEST: FINDEX 63.1, 63.2.

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§ 1:2332 Annotation references

Annotations which relate to the disqualification of a judge or other judicial officer to preside in a civil action in a trial in a United States District Court, or to complaints to a Federal Court of Appeals concerning alleged judicial misconduct or disability, are listed below.

L Ed annotations:

Contempt proceedings as violating procedural due process—Supreme Court cases. 39 L Ed 2d 1031 [see especially § 5, concerning right to trial before unbiased judge, and disqualification of judge].

Exercise of federal court's summary power to punish for contempt committed in the actual presence of the court. 96 L Ed 762, 3 L Ed 2d 1855 [see especially § 11, concerning disqualification of judge].

ALR Federal annotations:

Disqualification of federal judge, under 28 USCS § 455(b)(5)(ii), on ground that judge's relative is acting as lawyer in proceeding. 73 ALR Fed 879.

Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate. 65 ALR Fed 775.

Review of federal judge's grant or denial of motion to recuse. 64 ALR Fed 433.

Mandamus as remedy to compel disqualification of federal judge. 56 ALR Fed 494.

Disqualification of judge under 28 USCS § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding. 55 ALR Fed 650.

Disqualification of judge under 28 USCS § 455(b)(5)(iii), where judge or his or her spouse, or certain of their relatives, is known to have an interest that could be affected by the proceeding. 54 ALR Fed 855.

Judge's membership in bar association as ground for disqualification under 28 USCS § 455. 42 ALR Fed 331.

Construction and application of 28 USCS § 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned. 40 ALR Fed 954.

Timeliness of affidavit of disqualification of trial judge under 28 USCS § 144. 24 ALR Fed 290.

Form and requirements of certificate and affidavit of disqualification of trial judge under 28 USCS § 144. 23 ALR Fed 637.

Disqualification of original trial judge to sit on retrial after reversal or mistrial; federal cases. 22 ALR Fed 709.

Disqualification of federal judge, under 28 USC § 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved. 2 ALR Fed 917.

ALR annotations:

Abuse or misuse of contempt power as ground for removal or discipline of judge. 76 ALR4th 982.

Disqualification of judge because of political association or relation to attorney in case. 65 ALR4th 73.

Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR4th 923.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR3d 1021.

Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees payable by litigants. 72 ALR3d 375.

Affidavit or motion for disqualification of judge as contempt. 70 ALR3d 797.

Power of court to remove or suspend judge. 53 ALR3d 882.

Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation. 25 ALR3d 1331.

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

Disqualification of judge on ground of being a witness in the case. 22 ALR3d 1198.

Disqualification of judge for having decided different case against litigant. 21 ALR3d 1369.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case. 6 ALR3d 1457 [see especially § 6, generally concerning basis for disqualification of judge or transfer of cause].

Intervenor's right to disqualify judge. 92 ALR2d 1110.

Prohibition as appropriate remedy to prevent allegedly disqualified judge from proceeding with case. 92 ALR2d 306.

Time for asserting disqualification of judge, and waiver of disqualification. 73 ALR2d 1238.

Prior representation or activity as attorney or counsel as disqualifying judge. 72 ALR2d 443.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 64 ALR2d 600.

Relationship to attorney as disqualifying judge. 50 ALR2d 143.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification. 45 ALR2d 937.

Interest of judge in an official or representative capacity, or relationship of judge to one who is a party in an official or representative capacity, as disqualification. 10 ALR2d 1307.

Reminder: For additional annotation material, consult the ALR Index.

§ 1:2333 Procedural guide

Whenever a party in a proceeding in United States District Court files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias against the party or in favor of an adverse party, the judge must proceed no further in the proceeding, and another judge must be assigned to hear it. An affidavit alleging bias or prejudice on the part of a judge must state the facts and reasons for the belief that such bias or prejudice exists.[17] The affidavit must be filed not less than 10 days before the beginning of the session at which the proceeding is to be heard, unless good cause is shown for failure to file within such time, and it is to be accompanied by a certificate of counsel of record stating that it is made in good faith. A party may file only one such affidavit in any case.[18] In order to be disqualifying, the judge's alleged bias or prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from participation in the case.[19]

Under certain circumstances, judges and other judicial officers are required to disqualify themselves from a proceeding.[20]

Any person alleging that a circuit, district, bankruptcy, or magistrate judge has engaged in conduct prejudicial to the effective and expeditious

17. Affidavit may be made on information and belief if facts are set forth as basis of belief. Berger v United States (1921) 255 US 22, 65 L Ed 481, 41 S Ct 230 (under predecessor to 28 USCS § 144).

18. 28 USCS § 144.
Texts: 7A Fed Proc, L Ed, COURTS AND JUDICIAL SYSTEM §§ 20:339-20:363.
Annotations: Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate. 65 ALR Fed 775.
—Timeliness of affidavit of disqualification of trial judge under 28 USCS § 144. 24 ALR Fed 290.
Form and requirements of certificate and affidavit of disqualification of trial judge under 28 USCS § 144. 23 ALR Fed 637.
Disqualification of federal judge, under 28 USC § 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved. 2 ALR Fed 917.
Time for asserting disqualification of judge, and waiver of disqualification. 73 ALR2d 1238.

19. United States v Grinnell Corp. (1966) 384 US 563, 16 L Ed 2d 778, 86 S Ct 1698, 1966 CCH Trade Cases P 71789.

20. 28 USCS § 455.
As to such circumstances, see the checklist in § 1:2334, infra.
Texts: 7A Fed Proc, L Ed, COURTS AND JUDICIAL SYSTEM §§ 20:47-20:151.

administration of the business of the courts, or alleging that such a judge is unable to discharge all the duties of his or her office by reason of mental or physical disability, may file a written complaint with the clerk of the Court of Appeals for the circuit, which complaint must contain a brief statement of the facts constituting such conduct.[21] The chief judge to whom a complaint of judicial misconduct is referred may either (1) dismiss the complaint; (2) conclude that corrective action has already been taken or that action on the complaint is no longer necessary because of intervening events; or (3) appoint an investigative committee to conduct an investigation of the matter and report to the judicial council of the circuit.[22]

If a judge becomes unable to proceed after a trial or hearing has been commenced, any other judge may proceed upon (1) certifying familiarity with the record, and (2) determining that the proceedings in the case may be completed without prejudice to the parties.[23]

A person is ineligible for appointment to or employment in any office or duty in any court where the person is related by affinity or consanguinity within the degree of first cousin to any justice or judge of the court.[24]

§ 1:2334 Checklist—Grounds for disqualification of judge or other judicial officer under 28 USCS § 455[25]

- Reasonable question as to impartiality[26]

21. 28 USCS § 372(c)(1).
Texts: 7A Fed Proc, L Ed, COURTS AND JUDICIAL SYSTEM §§ 20:41-20:46.

22. 28 USCS § 372(c)(3)-(5).

23. FRCP 63.
Texts: 33 Fed Proc, L Ed, TRIAL §§ 77:183-77:185.

24. 28 USCS § 458.
Texts: 7A Fed Proc, L Ed, COURTS AND JUDICIAL SYSTEM § 20:29.

25. For convenience, each pertinent checklist item uses only the term "judge," rather than the full list of judicial officers subject to a provision of § 455—that is, a judge, magistrate judge, and so forth. In addition, this checklist is limited to 28 USCS § 455; see also the other provisions referred to in § 1:2331, supra.

26. 28 USCS § 455(a).
Recusal is required under 28 USCS § 455(a) if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge of facts indicating interest or bias in the case. Liljeberg v Health Services Acquisition Corp. (1988) 486 US 847, 100 L Ed 2d 855, 108 S Ct 2194, 11 FR Serv 3d 433.
It is not a ground for disqualification under 28 USCS § 455 that, prior to nomination, a judge has expressed an understanding of the meaning of a particular provision of the Federal Constitution. Laird v Tatum (1972) 409 US 824, 34 L Ed 2d 50, 93 S Ct 7 (per Rehnquist, J.).

- Personal bias or prejudice concerning a party[27]
- Personal knowledge of disputed evidentiary facts concerning the proceeding[28]
- Associated with action as:
  —Counsel
  —Material witness
  —Associate of counsel who served during such association as representative concerning matter
  —Associate of counsel who has been material witness[29]
- Participated in or expressed an opinion concerning matter while a government employee as:
  —Counsel
  —Adviser
  —Material witness[30]
- Interest which could be substantially affected by outcome of action or financial interest therein or in party thereto, by:
  —Judge as an individual

Annotations: Judge's membership in bar association as ground for disqualification under 28 USCS § 455. 42 ALR Fed 331.
Construction and application of 28 USCS § 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned. 40 ALR Fed 954.
Disqualification of judge because of political association or relation to attorney in case. 65 ALR4th 73.
Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR4th 923.
Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR3d 1021.
Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees payable by litigants. 72 ALR3d 375.
Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 64 ALR2d 600.
Interest of judge in an official or representative capacity, or relationship of judge to one who is a party in an official or representative capacity, as disqualification. 10 ALR2d 1307.

27. 28 USCS § 455(b)(1).
Annotations: Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.
Disqualification of judge for having decided different case against litigant. 21 ALR3d 1369.

28. 28 USCS § 455(b)(1).

29. 28 USCS § 455(b)(2).
Annotations: Disqualification of judge on ground of being a witness in the case. 22 ALR3d 1198.
Prior representation or activity as attorney or counsel as disqualifying judge. 72 ALR2d 443.

30. 28 USCS § 455(b)(3).

—Judge as a fiduciary
—Judge's spouse
—Minor child residing in judge's household[31]

- If judge, judge's spouse, person related within the third degree to either, or the spouse of such person, is:
  —A party or an officer, director, or trustee of a party to the action[32]
  —Acting therein as a lawyer[33]
  —Known by the judge to have an interest which could be substantially affected by the outcome[34]
  —To the judge's knowledge likely to be a material witness in the action[35]
- Exception not requiring disqualification where
  —After substantial judicial time has been devoted to a matter, there is a subsequent appearance or discovery that the judge individually or as a fiduciary, or a spouse or minor child residing in the judge's household, has a financial interest in a party other than an interest that could be substantially affected by the outcome, and
  —The judge, spouse, or minor child divests himself or herself of the interest that provides the grounds for disqualification.[36]

31. 28 USCS § 455(b)(4).
Federal judges are not required by 28 USCS § 455 to disqualify themselves in litigation challenging the constitutionality of federal laws stopping or reducing cost-of-living increases for federal judges. United States v Will (1980) 449 US 200, 66 L Ed 2d 392, 101 S Ct 471.
Annotations: Disqualification of judge under 28 USCS § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding. 55 ALR Fed 650.
Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation. 25 ALR3d 1331.

32. 28 USCS § 455(b)(5)(i).

33. 28 USCS § 455(b)(5)(ii).
Annotations: Disqualification of federal judge, under 28 USCS § 455(b)(5)(ii), on ground that judge's relative is acting as lawyer in proceeding. 73 ALR Fed 879.
Relationship to attorney as disqualifying judge. 50 ALR2d 143.

34. 28 USCS § 455(b)(5)(iii).
Annotations: Disqualification of judge under 28 USCS § 455(b)(5)(iii), where judge or his or her spouse, or certain of their relatives, is known to have an interest that could be affected by the proceeding. 54 ALR Fed 855.

35. 28 USCS § 455(b)(5)(iv).

36. 28 USCS § 455(f).

2. PROCEDURAL FORMS

§ 1:2341 Motion and notice—Disqualification of judge—Personal bias or prejudice [28 USCS §§ 144, 455(b)(1)]

UNITED STATES DISTRICT COURT
FOR THE __1__ DISTRICT OF __2__
__3__ DIVISION

__4__
Plaintiff,
v
__6__
Defendant.

Civil Action, File No. __5__
MOTION TO DISMISS

__7__ *[Moving party]* files herewith his [or "her"] affidavit, as required by Title 28, United States Code, Section 144, to show that the Honorable __8__ has a personal bias or prejudice __9__ [against him *or* in favor of __10__].

Based thereon, __11__ *[moving party]* respectfully moves that the Honorable __12__ proceed no further herein and that another judge be assigned to hear this proceeding.

Dated __13__, 19__14__.

[Signature and address]

Notice of Motion

To: __15__, Attorney for __16__ *[opposing party]* __17__ *[address]*

Please take notice that on __18__, 19__19__, at __20__ o'clock __21__.m., or as soon thereafter as counsel can be heard, in Room __22__, United States Court House, __23__ *[address]*, the undersigned will bring the above motion on for hearing.

Dated __24__, 19__25__.

[Signature and address]

NOTES

Practice Aids:

Texts: Disqualification for personal bias or prejudice. 7A FED PROC, L ED, Courts and Judicial System §§ 20:94-135.

Annotations: Contempt proceedings as violating procedural due process Supreme Court cases. 39 L Ed 2d 1031 [see especially § 5, concerning right to trial before unbiased judge, and disqualification of judge].

—Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate. 65 ALR Fed 775.

—Review of federal judge's grant or denial of motion to recuse. 64 ALR Fed 433.

—Mandamus as remedy to compel disqualification of federal judge. 56 ALR Fed 494.

—Judge's membership in bar association as ground for disqualification under 28 USCS § 455. 42 ALR Fed 331.

—Timeliness of affidavit of disqualification of trial judge under 28 USCS § 144. 24 ALR Fed 290.

—Form and requirements of certificate and affidavit of disqualification of trial judge under 28 USCS § 144. 23 ALR Fed 637.

—Disqualification of original trial judge to sit on retrial after reversal or mistrial; federal cases. 22 ALR Fed 709.

—Disqualification of federal judge, under 28 USC § 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved. 2 ALR Fed 917.

—Abuse or misuse of contempt power as ground for removal or discipline of judge. 76 ALR4th 982.

—Disqualification of judge because of political association or relation to attorney in case. 65 ALR4th 73.

—Power of court to remove or suspend judge. 53 ALR3d 882.

—Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

—Disqualification of judge for having decided different case against litigant. 21 ALR3d 1369.

—Time for asserting disqualification of judge, and waiver of disqualification. 73 ALR2d 1238.

—Prior representation or activity as attorney or counsel as disqualifying judge. 72 ALR2d 443.

§ 1:2342 Motion—Disqualification of judge—For interest [28 USCS § 455]

[Caption, see § 1:2341]

__1__ *[Moving party]* shows that the Honorable __2__ is disqualified from presiding as judge at the trial of the above numbered and entitled cause under the provisions of Title 28, United States Code, Section 455, due to __3__ *[set forth cause of disqualification for interest]*, as more fully set forth in the affidavit attached hereto and made a part hereof.

Wherefore, __4__ *[moving party]* moves that the Honorable __5__ declare himself [or "herself"] disqualified to sit on the hearing of this cause and that another judge be assigned to hear this action.

Dated __6__, 19__7__.

[Signature and address]

[Notice of motion, see § 1:2341]

[Attach affidavit]

NOTES

(See also notes in § 1:2341)

Practice Aids:

Texts: Interest of judge or judge's relative in case. 7A FED PROC, L ED, Courts and Judicial System §§ 20:142-20:151.

Annotations: Disqualification of judge under 28 USCS § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding. 55 ALR Fed 650.

—Disqualification of judge under 28 USCS § 455(b)(5)(iii), where judge or his or her spouse, or certain of their relatives, is known to have an interest that could be affected by the proceeding. 54 ALR Fed 855.

—Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees payable by litigants. 72 ALR3d 375.

—Relationship to attorney as disqualifying judge. 50 ALR2d 143.

—Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification. 45 ALR2d 937.

—Interest of judge in an official or representative capacity, or relationship of judge to one who is a party in an official or representative capacity, as disqualification. 10 ALR2d 1307.

§ 1:2343 Application—Disqualification of judge—For interest—Alternate form [28 USCS § 455]

[Caption, see § 1:2341]

[Title]

To the Honorable Judges of the said Court [or "To the Honorable __1__, Judge of the said court"]:

The petition of __2__, defendant [or "plaintiff"] in the above-entitled cause respectfully represents that the cause of action in the action is for __3__ [or "that the matter in controversy herein is __4__"], and that the Honorable __5__, Judge of said court in which the action was commenced and is now pending, and who is required by law to hear and decide the same, is concerned in interest therein for the reason that __6__ *[state facts which show judge's interest].*

[Or "has been of counsel for __7__ in that action" or "is a material witness for __8__ in that action" or "is related to (or, 'connected with') __9__, plaintiff (or 'defendant') herein in that he (or 'she') is __10__ (state relationship or connection)."]

Wherefore petitioner prays that another judge may be designated in the manner provided by law in such cases.

__11__ Defendant [or "Plaintiff"] and Petitioner [Verification]

NOTES

(See notes in § 1:2342)

§ 1:2344 Affidavit—In support of motion to disqualify judge for personal bias or prejudice [28 USCS §§ 144, 455(b)(1)]

[Caption, see § 1:2341]

State of __1__

County of __2__

I, __3__ *[name],* being duly sworn, say:

1. I am the __4__ *[identity of party]* in the above numbered and entitled cause.

2. I am informed and believe, and based on such information and belief, allege that the Honorable __5__, the judge before whom this cause is pending, has a personal bias or prejudice __6__ [against me *or* in favor of __7__ *(identity of any adverse party)].*

3. The facts and the reasons for the belief that such bias or prejudice exists are __8__ *[detail facts].*

Dated __9__, 19__10__.

[Signature]

Sworn to and subscribed before me this __11__ day of __12__, 19__13__.

[Signature and title]

NOTES

(See notes in §§ 1:2341, 1:2342)

§ 1:2345 Affidavit—In support of motion to disqualify judge for personal bias or prejudice—Together with certificate of counsel and application [28 USCS §§ 144, 455(b)(1)]

[Caption, see § 1:2341; venue, see § 1:2344]

__1__, being duly sworn, deposes and says:

1. I am the defendant [or "plaintiff"] in the above-entitled cause.

2. I believe that the Honorable __2__, Judge of the United States District Court in which this action was commenced and is now pending, and before whom it is to be tried or heard, has a personal bias [or "prejudice" or "bias and prejudice"] against me [or "in favor of __3__, the __4__ opposing party herein"], and the reason for such belief is as follows: __5__ *[state facts to show bias or prejudice].*

Dated __6__, 19__7__. (SIG)__8__, Defendant [or "Plaintiff"]

[Jurat, See § 1:2344]

Certificate of Counsel

I hereby certify that I am counsel of record for __9__, defendant [or "plaintiff"] in the above-entitled cause, and as such prepared the above affi-

davit at the request of the defendant [or "plaintiff"], that I am informed as to the proceedings therein, and that such affidavit and application are made in good faith and not for the purpose of hindrance or delay.

__10__, Attorney for __11__

Dated __12__, 19__13__.

To the Clerk of Above-named Court:

Application is hereby made, for the reasons set forth in the foregoing affidavit and certificate, that appropriate proceedings be taken under 28 USC 144 to assign another judge to hear the proceeding.

Dated __14__, 19__15__.

__16__, Attorney for Defendant [or "Plaintiff"]

NOTES

(See notes in § 1:2341)

§ 1:2346 Affidavit—In support of motion to disqualify judge for interest [28 USCS § 455]

[Caption, see § 1:2341; venue, see § 1:2344]

I, __1__, being duly sworn, say:

1. I am the __2__ *[identity of party]* in the above numbered and entitled cause.

2. Judge __3__ has __4__ *[set forth ground of disqualification]* and is therefore disqualified to act in the above numbered and entitled cause under the provisions of Title 28, United States Code, Section 455.

3. The facts showing such interest are __5__ *[set forth facts showing the grounds of disqualification].*

[Signature]

[Jurat, see § 1:2344]

NOTES

(See notes in § 1:2342)

§ 1:2347 Complaint—Alleging judicial misconduct or disability—In Second Circuit (CA2 Rules Appx, Part E) [28 USCS § 372(c)]

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

COMPLAINT AGAINST JUDICIAL OFFICERS UNDER 28 U.S.C. §372(c)

INSTRUCTIONS:

(a) All questions on this form must be answered.

(b) A separate complaint form must be filled out for each judicial officer complained against.

(c) Submit the correct number of copies of this form and the statement of facts. For a complaint against:

a court of appeals judge -- original and 3 copies
a district court judge or magistrate judge -- original and 4 copies
a bankruptcy judge -- original and 5 copies

(For further information see Rule 2(a)).

(d) Service on the judicial officer will be made by the Clerk's Office. (For further information see Rule 3(a)(1)).

(e) Mail this form, the statement of facts and the appropriate number of copies to the Clerk, United States Court of Appeals, United States Courthouse, 40 Foley Square, New York, New York 10007.

1. Complainant's name: _____

Address: _____

_____

Daytime telephone (with area code): [ ]

2. Judge or magistrate judge complained about:

Name: _____

Court: _____

Are (were) you a party or lawyer in the lawsuit?

Party [ ] Lawyer [ ] Neither [ ]

If a party, give the name, address, and telephone number of your lawyer:

_____

_____

_____

Docket numbers of any appeals to the __1____ th Circuit:

4. Have you filed any lawsuits against the judge or magistrate?

Yes [ ] No [ ]

If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court:_____

Docket number:_____

Present status of suit:_____

Name, address, and telephone number of your lawyer:_____

_____

Court to which any appeal has been taken:_____

Docket number of the appeal:_____

Present status of appeal:_____

5. On separate sheets of paper, not larger than the paper this form is printed on, describe the conduct or the evidence of disability that is the subject of this complaint. See rule 2(b) and 2(d). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

6. You should either

(1) check the first box below and sign this form in the notary public; or

(2) check the second box and sign the form. You do not need a notary public if you check the second box.

[ ] I swear (affirm that-

[ ] I declare under penalty of perjury that-

(1) I have read rules 1 and 2 of the Rules of the Judicial Council of the 8th Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

_____

(Signature)

Executed on_____

(Date)

Sworn and subscribed to before me_____

(Date)

_____

(Notary Public)

My commission expires:_____

NOTES

(See notes in § 1:2347)

Present status of suit:_____

Your Lawyer's Name:_____

Address:_____

_____

Telephone ( )_____

Court to which any appeal has been taken:_____

Docket number of the appeal:_____

Present status of the appeal:_____

5. On separate sheets of paper, not larger than the paper this form is printed on, describe the conduct or the evidence of disability that is the subject of this complaint. See rule 2(b) and rule 2(d). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

6. You should either

(1) check the first box below and sign this form in the presence of a notary public; or

(2) check the second box and sign the form. You do not need a notary public if you check the second box.

☐ I swear (affirm) that-

☐ I declare under penalty of perjury that-

(1) I have read rules 1 and 2 of the Rules of the Sixth Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

_____

(Signature)

Executed on_____

(Date)

Sworn and subscribed
to before me _____
(Date)

_____
(Notary Public)

My commission expires:

NOTES

(See notes in § 1:2347)

§ 1:2351 Complaint—Alleging judicial misconduct or disability—In Eighth Circuit (CA8 Rules, Appx V) [28 USCS § 372(c)]

COMPLAINT FORM

JUDICIAL COUNCIL OF THE 8TH CIRCUIT

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

MAIL THIS FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, 511 U.S. COURT & CUSTOM HOUSE, 1114 MARKET STREET, ST. LOUIS, MO 63101. MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE OR MAGISTRATE ON THE ENVELOPE.

SEE RULE 2(ε) FOR THE NUMBER OF COPIES REQUIRED.

1. Complainant's name:

Name_____

Address_____

_____

Daytime telephone: ( )

2. Judge or magistrate complained about:

Name_____

Court_____

_____

_____

_____

3. Does this complaint concern the behavior of the judge or magistrate in particular lawsuit or lawsuits?

Yes [ ] No [ ]

If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court:

Docket number:

X. DISMISSAL

B. INVOLUNTARY DISMISSAL FOR FAILURE TO PROSECUTE OR TO COMPLY WITH COURT RULES OR ORDERS

2. PROCEDURAL FORMS

§ 1:2088 Order—On court's own motion—Dismissal for failu to timely serve—In Western District of Arkans. (Form 9.2) [FRCP 4(m), 41(b)]

Delete section heading in bound volume and substitute the above heading

NOTES

Court Rules: As amended in December 1, 1993, FRCP 4(m) relates to time limit for service of sui mons.

XI. TRIAL

A. DISQUALIFICATION OF JUDGE OR OTHER JUDICIAL OFFICER; JUDICIAL MISCONDUCT OR DISABILITY

INTRODUCTION

§ 1:2333 Procedural guide

Cases:

Even though the "extrajudicial source" doctrine arose under 28 USCS § 144 (and its predecessor)—providing for the disqualification of a federal district judge upon a party's filing of a timely and sufficient affidavit that the judge has a personal bias or prejudice—the extrajudicial source doctrine or factor applies under 28 USCS § 455(a), for (1) § 455(a) requires the disqualification of any justice, judge, or magistrate of the United States in any proceeding in which such a person's impartiality might reasonably be questioned, and 28 USCS § 455(b)(1) requires such a person's disqualification in circumstances where such a person has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) in view of the pejorative connotation of the words "bias" or "prejudice" as they are used in §§ 144 and 455(b)(1)—as a favorable or unfavorable disposition that is somehow wrongful or inappropriate, because it is undeserved, rests upon knowledge that the subject ought not to possess, or is excessive in degree—the extrajudicial source doctrine is one application of this pejorativeness requirement; and (3) while the "objective appearance" principle of § 455(a) makes irrelevant the subjective limitation of § 455(b)(1)—so that under § 455(a), a judge does not have to be subjectively biased or prejudiced so long as the judge appears to be so—nothing in § 455(a) eliminates the longstanding § 455(b)(1) limitation that personal bias or prejudice does not consist of a disposition that fails to satisfy the extrajudicial source doctrine, where, for example, the objective appearance of an adverse disposition attributable to information acquired in a prior trial is not an objective appearance of personal bias or prejudice and hence not an objective appearance of improper partiality. Liteky v United States (1994, US) 127 L Ed 2d 474, 114 S Ct 1147.

wherein a constituent petition for review is pending. Multiple petitions for review pending in a single circuit shall be allotted only a single entry in the drum. This random selection shall be witnessed by the Clerk of the Panel or a designated deputy other than the random selector. Thereafter, an order on behalf of the Panel shall be issued, signed by the random selector and the witness,

(i) consolidating the petitions for review in the court of appeals for the circuit that was randomly selected; and

(ii) designating that circuit as the one in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

(b) A consolidation of petitions for review shall be effective when the Panel's consolidation order is filed at the offices of the Panel by the Clerk of the Panel.

Rule 25: Service of Panel Consolidation Order

(a) The Clerk of the Panel shall serve the Panel's consolidation order on the affected agency through the individual or individuals, as identified in Rule 23(c) of these Rules, who submitted the notice of multicircuit petitions for review on behalf of the agency.

(b) That individual or individuals, or anyone else designated by the agency, shall promptly serve the Panel's consolidation order on all other parties in all petitions for review included in the Panel's consolidation order, and shall promptly submit a proof of that service to the Clerk of the Panel. Service and proof of that service shall also be governed by Rule 22 of these Rules.

(c) The Clerk of the Panel shall serve the Panel's consolidation order on the clerks of all circuit courts of appeals that were among the candidates for the Panel's random selection.

THE LIMITED POWER OF THE FEDERAL COURTS OF APPEALS TO ORDER A CASE REASSIGNED TO ANOTHER DISTRICT JUDGE*

by

JACK B. WEINSTEIN**

Some panels of the federal courts of appeals have recently been ordering that a case on remand be heard by a different district court judge than the one who originally decided the case. This kind of order is a matter of concern because it represents an unjustified arrogation of power by some judges of the court of appeals and is destructive of the proper relationship between the trial and intermediate appellate courts.

I have never been subject to such an order. My interest in the subject is as a Chief Judge concerned with the morale of trial judges and with the important joint work of the federal trial and appellate courts. To satisfactorily administer justice, we should have a sense of mutual respect and understanding among all judges as well as a clear delineation of roles.

The assumption of power by an appeals panel to control judge selection can only add to the burdens placed on the trial courts, while adversely and unnecessarily lowering their morale. The district courts have carefully designed plans for the division of business among their judges, and interference from above gums up the works. Trial courts operate every day, often with one judge hearing several motions and supervising more than one jury at a time. If trial judges are to decide properly, they need the power granted them by statute to organize their own assignments.

One justification relied on by appeals panels ordering reassignment is that this is a power seldom used by the courts of appeals. That excuse hardly answers the argument that the power does not exist.

There are, of course, instances in which recusal by a trial judge is desirable. This result can be obtained on motion at nisi prius, ultimately reviewable on appeal, or by mandamus with notice to the trial judge and the right to be heard.

The situation can also be handled informally by the normal give and take of peers advising each other. As chief judge or colleague I have

* These remarks are from an address to the Alexander Fellows of the Benjamin N. Cardozo School of Law, New York City, given on February 22, 1988.

** Chief Judge, United States District Court, Eastern District of New York. While I take full responsibility for the views expressed in this paper, I should like to acknowledge with thanks the help of my present clerk Jonathan Wiener, and my former clerks Marie O'Connell and Anita Bernstein, who assisted with the research.

advised judges to recuse themselves and that advice has always been followed. The chief judge of any Circuit should be aware that his or her views or the views of a panel of the court of appeals can be brought to the attention of the trial judge informally, directly or through the chief judge of the district, when the trial judge may not have seen a difficulty as clearly as the appellate judges. But then the trial judge makes the decision. If he or she refuses to act, our district court Guidelines for the Division of Business among judges provide for involuntary reassignment at the district level. *See* Guidelines for the Division of Business, United States District Court, Eastern District of New York, revised February 17, 1988 [see Appendix].

Only after a motion to recuse is made by a party at trial and denied, or a mandamus proceeding is brought in the court of appeals, does the appellate court have the power to order transfer of a case, on the ground that the trial court abused its discretion in failing to recuse. The original decision whether to recuse is for the district judge. The system for assigning cases to trial judges is for the district court to administer. Congress delegated that power to the district courts under 28 U.S.C. § 137. There are good policy reasons for that delegation.

I. LOCAL GUIDELINES

Our court has recently revised its guidelines for the division of business among our judges to avoid some of the problems involved in assignment on remand and other assignment choices. Guideline 50.2(*l*) of the Guidelines for the Division of Business in the Eastern District of New York provides that the case shall stay with the original judge on remand, except that retrials or resentencing in criminal cases are reassigned at random to another judge. In civil remands and criminal remands not requiring retrial or resentencing, the chief judge or the judge to whom the case is assigned, may decide that another judge ought to be assigned instead.

These guidelines were adopted after careful study and much discussion with the trial bar. They reflect a diligent analysis of the problems confronted by the district court. Guideline 50.2(l) of the Guidelines for the Division of Business in the Eastern District of New York now reads as follows:

(l) Appeals—Assignment on Reversal or Remand

(1) In a criminal case upon reversal of a judgment and a direction for retrial or resentence, on receipt of the mandate of the appellate court the clerk shall randomly select a different judge to preside over the case. Notwithstanding this provision the chief judge may order the case assigned to the original presiding judge to avoid placing an excessive burden on another judge.

(2) In a civil case upon reversal the case shall remain assigned to the judge who was previously assigned, unless the chief judge or his designee orders otherwise.

Revised February 17, 1988. [See Appendix p. 286.]

In accordance with present practice, the judge assigned may recuse himself or herself or ask that the chief judge of the district court, or his

or her designee, assign the case to another judge. The chief judge may take the initiative to reassign. It is essential that the rule permit the chief judge discretion to avoid such problems as overloading judges and to give temporary relief to a trial judge conducting an extended trial. Reassignment will be made pursuant to a random selection procedure outlined in Guideline 50.2(b).

The guideline is neither predicated upon power granted by, nor inconsistent with, the Federal Rules of Civil or Criminal Procedure. *Cf.* Fed.R.Crim.P. 57; Fed.R.Civ.P. 83; N.D.Ill.R. 44; S.D.Ind.R. A–8; D.Mass.R. 8(h); D.R.I.R. 7(g); Seventh Circuit Court R. 18. It is adopted pursuant to 28 U.S.C. § 137, set out *infra*.

Generally, the practice in this district has been for a resentencing on remand to be by the same judge who originally sentenced the defendant. Having the judge who is most familiar with the defendant's case (and who in many cases has heard trial testimony) resentence the defendant is usually both the most efficient use of judicial resources and fair for the defendant and the government. Some concern about disparity in sentencing is alleviated in the United States District Court for the Eastern District of New York because of the practice of having a three-judge panel discuss sentencing recommendations and because of regular and extensive consultation with the Probation Department. This practice has worked well for a number of years.

Nevertheless, after consultation with the bar, the judges decided to experiment with a resentencing change that will normally send the case to a new judge after a remand for resentencing. This new practice will avoid the embarrassment of having some panels of the court of appeals require such transfers on a haphazard basis. Moreover, under the new mandatory sentencing guidelines many factual inquiries may need to be made, requiring, in effect, an extended hearing when resentencing is ordered. The defendant suffers no added risk when the resentencing is before a new judge, because, absent unusual circumstances, the sentence on remand may be no greater than the original sentence, in order to avoid chilling the exercise of the right to appeal. *See Blackledge v. Perry*, 417 U.S. 21, 28, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 725–26, 89 S.Ct. 2072, 2080–81, 23 L.Ed.2d 656 (1969); *United States v. Whitley*, 734 F.2d 994, 996–97 (4th Cir.1984).

II. STATUTORY SCHEME

In considering the power to assign we turn first to the statutory scheme. Section 137 of Title 28 places in the district court, and particularly the Chief Judge of the district, responsibility for division of business among the district judges. It reads:

§ 137. Division of business among district judges

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and

assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

Judicial councils of the Circuit—not panels of appellate judges—have some administrative supervisory powers. *See* 28 U.S.C. § 332. But as the revisor's notes to section 137 point out, section 332 does not limit the district court's powers under section 137. The notes to section 137 read:

Section was rewritten and the practice simplified. It provided for division of business and assignment of cases by agreement of judges . . .

The revised section [137] is consistent with section 332 of this title, the last paragraph of which requires the judicial council to make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit.

See Federal Civil Judicial Procedure and Rules 469 (West 1987).

Judicial councils are constituted so as to include both court of appeals and district judges. *See* 28 U.S.C. § 332(a)(1). It is the council, not individual appellate panels, that may "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. § 332(d)(1). *See generally* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3939 & n. 27 (1977 & Supp.1987). This supervisory authority extends to both the courts of appeals and district courts. 28 U.S.C. § 332. The judicial council may "abrogate" local rules adopted pursuant to the Federal Rules of Procedure. Fed.R.Civ.P. 83; 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3939 n. 27 (Supp.1987). This power of abrogation under Rule 83 does not extend to guidelines for the division of business adopted pursuant to section 137 of Title 28.

The general power of appellate courts to "require further proceedings . . . as may be just" does not encompass the division of business. That appellate power is contained in 28 U.S.C. § 2106, reading:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Appropriate proceedings may be ordered, but the statute does not authorize the appellate court to say what judge in a multijudge court shall preside—that issue is covered by section 137.

Where the court of appeals has some power over administrative matters concerning the district courts, the authority is granted by specific statute. *See, e.g.,* 28 U.S.C. § 152 (court of appeals appoints bankruptcy judges after consideration of recommendations of judicial council); *cf.* 18 U.S.C. § 3165 (judicial council approval of district court

speedy trial plans); 28 U.S.C. § 1863 (approval of plans for random jury selection); and 28 U.S.C. § 753 (approval of court reporter management plans).

This statutory scheme is better understood in light of the history of the relationship between the federal district and appellate courts. It is to this history that I now turn.

III. HISTORICAL BACKGROUND

Control over the conduct of individual judges has been a subject of interest since at least as early as Roman times. The *Leges Visigothorum,* a code of law used in the Roman empire during the seventh century, noted what constituted judicial misconduct: for example, the refusal to hear a case, prejudicial delay, the rendering of a decision contrary to received law, and receiving bribes. Roman law had a quasi-tort cause of action called the *actio in indicem qui litem suam facit,* permitting a litigant to sue a judge for false judgment. This action was seldom if ever used. It appears that the action would have been brought before a royal court. As a procedural safeguard, the accused judge could escape liability through oath taking, and the aggrieved litigant had to produce witnesses. *See generally* Hoeflich, *Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages,* 2 Law & Hist. Rev. 79 (1984).

Under English common law, some judges held office during good behavior by patent of the King, and were subject to the control of the King's Bench, a court independent of the monarch from at least the sixteenth century on. Raoul Berger writes:

By virtue of its 'general Superintendency over all inferior Courts,' King's Bench would punish judges of lesser courts by Attachment for Contempt 'for acting unjustly, oppressively, or irregularly,' 'for any practice contrary to the plain rules of natural Justice . . . as for denying a Defendant a Copy of the Declaration against him . . . or for compelling a Defendant to give exorbitant bail' and 'putting the Subject to unnecessary Vexation by colour of a judicial Proceeding wholly unwarranted by Law.' . . . '[T]he Court of King's Bench, by the Plenitude of its Power, exercises a Superintendency over all inferior Courts, and may grant an Attachment against the Judges of such Courts for oppressive, unjust or irregular Practice, contrary to the obvious Rules of Natural Justice.'

Berger, *Impeachment of Judges and "Good Behavior" Tenure,* 79 Yale L.J. 1475, 1503 n. 142 (1970) (first two ellipses in original) (citations omitted). In addition, it appears that the King's Bench could use its writ of *scire facias* (a proceeding to declare a forfeiture of the patent, comparable to an order to show cause to repeal a judicial commission) to discipline judges. *See id.* at 1479–81; *see also* Ervin, *Separation of Powers: Judicial Independence,* 35 Law & Contemp.Probs. 108, 110–11 (1970); Biancala, *For Want of Justice: Legal Reforms of Henry II,* 88 Colum.L.Rev. 433 (1988). Judge Irving Kaufman has maintained that *scire facias* was only used against administrative officials with life tenure, never against judges. *See* I. Kaufman, *Chilling Judicial Inde-*

pendence 20–29 (1979). Berger cites in support of his argument the experience of Sir John Walter, whom Charles I asked to surrender his patent in 1628; Walter refused to do so, saying that he was entitled to a *scire facias* proceeding by judges: "Thus a highly placed judge affirmed that his office could be forfeited for misbehavior in a *scire facias* proceeding." Berger, *supra* at 1481. Yet there appears to be no recorded history of a judge removed by judges through *scire facias*. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 Chi.-Kent L.Rev. 1, 14 (1977). *See generally* Shartel, *Federal Judges—Appointment, Supervision & Removal—Some Possibilities Under the Constitution*, 28 Mich.L.Rev. 485, 723, 870 (Parts 1–3) (1930) (suggesting supervision of district judges by Chief Justice and presiding circuit judges).

In framing the United States Constitution, the members of the Constitutional Convention provided judges with tenure "during good behavior" to ensure their independence from the legislature and the executive. United States Constitution, Art. III, § 1. The drafters of the Constitution rejected many traditional controls over judges, deliberately making no provision for executive removal of the judiciary or for legislative removal by bills of attainder (legislative declaration of a person's guilt), bills of pains and penalties (declarations of guilt where the punishment was less than death), and address (legislative removal for offenses that were less than impeachable). *See* Cameron, *The Inherent Power of a State's Highest Court to Discipline the Judiciary*, 54 Chi.-Kent L.Rev. 45, 49 (1977). Debate on a motion made on the floor of the Convention to provide for removal by the President on application of the Senate and House of Representatives (a form of joint address) reveals the framers' intent not to subject judges to extrabranch control except by impeachment. Gouveneur Morris called removal by address a "contradiction in terms" since it would subject judges serving during good behavior to removal without a trial; Edmund J. Randolph "opposed the motion as weakening too much the independence of the Judges." II M. Farrand, *The Records of the Federal Convention of 1787* 428–29 (rev. ed. 1966). Removal by address was explicitly rejected by the framers, the motion being defeated by a vote of seven to one, with three states absent. *See id.* at 429. Removal upon "impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors," of course, remained. United States Constitution, Art. II, § 4; *see id.*, Art. III, § 1.

I shall refrain from discussing the present plan for disciplining federal judges (which I consider in large part unconstitutional) because it is irrelevant to the present discussion. Responsibility for discipline is placed in the circuit judicial councils and in the United States Judicial Conference, not in the courts of appeals. *See* 28 U.S.C. § 372(c).

These constitutional choices made by the founding fathers show support for the concept of an independent judiciary in the United States, but they are inconclusive on the nature of that independence. Is an independent judge independent from his fellow judges or only from encroachment by the legislature and executive? Assertions in both directions exist. Because the boundaries of judicial independence have seldom needed clear delineation, the debate has been largely a rhetorical one

See e.g., Rehnquist, *Political Battles for Judicial Independence*, 50 Wash.L.Rev. 835, 842 (1975) ("the unwritten constitutional law surrounding Article III" supports judicial independence "even at the cost of enduring partisan judges"); Ervin, *Separation of Powers: Judicial Independence*, 35 Law & Contemp.Probs. 108, 121 (1970) ("judicial independence was ... a *sine qua non*" to the framers, who intended "that each individual judge would be free from coercion even from his own brethren."); Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 Sup.Ct.Rev. 135, 153 (1969) (framers' "purpose was to create a truly independent judiciary limited only by the cumbersome process of impeachment"); Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U.Kan.Cty.L.Rev. 3 (1938) (impeachment the sole method of control); Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 Mich.L.Rev. 420 (1987) (framers intended that impeachment be sole method, though cumbersome, in order to safeguard judicial independence); Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 Yale L.J. 1117, 1125 nn. 52 & 53 (1985) (collecting sources; author favors absolute independence); *but see* Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 Yale L.J. 1475, 1476–77 (1970) (Art. II, § 4's provision of impeachment for conviction of "high crimes and misdemeanors" is narrower than Art. III, § 1's provision of judicial tenure during "good behavior"; therefore Congress may provide for other methods of removing judges whose misbehavior is not impeachable); Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities under the Constitution*, 28 Mich.L.Rev. 870 (1930) (arguing that jurisdiction to discipline judges is not inconsistent with the Constitution).

Although this constitutional debate has not been resolved, the early American common law preserved a version of traditional King's Bench mandamus, an encroachment of judges upon judges. Chief Justice Marshall, the leading American proponent of judicial review, had a strong sense of hierarchy within the judiciary. To Marshall, the superior court must lead the inferior to do what it "determine[s], or at least supposes, to be consonant to right and justice." *Ex Parte Crane*, 30 U.S. (5 Pet.) 190, 192, 8 L.Ed. 92 (1830). *Crane* shows none of the hesitancy that arose in later case law, when mandamus began to be thought of as an "extraordinary remedy," a response to "usurpation." Marshall's language differs little from that of Blackstone:

> [I]t is the peculiar business of the court of king's bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice.

3 W. Blackstone, Commentaries 110, *cited in Ex Parte Crane*, 30 U.S. at 192.

Much of this constitutional and English history is not helpful in resolving the issue before us because the courts of appeals are a relatively late addition to our federal court structure. They were created

by statute and granted limited statutory powers. Even the Supreme Court, which could justly claim to have received all the judicial power of both the King's Bench and Parliament, has been from the outset prudently modest in claiming the inherent power of procedural superintendence over other federal courts. *See, e.g.*, The Federalist No. 81 (A. Hamilton) (distinguishing Supreme Court's judicial power under American system from Parliament's power under British system); J. Goebbel, Jr., I History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, 784–93 (1971) (discussing powers of superintendence); J. Weinstein, Reform of Court Rule–Making Procedures 59, 65–75 (1977) (Supreme Court's rulemaking power exercised pursuant to statutes).

IV. MODERN JUDICIAL SUPERVISION: THE RISE OF COMITY BETWEEN COURTS

A. *Creation of the Court of Appeals*

Hierarchy in the lower federal courts as we know it is a relatively recent phenomenon. The Judiciary Act of 1789 created two sets of trial courts of original jurisdiction, not a two tiered court system under the Supreme Court. Both district and circuit courts were originally trial courts with extremely limited jurisdiction when compared with the modern district courts. Originally the district courts were specialty courts, hearing admiralty and certain minor civil and criminal cases. Thirteen districts were established, coterminous with the new states, and permanent resident judges were appointed. The three circuit courts exercised original jurisdiction in cases resting on diversity of citizenship. The circuit courts were staffed by Supreme Court justices "riding circuit" sitting with district judges of that circuit.

Additionally, the circuit courts had a limited appellate jurisdiction over district court decisions in admiralty and civil cases. Professors Frankfurter and Landis, in their classic study of the federal judicial system, concluded that

> [t]he volume of th[e] [circuit courts'] appellate business with their original jurisdiction [while] not disclosed by available data.... could not have been very considerable if later figures are a dependable guide to the earlier period. The district and circuit courts were in practice two *nisi prius* courts dealing with different items of litigation.

F. Frankfurter and J. Landis, *The Business of the Supreme Court* 12–13 & nn. 35–36 (1928). Because federal jurisdiction was so narrow, these courts were able to manage their small caseloads with little centralization.

The expansion of federal court jurisdiction during the nineteenth century strained this court system and led to the authorization of general federal question jurisdiction in 1875. *See* Act of March 3, 1875, 18 Stat. 470. In 1891, Congress created a court system at the intermediate appellate level to alleviate the burdens on the Supreme Court. *See* Circuit Court of Appeals Act, Mar. 3, 1891, ch. 517, 26 Stat. 826.

Congress has followed the constitutional scheme of federal jurisdiction, which accords the Supreme Court constitutional status, with inferior courts to be created by Congress as needed. Both district and intermediate appellate courts are similar statutory creations. The federal court system does not preserve, in this relationship, the hierarchical authority of royal or superior courts over courts with more limited charters. In the system of seventeenth century England, lower courts were satellites, regional offices of a superior court. In the United States, the courts of appeals were established after many working years without them; no denigration of the general administrative power of the district courts to control themselves was accomplished by creation of the intermediate federal appellate system.

The need for intermediate appellate review in the federal courts was clear in 1891. With circuit and district courts both maintaining original jurisdiction, the limited right of appeal in most cases led only to the Supreme Court. The legislative history of the Circuit Court of Appeals Act asserted that the proposed bill "destroys the 'judicial despotism' of the present system by creating an intermediate appellate court...." H.R.Rep. No. 942, 50th Cong., 1st Sess. at 4 (1888). An intermediate court "simplifies the whole judicial establishment by modelling the system largely after the systems in the [state courts]." *Id.* Another goal of the legislation was to "relieve the Supreme Court of very considerable unimportant litigation." *Id.* at 3.

The structure of the Circuit Court of Appeals Act shows that it was designed to create appellate courts of limited jurisdiction apart from the dual trial court system, thus rearranging the jurisdiction of the lower courts. The bill first divested the existing circuit courts of their appellate jurisdiction. Ch. 517, § 4, 26 Stat. 826, 827. Later it gave the new circuit courts of appeals the power to review final judgments and certain interlocutory orders of the district courts. *See* ch. 517, § 6, 26 Stat. 826, 828, codified at 28 U.S.C. §§ 1291, 1292. The original jurisdiction of the circuit courts remained until its abolition in 1911, which ended the system of two sets of federal trial courts. *See* Act of Mar. 3, 1911, 36 Stat. 1087.

The Circuit Court of Appeals Act preserved the power of the federal courts to issue writs in aid of their jurisdiction. Ch. 517, § 12, 26 Stat. 826, 829. The All Writs Act authorizes the modern use of mandamus and prohibition by the courts of appeals. *See* 28 U.S.C. § 1651. Proper use of this power requires an accurate sense of the boundaries of that jurisdiction: to review errors of law.

Limited authority to control assignment of cases, administrative control of judges, or control over judicial conflict outside the boundaries of the rule of law in a particular case, exists only 1) in the district court sitting as a body, 2) to a limited degree in the judicial council of the circuit as provided by specific statute, 3) to a limited degree in the court of appeals as a body as provided by specific statute, 4) in the Judicial Conference of the United States as provided by statute, and 5) possibly in the Supreme Court as successor to the Court of Kings Bench. It does not exist in an appellate panel which is reviewing a specific case only for specific errors of law in the particular case by a particular federal judge.

B. *The Scope of Mandamus*

Case law since the creation of the courts of appeals has recognized the evolution of the federal court system from the Blackstone–Marshall hierarchy to a structure with more evenly allocated powers. Mandamus is now an extraordinary writ available to "all courts established by Act of Congress." *See* All Writs Act, 28 U.S.C. § 1651 (authority to grant writs only when "necessary or appropriate"). A judge may be controlled by another judge, or panel, only under extraordinary and constrained conditions. In contrast, a judgment, a matter of law, is subject to an appellate court's decision to "affirm, modify, vacate, set aside or reverse." *See* 28 U.S.C. § 2106.

Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), illustrates this evolved view of mandamus. In *Will* the district court had, apparently intentionally, disregarded discovery rules for a criminal case. *See* 389 U.S. at 100–01, 88 S.Ct. at 276. Nevertheless, the Supreme Court disapproved of the court of appeals' summary issuance of mandamus because the practice was isolated, not a persistent problem; the apparent lapse of the district judge was insufficiently extraordinary. The Court emphasized that mandamus is limited to situations where a judge has intentionally exceeded, or refused to exercise, the authority within his discretion. *See* 389 U.S. 102–05, 88 S.Ct. at 277–79 (rejecting mandamus where judge has not pursued "a deliberate policy in open defiance of the federal rules").

Will came after what had been the major precedent on mandamus, *La Buy v. Howes Leather Co.,* 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). There the Supreme Court approved of mandamus against a district judge whose *practice* it had been to refer antitrust cases to a master, in derogation of Federal Rule of Civil Procedure 53(b), which provides that in nonjury cases some "exceptional condition" must require the reference. Issuance of the writ was justified where the orders of reference "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." 352 U.S. at 256, 77 S.Ct. at 313. The Court declared that appellate courts have general supervisory powers to facilitate judicial administration. *See* 352 U.S. at 259–60, 77 S.Ct. at 315; *see also Schlagenhauf v. Holder,* 379 U.S. 104, 110–12, 85 S.Ct. 234, 238–39, 13 L.Ed.2d 152 (1964) (court of appeals should have decided all issues raised on mandamus concerning novel question of district court's power under Federal Rule of Civil Procedure 35 to order examinations of a defendant).

Will explicitly distinguished *La Buy,* limiting it to deliberate and persistent breaches of procedure. *See Will v. United States,* 389 U.S. at 102–05, 88 S.Ct. at 277–79. The four dissenters in *La Buy* maintained that the majority erroneously read the All Writs Act as conferring on appellate courts a source of independent appellate power; the *Will* court suggested that there was no such power. *See La Buy v. Howes Leather Co.,* 352 U.S. at 263, 77 S.Ct. at 317 (Brennan, J., dissenting); *Will v. United States,* 389 U.S. at 98, 88 S.Ct. at 275. It could therefore be argued that *Will* has overruled the assertion in *La Buy* "that supervisory control of the District Courts by the Courts of Appeals is necessary to proper

er judicial administration in the federal system." 352 U.S. at 259–60, 77 S.Ct. at 315. In a later case, then-Justice Rehnquist, writing for the Court, stated that although the respondent had probably satisfied the standard for review on appeal, it could not meet its burden of showing a "clear and indisputable" right to issuance of the writ of mandamus because the inaction complained of was within the district court's discretion. *See Will v. Calvert Fire Insurance Co.,* 437 U.S. 655, 665–66 & n. 7, 98 S.Ct. 2552, 2558–59 & n. 7, 57 L.Ed.2d 504 (1978).

Courts of appeals have, nevertheless, tended in recent years to use mandamus more freely than Supreme Court precedents have approved, with no interference from the Supreme Court and little objection from academic commentators. *See e.g.,* Fullerton, *Exploring the Far Reaches of Mandamus,* 49 Brooklyn L.Rev. 1131 (1983); Ward, *Can the Federal Courts Keep Order in Their Own House?* 1980 Brigham Young L.Rev. 233; Note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 86 Harv.L.Rev. 595, 598 (1973) (finding endorsement of limited use of "advisory" mandamus in *La Buy's* "supervisory" mandamus). Supervisory mandamus has been used in a variety of circumstances. *See, e.g., In re Virginia Electric & Power Co.,* 539 F.2d 357 (4th Cir.1976) (mandamus to offer guidance to district judges on when *not* to recuse under 28 U.S.C. § 455); *Sanders v. Russell,* 401 F.2d 241 (5th Cir.1968) (writ issued to void local rule on *pro hac vice* appearances); *Rapp v. Van Dusen,* 350 F.2d 806 (3d Cir.1965) (disqualifying district judge). As will be pointed out below, there is little warrant for much of this action by appellate panels given the explicit power of the district courts, Circuit Councils and United States Judicial Conference to supervise.

C. *Orders of Reassignment on Appeal*

While mandamus may lie to correct error in a case of disqualification, the power asserted by some panels of court of appeals judges to reverse a district court decision with an order that the case be assigned to another district judge is without statutory basis. For examples of such assertions of inherent power on appeal, *see, e.g., Sobel v. Yeshiva University,* 839 F.2d 18 (2d Cir.1988); *Outley v. City of New York,* 837 F.2d 587 (2d Cir.1988); *United States v. Pugliese,* 805 F.2d 1117 (2d Cir.1986); *United States v. Sears, Roebuck & Co.,* 785 F.2d 777 (9th Cir.), *mandamus denied sub nom. In re Real,* 479 U.S. 982, 107 S.Ct. 604, 93 L.Ed.2d 604 (1986); *United States v. Ritter,* 273 F.2d 30 (10th Cir.1959), *cert. denied,* 362 U.S. 950, 80 S.Ct. 863, 4 L.Ed.2d 869 (1960).

Most recently, the Second Circuit issued four such orders to reassign for sentencing. *See United States v. Stratton,* 820 F.2d 562 (2d Cir. 1987); *United States v. Louis,* 814 F.2d 852 (2d Cir.1987); *United States v. Pugliese,* 805 F.2d 1117 (2d Cir.1986); *United States v. Diaz,* 797 F.2d 99 (2d Cir.1986). Other precedents exist in that circuit. *See United States v. Robin,* 545 F.2d 775 (2d Cir.1976), *reh'g denied,* 553 F.2d 8 (2d Cir.1977) (en banc); *United States v. Rosner,* 485 F.2d 1213, 1231 (2d Cir.1973), *cert. denied,* 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672 (1974); *United States v. Brown,* 470 F.2d 285, 288–89 (2d Cir.1972).

Earlier cases seem to have recognized the lack of power to order reassignment, since circuit panels confined their remarks on reassignment

to "recommendations" to the district court on how it should exercise its statutory authority to divide its business. *See* 28 U.S.C. § 137; *United States v. Clark*, 475 F.2d 240, 251 (2d Cir.1973) ("a hearing before another member of the court is advisable"); *United States v. Brown*, 470 F.2d 285, 288–89 (2d Cir.1972) ("we think it best that further proceedings be assigned to a different judge"); *United States v. Bryan*, 393 F.2d 90, 91 (2d Cir.1968) (assumes trial judge "will act pursuant to our views regarding the preferred practice" of a new trial before another judge); *United States v. Mitchell*, 354 F.2d 767, 769 (2d Cir.1966) (chief judge, "in the interest of sound judicial administration, would be wise to re-assign the case to another judge for re-trial").

United States v. Yagid, 528 F.2d 962 (2d Cir.1976), demonstrates the dangers that can arise from the interference with normal case assignments at the trial level by an appellate panel. Yagid, one of three defendants jointly tried and convicted, appealed and obtained an order for a new trial because of Jencks Act violations by the prosecution. *See United States v. Badalamente, et al.*, 507 F.2d 12 (2d Cir.1974), *cert. denied*, 421 U.S. 911, 95 S.Ct. 1565, 43 L.Ed.2d 776 (1975). The appellate panel, in the course of its opinion declining to rule on Yagid's other claim, stated:

> Because it is possible that at the new trial the district judge who presided at the original trial may be required to testify concerning certain aspects of the suppression, we will not consider Yagid's other claims of reversible error. This is so because on retrial, another district judge *should* preside and he will not be bound by the rulings of the original trial judge ...

507 F.2d at 15 (emphasis added). On remand, the indictment had to be dismissed without prejudice for failure to retry the defendant within 90 days of his successful appeal. This failure occurred at least in part because of confusion in the district court over how the reassignment of the case should proceed. *See United States v. Yagid*, 528 F.2d at 963–65. The appellate panel's response was to chide the district court for not reading "should" as "must": "Such suggestions contained in appellate opinions should not be deemed merely precatory because they are not 'ordered,' especially when a retrial is mandated." 528 F.2d at 965 (footnote omitted). In support of this reading the panel cited, *inter alia*, a case from the previous year in which an appellate panel found it "advisable" that a new suppression hearing be held before another judge although it gave no opinion as to who should preside at the retrial. *See Yagid*, 528 F.2d at 965 n. 5; *United States v. Clark*, 475 F.2d 240, 251 (2d Cir.1973).

Courts more recently have used 28 U.S.C. § 2106, a catchall grant of authority to issue orders in aid of jurisdiction, to make reassignment an element of the mandate. This power can be explained and justified in a more principled fashion than the courts have used: Reassignment should be a device of the appellate court that meshes with the district judge's duty of recusal. Self-recusal is impractical in the event of systemic and deliberate repeated errors of law. There the court of appeals need not await action by the district judge, but may proceed by extraordinary writ of mandamus, after notice is given to the district judge. Reassignment

to avoid bias, however, is a question that statutorily falls first on the district judge.

D. *Statutes Dealing With Recusal in Individual Cases*

Both sections 144 and 455 of Title 28, dealing with disqualification, are obviously designed to permit a district judge to pass upon the matter, before his or her decision is reviewed on appeal. Section 144 reads:

> § 144. Bias or prejudice of judge
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

And section 455 reads in part:

> § 455. Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

It appears to be a violation of these statutory provisions for the court of appeals to reassign for bias if the district judge has not first passed on the matter. *See, e.g. United States v. Haldeman*, 559 F.2d 31, 131 & n. 287 (D.C.Cir.1976) ("involved judge has the prerogative, if indeed not the duty," to decide bias question), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *Berger v. United States*, 255 U.S. 22, 36, 41 S.Ct. 230, 234, 65 L.Ed. 481 (1921) (challenged judge "had a lawful right to pass upon the sufficiency of the affidavit" of bias). *Cf.* Stempel, *Rehnquist, Recusal and Reform*, 53 Brooklyn L.Rev. 589, 632–39 (1987).

Where disciplinary action against a judge is required, the judicial council may have power to act under 28 U.S.C. § 372(c) (assuming that this provision is constitutional). The judicial council of the various circuits are subject to detailed rules controlling the exercise of this power. Rule 0.24 of the Second Circuit provided from the outset, for example, that adoption of these disciplinary rules "shall not be construed as indicating any views with respect to the constitutionality of Title 28 U.S.C. § 372(c) or of any action taken thereunder." 16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3939, Supp. at 237 (Supp. 1987). *See also* Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 Yale L.J. 1117, 1124–25 (1985) (questioning authority of judicial council to control district judges); Ervin, *Separation of Powers: Judicial Independence*, 35 Law & Contemp. Probs. 108 (1970) (discussing original bill).

E. *Extraordinary Writ Jurisdiction to Remedy Repeated Errors of Law*

The appellate courts' function is to remedy errors of law. Courts without effective appellate review may practice "judicial despotism," as the 50th Congress' report put it. H.R.Rep. No. 942, 50th Cong., 1st Sess. 4 (1888). Not far from the power to review judgments is the power to decide, after *repeated* misapplication of the law by the district judge, that correction of the error requires reassignment. It is repeated and systematic errors of law that create the appellate grounds for reassignment through extraordinary writs. *See, e.g., Will v. United States,* 389 U.S. 90, 102–05, 88 S.Ct. 269, 277–78, 19 L.Ed.2d 305 (1967).

This practice, predicated upon the All Writs Act, 28 U.S.C. § 1651, requires at least a motion to recuse below, or in the case of mandamus or prohibition, notice to the trial judge. *See* Fed.R.App. P. 21; *see also Rapp v. Van Dusen,* 350 F.2d 806, 812 (3rd Cir.1965). The reassignment order in *Sobel v. Yeshiva University,* 839 F.2d 18 (2nd Cir.1988), and other recent court of appeals cases violate this norm where neither a motion to recuse nor mandamus was utilized.

F. *Conflict of Interest or Bias*

The distinction between erroneous application of the law and bias parallels the distinction between appeal and mandamus. In the federal courts the question of bias is explicitly left up to the individual judge to decide in the first instance. Review exists because of the obvious danger that an interested judge will conceal or deny his or her bias, but the system requires that each judge first be given the opportunity to determine his or her own capacity. Congress maintained the present system despite a 1961 recommendation from the Judicial Conference of the United States that the trial judge not pass first on the question of recusal. *See* 13A Wright & Miller, *Federal Practice and Procedure* § 3551 n. 10 (2d ed. 1984).

The recusal statutes instruct the judicial officer on the circumstances which require disqualification. *See* 28 U.S.C. § 455. A party who believes that the judge has not recused himself when he should have may file an affidavit stating the facts and the reasons for the belief that bias or prejudice exists. *See* 28 U.S.C. § 144. Both statutes suggest that the question of recusal lies initially in the district court's domain. They do not set forth bias as a ground for appellate review of the judgment; rather, they force the litigant to put the question of bias to the district judge and then appeal. *See United States v. Olander,* 584 F.2d 876, 883 (9th Cir.1978); *United States v. Mitchell,* 377 F.Supp. 1312 (D.D.C.1974), *aff'd,* 559 F.2d 31 (D.C.Cir.1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

Denial of the motion is not a final order appealable as of right. *See* 13A Wright & Miller, *Federal Practice and Procedure* § 3553 at 659 (2d ed. 1984). For the court of appeals to have jurisdiction, there must be a judgment to be appealed. Certification for interlocutory appeal under 28 U.S.C. § 1292(b) is unusual because rarely does a judge's refusal to disqualify raise "a controlling question of law as to which there is substantial ground for difference of opinion." Increasingly the courts of

appeals have had recourse to their mandamus power to order the disqualification of a judge who has wrongfully refused to recuse himself if the petitioner has "satisfied the burden of establishing that its right [to the writ] is clear and indisputable." *In re IBM Corporation,* 618 F.2d 923, 926–27 & n. 3 (2d Cir.1980).

The limited scope of review afforded the court of appeals requires it to decide whether the judge abused his discretion by not recusing himself. *See, e.g., Johnson v. Trueblood,* 629 F.2d 287, 290 (3d Cir.1980), *cert. denied,* 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 200 (1981); *United States v. Haldeman,* 559 F.2d 31, 139 & n. 359 (D.C.Cir.1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). On a motion for recusal, the standard for determining "impartiality" is whether it might "reasonably be questioned." 28 U.S.C. § 455(a). One court recently articulated this standard as being "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc. v. McMillen,* 764 F.2d 458, 460 (7th Cir.1985) (deciding request for mandamus). *See also United States v. Carmichael,* 726 F.2d 158 (4th Cir.1984); *United States v. Nelson,* 718 F.2d 315 (9th Cir.1983); *In re IBM,* 618 F.2d 923, 929 (2d Cir.1980) ("section sets up an objective standard for recusal, creating the so-called 'appearance of justice' rule").

The recusal statutes are not to be abused by parties making motions for tactical reasons which would result in wasted judicial resources. In *New York City Housing Development Corporation v. Hart,* 796 F.2d 976 (7th Cir.1986), the Seventh Circuit found a district court judge's recusal unwarranted by statute, declared the judge qualified to hear the case and left the question of his reassignment to the case in "the sound discretion of the Executive Committee of the District court." *Id.* at 981. In *Hart,* the district court judge had originally denied the disqualification motion because he believed it had been made solely for tactical reasons. 796 F.2d at 978.

Hart emphasizes the importance of not transferring cases from one judge to another without good cause. As the appeals court noted, sanctioning a practice of "ready recusal, coupled with a rule that requires the judge to whom the case is reassigned to revisit all of the rulings after the filing of the motion to disqualify, would multiply the work of judges who already have much to do." 796 F.2d at 981. In *United States v. Murray,* 762 F.2d 1013 (Table) (6th Cir.1985) (unpublished opinion available on Westlaw), the court of appeals, affirming the denial of a recusal motion which challenged the judge who ruled on the suppression motion on the ground that he had earlier authorized the wiretap, stated: "The frequent recusal of judges in such situations could lead to serious procedural headaches for the federal court system. Such a practice might even encourage an unjust form of judge-shopping." *See also In re IBM Corporation,* 618 F.2d 923, 934 (2d Cir.1980) (refusing to order disqualification because it "would result in the waste ... [of] the past decade ... of judicial time and energy....").

A busy district court cannot accept unwarranted recusals or changes in judges' assignments; they place extra burdens on the other judges

and waste scarce judicial resources. "The district judge is, of course, obligated not to recuse himself without reason just as he is obligated to recuse himself when there is reason." *Suson v. Zenith Radio Corporation,* 763 F.2d 304, 308–09 n. 2 (7th Cir.1985).

The existence of the recusal statutes indicates why decisions such as *United States v. Diaz,* 797 F.2d 99 (2d Cir.1986), are inappropriate. In *Diaz* the trial judge was not asked to recuse himself. On the basis of the trial judge's apparently having written a letter to a senator about the violent-felon sentencing statute, the appellate court ordered reassignment. Reassignment was ordered by the panel without any judgment, erroneous or not, by the district judge on the point of bias. As a result, the trial judge was not given the opportunity of providing the record needed for a proper decision on the issue of bias.

One panel went even further in *United States v. Pugliese,* 805 F.2d 1117 (2d Cir.1986), in which it held that although the sentencing judge's denial of defendant's motion of recusal was proper, reassignment on resentencing was required since certain of the judge's statements at sentencing concerning the presentence report "call into question [the] sentencing judge's impartiality, and thus cast doubt on the fair and impartial administration of justice...." 805 F.2d at 1124. Apparently the panel applied a lesser and more vague standard to the remand for resentencing before a different judge than it did to the motion for recusal. Recusal was not required because the challenged statement concerned matters that the sentencing judge learned of in his judicial capacity, but resentencing before another judge was ordered by the court of appeals panel, despite the fact that this change was contrary to the then Eastern District practice.

United States v. Robin, 545 F.2d 775 (2d Cir.1976), *reh'g denied,* 553 F.2d 8 (2d Cir.1977) (en banc), further illustrates the treatment of the recusal statutes on remand. In *Robin,* the court of appeals, recognizing that "an erroneous impression may have been left as to our reasons for such directions in a few cases," 553 F.2d at 9, set forth "guidelines" for determining when reassignment is desirable. *Id.* at 11. The principal factors the court of appeals found relevant to reassignment for resentencing in a case where recusal is not required by 28 U.S.C. § 144 are:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Robin, 553 F.2d at 10 (2d Cir.1977) (en banc). The judges of the Eastern District of New York have given careful consideration to these suggested "guidelines." Since they can be taken to apply to almost any case of resentencing on remand, the Eastern District's own Guidelines were changed to require resentencing by another judge as the norm. *See* Guidelines for the Division of Business, Eastern District of New York, Guideline 50.2(l) (revised Feb. 17, 1988).

The suggestion by the court of appeals in *Robin* that a new judge would be unaware of "previously expressed views or findings" on the "mind" of another judge of the district court strains credulity. Most matters of interest in administering the court are shared. And, of course, all judges read the opinions of the courts of appeals, so they all would be aware of any fact relied upon by the court of appeals as a basis for suggesting reassignment.

The federal system assumes that district judges are capable of understanding and executing a mandate even when they disagree with it. What a judge would "have substantial difficulty in putting out of his or her mind," *Robin,* 553 F.2d at 10, is a question normally best posed by a litigant, who has a stake in the problem of bias, and can move for recusal. It is better answered in the first instance by the trial judge—the person who knows the limits of his or her own objectivity. The effect on the other judicial business of the court of any transfer from one judge to another can be determined most readily by those responsible for the business of the court, at the trial, not the appellate, level.

Yet several Circuits continue to intrude on the assignment of district judges even in the absence of motions for recusal in the trial court. In *United States v. Sears,* 785 F.2d 777 (9th Cir.), *mandamus denied sub nom. In re Real,* 479 U.S. 982, 107 S.Ct. 604, 93 L.Ed.2d 604 (1986), the Court of Appeals for the Ninth Circuit addressed the problem of the recusal statutes and assumed that it had the power to order reassignment without notice to the district judge:

> We are not acting under the disqualification statutes, which a party must first invoke before the district court. Instead, this court is being asked in the first instance to exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment. We do not believe that the statutory provisions concerning disqualification are either exhaustive or the exclusive method whereby a judge may be removed from hearing a case.

785 F.2d at 780. *See also, United States v. Jacobs,* 855 F.2d 652 (9th Cir.1988); *Brown v. Baden,* 815 F.2d 575, 576 (9th Cir.), *cert. denied,* —— U.S. ——, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987); *Antron v. Union Pac. R.R. Co.,* 813 F.2d 917, 921 (9th Cir.1987). Although the Ninth Circuit may have been correct in stating that the recusal statutes are not the only way to disqualify a judge, it has made no adequate argument based on its statutory or historical authority to defend its acting outside those statutes.

Pressing further, the Second Circuit has taken upon itself the occasional role of ordering reassignments even when there is not the slightest evidence of any bias or error by the trial judge. In *United States v. Corsentino,* 685 F.2d 48 (2d Cir.1982), the appellate court granted a motion to vacate a sentence and ordered resentencing before another judge, although "the need for resentencing was caused entirely by the

prosecutor [who violated the plea agreement] and is not attributable to the sentencing judge." 685 F.2d at 52. *See also United States v. Chitty*, 760 F.2d 425, 432 (2d Cir.), *cert. denied*, 474 U.S. 945, 106 S.Ct. 310, 88 L.Ed.2d 287 (1985) (ordering remand to another judge, because of prosecutor's remarks, even "though obviously not the fault of" the judge); *United States v. Carbone*, 739 F.2d 45 (2d Cir.1984) (rule 35 motion predicated on prosecutor's violation of plea agreement to be heard by another judge).

The trial court is sensitive to the need to reassign some Rule 35 motions for resentencing, depending on their basis. *See United States v. Stolon*, 561 F.Supp. 63, 64–66 (E.D.N.Y.1983). A rule which would require automatic reassignment of Rule 35 motions does not serve the interests of judicial economy and will often be contrary to the interests of justice. But the decision should be made in the first instance at the trial, not the appellate level. *See United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir.1979) ("remand to a new judge is reserved for 'unusual circumstances' "). *Cf. Koller v. Richardson–Merrell*, 737 F.2d 1038, 1067 (D.C.Cir.1984) (Richey, J., concurring) ("even the suggestion of remanding the case to another judge is inappropriate"), *vacated on other grounds*, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985); *Nobel v. Morchesky*, 697 F.2d 97, 103 n. 11 (3d Cir.1982) ("mandatory reassignments should be made infrequently and with the greatest reluctance").

The recusal process was created for good reasons. Appellate circumvention of that process can only injure our ability to secure justice. I agree with Judge Richey's ringing conclusion:

> The time has come to implement the mandate of Congress and remand cases to a different judge *only* on the basis of evidence that would require recusal under 28 U.S.C. §§ 144 and 455. Otherwise, we will be opening a 'Pandora's Box' for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic.

Koller v. Richardson–Merrell, 737 F.2d 1038, 1067 (D.C.Cir.1984) (Richey, J., concurring) (emphasis in original), *vacated on other grounds*, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985). I would add to Judge Richey's remarks that the evidence for recusal must first be presented on motion to the trial judge. In short, absent repeated deliberate errors warranting the issuance of an extraordinary writ, the appellate panels ought never order reassignment on remand without observing the statutory recusal process.

V. CONCLUSION

Peremptory reassignments such as those in *United States v. Pugliese*, *United States v. Diaz*, and *Sobel v. Yeshiva University*, where claims concerning the trial judge's impartiality are made in the first instance in or by the appellate court, distort the statutorily prescribed recusal remedy as well as the All Writs Act. Such reassignment interferes with the docket of the district court where the district judge has neither exceeded his or her authority nor refused to exercise that authority (the

standard under *Will v. United States*), nor demonstrated an inability to execute the appellate mandate (the reasoning of *Sears*). It is a gratuitous gesture without authority to support it except in recent appellate decisions that themselves lack adequate legal basis. It runs the risk of masking unauthorized "[s]entence review." *United States v. Robin*, 545 F.2d 775, 782 (2d Cir.1976) (Timbers, J., dissenting), *reh'g. denied*, 553 F.2d 8 (2d Cir.1977) (en banc). It creates "the potential for havoc ... upon the effective administration of justice in the trial court." *Koller v. Richardson–Merrell*, 737 F.2d 1038, 1067 (D.C.Cir.1984) (Richey, J., concurring), *vacated on other grounds*, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985).

Despite the court of appeals' lack of authority to issue orders for reassignment, the judges of the district courts have generally followed the advice of the Circuits in these cases in a show of collegiality. The recent revision of Guideline 50.2(*l*) in the Eastern District of New York should avoid in the future the embarrassment that such unwarranted orders have caused both courts.

We need not consider at this time the limits on the powers of the Circuit judicial councils to order reassignments when the trial judge has received notice that this issue will be pursued on appeal. *See, e.g., Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970); Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 Brigham Young L. Rev. 39, 47; Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 Yale L.J. 1117, 1124–25 (1985). The Circuit judicial councils have generally been quite careful and have not attempted to interfere with the assignment of trial judges. Were they to do so, the district judges, I am confident, would resent this attack on their independence. *See, e.g.*, the article by District Judge Frank Battisti, *An Independent Judiciary or and Evanescent Dream*, 25 Case Western Reserve L.Rev. 711 (1975), decrying the circuit councils' attempts to remove judges outside the impeachment process.

Since the abuses to date have been by only a relatively few judges of the courts of appeals, it is my hope that neither the councils nor individual courts of appeals panels will attempt to flout the present historical and statutory scheme, but, instead, that they will leave the division of business among district courts to the judges of the district courts. For much the same reason that it would be unheard of for the Supreme Court to remand a case to the court of appeals with *sua sponte* instructions that certain court of appeals judges should not participate in the case, so judges of the courts of appeals should refrain from this practice when remanding to the district courts. One of the great strengths of the federal judicial system has been the strong sense of independent power and responsibility of each federal judge to protect the Constitution and laws of the United States. Any unnecessary erosion of this vital legal resource can only be deprecated and viewed with alarm.

APPENDIX

GUIDELINES FOR THE DIVISION OF BUSINESS UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

ADOPTED PURSUANT TO 28 U.S.C. § 137

50.1 CATEGORIES AND CLASSIFICATION OF CASES; INFORMATION ON CASES AND PARTIES

(a) *Categories of cases.* Cases shall be divided into the following main categories:

(1) civil

(A) regular

(B) multidistrict litigation

(2) criminal

(3) miscellaneous

(b) *Information sheet.* The party filing the initial paper in a civil or criminal case shall complete and attach an information sheet. The information sheet shall be placed in the case file.

(c) *Disclosure of interested parties.* To enable judges and magistrates to evaluate possible disqualification or recusal, counsel for a private (nongovernmental) party shall submit at the time of initial pleading a certificate identifying any corporate parent, subsidiaries, or affiliates of that party.

(d) *Long Island cases.*

(1) A criminal case shall be designated a "Long Island case" if the crime was allegedly committed wholly or in substantial part in Nassau or Suffolk County.

(2) A civil case shall be designated:

(A) a "Uniondale case" if the cause arose wholly or in substantial part in Nassau County, or all or most of the parties reside in that county; or

(B) a "Hauppauge case" if the cause arose wholly or in substantial part in Suffolk County, or all or most of the parties reside in that county.

(3) As provided in 50.2(f) a party may move to designate a case as a Long Island case, a Uniondale case or a Hauppauge case or to cancel such designation on the grounds that such action will serve the convenience of the parties and witnesses or is otherwise in the interests of justice.

(e) *Miscellaneous cases.* All matters that do not receive a civil or criminal docket number shall be given a miscellaneous docket number

APPENDIX—Continued

and assigned to the miscellaneous judge. The matter will continue to be assigned to that judge after he or she ceases to be miscellaneous judge.

50.2 ASSIGNMENT OF CASES

(a) *Time of assignment.* The clerk shall assign a civil case upon the filing of the initial pleading. In a criminal case after an indictment is returned or after an information (including a juvenile information under 18 U.S.C. § 5032) or a motion to transfer under 18 U.S.C. § 5032 has been filed, the United States Attorney shall refer the case to the clerk who shall then assign the case. The United States Attorney shall arrange with the judge to whom the case is assigned, or if that judge is absent or unavailable as provided in 50.5, with the miscellaneous judge, to have the defendant arraigned and a plea entered as promptly as practicable.

(b) *Random selection procedure.* All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk's offices in such a manner that each active judge shall receive as nearly as possible the same number of cases, except as provided in paragraph (h). Where a party or his counsel requests prior to selection that he or she be present at the selection, the clerk shall make reasonable efforts to comply with the request. In Brooklyn civil cases a magistrate shall be drawn at the same time and in the same manner as a judge. All Long Island civil cases shall be assigned to the Long Island magistrate. The parties to any Long Island case assigned to a Brooklyn judge may stipulate that the case be assigned to the Long Island magistrate for pretrial purposes.

(c) *Assignment of civil cases.* There shall be separate Brooklyn, Uniondale and Hauppauge civil assignment wheels. At least quarterly the Chief Judge shall fix the proportion of cases to be assigned to the Long Island courthouses so as to distribute the civil cases relatively equally among all the active judges.

(d) *Assignment of criminal cases.*

(1) There shall be a Brooklyn criminal and a Long Island criminal assignment wheel.

(2) There shall Brooklyn and Long Island criminal misdemeanor assignment wheels for the random assignment of these matters to a magistrate.

(e) *Place of trial.* Except in emergencies a case shall be tried at the place to which it has been assigned.

(f) *Objection.* Any objection by a party to designation of a judge or to place of trial shall be made by letter or motion to the judge assigned

(1) in a criminal case, within ten days from arraignment or from initial notice of appearance, whichever is earlier; or

(2) in a civil case, within the time allowed to respond to the complaint.

(g) *Special cases.*

(1) The miscellaneous judge shall send all narcotics addict commitment cases involving "eligible individuals" as defined by 28 U.S.C. § 2901(g) to the clerk for assignment as provided in paragraph (b).

APPENDIX—Continued

(2) Pro se applications or claims by persons in custody shall be filed without prepayment of fees upon receipt, prior to decision on their in forma pauperis petitions.

(3) Multidistrict litigation is to be assigned to the judge selected by the multidistrict litigation panel and may not be reassigned except by that panel.

(h) *Chief judge; senior judges; temporarily overloaded judges; notice of removal from wheel.* The chief judge and each senior judge shall indicate from time to time to the clerk the percentage of a full caseload that he or she elects to have assigned. The chief judge, with the consent of a judge, may remove that judge from any wheel temporarily to reduce the number of pending cases and prevent delay in the disposition of cases by a judge who is then overburdened by cases or due to ill health. The chief judge shall return that judge to the wheel only on consent of the judge. The clerk shall upon request inform any attorney or party of the identity of judges whose names have been removed from a wheel.

(i) *Visiting judge.* The chief judge shall approve the assignment or transfer of cases to a visiting judge.

(j) *Proceedings after assignment.* All proceedings in a case after assignment shall be conducted by the assigned judge, except as provided by these guidelines.

(k) *Recusal.* A judge or magistrate may recuse himself or herself at any time in accordance with U.S.C. § 455. This guideline takes precedence over any other guideline.

(l) *Appeals—Assignment on reversal or remand.*

(1) In a criminal case upon reversal of a judgment and a direction for retrial or resentence, on receipt of the mandate of the appellate court the clerk shall randomly select a different judge to preside over the case. Notwithstanding this provision the chief judge may order the case assigned to the original presiding judge to avoid placing an excessive burden on another judge.

(2) In a civil case upon reversal the case shall remain assigned to the judge who was previously assigned, unless the chief judge or his designee orders otherwise.

50.3 RELATED CASES; MOTION FOR CONSOLIDATION OF CASES

(a) *"Related" case defined.* A case is "related" to another for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate.

(b) *Civil cases.* By way of illustration and not limitation, the following civil cases are "related": when a case (A) relates to property involved in an earlier pending suit, or (B) involves the same factual issue or grows out of the same transaction as does a pending suit, or (C) involves the validity or infringement of a patent already in suit in a prior case.

(c) *Criminal cases.* Criminal cases are "related" only when (A) a superseding indictment or information is filed, or (B) more than one indictment or information is filed against the same defendant or defendants, or (C) when an application is filed by a person in custody that relates to a prior action. Other cases will be deemed "related" only upon application by a party, upon notice, to the judge presiding over the earlier assigned case. The application will be granted if a substantial saving of judicial resources is likely to result from assigning both cases to the same judge.

APPENDIX—Continued

(d) *Designation of related case.* If the party filing a case believes it to be related to a prior case, whether pending or closed, the party shall so indicate on the information sheet, specifying for each such case the title and the docket number, if any. Each attorney in a case has an ongoing duty to advise the clerk in writing upon learning of any facts indicating that his or her case may be related to any other pending case.

(e) *Assignment of related case.* Related cases shall be assigned by the clerk to the judge to whom was assigned the case with the lowest docket number in the series of cases. The clerk shall advise the judge of such assignment of a "related case."

(f) *Case erroneously assigned as related.* The designation of cases as related may be corrected *sua sponte* by the judge to whom they are assigned, by returning to the clerk for reassignment cases erroneously so assigned. The failure to assign related cases appropriately shall be corrected only by agreement of all of the judges to whom the related cases are assigned; if they agree, they may transfer the later-filed cases as provided in paragraph (e), and notify the clerk of that action.

(g) *Credit for related case.* A related case transferred or assigned to a judge shall be counted as would a newly-filed case regularly assigned. A judge shall be assigned an additional case for each case transferred from him or her under this guideline.

50.4 REASSIGNMENT OF CASES

No case shall be reassigned except in the interest of justice and the efficient disposition of the business of the court. The chief judge may at any time, with the consent of the judges involved, reassign individual cases. Reassignment of cases to accommodate changes in the complement of judges shall be made in accordance with the order of the Board of Judges.

50.5 MISCELLANEOUS JUDGE

(a) *Duties and functions.* A miscellaneous judge shall be designated for each session of the court to:

(1) hear and determine:

(A) matters requiring immediate action in cases already assigned to any judge of the court, if that judge is unavailable or otherwise unable to hear the matter;

(B) special proceedings which cannot be assigned in the ordinary course, including motions under Fed.R.Crim.Proc. 41 made prior to indictment;

(C) any other proceeding not part of or related to a case, including admissions to the bar and naturalization proceedings;

APPENDIX—Continued

(D) requests to be excused from service on the grand and petit juries; and

(E) all matters relating to proceedings before the grand jury;

(2) impanel the grand jury, receive indictments, and refer criminal cases to the clerk for assignment pursuant to 50.2.

(b) *Emergency matters.* The miscellaneous judge shall dispose of matters under paragraph (a)(1) only to the extent necessary and shall continue the case before the assigned judge. All applications for emergency action or relief shall disclose any prior application to a judge for the same or related relief and the outcome thereof.

50.6 CALENDARS

(a) *Numbers; Order of cases.* The docket number of each case shall be the calendar number. No note of issue shall be required to place the case on the calendar. Each judge shall dispose of cases assigned to him or her as required by law and the efficient administration of justice.

(b) *Preferences.* Each judge shall schedule cases appearing on his or her docket in such order as seems just and appropriate, giving preference to the processing and disposition of the following:

(1) habeas corpus petitions and motions attacking a federal sentence;

(2) proceedings involving recalcitrant witnesses before federal courts or grand juries, under 28 U.S.C. § 1846;

(3) actions for temporary or preliminary injunctive relief; and

(4) any other action if good cause is shown.

(c) *Publication of calendars.* Each court day the clerk shall post on bulletin boards throughout the courthouse and provide to legal newspapers for publication copies of the judges' calendars.

50.7 CONFERENCES

The judge assigned to any case may direct the attorneys to appear to discuss the case informally, to entertain oral motions, to discuss settlement, or to set a schedule for the events in the case, including completion of discovery, pretrial and trial.

GUIDELINES FOR THE DIVISION OF BUSINESS AMONG UNITED STATES DISTRICT COURT JUDGES FOR THE EASTERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 137

COMMENTARY

by

PROFESSOR PETER LUSHING

and

LAWRENCE J. ZWEIFACH, ESQ.

INTRODUCTION

In 1988 the Board of Judges of the United States District Court for the Eastern District of New York, pursuant to 28 U.S.C. § 137, adopted Guidelines for the Division of Business among United States District Court Judges. The Guidelines supersede the Court's Rules for the Division of Business among District Judges. The Guidelines were adopted on February 16, 1988, effective March 31, 1988. They were preceded by publication of proposed guidelines and many conferences with members of the bar and bar association committees.

The Guidelines for the Division of Business among United States District Court Judges are in part an outgrowth of the work of the Court's Criminal Procedure Committee, which was appointed by Chief Judge Jack B. Weinstein in the Fall of 1985. Reports of the Criminal Procedure Committee appear at 111 F.R.D. 303 and 311 (1986); these reports were not themselves approved by the Board of Judges and are cited here for informational and historical purposes only. Also part of the history of the Guidelines are letters to Chief Judge Weinstein from the Criminal Procedure Committee (October 8, 1987) and from the Committee on Federal Courts, Association of the Bar of the City of New York (October 6, 1987), commenting on a May 1987 draft of proposed Guidelines, and from the Committee on Federal Courts (January 8, 1987), commenting on the reports of the Criminal Procedure Committee. The Criminal Procedure Committee reports had been well-publicized, appearing not only in Federal Rules Decisions but in the *New York Law Journal* as well (June 18, 1986; digest published on June 17, page 1). Comments on the reports were received from practitioners, and matters covered by the proposed Guidelines were discussed at retreats of the judges of the court held during the Judicial Conferences of the Second Circuit in 1986 and 1987 and at subsequent meetings of the Board of Judges. In short, the Guidelines are the product of a dialogue among the judges, practitioners, and bar organizations.

This Commentary was prepared by Lawrence J. Zweifach, Esq., Chairman of the Criminal Procedure Committee and Prof. Peter Lushing, the

Committee Reporter, with the assistance of Douglas C. Dodge, District Executive of the Court, and has been reviewed by the Chief Judge.

50.1

(a) Rule 1 of the Rules for the Division of Business among District Judges (hereinafter "DR") categorized cases as Bankruptcy, Civil, or Criminal. With the restructuring of the bankruptcy court system in 1978, the District Court no longer sees enough original bankruptcy filings to make a separate category necessary. There are also bankruptcy court rules now. The new miscellaneous and multidistrict categories in the Guideline (hereinafter "GL") codifies existing practice.

(b) The first sentence carries over DR 1(b), except that the new category of miscellaneous cases does not require an information sheet, because many miscellaneous cases involve ministerial matters such as filing an abstract of judgment from another court. The new provision that the information sheet shall be filed codifies the existing practice of the clerk's office. The information sheet is of substantial importance, see GL 50.2(f), and the GL's reflect the fact that the sheet must be on file in order to give notice to all parties of case designations. A suggestion that the information sheet be given to defense counsel along with the indictment was rejected as unnecessary.

(c) This paragraph appears in General Civil Rule 9 and is included here as the logical location for requirements affecting the commencement of an action.

(d) Designation of Long Island criminal cases is unchanged from DR 1(c)(1). Long Island civil cases are now subdivided into the locations of the courthouses on Long Island, the Hauppauge Courthouse not being in existence when the DR's were promulgated. The criteria for discretionary designation or cancellation of designation as a Long Island case are unchanged from DR 1(c)(3). A cross-reference to a uniform procedure for objections to case designations is given.

(e) Miscellaneous matters such as non-party motions to quash subpoenas are not categorized as civil or criminal cases and are referred to the miscellaneous judge. To avoid any question on a sensitive topic, the GL makes it clear that a miscellaneous matter follows the judge, not the miscellaneous part.

50.2

(a) Unchanged from DR 2(a).

(b) DR 2(b) required the judges to determine the method of random selection of cases and provided other details on the mechanics of assignment. The GL removes some of the formal requirements as unnecessary and provides for the first time that cases shall be assigned in public view in the clerk's office. There was a widespread and deeply held feeling among criminal defense practitioners that assignment of a judge to the case was an important and sensitive step in the litigation and should therefore be performed in public. In fact it was already the practice of the clerk's office to allow counsel to attend the drawing of the judge's name from the assignment drum, but many argued that attorneys unfamiliar with with the practices of the court would not be aware of the opportunity to attend the assignment—hence this restatement of the

practice. A recommendation by the Criminal Procedure Committee that the assignment be in open court was rejected as cumbersome and having no additional utility.

It will still be up to the attorney to endeavor to be informed as to when the assignment of the judge takes place. In civil actions the assignment occurs when the complaint is filed, so defendant's eventual counsel will be present at this event only by accident, as it were. But in criminal cases many defendants will have retained counsel or have been assigned the Legal Aid Society prior to indictment, and by dint of counsel's communications with the Assistant United States Attorney and the clerk's office there often can be some assurance that counsel will be aware of the impending filing of the indictment. Counsel will therefore be able to attend the drawing of the judge. This will be mostly in cases where the prosecutor does not intend to have the defendant arrested, for in arrest cases the indictment is usually sealed until the arraignment with the defendant safely in custody, an arrest warrant having been issued when the indictment was handed up to the court *in camera*. Meanwhile, the judge will have been drawn in secret, and the docket sheet will have been sealed.

In any event this GL should not be construed either as creating any right to be informed of the time of the drawing of the judge or as furnishing any ground for vacating a judgment, vacating an assignment, or any other remedy because of a failure to be informed of the time of the drawing.

The provision on assigning magistrates in Brooklyn civil cases is new and reflects a practice followed for over three years and which was inaugurated through the promulgation of the Standing Orders on Effective Discovery in Civil Cases (Standing Order 4 provides in part that "a magistrate shall be assigned to each case at random on a rotating basis upon the commencement of an action...."). On Long Island there is at present only one magistrate.

(c) Substantially unchanged from DR 2(c). The separate wheels for civil cases reflects the assignment of judges to the several courthouses. Distribution of cases "relatively equally" is a more realistic goal than the terminology of the DR.

(d) DR's did not provide for judge assignment of criminal cases as "Long Island," although that case-designation category did in fact exist. For some time there has been more than one judge assigned to Long Island, but the DR's had not reflected that fact. As there is only one judge in Hauppauge at present, there should only be one criminal assignment wheel for all of Long Island to afford a random selection process for criminal cases, where the bar is most sensitive about judge selection. Proposals to add a category of criminal "complex" cases, or even "short," "medium," and "long" case categories, which were intended to spread the workload evenly among the judges, were rejected as an unnecessary and complicating refinement. Cf. GL 50.2(h).

(e) DR 2(c) gave the assigned judge discretion to designate the place of trial. The existence of such discretion is contrary to the purpose of geographical case designations and assignment wheels, as well as to the

rationale for a proposed change in jury wheels under which Brooklyn courthouse jurors will come only from non-Long Island counties. The GL provides an exception only for emergencies, and even those exceptions may be challenged under paragraph (f).

(f) DR's regulated objections to designations and assignments in various places; e.g., DR's 1(c), 2(c), 4(b). The GL provides a single format for objection and sets short time limits, precisely measurable, for the making of objections so that the issue can be resolved before substantial expenditure of judicial energy. This provision includes objections to the designation of cases as related or to failure to so designate under 50.3.

(g) Paragraphs (1) and (2) substantially restate DR 2(d)(1) and (2) The subject matter of DR 2(d)(3) is treated in GL 50.2(*l*). Paragraph (3) of the GL is in accord with the Manual for Complex Litigation, Second, § 31.121, at 253 (1985).

(h) The first sentence substantially restates DR 2(f). The provisions on removal and restoration of judges to a wheel serve to regularize those practices. The last sentence affords any practitioner before the court equal access to information that often is available only to institutional litigants who are constantly in attendance at the courthouse, such as the United States Attorney and the Legal Aid Society. Many attorneys believe that the status of judges in the wheels is important and unnecessarily recondite and, as "hidden information," could be used to manipulate the assignment of judges by influencing the chosen designation of a case; the GL is intended to assuage these anxieties. A proposal to publish the status of judges in the assignment wheels in the *New York Law Journal* was rejected as useless, given the time lag between the change of status and the eventual publication.

(i) This regularizes and restates existing practice.

(j) This is a restatement of DR 2(g).

(k) This paragraph simply alerts the practitioner to the overriding statute. See also 28 U.S.C. § 144 (recusal on motion).

(*l*) DR 2(d)(3) provided for reassignment of civil and criminal cases sent back by an appellate court for retrial, unless the mandate of the appellate court directed otherwise. In fact the practice under the DR was to reassign mechanically only criminal cases, and only those to be retried. The GL draws a distinction between remand in civil and criminal cases, and provides for reassignment of civil cases on remand only in the discretion of the chief judge. Knowledge that a case would be retried by the same judge is believed to have a possible inhibiting effect on vigorous appellate advocacy. In civil litigation however this danger is thought to be outweighed by considerations of judicial economy, civil litigation often having a plethora of complex rulings and information.

In contrast, as to criminal cases the GL mandates reassignment for retrial or resentence but grants the chief judge discretion to assign the case to the original judge in the interest of substantial administrative savings. For example, if a new judge assigned to resentence were compelled to read a record of a multi-month trial, there might be good grounds for the chief judge to order assignment to the original judge.

The court considered the possibility of explicitly providing that upon stipulation of the parties a criminal case would be sent back to the original judge for retrial after reversal. It omitted such a provision in order not to put pressure on the parties to so stipulate. Upon agreement of the parties and the judge involved this result is not precluded by the Guidelines.

The United States Court of Appeals for the Second Circuit has from time to time directed that a new judge hear a matter, but the source of the court's power to do this in the absence of a recusal issue's being first raised in the court below is unstated and seems dubious. Recent examples include *Sobel v. Yeshiva University*, 839 F.2d 18 (1988); *Outley v. City of New York*, 837 F.2d 587 (1988); *United States v. Pugliese*, 805 F.2d 1117 (1986); and *United States v. Diaz*, 797 F.2d 99 (1986).

No statute authorizes an appellate court to order reassignment for bias as an original matter. 28 U.S.C. § 2106 arguably authorizes an appellate order of reassignment to correct repeated errors of law, but even then only upon notice to the district judge that a petition for mandamus is being filed. The recusal for bias statutes, 28 U.S.C. §§ 144 and 455, seemingly contemplate that the district judge pass upon the issue in the first instance. And even here the scope of appellate review is apparently limited to abuse of discretion.

It is extraordinarily wasteful for a case to be unnecessarily reassigned after remand from an appellate court. This will be especially so under the new sentencing guidelines, which will require many factual inquiries.

Channeling the bias issue before the district court in the first instance affords the judge an opportunity to make a record on the matter. Such channeling further confines the issue to the statutory criterion for bias under §§ 144 and 455 and avoids the use of vague *ad hoc* standards. See *United States v. Pugliese, supra*, where denial of a recusal motion was upheld and yet a necessary resentencing was ordered reassigned to a different judge, apparently under a broader standard than provided by the recusal statutes.

The judges of the Eastern District of New York are mindful of the criteria for reassignment set down in *United States v. Robin*, 553 F.2d 8, 10 (2nd Cir.1977) (per curiam en banc). But it is also the case that any of the judges of the court will be aware of the appellate court's opinion and thus know of the facts that are not to be considered on resentence—and which the original sentencing judge was apparently deemed by the appellate court to be unable to disregard on resentence. A judge is in the best position to know whether he or she can disregard certain facts, and so the question of recusal can properly be left to that judge in the first instance.

The GL therefore effects a sensible compromise between the need for reassignment and the administrative needs of the court. Reassignment in the indicated cases shall be the rule, subject to administrative exception by the chief judge, which exception will itself be subject to overruling by the presiding judge in cases of felt bias.

50.3

(a) DR 3(a) defined "related" in general discretionary terms to be applied in the first instance by the party filing the case and furnished illustrative examples. This paragraph retains the general definition, but a party acting on its own can apply the definition to civil cases only; see paragraphs (b) and (c).

(b) These examples come from DR 3(a)(1).

(c) DR 3(a)(2) furnishes examples (A) and (B) as illustrative and not by way of limitation. The GL examples are exclusive unless the court grants an application under the discretionary standard. There was some opposition from the bar to retaining the discretionary standard as overly elastic and inviting judge-shopping. However the proposed GL permitted the prosecutor filing the indictment to designate unilaterally the case as "related" under the discretionary criteria; under the GL as promulgated the prosecutor must instead make an application to the judge presiding over the earlier assigned case. The bar was also concerned with counsel's having to oppose the designation before the very judge who might preside over the case, but the Board of Judges felt that that judge was in the best position to apply the standard, as he or she would know the particulars of the "related" case and therefore whether there would be a substantial saving of judicial resources by approving the designation.

(d) The first sentence substantially restates the first sentence of DR 3(b). The second sentence of DR 3(b) is omitted as having little or no application. The second sentence of the paragraph derives from DR 3(f).

(e) This paragraph derives from DR 4(c). The last sentence of DR 4(c) is omitted as redundant to 50.3(b)(B).

(f) This paragraph deals with *sua sponte* challenges to relating or failing to relate cases and substantially restates DR 4(d). Party challenges to unilateral relating or failing to relate cases must be made in accordance with GL 50.2(f).

(g) This paragraph derives from DR 4(e).

50.4

This is a substantial restatement of DR 4(a). The proposed GL granted unlimited discretion to reassign; this raised some concern among the bar so the DR criteria were restored.

50.5

Paragraphs (a) and (b) restate DR 5 (a) and (b); the subject of DR 5(c) is covered by the second sentence of GL 50.5(b). A highly controversial proposal to add an arraignment function to the miscellaneous part was rejected. See the Criminal Procedure Committee Report on the Assignment of Cases to Judges, 111 F.R.D. 307 (1986); Rakoff, *Business Crime*, N.Y.L.J., May 14, 1987, p. 1, col. 1.

50.6

Paragraphs (a) and (b) restate DR 6(a) and (b). Paragraph (c) is new and restates existing practice. DR 6(d), (e), and (f) are omitted.

50.7

This is a restatement of DR 7.

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COMMENT

QUESTIONING THE IMPARTIALITY OF JUDGES: DISQUALIFYING FEDERAL DISTRICT COURT JUDGES UNDER 28 U.S.C. § 455(a)

INTRODUCTION

An impartial judiciary is an essential element of the system of justice in the United States. The right to a "neutral and detached judge" in all proceedings is protected by the Constitution.[1] In addition, an impartial judiciary is essential to maintain public confidence in the integrity of the judicial system.[2] Throughout the history of our national government, Congress has sought to secure the impartiality of trial judges by requiring judges to disqualify themselves in various circumstances.[3]

Congress revised the federal disqualification law in 1974, and instituted an objective standard for disqualification in place of a subjective standard.[4] As stated in 28 U.S.C. § 455(a), the objective disqualification requirement mandates disqualification when a reasonable person would question a judge's impartiality.[5]

Since the objective standard was adopted, however, judicial interpretation of section 455(a) has narrowed the broad scope Congress intended for disqualification law.[6] Federal courts have limited the scope of the current statutory provi-

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1. Ward v. City of Monroeville, 409 U.S. 57, 61-62 (1972). *See also* Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980) ("powerful" constitutional interest in fair adjudicative procedure); Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986) (independent adjudicator necessary to satisfy due process requirements).

2. *See Judicial Disqualification: Hearing on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1, 75 (1971 and 1973) [hereinafter *Senate Hearing*] (statement of Senator Burdick) (disqualification ensures that judicial decision is not tainted with partiality and thus "enhances public confidence in the judicial system").

3. The first federal disqualification statute disqualified judges from cases in which the judge was "concerned in interest," or had been of counsel for either party. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278 (1872) (amended and recodified 1911). 28 U.S.C. § 455(b) (1982) requires judges to disqualify themselves on several specified grounds, including financial interest, personal or professional relationships with persons involved in the litigation, or prior involvement in the litigation. *See infra* note 12 for the text of § 455(b). In addition, federal law disqualifies judges in circumstances where a reasonable person would question a judge's impartiality, 28 U.S.C. § 455(a), and specifically disqualifies a judge for bias or prejudice. 28 U.S.C. §§ 144 & 455(b)(1); *see infra* note 35 for the text of § 144, and *infra* note 12 for the text of § 455.

4. *Senate Hearing*, *supra* note 2, at 74 (statement of Senator Burdick); H.R. REP. NO. 1453, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6354 [hereinafter *House Report*].

5. 28 U.S.C. § 455(a) (1982). *See infra* note 12 for the text of § 455(a).

6. *See infra* notes 26-30 and accompanying text for a discussion of the congressional intent behind the revision of § 455.

sions by requiring a high standard of proof of bias[7] and by applying judicially-created rules restricting the circumstances in which bias can be found.[8] In addition, the procedures for disqualification cast into doubt the objectivity of disqualification decisions.[9] The procedures allow the challenged judge to make the disqualification decision. If a judge refuses to disqualify himself, review is not always immediately available and appellate courts tend to defer to the initial judgment of the district court.[10]

This comment will review current standards and procedures required by statute and applied to judicial disqualification by the courts. It will assess the extent to which current interpretations conform to the objective standard set forth in section 455(a) and explore ways in which disqualification decisions may be made on a more objective basis.

I. Statutory Provisions for Disqualification

Two provisions of federal law furnish the means for disqualifying district court judges.[11] The paramount disqualification statute is 28 U.S.C. § 455.[12] Section 455(a) sets forth a general provision mandating disqualification whenever a reasonable person would question a judge's impartiality.[13]

Section 455(b) requires disqualification in several specified circumstances.[14] A judge is disqualified if he or she has a financial interest in a case,[15] defined by the statute as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party."[16] Section 455(b) also mandates disqualification if the persons involved in the litigation are related to the judge "within the third degree of [blood] relationship."[17] The statute also provides for disqualification if the judge has a professional relationship with a party, including representation of a party by the judge or by a member of the judge's former firm.[18] Judges who have been in government employment must disqualify themselves from proceedings in which they had a role and from cases about which they have expressed an opinion on

7. *See infra* notes 83-108 and accompanying text for a discussion of the standards of proof of bias under §§ 455(a), 455(b)(1) and 144.

8. *See infra* notes 109-94 and accompanying text for a discussion of the judicially-created substantive rules for disqualification.

9. *See infra* notes 23-25, 228-32 and accompanying text for a discussion of disqualification procedures.

10. *See infra* notes 51-88 and accompanying text for a discussion of the availability and standards of review on appeal.

11. 28 U.S.C. §§ 144, 455 (1982). Appellate courts as well as district courts are subject to § 455, while § 144 applies only to district courts. The only other federal disqualification statute applies to appellate courts and provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47 (1982).

12. 28 U.S.C. § 455 (1982) states:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer , director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

13. *Id.* § 455(a).

14. *Id.* § 455(b).

15. *Id.* § 455(b)(4).

16. *Id.* § 455(d)(4).

17. *Id.* § 455(b)(5).

18. *Id.* § 455(b)(2).

the merits.[19] Section 455(b) also requires disqualification when a judge has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[20]

Parties cannot waive their right to disqualification when it is based on one of the grounds specified in section 455(b).[21] When the disqualification is based on section 455(a), however, waiver is permitted upon full disclosure of the basis for disqualification.[22]

Section 455 places responsibility for disqualification on the judge.[23] This action can be taken *sua sponte*.[24] Courts also permit disqualification to be prompted by a party either by motion or on appeal.[25]

Section 455 was significantly revised in 1974.[26] A major concern of Congress was to eliminate the subjective opinion of the judge as the basis for determining disqualification.[27] The superseded version of section 455 required

19. *Id.* § 455(b)(3).

20. *Id.* § 455(b)(1).

21. *Id.* § 455(e).

22. *Id.* The waiver provision is an inversion of the waiver provisions of the American Bar Association ("ABA") Code of Judicial Conduct. In the final draft of the ABA Code, waiver of disqualification on grounds of interest or relationship is allowed after full disclosure. CODE OF JUDICIAL CONDUCT Canon 3D (1972). Waiver is not permitted under the general provision that disqualifies the judge whose impartiality is reasonably questioned. *Id.* The ABA's rule was based on the premise that parties should not be permitted to waive a provision designed to promote public confidence in the judiciary. *Senate Hearing*, *supra* note 2, at 109 (Professor Thode, Reporter of the ABA's Special Committee on Standards for Judicial Conduct). The ABA allowed waiver where public confidence in the judiciary would not be affected, and safeguarded the parties by requiring that the waiver be made in writing, rather than orally in the presence of the judge. *Id.* The Senate framers, on the other hand, rejected any waiver of disqualification based on § 455(b) grounds, but allowed waiver of § 455(a) disqualification on the rationale that a judge should be permitted to discuss with the attorneys involved in a case whether the objective standard required disqualification. *Id.* at 112 (Mr. Westphal, chief counsel to the Senate Committee on the Judiciary).

23. 28 U.S.C. § 455(a) ("Any judge . . . shall disqualify himself. . . ."); *id.* § 455(b) ("He shall also disqualify himself. . . .").

24. *See* Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (party need not follow particular procedure under § 455(a); federal judges must observe § 455 guidelines *sua sponte*).

25. Davis v. Board of School Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

26. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609 (codified as amended at 28 U.S.C. § 455 (1982)).

27. *Senate Hearing*, *supra* note 2, at 74 (statement of Senator Burdick); *House Report*, *supra* note 4, at 6355. The revisions were also motivated, in part, by a perceived need for clarification of standards that arose from the confirmation hearings for Judge Haynsworth, a Nixon nominee to the Supreme Court who was rejected by the Senate. *Senate Hearing*, *supra* note 2, at 10, 25 (statements of Senators Burdick, Bayh, and Hollings).

Congress also acted to coordinate federal law with revisions in the Canon of Judicial Conduct being developed by the American Bar Association. A tentative draft of the proposed ABA revisions was circulated two months prior to the first Senate hearings on the revisions to § 455, and the bill was delayed until the ABA completed its process of revision. *Senate Hearing*, *supra* note 2, at 2, 74, 78-79 (statements of Senator Burdick and Judge Traynor). The bill's sponsors wanted to minimize discrepancies between federal disqualification law and ABA standards. *Id.* at 74 (Senator Burdick).

The bill's sponsors were also motivated by their perception of heightened public standards of impartiality, *id.* at 10 (statement of Senator Bayh), and noted that the increased number of federal

disqualification if, "in his opinion," it was improper for a judge to sit during the proceedings.[28] Congress replaced this subjective standard with an objective standard that obliges judges to disqualify themselves when their impartiality "might reasonably be questioned."[29] In instituting this objective standard, Congress stressed that it was doing away with the "duty to sit" rule, requiring that a judge should stay with the case when in doubt about disqualification.[30]

The general disqualification standard set forth in section 455(a) cannot be understood without analysis of two other disqualification provisions—section 455(b)(1) and 28 U.S.C. § 144, both of which disqualify a judge for personal bias and prejudice.[31] A party moving for disqualification under section 455(a) frequently seeks disqualification under both sections 455(b)(1) and 144 as well.[32] Furthermore, interpretation of section 455(a) has been shaped by judicial interpretation of section 144, which predated the revised general disqualification

judges gave them the freedom to require stricter standards. *Id.* at 26 (statement of Senator Hollings).

28. The superseded statute read in full:

> Any justice or judge of the United States shall disqualify himself in any case in which he was a substantial interest, has been of counsel, is a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908.

29. 28 U.S.C. § 455(a); *see supra* note 12 for the text of § 455(a).

30. *Senate Hearing*, *supra* note 2, at 2, 74 (Senator Burdick); *House Report*, *supra* note 4, at 6255. The chairman of the Senate Judiciary Committee described the "duty to sit" rule as a rule that clouded a judge's judgment on disqualification. *Senate Hearing*, *supra* note 2, at 74 (Senator Burdick). The House, however, added the caution that elimination of this rule "should not be used by judges to avoid sitting on difficult or controversial cases." *House Report*, *supra* note 4, at 6355; *see also* New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976, 980 (7th Cir. 1986) (judge disqualified himself unnecessarily when his holdings did not constitute § 455(b)(4) financial interest). The court stated: "A judge may decide close calls in favor of recusal. But there must first be a close call." *Id.*

31. *See supra* note 12 for the text of § 455(b)(1); *see infra* note 35 for the text of § 144.

32. Courts have determined that a motion for disqualification under one of the sections—455(a), 455(b)(1), or 144—requires the consideration of disqualification under the other sections as well. *See* Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (judge has duty to consider disqualification under § 455 when § 144 affidavit does not require disqualification); United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980) (judge who declines to grant recusal under § 455 must still consider sufficiency of affidavit under § 144).

Courts have coordinated the statutes procedurally by charting various paths that reach, if necessary, all three provisions. One approach is to begin by evaluating the affidavit under § 144 and to proceed to assessment of the situation under § 455 only if the affidavit is untimely or insufficient. *See* United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985) (after determining § 144 affidavit legally insufficient, court considered disqualification under § 455(b)(1)), *cert. denied*, 106 S. Ct. 3284 (1986); *Bailar*, 625 F.2d at 128 (judge disqualified under § 455(a) although § 144 affidavit was technically insufficient); *Sibla*, 624 F.2d at 868 (finding that § 144 affidavit is legally insufficient triggers duty to evaluate circumstances under § 455).

Alternatively, judges may begin with § 455(a) and evaluate the § 144 affidavit only if they do not disqualify themselves under § 455. *See Sibla*, 624 F.2d at 868 (judge who declines to grant recusal under § 455 must still consider the sufficiency of the affidavit under § 144). A judge beginning at § 455(a) would need to consider § 144 only if the allegations of bias where false and thus would not lead a reasonable person to question the judge's impartiality.

statute.[33]

Section 144, first enacted in 1911,[34] focuses exclusively on bias and prejudice as grounds for disqualification.[35] It authorizes a litigant with the power to disqualify a district court judge by means of a "timely and sufficient affidavit" alleging "personal bias or prejudice" for or against a party.[36] The key to disqualification under section 144 is the sufficiency of the affidavit. As long as procedural rules regarding the form and timing of the affidavit are met,[37] the filing of a legally sufficient affidavit compels a judge to transfer the case to another district court judge.[38]

As the Supreme Court determined in *Berger v. United States*,[39] the challenged judge must take the initial step of evaluating the sufficiency of the affidavit, and may not automatically transfer the case when an affidavit is filed.[40] Thus, section 144 does not provide for peremptory challenge of the judge.[41] Instead, a judge is required to evaluate the legal sufficiency, but not the truth, of

33. *See infra* notes 112-18 and accompanying text for a discussion of courts' application of the § 144 judicial gloss to § 455(a).

34. Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090 (amended by Act of June 25, 1948, ch. 646, § 144, 62 Stat. 898) (amendment added the words "timely and sufficient" to modify "affidavit").

35. 28 U.S.C. § 144 (1982) provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

36. *Id.*

37. A § 144 affidavit must "state the facts and reasons for the belief that bias or prejudice exists," 28 U.S.C. § 144, and must be signed. *See* Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (court need not consider § 144 motion where party had not signed affidavit). A court may consider only one affidavit filed pursuant to § 144. *See* United States v. Merkt, 794 F.2d 950, 961 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987); United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 3284 (1986).

Section 144's timeliness provision has been interpreted to require filing of the motion within a reasonable time of discovery of the bias. *See* United States v. Gigax, 605 F.2d 507, 511 (10th Cir. 1979) (file § 144 motion promptly after facts become known); Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. 1978) (timeliness measured not in absolute and arbitrary way from date of discovery but with consideration of future stages of case).

38. *See* Berger v. United States, 255 U.S. 22, 36 (1921).

39. 255 U.S. 22 (1921).

40. *Id.* at 35-36.

41. Until the Supreme Court decided *Berger*, it was possible to interpret § 144 as providing a peremptory challenge. The chief sponsor of the bill indicated that it would function as a form of peremptory challenge of judges, 46 Cong. Rec. 2627 (1911) (statements of Rep. Cullop), and the wording of the original provision would have permitted it to be so used. Prior to amendment in 1948, the word "sufficient" did not appear as a modifier of "affidavit." Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090. The 1911 version required the judge to transfer the case when an affidavit was filed. *Id.*

the allegations.[42] Standards for determining legal sufficiency have developed in case law, interpretating the meaning of "personal" bias or prejudice.[43]

Section 455(b)(1) echoes the personal prejudice language of section 144, disqualifying where a judge "has a personal bias or prejudice" concerning a party.[44] The vagueness of language in this provision contrasts sharply with the other sections of 455(b), in which Congress spelled out in detail the amount and type of financial interest, and the degree of relationship to a participant or prior involvement in a case that necessitates disqualification.[45] Section 455(b)(1) uses undefined terms and provides no concrete guidelines for determining bias or prejudice.[46] This vagueness reflects the difficulties inherent in providing standards for disqualification on grounds of bias or prejudice. Such standards are hard to state; when concrete phrases are substituted for a vague statement of objectives, they are subject to the criticism of being underinclusive.[47]

Both Congress and the American Bar Association ("ABA") encountered this difficulty in their attempts to frame the bias and prejudice provisions of their respective codes. One of the earlier drafts of the Senate bill required disqualification when a judge "has a fixed belief concerning the merits of the matter in controversy or personal knowledge of material facts."[48] This language was later replaced with the language of section 455(b)(1), requiring disqualification where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings."[49] The change followed the alterations made in the ABA Code of Judicial Conduct. The "fixed belief" language in the first ABA draft was abandoned in response to criticism that it would predispose judges to disqualification for having an understanding of the law and a commitment to uphold it.[50] The final draft of the Senate bill, like the final ABA draft, returned to the "personal bias or prejudice" language

42. *Berger*, 255 U.S. at 36. The Court explained: "To commit to the judge a decision on the truth of the facts gives chance for the evil against which the section is directed." *Id.*

43. *See infra* notes 109-94 for a discussion of judicial rules for disqualification on the basis of personal bias or prejudice.

44. 28 U.S.C. § 455(b)(1).

45. *Compare* § 455(b)(2)-(5) *with* § 455(b)(1).

46. *See supra* note 12 for the text of § 455(b)(1).

47. Courts seldom offer a definition of bias or prejudice. The Supreme Court provided a general, but tautological, definition of bias or prejudice in Berger v. United States, describing it as "a bent of mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34. In case law, positive definitions tend to be fact-specific. For example, in Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976), a prisoners' rights suit in which the judge was accused of bias toward state prisoners, the court defined personal bias "as an attitude toward petitioner that is significantly different from and more particularized than the normal, general feelings of society at large against convicted wrongdoers." *Id.* at 417.

48. S. 1553, 92d Cong., 1st Sess. (1971), *reproduced in Senate Hearing*, *supra* note 2, at 3.

49. 28 U.S.C. § 455(b)(1).

50. *Senate Hearing*, *supra* note 2, at 85. As the chairman of the ABA committee explained, "There are many things on which it may be good for judges to have fixed opinions, like fixed opinions on freedom under the first amendment, fixed opinions that racial discrimination is invidious, and so on." *Id.*

of section 144,[51] and thus premitted courts to apply the judicial gloss built up over the years on section 144 to section 455.[52]

II. Applying the Disqualification Statutes

Application of section 455(a),[53] the general federal disqualification statute, has been shaped in part by courts' concern to balance the advantages of disqualification with countervailing judicial interests.[54] On the one hand, disqualification of judges whenever reasonable doubt arises concerning their impartiality promotes public confidence in the judiciary. Conversely, disqualification may diminish the efficiency of the judicial system.[55] Transferring a case always creates some administrative costs, and when disqualification occurs in a complex case some time after the case has commenced in the court, the burden may be substantial.[56] Although courts may be tempted to give significant weight to efficiency, Congress' elimination of the duty to sit rule indicates that the goal of impartiality should be paramount whenever there are reasonable grounds for disqualification.[57] Congress and the courts also face the concern that litigants will manipulate disqualification to their advantage or to the disadvantage of their opponents by judge-shopping or by causing costly delays.[58]

51. *See supra* note 35 for the text of § 144. The ABA commentator indicated that despite the change in language, "[i]t was intended that a judge disqualify himself if he had made up his mind on the merits before he heard the case." *Senate Hearing*, *supra* note 2, at 93 (Professor Thode).

52. *See infra* notes 12-18 and accompanying text for a discussion of the judicial gloss on disqualification for bias or prejudice.

53. 28 U.S.C. § 455(a) (1982).

54. *See* Redish & Marshall, *supra* note 1, at 472-75 (analysis and critique of balancing test applied to procedural due process rights).

55. *See* Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. L. Rev. 662, 664-65 (1985) (excessive disqualification would damage efficient administration of justice).

56. *See In re* Cement Antitrust Litig., 688 F.2d 1297, 1313 (9th Cir.) (judge disqualified in complex class action suit because his wife had minimal stock holdings in plaintiff companies), *aff'd mem. sub nom.*, Arizona v. United States Dist. Ct., 459 U.S. 1191 (1982). This case has attracted critical comment as an example of the high burden imposed by the expansive definition of financial interest in § 455(b)(4) and the impossibility of waiver under § 455(e) for § 455(b) cases. *See* Bloom, *supra* note 55, at 702-05 (disqualification for de minimis financial interest without possibility of waiver disrupts litigation and wastes judicial resources); Note, *Bias and Interest: Should They Lead to Dissimilar Results in Judicial Qualification Practice?*, 27 Ariz. L. Rev. 171, 189-92 (1985) (per se disqualification for minimal financial interests harmful to public perception of judiciary).

57. Statements from both the Senate and the House of Representatives suggested that Congress found that the large numbers of federal judges permitted liberal standards for disqualification and sharp restrictions on waiver of disqualification. *Senate Hearing*, *supra* note 2, at 74; *House Report*, *supra* note 4, at 6357. *See supra* note 30 and accompanying text for a discussion of congressional elimination of the duty to sit.

58. Concern for judge-shopping is evident in the *House Report* which stated: "Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." *House Report*, *supra* note 4, at 6355. *See also In re* International Business Machs. Corp., 618 F.2d 923, 929 (2d Cir. 1980) (adverse ruling cannot disqualify judge).

Courts have had the opportunity to shape disqualification standards under section 455(a) through their interpretation of the law in two areas of inquiry. One question facing the courts concerns what constitutes reasonable grounds for disqualification. The substantive requirements for disqualification which have been developed through this inquiry will be discussed in section B below.[59] Another question facing the courts is whether, and to what extent, the appearance of bias justifies disqualification. Is it appropriate to disqualify a judge on the appearance of bias or is it, at least in some cases, necessary to establish bias in fact? The interpretations offered in each of these areas determine the reach of federal disqualification, its availability in particular cases, and the appealability of the denial of disqualification.

A. Assessing Bias: Standards of Proof

The question whether disqualification should rest on the appearance or the fact of bias arises because the two objectives of disqualification law—promoting confidence in the judiciary and providing a fair trial to litigants—differ in focus. Protection of individual rights requires disqualification of judges who will not consider particular cases with impartiality. Protecting and promoting public confidence in the judiciary, in contrast, depends not only on actual fairness in particular cases but also on the appearance of fairness.[60] Disqualification based on the appearance of bias may be required to promote public confidence when, in fact, no actual partiality exists.[61]

In many circumstances where federal law requires disqualification, concerns for judicial appearance and individual fairness are both present. But some circumstances may involve only one of these objectives. On the one hand, fairness may require disqualification in situations where there is no appearance of partiality and the need for disqualification is not known to anyone but the judge.[62] Public appearances, on the other hand, may require assigning another judge even in cases where litigants are confident they would be treated fairly by the disqualified judge.[63]

59. *See supra* notes 109-94 and accompanying text for a discussion of the judicial development of substantive grounds for disqualification under § 455(a).

60. *See* Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 746-47 (1973) (concern for appearances necessary because judicial authority rests ultimately on public acceptance of judicial decisionmaking).

61. *See* Hall v. Small Business Admin., 695 F.2d 175, 178-79 (5th Cir. 1983) (to satisfy appearance of impartiality test of § 455(a), disqualification must be based on reasonable conclusion from objectively ascertainable facts, not on subjective assessment of judge's state of mind).

62. The language of 28 U.S.C. § 455 (1982), which gives judges the responsibility to disqualify themselves in several specified circumstances, provides for disqualification where no one but the judge knows the reason. Disqualification of this sort is generally not documented by written opinion. An instance of this use of § 455 may be seen in United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986) (judge's unexplained voluntary recusal in prior case involving defendant is not sufficient grounds for disqualification in subsequent case involving defendant), *cert. denied*, 107 S. Ct. 1603 (1987).

63. *See supra* notes 21-22 and accompanying text for a discussion of waiver requirements in § 455(e), prohibiting waiver where disqualification is based on § 455(b).

Analysis of the language of the disqualification statutes suggests that both 28 U.S.C. §§ 144 and 455(b)(1) can be interpreted as requiring bias in fact.[64] Section 144 requires that the affidavit state facts sufficient to establish bias.[65] Section 455(b)(1) states that a judge "shall . . . disqualify himself . . . [w]here he *has* a personal bias or prejudice. . . ."[66] The same objective standard applied to these statutes is also applied to section 455(a),[67] however, and thus bias in fact cannot be established by subjective assessment of the judge's state of mind. Instead, courts have required that a litigant seeking disqualification meet a higher standard of proof to show bias in fact.[68]

A higher standard of proof is firmly established as part of the disqualification process under section 144. When scrutinizing the affidavit to determine whether it is legally sufficient,[69] courts apply a "clear and convincing" standard, and evaluate whether the facts "would *convince* a reasonable man that bias exists."[70] In contrast, courts have not asked whether the facts would cause a reasonable person to *question* the judge's impartiality under section 144.[71] Imposing a stricter standard of proof for disqualification under section 144 provides a reasonable counterbalance to the stipulation that the judge accept all the averments in a section 144 affidavit as true.[72] This more rigorous standard of proof does not, however, ensure that judges are disqualified under section 144 only where there is bias in fact. The requirement that the facts be taken as true,

64. 28 U.S.C. §§ 144, 455(b)(1) (1982). *See supra* note 12 for the text of § 455(b)(1); *see supra* note 35 for the text of § 144.

65. 28 U.S.C. § 144.

66. *Id.* § 455(b)(1) (emphasis added).

67. For the standard applied to § 144, *see* Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982) (§ 144 affidavit sufficient if it alleges facts which, if true, would convince reasonable person that bias exists), *cert. denied*, 464 U.S. 814 (1983); *see also* United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 3284 (1986); United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973).

Courts tend to treat § 455 as a unit when setting forth the standard, rather than treating § 455(b)(1) separately from § 455(a). *See Story*, 716 F.2d at 1091 (reasonable person standard applied to § 455 as a whole); *Chitimacha*, 690 F.2d at 1167 (charges of partiality based on §§ 455(a) and (b) resolved by application of reasonable person standard).

68. *See Chitimacha*, 690 F.2d at 1165 (§ 144 affidavit must convince a reasonable person); *Balistrieri*, 779 F.2d at 1202 (requirement that facts convince a reasonable person of bias applied to both § 455(b)(1) and § 144).

69. Courts generally apply a three-part test for legal sufficiency, requiring that the facts set forth in the affidavit (1) be material and stated with particularity; (2) be such that, if true, they would convince a reasonable person that bias exists; and (3) show personal rather than judicial bias. United States v. Merkt, 794 F.2d 950, 960 n.9 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987); *see also* Phillips v. Joint Legislative Comm'n., 637 F.2d 1014, 1019 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); *Thompson*, 483 F.2d at 528.

70. *Thompson*, 483 F.2d at 528 (emphasis added); *accord Balistrieri*, 779 F.2d at 1199; United States v. Serrano, 607 F.2d 1145, 1150 (5th Cir. 1979), *cert. denied*, 446 U.S. 910 (1980). The standard has become more rigorous over the years. In Berger v. United States, the Supreme Court demanded only that the affidavit "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34.

71. *See infra* note 83 and accompanying text for discussion of the § 455(a) standard.

72. *Berger*, 255 U.S. at 36.

even where the judge knows them to be false,[73] delimits the court's assessment of the facts, making it inaccurate to describe section 144 as a statute that disqualifies only for actual bias.

Whether the "clear and convincing" standard of proof should be applied to section 455(b)(1) has seldom been addressed by the courts. Most courts treat section 455(a) as predominant, rest their decision on that section when bias or prejudice is alleged, and avoid the issue of whether they are required to make a finding of actual bias under section 455(b)(1).[74] Other courts interpret section 455(b)(1) as providing a specific example of grounds for disqualification under section 455(a) and apply to section 455(b)(1) the standard they apply to section 455(a).[75] In *United States v. Balistrieri*,[76] the United States Court of Appeals for the Seventh Circuit held that section 455(b)(1) requires that actual bias be found in order to meet that section's standard of proof.[77] The court applied the "clear and convincing" standard, asking whether a reasonable person with knowledge of all the facts would be convinced that the judge was biased.[78]

73. *Balistrieri*, 779 F.2d at 1199 (judge must assume facts are true, even if judge knows them to be false); Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976) (judge must accept truth of allegations and good faith of pleader even if judge has knowledge to the contrary).

74. *See, e.g., In re* Yagman, 796 F.2d 1165, 1181-82 (9th Cir. 1986) (§ 455 treated as unit in setting forth reasonable doubt standard for disqualification); United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) (single reasonable doubt standard established for § 455).

Focus on § 455 is not surprising. Judges can save face by disqualifying themselves under § 455(a), on grounds that a reasonable person could question their impartiality, rather than admitting they are actually biased by disqualifying themselves under § 455(b)(1). *See Balistrieri*, 779 F.2d at 1203 (judges may be especially reluctant to recuse themselves when doing so requires admission that actual bias or prejudice has been proved). Likewise, it is logical for one to surmise that courts of appeals support that focus, because they may then avoid directly impugning the integrity of district court judges by using § 455(a) instead of § 455(b)(1).

75. *See, e.g.*, United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980) (§ 455(b)(1) simply provides specific example of situation in which a judge's "impartiality might reasonably be questioned" pursuant to § 455(a)); United States v. Conforte, 624 F.2d 869, 881 (9th Cir.) (same test for subsections (a) and (b) which disqualifies on a reasonable person standard for either the appearance or the fact of bias) *cert. denied*, 449 U.S. 1012 (1980).

Bloom, *supra* note 55, at 675, suggests that the Ninth Circuit Court of Appeals applies the bias in fact requirement of § 455(b)(1) to both § 455(a) and § 455(b)(1). But the court made clear in *Conforte* that both sections would be evaluated under the standard requiring disqualification for the appearance of bias set forth in § 455(a). 624 F.2d at 881.

The Fifth Circuit Court of Appeals, soon after § 455 was revised, issued an ambiguous holding that could be interpreted as imposing a bias in fact requirement on both § 455(a) and § 455(b)(1). Parrish v. Board of Comm'rs, 524 F.2d 98, 103-04 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976). *See* Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 248 n.66 (1978) (*Parrish* holding ambiguous but compatible with appearance of bias rule). *But cf.* Bloom, *supra* note 55, at 675 (*Parrish* and subsequent cases require bias in fact). More recent Fifth Circuit decisions clearly apply the § 455(a) requirements to both § 455(a) and § 455(b)(1). *See* United States v. Merkt, 794 F.2d 950, 960 n.8 (5th Cir. 1986) (test of whether reasonable person would "harbor doubts" applied to both sections), *cert. denied*, 107 S. Ct. 1603 (1987).

76. 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1490 (1986).

77. *Id.* at 1202. The *Balistrieri* court apparently based its holding on a literal reading of the statute. The court stated that actual bias was required after simply reciting the statutory language and offered no other support for this position. *Id.*

78. *Id.* at 1202. The court reasoned that "[t]he disqualification of a judge for actual bias or

The language of section 455(a) suggests that it requires disqualification for the appearance of bias.[79] The section mandates disqualification when a reasonable person would question a judge's impartiality, regardless whether actual bias exists.[80] Clear and convincing evidence is not required by the language of the statute.[81] Moreover, disqualification when doubt about impartiality exists, rather than only when convincing evidence of bias is produced, is in keeping with the congressional aim to eliminate the duty to sit rule and replace it with the rule that judges, when uncertain, should disqualify themselves.[82]

Courts generally apply the reasonable doubt standard to section 455(a) disqualification and disqualify for the appearance of bias.[83] However, the standard of proof for disqualification under section 455(a) was subject to controversy for a time during which some courts of appeals' decisions were interpreted as equating section 455(a) with section 144 and requiring the same "clear and convincing" standard of proof.[84] This position appears to have been abandoned.[85]

Recently, however, a new controversy has arisen. The Seventh Circuit has limited appellate review of disqualification under section 455(a) because that section disqualifies based on the appearance of bias or prejudice.[86] After requiring

prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by compelling evidence." *Id.* The court found no actual bias on the part of the judge who had previously worked as a prosecutor and allegedly targeted the defendant as the head of an organized crime family. *Id.* at 1196-97.

79. *See supra* note 12 for the text of § 455(a).

80. Hall v. Small Business Admin., 695 F.2d 175, 178-79 (5th Cir. 1983) (test under § 455(a) is appearance of partiality, not actual prejudice); *see also* Balistrieri, 779 F.2d at 1204; United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983).

81. 28 U.S.C. § 455(a).

82. *Senate Hearing*, *supra* note 2, at 2, 74 (Senator Burdick); *House Report*, *supra* note 4, at 6354. *See* Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980) (disqualification required even where question is close).

83. *See, e.g.*, United States v. Nobel, 696 F.2d at 235-36 (3d Cir. 1982) (§ 455(a) disqualifies on appearance of bias standard), *cert. denied*, 462 U.S. 1118 (1983); Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982) (standard is whether reasonable person would harbor doubts about judge's impartiality; appearance of impartiality is required), *cert. denied*, 464 U.S. 814 (1983).

84. *See* Idaho v. Freeman, 507 F. Supp. 706, 723-725 (D. Idaho 1981) (Fifth and Ninth Circuits interpret § 455(a) as requiring bias in fact) (citing United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978) (§ 455(a) should be interpreted as setting up same test for disqualification as § 455(b)(1) and § 144) and Parrish v. Board of Comm'rs, 524 F.2d 98, 101-02 (5th Cir. 1975) (en banc) (gloss on § 144 applies fully to § 455), *cert. denied*, 425 U.S. 944 (1976)); *see also* Bloom, *supra* note 55, at 675 (Fifth Circuit and Ninth Circuit cases require bias in fact).

85. The Fifth Circuit, which may have required bias in fact at one time, has more recently stated clearly that the standard under § 455(a) is the appearance of bias. Hall v. Small Business Admin., 695 F.2d 175, 178-79 (5th Cir. 1983) (test under § 455(a) is appearance of partiality rather than actual bias). *See also* Comment, *supra* note 74, at 248 n.66 (majority opinion in *Parrish* ambiguous; can be read as acknowledging appearance of bias standard for § 455(a)).

The Ninth Circuit backed away from the bias in fact requirement in United States v. Conforte, 624 F.2d 869 (9th Cir. 1980). The *Conforte* court interpreted its *Olander* holding to mean that the same substantive rules regarding bias or prejudice would apply whether the court was determining the appearance or the fact of bias. *Conforte*, 624 F.2d at 880 (citing Idaho v. Freeman, 584 F.2d at 882).

86. United States v. Balistrieri, 779 F.2d 1191, 1204 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1490 (1986). *Accord* New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976, 979 (7th Cir. 1986); Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 713 (7th Cir. 1986).

proof of bias in fact under section 455(b)(1) in *Balistrieri*,[87] the Seventh Circuit refused to consider whether the judge should have recused himself from the case under section 455(a). Rather, the court held that the denial of disqualification under section 455(a) is not reviewable on post-trial appeal because disqualification under that section does not rest on actual bias.[88] The court reasoned that because the standard in section 455(a) is the appearance of bias, in contrast to the actual bias standard of section 455(b), section 455(a) does not implicate the substantive rights of the parties.[89] The court characterized section 455(a) as aimed only at protecting against injury to the judicial system as a whole, and further suggested that a pretrial mandamus petition provides the only appropriate vehicle for review.[90]

This distinction could severely limit the number of disqualification denials that could be heard on appeal. Courts tend to focus on section 455(a) when considering disqualification and thus may not develop a record that will permit full consideration of whether disqualification could be supported by clear and convincing evidence.[91] In addition, questions regarding the impartiality of judges do not only arise before trial, but instead may come to the attention of a party during or after trial.[92]

More fundamentally, the legislative history of section 455 does not support a bifurcation of the focus and reviewability of its subsections. Section 455(a) is not accurately characterized as directed solely toward appearances and thus does not compel the *Balestrieri* court's interpretation. Advocates of section 455(a) described it as a provision that would enhance public confidence,[93] but it was not proposed exclusively for that purpose. Instead, members of Congress and the ABA Judicial Conduct Committee viewed section 455(a) as a provision that would fill in gaps and provide a requirement for disqualification in circumstances not covered by the specific standards set forth in section 455(b).[94] The Senate committee, for example, regarded section 455(a) as a tool for disqualifying a judge for a close personal relationship not covered by section 455(b)(5), which requires disqualification in cases involving relatives up to the third degree of blood relationship.[95] The chairman of the ABA committee also regarded the general provision as a means for disqualifying judges for actual bias, and noted

87. *See supra* notes 76-78 and accompanying text for a discussion of the *Balistrieri* court's analysis of § 455(b)(1).

88. 779 F.2d at 1204.

89. *Id.*

90. *Id.* at 1204-05.

91. *See supra* notes 73-74 and accompanying text for a discussion of the courts' tendency to focus on § 455(a).

92. *See, e.g.*, Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 983 (D.C. Cir. 1984) (disqualification issue arose as a result of opinions expressed in judge's memorandum opinion), *cert. denied*, 470 U.S. 1005 (1985).

93. *House Report*, *supra* note 4, at 6355.

94. *Id.*

95. *Senate Hearing*, *supra* note 2, at 112 (statements of Prof. Thode and Mr. Westphal).

that there was no need for "fixed opinion" language in section 455(b)(3) because a judge who had expressed an opinion on the merits of a controversy would be disqualified under 455(a).[96] These examples indicate that section 455(a) was directed toward actual bias as well as toward the appearance of bias.

Section 455(b) also serves this dual function. Some of the provisions in section 455(b) are clearly directed at promoting the appearance of impartiality rather than protecting parties from actual bias. For example, under section 455(b) a judge is disqualified if she has any financial interest in the case, no matter how small, without the possibility of waiver.[97] Concerns with both due process and the preservation of confidence in the judicial system thus permeate the entirety of section 455.

The Supreme Court's analysis of the due process right to an impartial judge provides yet another reason for rejecting an interpretation of the disqualification statutes that conditions review on a finding of actual bias. The due process criteria for judicial disqualification, as delineated by the Supreme Court,[98] is not as extensive as the federal statutory requirements mandating disqualification. The Court has focused on disqualification for interest,[99] leaving open the question whether a bias charge implicates due process.[100] Yet the Court has indicated that where due process requires disqualification, it is concerned with the appearance of justice.

96. *Id.* at 87-88. Judge Traynor, chairman of the ABA Special Committee of Standards of Judicial Conduct, objected to what is now § 455(b)(3), and argued that the last part of that provisions, not found in the ABA Code, was unnecessary. *Id.*

97. *See supra* note 12 for text of §§ 455(b)(4) and 455(d)(4). *But see* Note, *supra* note 56, at 189-92 (per se disqualification for minimal financial interests harmful to public perception of judiciary).

98. *See infra* notes 99-107 and accompanying text for a discussion of Supreme Court cases setting forth the due process standards.

99. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 60-61 (1972) (due process right violated where judge is mayor of town receiving benefit of fines); *In re* Murchison, 349 U.S. 133, 136-37 (1955) (due process right violated where trial judge also acted as prosecuting judge); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (due process right violated where judge's salary paid in part by fines judge imposed).

100. *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1585 (1986) (only in extreme cases would disqualification on basis of personal bias or prejudice be constitutionally required); *Tumey*, 273 U.S. at 523 (not all questions of judicial disqualification are constitutional questions). These cases involved disqualification of state court judges.

Other due process decisions dealing with adjudicative impartiality have involved administrative decisionmakers. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980) (decision by regional administrator in Department of Labor not required to meet impartiality standards applied to judges); FTC v. Cement Inst., 333 U.S. 683, 701-02 (1948) (FTC's expressed opinions on points of law neither evidence of bias nor violative of due process).

In the few federal judicial disqualification cases heard by the Supreme Court, the Court has not reached the question of due process but rather has confined itself to interpreting the federal statute at issue. *See* United States v. Grinnell Corp., 384 U.S. 563, 580-83 (1966) (applying § 144 where judge's personal bias alleged); Berger v. United States, 255 U.S. 22, 34-35, (1921) (applying Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090, precusor to § 144). The Court's focus on statutory interpretation is consistent with its practice of resolving cases on statutory grounds if possible before reaching constitutional questions. *See* Wood v. Strickland, 420 U.S. 308, 314 (1975) (Court practice is to deal with dispositive statutory issues before considering constitutional questions).

The Court's recent decision in *Aetna Life Insurance Co. v. Lavoie*[101] illustrates its approach to the due process implications of judicial bias. In *Lavoie*, an insurance company charged that its due process rights were violated because the chief judge on the state appellate court panel was suing other insurance companies on issues similar to those in the *Lavoie* case and because the other judges on the panel were class plaintiffs in one of the suits.[102] The Court found that due process required disqualification of the chief judge on the basis of interest because his decision in *Lavoie* could enhance the status of a case he had filed in a lower court.[103]

The Supreme Court declined to find due process violations based on other grounds of personal bias and interest alleged by the appellants.[104] Noting that the right to due process does not extend so far as to require disqualification under the fourteenth amendment whenever it is required under statute, the Court held that "only in the most extreme of cases would disqualification . . . be constitutionally required" on the basis of bias or prejudice.[105] The Court also held that the Constitution does not require disqualification for only a slight pecuniary interest.[106]

Although the *Lavoie* Court held that the due process right to disqualification does not extend to all the circumstances in which Congress has required disqualification, the Court did not tie due process disqualification to a showing of actual fairness. Instead, the Court reiterated the position that due process requires disqualification on the basis of the appearance of partiality, stating:

> We made clear that we are not required to decide whether in fact Justice Emery was influenced, but only whether sitting on the case . . . "would offer a possible temptation . . . to the average [judge] . . . [to] lead him not to hold the balance nice, clear, and true." The Due Process Clause "may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' "[107]

Thus, the Supreme Court established that whether the due process right to an

101. 106 S. Ct. 1580 (1986).

102. *Id.* at 1582-83.

103. *Id.* at 1586-87.

104. *Id.* at 1585, 1588.

105. *Id.* at 1585. The Court determined that the appellant's allegation of bias based on the chief judge's expressions of general frustration with insurance companies did not rise to the level of a constitutional question. *Id.* The Court did not, however, indicate what circumstances or what evidence of bias would rise to the level of a due process violation.

For a critique of the judicial reluctance to find violations of due process where bias or prejudice is alleged, *see* Redish & Marshall, *supra* note 1, at 500-02 (distinction in constitutional treatment between personal bias and interest unjustified).

106. *Lavoie*, 106 S. Ct. at 1587-88. The Court ruled that the alleged interest of the other judges on the panel, who were members of the plaintiff class in a suit against another insurance company, was "highly speculative and contingent," and thus did not meet the due process test that an interest be direct, personal, substantial, and pecuniary. *Id.* at 1588.

107. *Id.* at 1587 (quoting Ward v. Village of Monroeville, 409 U.S. 57, 60-61 (1972) and *In re* Murchison, 349 U.S. 133, 136 (1955) respectively).

impartial judge requires disqualification depends on reasonable inferences from facts that raise the possibility of bias, and not a finding of actual bias.

In instituting the objective standard, Congress made a similar choice regarding the extent of inquiry into bias. Investigation into the state of mind of a judge under the objective standard stops at the point where a reasonable inference of bias or prejudice can be made. This limitation of the inquiry permits, and indeed requires, higher courts to consider disqualification without establishing whether a party actually suffered a violation of the right to an independent adjudicator. Thus the restrictions on the appeal of section 455(a) imposed by the Seventh Circuit,[108] a court which refuses post-trial review unless actual bias is involved, are not justified.

B. Reasonable Grounds for Disqualification

1. Judicially-Created Requirements for Disqualification for Bias or Prejudice

The most significant way in which courts have limited the availability of disqualification is by placing restrictions on the types of evidence that can be considered in support of disqualification. Courts require that evidence of bias or prejudice have an extrajudicial source and refuse to consider disqualification for opinions on the law.[109] Some courts, however, have interpreted the requirement of "personal" bias to preclude disqualification on grounds of bias toward an attorney.[110] The requirement of "personal" prejudice is also used to refuse disqualification on the basis of general background and experience.[111]

These restrictions originally developed through courts' interpretations of 28 U.S.C. § 144.[112] The question whether the judicial gloss on section 144 should apply to 28 U.S.C. § 455[113] was answered in the affirmative soon after section 455 was revised. In *Davis v. Board of School Commissioners*,[114] the United States Court of Appeals for the Fifth Circuit found "no suggestion in the legislative history that [section 144] decisions were being overruled or in any way eroded."[115] The court concluded that it should "give [sections] 144 and 455 the same meaning legally . . . whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned."[116] Most courts agree

108. *See supra* notes 86-90 and accompanying text for a discussion of the Seventh Circuit position concerning appellate review of disqualification decisions.

109. *See infra* notes 124-50 and accompanying text for a discussion of the extrajudicial source requirement. *See supra* notes 51-83 and accompanying text for discussion of disqualification for opinions on the law.

110. *See infra* notes 184-88 and accompanying text for a discussion of disqualification for bias toward an attorney.

111. *See supra* notes 89-94 and accompanying text for discussion of courts' refusal to disqualify on the basis of general background and experience.

112. 28 U.S.C. § 144 (1982).

113. *Id.* § 455 (1982).

114. 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

115. *Id.* at 1052.

116. *Id.*

that the judicial interpretation of section 144 applies fully to section 455.[117] In effect, these courts are finding that the judicial gloss on bias and prejudice defines the grounds upon which it is *reasonable* to question a judge's impartiality.[118]

Court-made restrictions developed under section 144 and carried over to disqualification under section 455 in part reflect the logic of the judicial decision-making process and promote efficiency.[119] The restrictions may, however, protect the efficiency of the system at the expense of fairness and public confidence in the judiciary. Unfortunately, the presumption that judges are impartial results in restrictions on evidence and the imposition of a heavy burden on a movant.[120] To surmount this presumption, a litigant generally must show clear evidence of personal bias.[121] Occasionally, courts have based disqualification on evidence of a level of emotional involvement that indicates "pervasive prejudice."[122] This heavy burden on the movant however, may not further the goals of disqualification law.[123]

117. *See, e.g.*, United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) (well settled that §§ 144 and 455 "must be construed *in pari materia*") (quoting City of Cleveland v. Kruppansky, 619 F.2d 576, 578 (6th Cir.), *cert. denied* 449 U.S. 834 (1980)); United States v. Sibla, 624 F.2d 864, 869 (9th Cir. 1980) (§§ 455(a) & (b)(1), like § 144, require recusal only if bias or prejudice is directed against party and stems from extrajudicial source); *In re* International Business Machs. Corp., 618 F.2d 923, 928-29 (2d Cir. 1980) (§§ 455(a) and 455(b)(1) require that bias be personal and from extrajudicial source).

118. *See* United States v. Haldeman, 559 F.2d 31, 132 n.297 (D.C. Cir. 1976) (judicial understanding of § 144 applies to revised § 455, which requires disqualification when impartiality may reasonably be questioned), *cert. denied*, 431 U.S. 933 (1977).

A few courts have disagreed, stating that the judicial interpretation of § 144 does not carry over to § 455(a). United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). *See also* United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978) (§ 455(a) permits disqualification on evidence from judicial source). The minority view does not, however, produce results significantly different from the results reached by courts which apply the § 144 judicial gloss to § 455(a). The courts that limit the applicability of the § 144 judicially-created rules take them as being without exception or nuance. In contrast, courts that apply the §§ 144 requirements to § 455(a) include exceptions within the standards they apply to each of the sections. *Compare Coven*, 662 F.2d at 168-69 (information from a judicial source relevant but not sufficienlty prejudicial to disqualify without any other basis in record for questioning judge's impartiality) *with* Nicodemus v. Chrysler Corp., 596 F.2d 152, 156-57 (6th Cir. 1979) (emotional response by judge within judicial context sufficiently prejudicial to warrant disqualification).

119. *See infra* notes 127-34 and accompanying text for a discussion of the advantages of the extrajudicial source requirement.

120. *See, e.g.*, United States v. Lee, 648 F.2d 667, 669 (9th Cir. 1981) (nature of judicial system is such that judges must rise above impermissible influences); United States v. Sinclair, 424 F. Supp. 715, 718 (D. Del. 1976) (affidavit must be strictly construed because judge presumed impartial), *aff'd*, 566 F.2d 1171 (3d Cir. 1977); *see also infra* notes 169-71 and accompanying text for a discussion of the presumption of impartiality in the context of disqualification for judges' opinions on the law.

121. *See infra* notes 135-40 and accompanying text for a discussion of the requirement for clear evidence of personal prejudice.

122. *See infra* notes 178-83 for a discussion of a proposal to permit disqualification based on strongly-felt disagreement with the law.

123. *See infra* notes 141-44 and accompanying text for a discussion of the pervasive prejudice exception to the extrajudicial source requirement.

a. *The extrajudicial source requirement*

A fundamental principle of the judicially-created standards for disqualifying judges for bias and prejudice is that the evidence of bias must come from an extrajudicial source. Evidence of prejudice or bias that arises from or can be linked to a judicial source, such as pretrial or trial proceeding or any aspect of case management, is excluded from consideration.[124] The Supreme Court stated this requirement in *United States v. Grinnell*:[125] "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[126]

The extrajudicial source requirement is most frequently applied to reject disqualification on the basis of statements made by a judge in the course of a case.[127] Courts also apply the extrajudicial source requirement to reject disqualification based on adverse rulings by a judge,[128] whether in the trial of the party bringing the motion[129] or in previous trials.[130] In criminal trials, the extrajudicial source rule is used to prevent disqualification on the basis of allegations questioning a judge's impartiality merely because the judge, while presiding over a previous hearing, was exposed to or ruled on evidence.[131] The extrajudicial source requirement is also invoked to reject disqualification based on claims of bias resulting from hostile actions of a party or an attorney toward a judge or resulting from the judge's response to such actions.[132]

124. *See, e.g.*, United States v. Haldeman, 559 F.2d 31, 133 (D.C. Cir. 1976) (§ 144 does not disqualify judges on basis of prior judicial rulings or in-court comments prompted by legal proceedings), *cert. denied*, 431 U.S. 933 (1977).

125. 384 U.S. 563 (1966).

126. *Id.* at 583.

127. *Id.* at 580-83 (judge's comments critical of attorney's handling of case are not grounds for disqualification). *See also* Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) ("intemperate" statements in settlement conference based on perception of case are not grounds for disqualification), *cert. denied*, 450 U.S. 999 (1981).

128. *See Ex parte* American Steel Barrel Co., 230 U.S. 35, 44 (1913) (adverse rulings not grounds for disqualification).

129. *In re* International Business Machs. Corp., 618 F.2d 923, 927-30 (2d Cir. 1980) (statistical evidence of pattern of adverse ruling not grounds for disqualification under §§ 144 or 455).

130. *See* Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1020 (5th Cir. 1981) (outmoded and improper racial remarks incorporated in prior rulings do not disqualify judge in subsequent civil rights case), *cert. denied*, 456 U.S. 960 (1982); United States v. Jackson, 627 F.2d 1198, 1207 n.20 (D.C. Cir. 1980) (prior judicial exposure to same type of case inadequate basis for showing personal bias).

131. For application of the extrajudicial source requirement to bail hearings, *see, e.g.*, United States v. Archbold-Newball, 554 F.2d 665, 681-82 (5th Cir.) (judge's bail denial based on stated belief of police testimony that defendants were in conspiracy not grounds for recusal), *cert. denied*, 434 U.S. 1000 (1977).

For application of the extrajudicial source requirement to other pretrial proceedings, *see, e.g.*, United States v. Porter, 701 F.2d 1158, 1166 (6th Cir.) (judge's comment during preliminary hearing that defendants were "apparently caught red-handed" not grounds for disqualification absent pervasive bias), *cert. denied*, 464 U.S. 1007 (1983); United States v. Cepeda Penes, 577 F.2d 754, 756-58 (1st Cir. 1978) (judge who heard aborted attempt to plead nolo contendere not disqualified from presiding over trial).

For application of the extrajudicial source requirement to trials, *see, e.g.*, Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985) (judge who presided over denaturalization hearing need not disqualify himself from extradition hearing or from considering habeas corpus relief), *cert. denied*, 106 S. Ct. 1198 (1986); *In re* Corrugated Container Antitrust Litig., 614 F.2d 958, 963-66 (5th Cir.) (judge who presided over criminal trial not disqualified from hearing subsequent civil trial), *cert. denied*, 449 U.S. 888 (1980); United States v. Partin, 552 F.2d 621, 637 n.20 (5th Cir.) (judge not disqualified from presiding over retrial), *cert. denied*, 434 U.S. 903 (1977).

The extrajudicial source requirement protects the judicial system from unreasonable interference with judicial decision-making. If statements of opinion could generally disqualify a judge, adjudicators could be inhibited from carrying out the evaluative tasks required to move cases through the court and to reach decisions.[133] Use of the extrajudicial source requirement to avoid disqualification as a result of the provocation of a party or attorney serves to prevent litigants from manipulating the judicial system to their advantage by harrassing judges.[134]

Despite the important benefits of the extrajudicial source requirement, it could stand in the way of a fair, impartial trial if it were rigidly applied. An absolute refusal to consider as evidence of bias or prejudice any statement made in a judicial setting in response to information learned in the case gives judges a zone of immunity in which to voice personal prejudices. Courts do not, however, generally invoke the extrajudicial source rule to protect a judge from disqualification who has made statements within the judicial context that present clear evidence of personal bias for, or prejudice against, an individual in the case.

132. *See, e.g.*, United States v. Studley, 783 F.2d 934, 939-40 (9th Cir. 1986) (fact that defendant publically denounced and filed lawsuit against judge not grounds for disqualification); United States v. Phillips, 664 F.2d 971, 1000-04 (5th Cir. 1981) (no extrajudicial source of bias to disqualify judge who learned of and discussed defendant's plans to disrupt trial and his threats against judge's life), *cert. denied*, 457 U.S. 1136 (1982).

133. *See In re* International Business Machs. Corp., 618 F.2d 923 (2d Cir. 1980), in which the court stated: "A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias." *Id.* at 929. *See also* Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) (extrajudicial source rule extended to statements in settlement conference to avoid unduly hampering judge's ability to effectuate settlement), *cert. denied*, 450 U.S. 999 (1981).

The use of this rationale in Phillips v. Joint Legislative Comm., 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982), in response to allegations of racism, raises the question whether the protection afforded by the extrajudicial source requirement extends too far. The court stated:

> We would be reluctant, in any but an extreme case, to base a disqualification order on . . . allegations [of a pattern of racism in prior opinions]. It is a district judge's duty to conduct trials, weigh evidence, consider the law, exercise his discretion, and reach decisions in the cases on which he sits. If he understands that a seemingly harsh comment toward a party or an attorney, or a perceived tendency to give severe sentences to some class of offenders, or an aggregate imbalance in victories for plaintiffs or defendants in a particular class of cases may subject him to a train of successful recusal motions in future cases, he may consciously or subconsciously shape his judicial actions in ways unrelated to the merits of the cases before him.

Id. at 1020.

134. *See, e.g.*, Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (allowing defendant's assault of judge to support disqualification would encourage unruly courtroom behavior and result in disruption of judicial administration), *cert. denied*, 449 U.S. 1086 (1981).

Berger v. United States[135] presents a classic example of prejudicial statements made by a judge within the judicial context. In *Berger*, the judge allegedly delivered an anti-German diatribe in a case involving Germans and German-Americans as defendants.[136] Another example of a judicial remark revealing bias is found in *Roberts v. Bailar*,[137] a case which involved an employment discrimination suit against the Postal Service. In response to a motion to dismiss a party who had a supervisory role,[138] the district court judge said: "I know Mr. Graves, and he is an honorable man and I know that he would never intentionally discriminate against anybody."[139] Because the actions of this "honorable man" were at issue in the discrimination suit, the court of appeals held that "it is clear that a reasonable person would question the impartiality of the District Judge."[140]

The statement at issue in a disqualification motion may not, however, clearly reveal personal bias or prejudice evidenced through an extrajudicial source, but rather may suggest that a bias toward or prejudice against a party has developed over the course of the proceeding or a prior proceeding. Disqualifying a judge in these circumstances requires making an exception to the extrajudicial source rule when a judge's statement or actions reveal that he or she has not or is not likely to put aside personal feelings in conducting the trial or passing judgment. The United States Court of Appeals for the Fifth Circuit suggested the possibility of a "pervasive prejudice" exception in *Davis v. Board of School Commissioners*[141] and applied this exception in *United States v. Holland*.[142] In *Holland*, a defendant sought disqualification of a district court judge after gaining a new trial on appeal because the judge stated that the defendant had "broken faith" with the court by appealing and intended to increase the defendant's sentence.[143] The appellate court held that the district judge's statement showed pervasive prejudice and thereby satisfied the reasonable person standard for disqualification.[144]

In *Nicodemus v. Chrysler Corp.*,[145] the Sixth Circuit Court of Appeals disqualified a judge for bias on the basis of his "vilification" of the defendant in an employment discrimination suit.[146] The court indicated that the development of

135. 255 U.S. 22 (1921).

136. *Id.* at 28-29. *See also* Connelly v. United States Dist. Ct., 191 F.2d 692, 694-95 (9th Cir. 1951) (judge disqualified who publicly stated that Communists hid behind Bill of Rights and who said to counsel, "I'm sorry to see you get mixed up with these Commies.").

137. 625 F.2d 125 (6th Cir. 1980).

138. The party was the local postmaster for whom the Postmaster General was substituted. *Id.* at 127.

139. *Id.* at 127.

140. *Id.* at 129.

141. 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

142. 655 F.2d 44 (5th Cir. 1981).

143. *Id.* at 45 & n.2.

144. *Id.* at 47.

145. 596 F.2d 152 (6th Cir. 1979).

146. *Id.* at 157. The district judge stated:

> This thing is the most transparent and the most blatant attempt to intimidate witnesses and parties that I have seen in a long time. I don't believe anything that anybody from Chrysler tells me because there is nothing in the record that is before me and in my experience in dealing with this case that gives me reason to believe that they are worthy of credence by anybody. They are a bunch of villains and they are interested only in feathering their own nests at the expense of everybody they can, including their own employees, and I don't intend to put up with it.

Id. At a later point in the trial, the judge indicated that the award he granted was shaped by his negative assessment of the defendant. *Id.* at 156-57.

In Shank v. American Motors Corp., 575 F. Supp. 125 (E.D. Pa. 1983), a district court judge reacted in similar fashion to the defendant automobile manufacturers. The judge refused to disqualify himself, alleging that his statement arose out of judicial experience and did not indicate extrajudicial bias. *Id.* at 129. He said, "Automobile manufacturers are among the most devious groups of defendants that I have seen in twenty-one years on the Bench." *Id.* The defendants did not appeal this denial of disqualification.

147. *Id.* at 156. The court stated: " 'Often some degree of bias develops inevitably during a trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself.' " *Nicodemus*, 596 F.2d at 156 (quoting Whitaker v. McLean, 118 F.2d 596, 596 (D.C. Cir. 1941)).

148. *Nicodemus*, 596 F.2d at 156 (quoting Whitaker v. McLean, 118 F.2d at 596).

149. *See, e.g.*, Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971) ("A judge cannot be driven out of a case"); Wilks v. Israel, 627 F.2d 32, 37 (7th Cir. 1980) (judge not disqualified for response toward defendant who had assaulted him), *cert. denied*, 449 U.S. 1086 (1981).

150. *See Mayberry*, 400 U.S. at 465-66 (judge became "personally embroiled" with defendant, and therefore defendant given public trial before another judge). *Compare In re* Jafree, 741 F.2d 133, 136-37 (7th Cir. 1984) (in non-summary contempt proceeding for defamatory actions toward district court judges in which court did not follow proper procedure, judges disqualified for being personally embroiled in the controversy) *with* United States v. Greer, 714 F.2d 358, 360 (4th Cir. 1983) (judge who objected to attorney's accusation that he sentenced on racial basis and then called a recess, permitting time for emotions to cool, not disqualified for bias) *and Wilks*, 627 F.2d at 36-37 (although judge responded to assault, reaction did not disqualify him because he calmed down and conducted fair trial).

151. This rule is mitigated somewhat by 28 U.S.C. § 455(b)(3), which provides that judges who had been government employees are disqualified from a case if they previously served as counsel, adviser, or material witness concerning the proceedings, or if they expressed an opinion on the merits of the case. *Id.*

some degree of bias over the course of court proceedings is a normal part of the judicial process,[147] but declared that " 'if . . . a judge's bias appears to have become overpowering, we think it disqualifies him.' "[148]

In a situation in which the judge was directly or deliberately provoked by a participant in the case, an emotional response by a judge generally will not disqualify her.[149] Nevertheless, even in circumstances in which the judge has been deliberately provoked, an extreme reaction to a party or attorney may necessitate disqualification.[150] The appropriate focus under section 455(a) is not whether the judge's statement springs from an extrajudicial source but instead whether the judge's statement or action would lead a reasonable person to question whether the judge would remain impartial.

b. *Opinion on law or policy*

A second fundamental principle of disqualification law articulated by the courts is that judges cannot be disqualified for their knowledge of, or opinions on, the legal issues in a case.[151] The policy concerns underlying this rule are

clear: disqualification on grounds of previously developed legal opinion would wreak havoc within the judicial system. As the United States Court of Appeals for the Third Circuit recently observed: "If [j]udges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worse-prepared lawyers could be appointed to the bench."[152]

Although the judicially-created rule against considering disqualifying judges on the basis of their legal knowledge is a sound one, application of the rule may be problematic when a judge has been personally involved in instituting a particular policy or when a judge has emphatically expressed support for, or opposition to, a policy position. The best-known case involving the issue of disqualification of a judge for his involvement in instituting a policy is *Laird v. Tatum*,[153] a case in which the plaintiffs challenged army surveillance of anti-war protestors.[154] Plaintiffs moved to disqualify Justice Rehnquist, who had cast the deciding vote in a five to four decision dismissing the case,[155] on the grounds that he had been involved in defending the surveillance program before a Senate committee as assistant attorney general in the Nixon administration.[156] Justice Rehnquist determined that he was not obliged to disqualify himself because he "did not have even an advisory role in the conduct of the case of *Laird v. Tatum*."[157] He also declined to disqualify himself through an exercise of discretion, reasoning that opinions on the law and policy were necessary and inevitable,[158] and that having publicly expressed these opinions was not sufficient grounds for disqualification.[159]

152. Cipollone v. Liggett Group, Inc., 802 F.2d 658, 659-60 (3d Cir. 1986) (judge's prior knowledge of issues in products liability suit against tobacco companies not grounds for disqualification), *cert. denied*, 107 S. Ct. 907 (1987).

153. 408 U.S. 1 (1972) (suit against army surveillance dismissed); 409 U.S. 824 (1972) (memorandum of Rehnquist, J., rejecting motion for disqualification).

154. 408 U.S. at 2.

155. 409 U.S. at 824-25.

156. *Id.*

157. *Id.* at 829. The revised version of § 455 has not yet been enacted. For the text of the disqualification statute in effect at the time, *see supra* note 28.

During the hearing process prior to Justice Rehnquist's confirmation as Chief Justice, information regarding his role in formulating the surveillance program became public and prompted criticism of his failure to disqualify himself in *Tatum*. Members of Congress and the legal community maintained that his involvement in policy-making required disqualifications. *See Rehnquist's Critics Press Charges That He Was Unethical on Court*, N.Y. Times, Sept. 11, 1986, p. B12, col. 1 (statements of Hazard, an expert on judicial ethics and a Republican, to the effect that Rehnquist should have disqualified himself in *Tatum*); *Rehnquist Acted Improperly by Ruling On Surveillance Case, Ethics Expert Says*, Wall St. J., Sept. 11, 1986, at 64, col. 1 (Yale Law School Professor Geoffrey Hazard statements that Rehnquist should not have participated in *Tatum* because of direct involvement in events that culminated in suit); *New Questions Raised About Rehnquist's Role in Army Surveillance of Protestors*, Wall St. J., Sept. 10, 1986, at 64, col. 1 (Senate Democrats state that information regarding Rehnquist's involvement in formulating surveillance policy raises questions regarding his ethical judgment and sensitivity to the appearance of impropriety).

158. 409 U.S. at 835.

159. *Id.* at 836. Justice Rehnquist also argued that federal judges have a "duty to sit" if not disqualified. *Id.* at 837. Congress specifically rejected this rule when it passed the revised disqualification statute later that same year. *See supra* note 30 and accompanying text for a discussion of the duty to sit.

In its revision of section 455, Congress included a specific provision, section 455(b)(3),[160] to address issues raised in *Tatum*.[161] Section 544(b)(3) does not, however, clearly require disqualification where a judge is ruling on the applicability or constitutionality of laws or executive policies that he had a significant hand in shaping. Section 455(b)(3), on its face, seems to be applicable only in those cases in which a judge had been involved in, or expressed an opinion about, a particular case. Disqualification in circumstances like those presented in the *Tatum* case would fall, instead, under the general provision of section 455(a), which requires the court to ask whether the judge's participation in lawmaking raises reasonable doubts concerning his impartiality. It is reasonable to believe that one who has had a significant part in formulating a policy may have difficulty maintaining impartiality when that policy is challenged.

The disqualification issue may also arise when a judge has not played a significant role in formulating policy but rather has expressed an opinion on an issue, either by casting a vote in a legislature, or by publicly expressing an opinion. Courts have generally refused to disqualify judges in these circumstances.[162] Nevertheless, evidence of strongly held opinions can raise reasonable doubts about a judge's impartiality.

In *Southern Pacific Communications v. American Telephone & Telegraph Co.*,[163] the United States Court of Appeals for the District of Columbia considered the issue of disqualification based on emphatic policy statements in post-trial review of an antitrust case against American Telephone & Telegraph Co. ("AT&T"). The district court judge, in his memorandum opinion,[164] forcibly stated his belief that the public interest was better served by an AT&T monopoly rather than by competition in the telecommunications industry.[165] The court of appeals, noting that views on the law and policy do not ordinarily disqualify a judge,[166] allowed for the possibility of disqualification if the court prejudged a case.[167] The court set forth an "irrevocably closed mind" test for determining

160. *See supra* note 12 for text of § 455(b)(3).

161. *See Senate Hearings*, *supra* note 2, at 88-89 (need for § 455(b)(3) explained by reference to *Laird v. Tatum*).

162. *See, e.g.*, Shaw v. Martin, 733 F.2d 304, 315-16 (4th Cir.) (vote for death penalty no more significant than oath binding judges to apply laws of legislature; it is not grounds for disqualification), *cert. denied*, 469 U.S. 873 (1984); United States v. Allen, 675 F.2d 1373, 1385 (9th Cir. 1980) (statement that marijuana importation is a serious crime with cancer-like effect on society is restatement of congressional purpose and cannot be grounds for disqualification), *cert. denied*, 454 U.S. 833 (1981); Smith v. Danyo, 585 F.2d 83, 87 (3d Cir. 1978) (statement that diversity cases do not belong in federal court is statement of legal principle and does not disqualify judge); *see also* Lawton v. Tarr, 327 F. Supp. 670, 671-72 (E.D.N.C. 1971) (judge who had publicly expressed his strong objection to Vietnam war refused to disqualify himself from Selective Service case).

163. 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

164. Southern Pacific Communications Co. v. American Tel. & Tel. Co., 556 F. Supp. 825 (D.D.C. 1982), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

165. 740 F.2d at 983, 988 n.7.

166. *Id.* at 990.

167. *Id.* at 991.

when a judge's actions overcome the presumption of impartiality.[168]

The *Southern Pacific Communications* "irrevocably closed mind" test cannot be applied to pretrial disqualification, however. Pretrial application of the test would conflict with the presumption that a judge will maintain an open mind toward a case, and follow precedent faithfully.[169] In a section 455(a) pretrial disqualification challenge, this presumption would preclude challenge of a judge's impartiality prior to trial because it would not be possible to prove that an upcoming presentation of an issue would not sway the judge.[170] A litigant cannot make a pretrail showing of an "irrevocably closed" mind sufficient to overcome the presumption when such a showing depends on evidence of bias in the proceedings.[171]

Although in general a judge may not be disqualified for an opinion on the law, a judge may be disqualified for holding a fixed opinion regarding sentencing.[172] This exception was established in *United States v. Thompson*,[173] the case in which the defendants had allegedly violated the Selective Service Act.[174] The district court judge, in a previous case, had announced that it was his policy to sentence all Selective Service Act violators to at least thirty months in jail.[175]

168. *Id.* The court suggested that judges should not be disqualified if they are "capable of refining" their views in the process of the case, but they should be disqualified if their minds are "irrevocably closed." *Id.* Applying this test to the district court judge's handling of the AT&T case, the court found that the judge did not hold a fixed opinion at the outset of the case, as evidenced by his denial of a motion to dismiss the case on the basis of antitrust immunity, and that his evenhanded administration of the case provided no evidence of a "closed mind" during trial. *Id.* at 991-92.

169. *See id.* at 993 (evidence must be weighed against strong presumption that judges do not substitute their personal views for controlling law).

170. *Cf.* Bloom, *supra* note 55, at 689 (previously stated opinion on important issue in case could lead reasonable person to question judge's impartiality).

Bloom addressed this issue prior to the circuit court decision in *Southern Pacific Communications*. He perceived the policy against disqualifying judges for opinions on the law as a blanket prohibition, rather than as a policy giving rise to a strong presumption of impartiality. *Id.* at 688. Bloom advocated replacing the blanket prohibition with a case-by-case analysis that would disqualify judges for the appearance of bias, and that would take into account "whether and how widely the judge's views are publicly known, how strongly the views are held, whether the proper resolution of the legal issue is unsettled, and whether his views relate to the legal issue as applied in the specific factual context of the case . . . ." *Id.* at 697.

171. *See Southern Pacific Communications*, 740 F.2d at 991 (each new case confronts judge with new factual context, new evidence, and new efforts at persuasion; test is whether judge's mind is irrevocably closed with respect to issues as they arise in context of specific case).

172. *See* United States v. Clements, 634 F.2d 183, 187 (5th Cir. 1981) (fixed sentencing policy, established through judge's statement or prior record in similar cases, may disqualify); United States v. Thompson, 483 F.2d 527, 528-29 (3d Cir. 1973) (judge's statement showing policy of imposing stiff sentences for Selective Service violations grounds for disqualification).

173. 483 F.2d 527 (3d Cir. 1973). Although the *Thompson* court held that a litigant can disqualify a judge through a pretrial § 144 affidavit alleging a fixed sentencing policy, the court was evaluating a case in which the judge had declined to disqualify himself, *id.* at 528, and had actually imposed the thirty-month sentence he had indicated was his minimum. *Id.* The court, however, focused on the allegations in the affidavit, rather than the judge's conduct in the case. *Id.* at 528-29.

174. *Id.* at 528.

175. *Id.* *See* United States v. Townsend, 478 F.2d 1072, 1074 (3d Cir. 1973) (judge disqualified for statement showing fixed opinion on sentencing).

The appellate court determined that this allegation provided grounds for disqualification because it "was not an allegation of judicial bias in favor of a particular legal principle," but rather of personal bias "directed against the appellant as a member of a class."[176] The court also noted, however, that a fixed policy as to sentencing was inconsistent with the trial judge's authorized discretion to tailor sentences appropriately.[177]

The *Thompson* court's consideration of the judge's violation of his official duties suggests a framework for a narrow exception permitting disqualification for opinions on the law or public policy. Courts could adopt the rule that while policy statements should not generally provide grounds for disqualification, an exception will be made when a statement or action would lead a reasonable person to conclude that the judge is predisposed to violating his or her oath or ignoring a mandate.[178] Such a rule would not interfere with the present practice of refusing disqualification when the judge's statement expresses an enthusiastic commitment to enforce the law,[179] or when a judge previously voted in favor of a law applicable in the case.[180] Simple disagreement with existing law would also not disqualify.[181] Under the proposed exception, however, the presumption of impartiality could be overcome if a judge's action provided evidence of intense disagreement with a particular policy or law.[182] The critical issue would be whether the judge could reasonably be expected to put aside his or her personal feelings, rather than allow them to dominate the decision-making process.[183]

c. *Bias or prejudice toward an attorney*

Some courts have required that judicial bias be directed toward the party as an individual, rather than toward that party's attorney, before disqualifying a

176. 483 F.2d at 529. One member of the circuit court panel filed a dissent in which he argued that the class was a judicial one, defined merely by their violation of the Selective Service Act, and not by a "trait extraneous to the judicial process." *Id.* at 530 (Adams, J., dissenting).

177. *Id.* at 529.

178. *See* Reserve Mining Co. v. Lord, 529 F.2d 181, 188-89 (8th Cir. 1976) (judge disqualified for disregarding appeals court mandate regarding district court jurisdiction).

179. *See* United States v. Allen, 675 F.2d 1373, 1385 (9th Cir. 1980) (anti-drug statement not grounds for disqualification in drug smuggling trial), *cert. denied*, 454 U.S. 833 (1981).

180. *See* Shaw v. Martin, 733 F.2d 304, 316 (4th Cir.) (judge who as legislator had voted for death penalty not disqualified), *cert. denied*, 105 S. Ct. 230 (1984).

181. Courts have shown an appropriate reluctance to disqualify on the basis of disagreement with applicable law. The *Southern Pacific Communications* court articulated the reason for this reluctance when it stated:

> It is well established . . . that a judge is not disqualified merely because he personally disagrees with the policy underlying a law that he is bound to apply in a case [since] . . . '[i]n fulfilling the functions of applying or considering the validity of a statute, or a government program, the judge endeavors to put aside personal views as to the desirability of the law or program . . . .'

740 F.2d at 993 (quoting Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1175 (D.C. Cir. 1979) (Leventhal, J., concurring), *cert. denied*, 447 U.S. 921 (1980)).

182. For example, a judge who had previously campaigned for political office on an anti-abortion platform could be disqualified from abortion cases.

183. *See Southern Pacific Communications*, 740 F.2d at 993 (allegation that judge allowed feelings to dominate considered but rejected on basis of record).

judge.[184] Under section 455(a), however, bias or antipathy directed at counsel may justify disqualification, but only if this bias or prejudice could affect the outcome of the case to the detriment of a party.[185] As the United States Court of Appeals for the Tenth Circuit noted in *United States v. Ritter*,[186] "if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party."[187]

Yet, as the Ninth Circuit has noted, when a judge is charged with prejudice against an attorney, the court must take into account tensions between judge and attorney inherent in the adversarial system.[188] A disqualification motion based on bias for or prejudice against an attorney thus should be evaluated in context, like other charges of prejudice arising from a judge's statements or actions within the judicial process.

d. *General background and experience*

Reviewing courts also refuse to disqualify judges on the basis of their general background, education, and experience.[189] In *Blank v. Sullivan & Cromwell*,[190] a sex discrimination case against a law firm, the defendant sought to disqualify the judge because she was female and as a lawyer had worked on behalf of minorities who had suffered from discrimination.[191] The *Blank* court refused to disqualify, reasoning that if background, race, or sex were in themselves grounds for removal, "no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, [and] often with distinguished law firm or public service backgrounds."[192]

184. *See* Davis v. Board of School Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975) (disqualification should be based on judicial bias toward a party rather than counsel), *cert. denied*, 425 U.S. 944 (1976); *cf.* Gilbert v. City of Little Rock, 722 F.2d 1390, 1298-99 (8th Cir. 1983) (judge who voluntarily disqualified herself from cases involving certain attorney not required to disqualify herself from case in which that attorney had previously represented party because antipathy to attorney insufficient grounds for disqualification on personal prejudice), *cert. denied*, 466 U.S. 972 (1984).

185. *See, e.g., In re* International Business Machs. Corp., 618 F.2d 923, 932 (2d Cir. 1980) (court considered incidents of intemperate behavior toward attorneys and concluded they did not show bias toward party).

186. 540 F.2d 459 (10th Cir. 1976), *cert. denied*, 429 U.S. 951 (1976).

187. *Id.* at 462.

188. *In re* Yagaman, 796 F.2d 1165, 1178 (9th Cir. 1986) (tension between court and attorney did not create bias toward party). The court described this tension as a normal component of the judicial process, stating that "[b]ecause the nature of our system is adversarial, parties will occasionally be uncooperative, both with each other and with the court, and courts will sometimes be exacting." *Id. See also In re* International Business Machs. Corp., 618 F.2d at 932 (incidents of intemperate behavior "endemic to a trial of this dimension").

189. *See* Paschall v. Mayone, 454 F. Supp. 1289, 1300-01 (S.D.N.Y. 1978) (judge not disqualified for experience as an NAACP attorney).

190. 418 F. Supp. 1 (S.D.N.Y. 1975).

191. *Id.* at 4.

192. *Id.* Disqualification sought on the basis of a judge's background and experience was also rejected in Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 182 (E.D. Pa. 1974), *aff'd*, 552 F.2d 498 (3d Cir. 1977). The defendants, who were charged with discriminating against a class of black plaintiffs on the basis of race, sought to disqualify Judge Higginbotham by means of a § 144 affidavit alleging that he was black and had identified himself with black causes.

Rejection of recusal for general background or experience is sensible because evidence of general associations does not provide a reasonable basis for an inference of bias.[193] Courts must, however, carefully distinguish between general evidence of background or associations and specific evidence that may provide a basis for disqualification under section 455(a) if an interest or relationship is not specified under section 455(b).[194]

2. Grounds for Disqualification Under Section 455(a) Other Than Bias or Prejudice

Disqualification under section 455(a) is not limited to circumstances where bias or prejudice is explicitly alleged; section 455(a) also applies when an interest or relationship, not among those defined by section 455(b), raises doubt about a judge's impartiality.[195] It is evident from the record of the Senate committee hearing on the proposed revision of section 455 that Congress envisioned the use of section 455(a) as a tool for disqualification on grounds not specified in section 455(b).[196]

Recognizing the scope of the general provisions, courts have made use of section 455(a) to disqualify judges for interests or relationships not covered by section 455(b).[197] Several courts have used section 455(a) as their framework for examining disqualification motions that allege that a judge's law clerk or former law clerk had a role or an interest in a case.[198] The United States Court of Appeals for the Third Circuit has held that judges are required under section 455(a) to disqualify themselves from criminal actions if they have a substantial interest in the victim of the crime.[199] The Fifth Circuit, in *Potashnick v. Port*

Id. at 157-58. The defendant's central allegation was that Judge Higginbotham's recent speech before a black history organization revealed his identification with civil rights cases. *Id.* at 159-60, 163. In addition to refusing disqualification on the grounds that background and associations could not be used to prove bias, the judge noted that dedication to upholding the law also could not be used to disqualify a judge. *Id.* at 159.

See also Brody v. President & Fellows of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981) (fact that judge graduated from Harvard College does not disqualify him from hearing suit against Harvard), *cert. denied*, 455 U.S. 1027 (1982).

193. *See* Note, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1461 (1981) (simplistic allegations of bias based on implications from background rightfully given short shrift).

194. *See infra* notes 195-220 and accompanying text for a discussion of disqualification for an interest or relationship under § 455(a).

195. *See supra* note 12 for the text of 28 U.S.C. § 455.

196. *See Senate Hearing, supra* note 2, at 112 (relationship not specified under § 455(b) may raise question of impartiality under § 455(a)).

197. *See infra* notes 207-20 and accompanying text for a discussion of cases in which § 455(a) disqualification was based on an interest or relationship.

198. *See* Patzner v. Burkett, 779 F.2d 1363, 1372 (8th Cir. 1985) (disqualification not mandated where defense attorney had served judge as law clerk more than a year before in light of circuit rule that prohibited law clerks from appearing before their judge within a year of their service); Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (judge disqualified because current law clerk had interest in case).

199. United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982) (judge disqualified for holding stock in corporate victim of fraud), *cert. denied*, 462 U.S. 1118 (1983).

City Construction Co.,[200] relied on section 455(a) to disqualify a judge who had extensive business dealings with the plaintiff's attorney.[201] More recently, the Fifth Circuit used section 455(a) in *Health Services Acquisition Corp. v. Liljeberg*[202] to disqualify a judge who claimed he had no knowledge of information that, if known, would have disqualified him under section 455(b)(4).[203]

In each of these cases, the respective appellate court determined that a relationship or interest in itself raised questions regarding impartiality. The courts did not evaluate the extent of the relationship or interest to determine whether the judge in each case was actually biased. Rather, the courts disqualified due to the appearance of bias.[204]

Casting disqualification questions in terms of relationships or interests, instead of in terms of bias, has several advantages. Stating the disqualification motion in terms of a questionable relationship can bring into clearer focus the grounds for objecting to the participation of a particular judge.[205] In addition, relationships and interest are easier for courts to ascertain because the evidence is more concrete and accessible. Such decisions are also easier to review, since the court can consider, as a matter of law, whether a particular interest or relationship should be added to the list of those that disqualify.[206] Furthermore, resting the need for disqualification on the existence of a relationship is less personal and may be easier for a judge to view objectively than a direct charge of bias.

Nevertheless, litigants and courts tend to treat any relationship or interest not specifically enumerated in Section 455(b) as presenting a question of disqualification for bias or prejudice, requiring the more difficult showing of personal prejudice, rather than considering the relationship under section 455(a). The opinion issued by the Fifth Circuit in *United States v. Harrelson*[207] provides an

200. 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

201. *Id.* at 1110-12; *see also Pepsico, Inc.*, 764 F.2d at 461 (disqualification required where judge indirectly sought employment in firm of attorney appearing before him).

202. 796 F.2d 796 (5th Cir. 1986).

203. *Id.* at 800-02. 28 U.S.C. § 455(b)(4) requires disqualification if a judge "knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy . . . ." The court held that the judge, who was a trustee of Loyola University, had "constructive knowledge" of an interest in the case because he had attended a meeting at which financial information was disseminated that revealed the university's interest. 796 F.2d at 803. The court concluded that the judge's claimed forgetfulness could not provide a defense against disqualification under the objective standard of § 455(a) and thus held that the judge's recusal was necessary. *Id.* at 802-03. *Cf.* Davis v. Xerox, 811 F.2d 1293 (9th Cir. 1987) (if reasonable person would conclude that judge had no knowledge of interest at time rulings made, § 455(a) does not require that rulings be vacated).

204. *See, e.g., Nobel*, 696 F.2d at 235 (disqualification depends on appearance of bias); Hall v. Small Business Admin., 695 F.2d 175, 178 (5th Cir. 1983) (inappropriate under § 455(a) to inquire into actual bias of judge).

205. *See, e.g.*, United States v. Story, 716 F.2d 1088, 1090-91 (6th Cir. 1983) (personal bias charged but court addressed as real issue whether judge should be disqualified for prior association with charity which was victim of crime).

206. *See Nobel*, 696 F.2d at 234 (question of whether judge is disqualified for financial interest in corporate victim of crime is a question of law).

207. 754 F.2d 1153 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 277 (1985).

example of this tendency. The *Harrelson* defendants were convicted of murder and conspiracy to murder a federal judge.[208] Pursuant to section 455(a), the defendants had sought to disqualify the trial judge, who had known and worked with the murder victim for eight or nine years, served as an honorary pallbearer at his funeral, and eulogized him at several memorial ceremonies.[209] The court analyzed section 455(a) as requiring disqualification on the basis of conduct that shows personal prejudice, insisting that "recusal is not warranted absent specific instances of conduct indicating prejudice against a defendant."[210] Because such evidence was lacking, the court held that disqualification was not required.[211]

The *Harrelson* court then considered the question of relationship briefly and superficially.[212] The court reasoned that a trial judge in this position may harbor hostility toward the actual killers but would presume the innocence of persons pleading not guilty.[213] The court did not consider the possible impact of this hostility if the judge reached a conclusion regarding guilt before the end of the trial or its possible impact upon sentencing.[214] The court concluded that absent a stronger showing of personal prejudice, a reasonable person would not presume that the "careful and seasoned trial judge" was biased.[215] By requiring a showing of personal prejudice,[216] the court lost sight of the objective "appearance of bias" standard established in section 455(a) as applied to questions of disqualifying relationship or interest.

Other courts have given questions involving a relationship equally short shrift. For example, in *United States v. Balistrieri*,[217] disqualification was sought on the grounds that the judge, when he was Wisconsin Attorney General, identified the defendant as the head of an organized crime family and targeted the defendant's family business for investigation in his efforts against organized crime.[218] The court denied disqualification on the grounds that there was no showing of personal animus[219] and did not ask whether a reasonable person would consider the relationship of the judge to the defendant one which called into doubt the impartiality of the judge.[220]

208. *Id.* at 1158-59.

209. *Id.* at 1164-65.

210. *Id.* at 1165.

211. *Id.* at 1166.

212. *Id.*

213. *Id.*

214. The question whether a personal relationship with the victim of a crime constitutes a disqualifying relationship is not settled. *Compare* United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982) (concern for maintaining public confidence in judicial integrity, which "depends on a belief in the impersonality of judicial decisionmaking," requires disqualification of judge with financial interest in corporate victim of crime), *cert. denied*, 462 U.S. 1118 (1983) *with* United States v. Sellers, 566 F.2d 884, 887 (4th Cir. 1977) (fact that judge owned stock in bank that was victim of robbery did not create reasonable apprehension that judge would be partial).

215. 754 F.2d at 1166.

216. *Id.*

217. 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1490 (1986).

218. *Id.* at 1200.

219. *Id.* at 1201.

220. *Compare id.* at 1201-02 (disqualification not required of judge who, as Attorney General,

The tendency of courts to focus on personal prejudice suggests that a subjective element remains in disqualification decisions under section 455(a) despite the congressional emphasis on an objective standard. The next section will examine the disqualification decision-making process and consider means for achieving greater objectivity in disqualification under section 455(a).

III. Disqualification Procedure

A. Disqualification Decision-Making

Objective disqualification can be promoted by clarifying the process of evaluating evidence for disqualification. The inherently subjective nature of evidence of personal bias and prejudice may make objective evaluation difficult.[221] Yet even when disqualification is based on bias or prejudice, courts are required by Congress to apply the objective standard of section 455(a).[222]

The decision-making process followed when disqualification is based on an interest or relationship defined under section 455(b)[223] is simple to describe and provides a framework for a more objective approach to disqualification under section 455(a). In deciding whether to disqualify for interest or relationship, the first question a court poses is: does the interest or relationship exist? If it does, the court must arrive at an accurate description of the relationship and ask: does the judge's interest or relationship fall within those specified under section 455(b)? If so, disqualification is automatic.[224] The statute imposes the presumption that the particular interest or relationship would reasonably result in bias.[225]

If the interest or relationship is not one specified under section 455(b), the next question posed is whether this interest or relationship reasonably raises questions regarding a judge's impartiality.[226] Once the factual determination is

allegedly focused on defendant as organized crime figure) *with* Bradshaw v. McCotter, 785 F.2d 1327, 1329 (5th Cir. 1986) (habeas corpus relief granted because appellate judge, who had been state prosecuting attorney at time party was prosecuted and whose name appeared on state's brief, should have disqualified himself even though name appeared on brief as a matter or protocol and judge had not participated in prosecution), *modified on reh'g*, 796 F.2d 100, 101 (5th Cir. 1986) (although judge disqualified, habeas corpus relief not granted because judge's vote on appeal not controlling). *See also* Idaho v. Freeman, 507 F. Supp. 706, 731-33 (D. Idaho 1981) (in case in which plaintiffs sought extension of deadline for ratification of ERA, disqualification on basis of judge's holding responsible office in Mormon Church, which had taken stand and engaged in lobbying efforts against ERA, denied by challenged judge on grounds that he had never participated in anti-ERA lobbying nor made his personal position known).

221. *Cf.* Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 Hastings L.J. 829, 846 (1984) (disqualification on the basis of bias or prejudice inherently subjective, requiring different treatment on review).

222. 28 U.S.C. § 455(a) (1982).

223. *Id.* § 455(b).

224. *See supra* notes 14-20 and accompanying text for a discussion of the statutory provisions mandating disqualification for interest or relationship.

225. *Id.*

226. *See supra* notes 195-220 and accompanying text for a discussion of disqualification under § 455(a) on the basis of interest or relationship. *See also* Aetna Life Ins. Co. v. Lavoie, 106 S. Ct.

made regarding the existence of an interest or relationship, the question whether it provides reasonable grounds for disqualification is one an appellate court can determine as a matter of law.[227]

In cases seeking disqualification on the basis of personal bias or prejudice, the judge's statements and other expressive actions provide the evidence for disqualification.[228] To make an objective assessment of this evidence, the court must first test its accuracy, and question whether the event or statement occurred as reported. Once the court has obtained an accurate description of the expressive act that may reveal bias, that evidence must be evaluated using the reasonable person standard to determine whether the expressive acts reasonably raise doubts regarding the judge's impartiality.[229] Under the objective standard, it is inappropriate for the court to inquire further and attempt to determine the judge's actual state of mind. The court is limited to assessing outward manifestations and to making a reasonable inference as to whether the typical judge would be biased under those circumstances.[230]

The task of applying the objective standard to the facts grants the judge a degree of discretion in disqualification decisions under section 455(a) that is not present in section 455(b) decisions. The scope of that discretion is limited, however, because Congress established a low threshold when it eliminated the duty to sit.[231] Judges are required to recuse themselves if they perceive any grounds for disqualification.[232] The discretion of district court judges can be limited further by the courts of appeals if they respond to disqualification cases by establishing clearer guidelines for disqualification.[233]

1580, 1587 (1986) (reviewing court not required to decide whether judge is actually biased by interest but only whether normal average judge would be biased in circumstances).

227. *See* Pepsico, Inc. v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985) (disqualification mandated where judge in negotiation for employment with law firm or party appearing before him); United States v. Nobel, 696 F.2d 231, 235-36 (3d Cir. 1982) (court adopted rule that judge is disqualified for financial interest in victim of crime), *cert. denied*, 462 U.S. 1118 (1983).

228. *See supra* notes 109-93 and accompanying text for a discussion of judicial requirements for disqualification for bias or prejudice.

229. *See, e.g.*, Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980) (remark undisputedly made by judge must be evaluated on objective standard that asks whether a reasonable person with knowledge of all the facts would doubt judge's impartiality).

230. *See* Hall v. Small Business Admin., 696 F.2d 175, 179 (5th Cir. 1983) (inquiry into the state of mind of a judge not part of the objective test); Roberts v. Bailar, 625 F.2d at 129-30 (judge's statement regarding his assessment of supervisor's character in employment discrimination suit disqualified him under the objective standard; court did not consider and explicitly rendered no opinion regarding existence of actual bias).

231. *See supra* note 30 and accompanying text for a discussion of the elimination of the duty to sit.

232. *Id.*

233. *See, e.g.*, Roberts v. Bailar, 625 F.2d at 129-30 (judge's statement assessing character of key person in lawsuit disqualifies judge); Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-56 (6th Cir. 1979) (outburst against party unsupported by record grounds for disqualification); United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973) (fixed opinion on sentencing disqualified judge).

B. Evaluation by the Challenged District Court Judge

Federal law provides that the decision-making process described above be carried out by the judge who is under challenge. Under section 144, which provides for disqualification upon filing of a sufficient affidavit,[234] the challenged judge is charged with determining whether the affidavit is legally sufficient.[235] Although the judge is required to assume the truth of the allegations and the good faith of the attorney regardless of any knowledge to the contrary,[236] the judge exercises significant power over disqualification. The requirement of convincing evidence of bias,[237] and the restrictions on disqualification evidence such as the extrajudicial source rule,[238] give the challenged judge the responsibility of making an extensive evaluation of the charges.[239]

Under section 455, judges have more latitude in reaching the decision whether to disqualify themselves. Judges are not required to accept the veracity of the factual averments in a motion, but rather are free to make credibility determinations, weigh the evidence, and contradict it with facts drawn from their own personal knowledge.[240]

Giving the challenged judge this role in the disqualification process has the advantage of allowing the judge with the best knowledge of the issue to resolve it speedily. But when the judge denies disqualification, questions regarding that judge's impartiality are compounded rather than settled. Moreover, the appearance of impartiality is not advanced when a challenged judge proceeds to try a case and there has been no outside assessment of the challenge to that judge's impartiality.[241]

234. 28 U.S.C. § 144 (1982). *See supra* notes 35-43 and accompanying text for a discussion of § 144 requirements.

235. Berger v. United States, 225 U.S. 22, 36 (1921).

236. *Id.*

237. *See supra* notes 69-73 and accompanying text for a discussion of the standard of proof under § 144.

238. *See supra* notes 109-94 and accompanying text for a discussion of the judicial limitations on disqualification.

239. To determine the legal sufficiency of a § 144 affidavit, a judge must consider whether it is definite enough in its pleadings, whether the kind of prejudice it alleges is judicially recognized as grounds for disqualification, and, if so, whether the facts it alleges would convince a reasonable person that the judge is biased. *See supra* note 69 for the three-part test for legal sufficiency generally applied by the courts.

240. United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985), *cert. denied*, 106 U.S. 1490 (1986); *see also* Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (judge must evaluate disqualification motion from perspective of reasonable person with knowledge of all objective facts); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir.) (disqualification required if reasonable person with knowledge of circumstances would harbor doubts about judge's impartiality), *cert. denied*, 449 U.S. 820 (1980); Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979) (disqualification required if reasonable person would have factual grounds for doubting judge's impartiality).

241. *See, e.g., In re* International Business Machs. Corp., 618 F.2d 923, 927 (2d Cir. 1980) (intolerable to judicial system to allow challenged judge to terminate inquiry of prejudice until ultimate review on merits).

C. Other Means for Determining Disqualification

Commentators have proposed several ways of changing or supplementing disqualification procedures to better ensure an impartial adjudicator. One proposed alternative to the current disqualification procedure is to eliminate judicial decision-making from the process by instituting the peremptory challenge of judges.[242] Reliance on peremptory challenge, however, may lead to judge-shopping[243] and inefficiency.[244] Furthermore, the introduction of a peremptory challenge would not actually address the problem of ensuring impartial judges. The proposals limit litigants to one use of a peremptory challenge.[245] Litigants could face a biased judge after reassignment and the need for a statute disqualifying judges for cause would remain, as would the problems of achieving disqualification on an objective standard under such a statute.

The other two proposed alternatives, which would bring judges other than the challenged judge into the disqualification process, deserve more extensive consideration. One proposal is to transfer the decision to another judge at the district court level. A second alternative is to allow full and immediate appellate review of denials of disqualification.

1. Transfer to Another District Judge

Commentators have recommended that independent adjudication of disqualification motions be assured by requiring that a district court judge presented with a disqualification motion transfer the motion to another judge for decision.[246] Such a transfer would, according to commentators, address the problem presented by having judges decide their own cases, provide a more disinterested forum, and thus promote the appearance of impartiality.[247] The major objection commentators have leveled against this proposal is that transfer of

242. *See* Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612, 633-36 (1976) (automatic disqualification upon filing of motion recommended as efficient method that protects judges' reputations since it avoids discussion of actual or apparent bias); Note, *Disqualification of Federal District Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 159-63 (1976) (disqualification by peremptory challenge "best way to rectify the existing deficiencies" in disqualification process).

243. *See* Note, *supra* note 193, at 1471-72 (judge-shopping most common abuse of California peremptory challenge provision).

244. *Id.* at 1472-73 (delays and judicial waste in California results from peremptory challenge rule).

245. *See Senate Hearing*, *supra* note 2, at 7-8, 13 (S. 1886, introduced by Senator Bayh, allowed one peremptory challenge per side).

246. To make transfer of disqualification decisions mandatory would require amendment of the current statute, 28 U.S.C. § 455, which explicitly places the responsibility for disqualification on the challenged judge. *See supra* note 12 for the text of § 455. *See also* Comment, *supra* note 75, at 266 n.172, for a discussion of creative ways to circumvent the current requirement that judges disqualify themselves.

247. *See* Bloom, *supra* note 55, at 697, 706 (decision should be referred to another district court judge to enhance appearance of impartiality); Redish & Marshall, *supra* note 1, at 503 n.180 (to make right to non-biased adjudicator meaningful, parties should be afforded opportunity to present their case for disqualification before judge other than the person challenged); Comment, *supra* note 75, at 265-67 (courts should encourage transfer at discretion of challenged judge); Note, *supra* note

the disqualification motion to another judge for a hearing, or for review of affidavits,[248] would delay litigation and impose an administrative burden.[249] Those advocating this alternative argue that an independent review of disqualification is worth the delay and burden on the courts.[250]

2. Appellate Review

Another means for insuring independent assessment of disqualification decisions is to afford litigants immediate and comprehensive review of disqualification denials. Immediate appellate review would clearly further the goals of judicial disqualification. Without interlocutory review, trials proceed before judges whose impartiality is in question, thereby imposing upon litigants a possibly unfair trial and undermining the public perception of the impartiality of judges.[251]

Nevertheless, routine interlocutory consideration of disqualification would impose a burden on the courts. Timely appeal may, however, reduce the burden imposed on the judicial system when a new trial is necessitated following reversal based on disqualification.[252] Moreover, resolution of a disqualification issue at pretrial is less complex than resolution of the disqualification question as part of a completed case. In post-trial review, a new trial may be required even though everything but the disqualification issue appears to have been correctly decided.[253] In this position, a court may be reluctant to apply the liberal standards instituted by Congress which address the disqualification question.

Unfortunately, timely review of disqualification denials is impeded by statutory limitations on interlocutory review. Disqualification motions are usually raised and decided before the trial.[254] A final decision on the merits of a case is

193, at 1484 ("mini-hearing review" of affidavits on district court level best solution to problems with disqualification process).

248. *See* Note, *supra* note 193, at 1484 (refer disqualification questions to presiding judge to decide solely on basis of affidavits).

249. *See* Comment, *supra* note 75, at 265-66 (transfer policy could be used for delay and could be disruptive in states or territories with only one or two federal judges).

250. *See* Bloom, *supra* note 55, at 697 (administrative burden may be worth paying to enhance appearance of judicial impartiality); Comment, *supra* note 75, at 265-66 (transfers would produce more disinterested decision and spare judge embarrassment of ruling; best to make practice of transferring except where delay or disruption substantial).

251. *See* Redish & Marshall, *supra* note 1, at 504 n.180 (to allow litigant to go through trial with biased judge is at odds with Supreme Court pronouncement that due process affords right to impartial judge at all stages of process); *see also* Moore, *supra* note 226, at 851 (permitting trial before judge who is or appears to be biased constitutes enormous encroachment on fundamental value of impartiality).

252. *See, e.g.*, Roberts v. Bailar, 625 F.2d 125, 126 (6th Cir. 1980) (remanded for new trial because disqualification required under § 455); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1104 (5th Cir.) (reversed because judge should have disqualified himself; remanded for new trial before different judge).

253. *See, e.g.*, United States v. Harrelson, 754 F.2d 1153 (5th Cir.) (court faced with whether to grant new trial to person convicted of murdering district court judge), *cert. denied*, 106 S. Ct. 599 (1985).

254. Section 144 contains a timeliness requirement. *See supra* note 37 for discussion of the timeliness requirement under § 144. Section 455 does not contain any such requirement. In SCA

generally required, however, before an issue in a case can be reviewed on appeal.[255]

Review under a writ of mandamus, however, provides a vehicle by which the courts may hear disqualification denials.[256] Mandamus is a writ used to

Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam) the Seventh Circuit held that no time limits may be imposed. Since then, the Seventh Circuit has questioned, but not altered, this ruling. *See* Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 716 (7th Cir. 1986) (*Morgan* decision repeatedly questioned, recently undermined by court of appeals; reconsideration unnecessary here). Several courts have rejected the *Morgan* analysis and imposed a timeliness requirement on § 455. *See* Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1164 n.3 (5th Cir. 1982) (§§ 144 and 455 both require timely motion), *cert. denied*, 464 U.S. 814 (1983); *In re* International Business Machs. Corp., 618 F.2d 923, 932 (2d Cir. 1980) (court can impose timeliness requirement despite lack of statutory provision). Timeliness may also be encouraged by treating failure to move for disqualification at an appropriate moment as an implicit waiver, as the Third Circuit did in United States v. Nobel, 696 F.2d 231, 237 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983).

255. 28 U.S.C. § 1291 (1982). A decision is considered final only when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-74 (1981) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

Courts seldom review disqualification issues under the exception to the finality rule provided by federal law, 28 U.S.C. § 1292(b) (1982), which allows review prior to a decision on the merits only in narrowly circumscribed instances. Under § 1292(b), a district judge must certify an order asking for review and the appellate court must agree to hear the appeal. *Id.* The issue in question must involve "a controlling question of law as to which there is substantial grounds for difference of opinion," and where "immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*

The certification process is seldom available for a disqualification motion grounded in either § 144, 455(b)(1) or 455(a), since such a motion generally hinges on interpretation of facts and is unlikely to present a question involving a controlling issue of law as to which there is substantial grounds for difference of opinion. *See* 13A C. WRIGHT, A MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3553 at 659 (1984) (§ 1292(b) standard not often met in disqualification decisions).

Reviewed by certification has been employed occasionally. *See, e.g.*, Davis v. Board of School Comm'rs, 517 F.2d 1044, 1047 (5th Cir. 1975) (review allowed under 28 U.S.C. § 1292(b) to determine whether prejudice against attorney disqualifies under § 144), *cert. denied*, 425 U.S. 944 (1976).

Another means for interlocutory review is the collateral order rule, a common law rule that an interlocutory order is immediately appealable if it is "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). Appellate courts have proved unwilling to exercise this common law doctrine to review disqualification motions. *See, e.g., In re* Corrugated Container Antitrust Litig., 614 F.2d 958, 960-61 (5th Cir.) (disqualification motions not reviewable under collateral order doctrine because fully reviewable on appeal from final judgment), *cert. denied*, 449 U.S. 888 (1980); *accord* United States v. Gregory, 656 F.2d 1132, 1136 (5th Cir. 1981); United States v. Washington, 573 F.2d 1121, 1122 (9th Cir. 1978). *But see* Moore, *supra* note 226, at 862-63 (arguments supporting review for mandamus also support review under collateral order rule; review under collateral order rule preferable because mandamus may impose higher standard).

256. *See, e.g.*, Pepsico, Inc. v. McMillen, 764 F.2d 458, 460 (7th Cir. 1985) (mandamus appropriate where judge fails to step down when required to by § 455(a)); *In re* United States, 666 F.2d 690, 694 (1st Cir. 1981) (mandamus jurisdiction appropriate where issue is judicial disqualification); *In re* International Business Machs. Corp., 618 F.2d 923, 927 (2d Cir. 1980) (court has power to issue writ of mandamus when disqualification has been denied). *See generally* Berger, *The Manda-*

command an official to perform a specific act that arises from a public duty,[257] or to confine a court to lawful exercise of its prescribed jurisdiction.[258] Issuance of the writ is traditionally limited to extraordinary circumstances,[259] however, and several conditions governing mandamus limit its use for review of disqualification denials and the comprehensiveness of review under the writ.

One limitation on use of the writ of mandamus is that the writ can be used only to "compel an officer to perform a purely ministerial duty."[260] A writ of mandamus may be issued to confine judges to their jurisdictional powers or to compel them to exercise their judicial authority, but it cannot be used to compel action within judicial discretion.[261] Mandamus may be issued, however, where the discretionary duty is limited and the official has abused that discretion by transgressing those limits.[262]

"Abuse of discretion" is the standard of review that is generally applied to section 455 motions on appeal.[263] Thus, this requirement of mandamus raises questions, which are also present in post-trial review of disqualification denials, regarding the amount of discretion judges actually have over disqualification and what constitutes abuse of this discretion. If the judge's discretion is limited, review is possible under a writ of mandamus and more comprehensive at any stage.

Establishment of abuse of discretion as the standard of review for section 455 decisions occurred prior to the 1974 decision when disqualification was completely discretionary.[264] When Congress revised section 455, it made disqualification mandatory, rather than discretionary, when a reasonable person would question the judge's impartiality.[265] Yet the House of Representatives' commentary on the revised bill suggested that section 455 decisions would continue to be reviewed under the abuse of discretion standard.[266] The House report stated that "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion."[267]

On the basis of the House report, appellate courts generally have applied the abuse of discretion standard to section 455 questions with little consideration of what discretion the district court should exercise.[268] Occasionally, appellate courts have displayed discomfort with broad discretion by focusing on the substantive issue in a case, thoroughly evaluating the evidence, independently assessing reasonableness, and stating their conclusions without any reference to abuse of discretion.[269]

Recently, the Seventh Circuit directly questioned the abuse of discretion standard in *United States v. Balistrieri*,[270] and rejected it as an inappropriate standard for appellate evaluation of section 455(b)(1) decisions.[271] The court held that review of a disqualification denial should not be deferential because a disqualification motion "puts into issue the integrity of the court's judgment" and places adjudicators in the role of judges of their own cause.[272]

The *Balistrieri* court's position has appeal because it addresses the most troublesome aspect of the disqualification process, the requirement that a judge under attack make an "objective" assessment of his personal, emotional involvement. In addition, the *Balistrieri* court's position rests on the argument frequently used to support mandamus jurisdiction—the responsibility of the courts of appeals to supervise and maintain the integrity of the judicial system.[273] The court did not, however, address the fact that plenary review of disqualification is in conflict with the congressional commentary on the standard of review,[274] and contrary to the general practice of the courts.[275]

Although the position taken by the *Balistrieri* court is extreme, consideration of the congressional statement in context suggests that appellate courts should not be wholly deferential to district court judges who have denied a disqualification motion. The House Report called on appellate courts to assess "all the facts and circumstances" of a disqualification issue at the same time that it

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mus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control, 31 BUFF. L. REV. 37 (1982). *See also* Moore, *supra* note 221, at 839-54 (analysis of mandamus review of disqualification denials).

257. Work v. United States *ex rel.* Rives, 267 U.S. 175, 177 (1925).

258. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Courts have the power to issue writs of mandamus under a statutory provision which allows courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1982).

259. Will v. United States, 389 U.S. 90, 95 (1967).

260. *Work*, 267 U.S. at 177.

261. *Roche*, 319 U.S. at 27. *See also* Moore, *supra* note 221, at 842-43 (analysis of use of mandamus to direct judges).

262. La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957); *Work*, 267 U.S. at 177-78.

263. *See* United States v. Harrelson, 754 F.2d 1153, 1165 (5th Cir.) (disqualification decision committed to sound discretion of trial judge; denial of disqualification will be overturned only if discretion is abused); *cert. denied*, 106 S. Ct. 599 (1985); United States v. Nobel, 696 F.2d 231, 234 (3rd Cir. 1982) (accepted standard for review of disqualification denial is abuse of discretion), *cert. denied*, 462 U.S. 1118 (1983); *accord In re* Ibrahim Khan, 751 F.2d 162, 165 (6th Cir. 1984); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1183 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

264. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908. *See supra* note 28 for text of this predecessor section.

265. 28 U.S.C. § 455(a). *See supra* note 12 for text of § 455(a).

266. *House Report*, *supra* note 4, at 6355.

267. *Id.*

268. *See infra* notes 270-75 and accompanying text for cases applying abuse of discretion standard.

269. *See, e.g.*, McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 100 (3d Cir. 1985) (scrutiny of record, which yielded no evidence of bias, decisive factor in upholding decision); United States v. Porter, 701 F.2d 1158, 1166 (6th Cir.) (court's scrutiny of record showed no evidence of personal prejudice), *cert. denied*, 464 U.S. 1007 (1983).

270. 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1490 (1986).

271. 779 F.2d at 1203. The court did not review the motion on the basis of § 455(a); it held that this section could not be raised on post-trial review. *Id.* at 1205.

272. *Id.* at 1203.

273. *Id.* at 1203.

274. *See infra* notes 276-77 and accompanying text for the House statement on the standard of review.

275. The *Balistrieri* decision cited no cases in support of its holding. *See Balistrieri*, 779 F.2d at 1202-03. Other courts have consistently applied the abuse of discretion standard. *See* United States v. Nobel, 696 F.2d 231, 234 (3d Cir. 1982) (abuse of discretion is accepted standard), *cert. denied*, 462 U.S. 1118 (1983).

referred to "sound judicial discretion,"[276] thus suggesting that the court's review should be comprehensive. Furthermore, Congress severely constricted judicial discretion over disqualification in revising section 455. This is evidenced by the fact that there is no discretion if the circumstances of a case fit within one of the categories in section 455(b), which mandates disqualification without exception.[277] Although judges have some discretion in their evaluation of the evidence under the objective standard of section 455(a), their evaluation is limited by the low threshold of proof set by Congress and by guidelines set by the appellate courts.[278] Moreover, when reasonable grounds for disqualification exist disqualification is mandatory.[279] The discretion of the district court is thus narrowly circumscribed and subject to the supervision of the courts of appeals.

Other limitations on issuance of the writ of mandamus restrict its availability. One limitation is that the writ is generally not available when appeal from final judgment provides an adequate remedy.[280] The Fifth Circuit has denied the writ on the grounds that appeal provided an adequate remedy for failure to disqualify.[281] The majority of courts have held, however, that review of disqualification denials prior to final judgment is critical to the judicial system, if not to the litigant.[282]

A more significant barrier to obtaining disqualification by means of a writ of mandamus is that litigants are required to show that their right to issuance of the writ is "clear and indisputable."[283] It is possible to interpret this requirement as necessitating no more than a finding of abuse of discretion.[284] But the

276. *House Report*, *supra* note 4, at 6355.

277. 28 U.S.C. § 455(b) & (e).

278. *See supra* notes 222-33 and accompanying text for a discussion of the decision-making process for disqualification determinations under section 455(a).

279. 28 U.S.C. § 455(a).

280. Kerr v. United States Dist. Ct., 426 U.S. 394, 403 (1976).

281. *In re* Corrugated Container Antitrust Litig., 614 F.2d 958, 962 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980). The *Corrugated Container* court also considered the merits of the claim for disqualification, 614 F.2d at 963-68, and refused to issue a writ on the merits. *Id.* at 968. The court apparently modified its position later. *See* United States v. Gregory, 656 F.2d 1132, 1136-37 (5th Cir. 1981) (Fifth Circuit followed *Corrugated Container* in holding that review not available under collateral order rule because claim was reviewable on appeal; ignored this argument in considering whether to issue a writ of mandamus).

282. *See In re* United States, 666 F.2d 690, 694 (1st Cir. 1981) (public confidence in judiciary requires that substantial claim of bias be addressed at earliest possible opportunity) (citing *In re* Union Leader Corp., 292 F.2d 381, 384 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961)); *In re* International Business Machs. Corp., 618 F.2d 923, 927 (2d Cir. 1980) (intolerable to judicial system to delay consideration of disqualification denial to final appeal).

The Seventh Circuit has settled the issue of whether appeal provides an adequate remedy by denying the post-trial appealability of § 455(a) disqualification motions and making mandamus the only remedy. United States v. Balistrieri, 779 F.2d 1191, 1205 (7th Cir. 1985), *cert. denied*, 106 U.S. 1490 (1986).

283. Bankers Life and Casualty Co. v. Holland, 346 U.S. 379, 384 (1953); *see also* United States v. Gregory, 656 F.2d 1132, 1136 (5th Cir. 1981) (question of disqualification reviewable on mandamus but party seeking writ must prove "clear and indisputable right" to writ).

284. *See* La Buy v. Howes Leather Co., 352 U.S. 256, 257 (1957) (writ granted where judge clearly abused discretion in referring case to master); Pepsico, Inc. v. McMillen, 764 F.2d 458, 461

need to show a clear and indisputable right has also been interpreted as imposing a higher standard of review.[285] Following disqualification denials, courts of appeals generally require a non-frivolous claim for disqualification[286] and require that bias be "clearly and indisputably" established.[287]

The limited scope of discretion in disqualification decisions and the courts' general interpretation of mandamus requirements suggest that limitations on mandamus do not preclude interlocutory review of disqualification motions in federal courts. Courts have, in fact, advocated liberal interpretation of their powers of review under the writ in disqualification matters as a measure essential to preserving the integrity of the court.[288] Actual disqualification by means of the writ is subject to the clear and indisputable right requirement, however. Thus the writ can be used to correct clearly wrongful refusals but it may not be available for routine review. As a result, mandamus review cannot be relied on to ensure the participation of an adjudicator other than the challenged judge in the disqualification decision.

CONCLUSION

The goals of fairness and public confidence in the judiciary are not fully met by current disqualification practices. Mandamus provides a means for courts of appeals to supervise and set standards for clear abuse of discretion, but it does not provide for the routine involvement of an independent adjudicator in the disqualification process.[289] To make objective disqualification more meaningful, Congress should act either to amend section 455 to provide for transfer of the disqualification motion to another adjudicator at the district court level[290] or provide for immediate and comprehensive appellate review of disqualification denials without the restrictions imposed on review under the writ of mandamus.[291]

(7th Cir. 1985) (writ granted to disqualify judge in circumstances where reasonable people could disagree whether disqualification was mandated).

285. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 & n.7 (1978) (mere showing of abuse of discretion not sufficient for issuance of writ of mandamus) (Rehnquist, J.) (plurality opinion).

286. *In re* United States, 666 F.2d at 694. *See also* Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 712 (7th Cir. 1986) (writ will be denied in frivolous and even routine cases).

287. *In re* International Business Machs. Corp., 618 F.2d at 934. The clear and indisputable right requirement arguably puts a higher burden on the litigants seeking mandamus than on those seeking final review and leaves open the possibility that the issue could be raised again on final review. Moore, *supra* note 226, at 854 & n.154 & 155.

288. *See* Union Carbide Corp. v. United States Cutting Serv., Inc., 782 F.2d 710, 712 (7th Cir. 1986) (refusal to disqualify in the face of a substantial challenge casts shadow over individual litigation and over integrity of federal judicial process which should be dispelled as soon as possible by authoritative judgment; therefore, court should be liberal in use of writ of mandamus to insure timely review).

289. *See supra* notes 256-62 for a discussion of the use of a writ of mandamus to assure the integrity of the disqualification process.

290. *See supra* notes 246-50 for a discussion of the proposed transfer of the disqualification decision to an adjudicator other than the challenged judge.

291. *See supra* notes 251-55 for a discussion of the proposal for immediate and comprehensiv appellate review of a disqualification motion.

In addition to congressional action to ensure independent adjudic... disqualification issues, realization of the goals of judicial disqualification... the commitment of the courts. Congress struck a balance when it rev... tion 455 and decided that, despite the burdens disqualification imposed, ... be mandated where a judge's impartiality might reasonably be questio... Congress has appropriately left to the courts the responsibility of inter... this standard. The courts, however, have not always held fast to the obj... Congress established.[293] Instead, courts have avoided the burden of disqu... tion by failing to focus on the congressionally mandated objective standar... by showing deference at the appellate level to the decisions of the chall... judges. One circuit has gone so far as to impose the requirement of a high... dard of proof of bias as a prerequisite to post-trial review.[294]

To establish the proper balance, courts of appeals should reexamin... restrictions they have placed on disqualification. As supervisors of the d... courts, they should use the available review procedures to set forth more ex... guidelines for disqualification based on an objective standard and thus hol... trict court judges to the appropriate high level of accountability.

Susan B. Hoe...

292. *See supra* note 57, notes 93-97 and note 108 and accompanying text for a discussion of... balance struck by Congress in § 455(a).

293. *See supra* notes 109-241 and accompanying text for a copy of judicial interpretation... application of § 455(a).

294. *See supra* notes 76-100 for a discussion of the Seventh Circuit's opinion in United State... Balistrieri, 779 F.2d 1191 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1490 (1986).

NOTES

ANTITRUST LAW—A Relaxed Application of the State Action Doctrine—*One 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032 (2d Cir. 1986).

INTRODUCTION

In a line of cases beginning in 1943, the United States Supreme Court develoed a doctrine that exempts certain state action from the operation of the fedeal antitrust laws.[1] In the seminal case of *Parker v. Brown*,[2] the Supreme Court held that Congress did not intend that the Sherman Antitrust Act[3] ("Sherman Act") should apply to sovereign state action.[4] Similarly, the Court recognized a "state action defense" in a series of cases involving anticompetitive conduct by state supreme courts,[5] state agencies,[6] municipalities,[7] and private parties[8] who

1. *See infra* notes 87-153 and accompanying text for a discussion of the development of the state action doctrine.

"The word 'exemption' is commonly used by courts as a shorthand expression for [the holding in Parker v. Brown] that the Sherman Antitrust Act was not intended by Congress to prohibit [anticompetitive restraints imposed by states]." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393 n.8 (1978).

2. 317 U.S. 341 (1943).

3. 15 U.S.C. §§ 1-7 (1982). The Sherman Antitrust Act prohibits "[e]very contract, combina... tion . . . , or conspiracy, in restraint of trade or commerce among the several States . . ." *Id.* § 1. The purpose of the Clayton Antitrust Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1982 & Supp. III 1985)), enacted as a supplement to the Sherman Act, is to prevent acquisitions when "the effect of such acquisition may be to substantially lessen competition, or tend to create a monopoly." 15 U.S.C. § 18 (1982).

4. 317 U.S. at 352. *See infra* notes 87-92 and accompanying text for a discussion of the *Parker* decision.

5. *See* Hoover v. Ronwin, 466 U.S. 558, 582 (1984) (state supreme court immune from antitrust liability for regulating admission to the bar); Bates v. State Bar, 433 U.S. 350, 363 (1977) (state supreme court immune from antitrust liability for regulating attorney advertisng); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 (1975) (state supreme court immune from antitrust liability for regulating attorney fee schedules).

6. *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 65 (1985) (state agency immune from antitrust liability for regulating carrier rates); California Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 106 (1980) (state agency not immune from antitrust liability for regulating liquor resale prices); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 97 (1978) (state agency immune from antitrust liability for regulating automobile manufacturers).

7. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985) (municipality operating in competition with neighboring towns protected by antitrust state action exemption); Community Communications Co. v. City of Boulder, 455 U.S. 40, 55 (1982) (municipality regulating cable television under Home Rule not protected from antitrust laws); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408 (1978) (municipality operating utility in competition with investor-owned utility subject to antitrust laws).

Plumer analysis involves a determination as to whether a rule is substantive or procedural.

For the constitutional provision for a federal court system (augmented by the necessary and proper clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna v. Plumer, 380 U.S. at 472, 85 S.Ct. at 1144. Plaintiffs in this case make no showing that the classification of Rule 81(c) as procedural is not rationally based and this Court finds no basis upon which to so hold.

Accordingly, it is ORDERED that Plaintiffs' Motion for Jury Trial be, and is hereby, DENIED.

So ORDERED.

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and that the better approach to this problem is to adhere to *Hanna* and its progeny rather than to enter the "uncertain area between substance and procedure...." *Hanna*, 380 U.S. at 472, 85 S.Ct. at 1144.

THE DELICATE DICHOTOMIES OF JUDICIAL ETHICS

by

CHIEF JUDGE HOWARD T. MARKEY

"Judicial Ethics" has become a growth industry. Dean McKay has pointed out that "The ethical expectations of the public have risen more rapidly than the perception of judges of what is expected of them." In 1960 there were five literary articles published on judicial ethics. In 1975, there were thirty. Congress has enacted "The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," (Discipline Act) establishing a mechanism for receiving and acting on complaints of judicial misconduct. Congress also passed the "Ethics in Government Act," over-named because it requires only that judges and others publicly disclose their financial status and that of their families once a year. The Judicial Conference of the United States has adopted a "Code of Judicial Conduct for United States Judges," (App. A) and has charged an Advisory Committee of thirteen judges with the triple task of advising inquiring individual judges on ethical questions, publishing opinions on ethics for guidance of all judges, and recommending changes in the Code to the Conference. Many states have established similar advisory bodies.

An expanded, and expanding, public interest in judicial ethics should surprise no one. The federal judiciary is currently at the height of its power and influence. Federal judges not only send people to jail, and make people pay large sums, and decide disputes between A and B—they tell whole classes of people, and cities, and states, and presidents, what they can and cannot do—and they do that almost every day.

It is important to federal judges as well that the public look at judicial ethics and be satisfied with what it sees. It is a requirement absolute that federal judges enjoy a reputation for adherence to the highest ethical standards, for that is the bedrock of their power and influence. Without it they would be impotent. As we all know, the judiciary has no armies. Its ability to render justice, to protect the people's liberties against abuse by any group and by the other branches of government, to cement the public's adherence to the law—all depend on its lifeblood: respect for its moral authority, the only authority it has.

That respect must be earned. It doesn't come with the title, "Judge," or with "Your Honor," or with the robe, or with the Bench, which are but its symbols, important and necessary, but symbols nonetheless. Respect cannot, of course, be ordered, bought, or assumed. It cannot for long be simply granted. Respect must be—and can only be—earned.

Neither is it surprising that every judicial misstep, apparent or real, makes headlines. Nor is that practice all bad. Judges who object should ask themselves whether they would want a federal judiciary in which judicial misconduct was so commonplace as not to be newsworthy. Of course it is sad that, when our burgeoning communications enable the peccadillos of one judge to be seen by millions on TV, the American public's tendency to generalize results in a nationwide tarnishing of the judicial image. That tendency, plus the advent and growth of the investigative reporting phenomenon—reporting only failures, never triumphs—makes the smallest apparent anthill of judicial misconduct a mountain to be climbed by other judges in earning respect for the judiciary. An outstanding judge was denied elevation on the expressed ground that he had reflected an insensitivity to general ethical considerations, by participating in a case in which his family financial interest may have been at least minimally involved. In-house publications, like "Judicature," "The Judges' Journal," and the American and Federal Bar Journals, have periodically carried articles on judicial ethics. The ferment proves the prescience of the Commentary to Canon 2 of the Code of Judicial Conduct in its warning that judges should expect to be "the subject of constant public scrutiny."

The widespread, intense interest in the conduct of judges has many causes, among them the expanded judicial role in the affairs of the people described above, the Justice Fortas affair, and the Watergate syndrome. With "U.S. News and World Report" reporting that 26,000,000 law suits were filed in this country last year, a disinterest in judicial ethics would be impossible. Whatever the cause, however, that increased interest in itself is all to the good. Sunlight can be a great cure. What may be coming clear now, after the early forays, is that some actions taken toward assured saintliness may have been excessive. The aftermath of Watergate may have led to a spasm reaction, unrecognized as such at the time. Improperly handled, sunlight can produce cancer. Hence it was a happy election of The Roscoe Pound—American Trial Lawyers Foundation to address at its 1982 Earl Warren Conference the *issues* associated with "Ethics in Government." The subject is seen as particularly apt when one recalls that Chief Justice Warren, like the present Chief Justice, took a strong personal interest in the ethics of Bench and Bar.

It would be comforting, but unrealistic, to suppose that ethical conduct of judges is a subject without issues. Ethical principles, like all true principles, may themselves be unchallengeable. It is in their application to specific conduct that discomforting issues are present. The need for value trade-offs, mostly unforeseen when ethical codes and statutes were being adopted, arises when the judge confronts a match-up of an ethical principle or a Code provision with contemplated conduct. It would be nice to think that promulgation of Codes and Statutes, and expected, rigid adherence thereto by all judges all the time, would solve the problem. It would be easy, in responding to a judge's "can I ethically do this?" to merely read a code or statute and always say "No." In a

pluralistic, complex society, with numerous competing interests and values, that easy course is rarely open. There are too many delicate dichotomies.

I do not, of course, speak for the federal judiciary, or for the Advisory Committee. My purpose here is to describe, in general and nonexhaustive terms, some of the delicate dichotomies present in considering the ethics of the Judicial branch of government. Others will surely occur to the reader. The conflict content of some may be seen as either greater or less than that envisaged here. In all events, solutions appear needed to problems represented by at least some of the troubling choices outlined.

INDEPENDENCE v. ACCOUNTABILITY

Federal judges are constitutionally appointed to serve "during good behavior." The practical effect of that provision in Article III is that federal judges, absent an impeachable offense, may hold their office "for life."

That the constitutional provision serves as a protection of the people, not the judges, was recognized in *Bradley v. Fisher.*[1] Nonetheless, the presumed inability of "the system" to deal with judicial misconduct short of that warranting impeachment, and the impracticalities attending the impeachment process, have led some to question the wisdom of appointing federal judges "for life." Historically, the questioning has surfaced when judicial decisions have displeased a fair segment of the public and its political representatives, leading often to suggestions that federal judges be subject to reappointment every 10 or 12 years. That dislike for decisions phenomenon, thought by some to be alive today, and to the extent that it seeks to control judicial decisionmaking, constitutes perhaps the greatest threat to the constitutional principle of judicial independence, for it appears directed at the very purpose of the principle.

It is too easy to say judges should be independent in decisionmaking but accountable for the ethics of every other activity in their lives, and stop there. It may well be true in principle. It can be very difficult in application. One must define terms. Accountable to whom? Under what sanctions? Does "accountable" mean "removable" for less than an impeachable offense?

The present-day question is not, or should not be, whether judicial accountability requires creation of an alternative to impeachment as a means of removing judges from office. The real question is, or should be, whether accountability for misconduct or unfitness can be achieved by other means. That effort is not aided when the "independence" of federal judges is equated with a blanket, absolute, "unaccountability." Interestingly, the equation appears in the approach made by supporters and opponents of judicial independence.

1. 80 U.S. (13 Wall) 335 at 349–50, 20 L.Ed. 646.

Though directed at preserving limitation of removal to the established impeachment process, Judge Irving R. Kaufman's perceptive article, "Chilling Judicial Independence" [2] encompasses the view that making judges accountable, even to their judicial peers and for non-impeachable conduct, would so chip away at independence as to warrant rejection of even that limited accountability. Beyond validity of the attribution, it is at least possible to conceive of circumstances under which a judge who had been "disciplined" (short of removal) by his or her colleagues might thereafter feel fear of consequences in decisionmaking. Judge Kaufman makes that point directly in "The Essence of Judicial Independence." [3] Unfortunately, ad hominem derogations of their colleagues' decisions appearing in dissents and concurrences lend credence to the view that judges could (though there is no evidence they ever have) equate "bad" decisionmaking with "bad" conduct warranting some form of "discipline."

Some judges—happily few—nay, very few—whose peccadillos have graced the front page have either stated or implied that no person, body, or institution (other than Congress by impeachment) has a right even to question their conduct, however egregious that conduct may have been. At the moment, the press reports an indicted federal judge as maintaining that he cannot be indicted or tried for a crime until *after* he has been impeached by the House and convicted by the Senate (an approach that does not appear to have occurred to Judges Kerner and Manton, the former resigning his office after conviction, the latter just before trial, or to readers of *United States v. Isaacs.*[4])

The equating of unaccountability with independence by supporters of judicial independence is joined by its opponents, who find unaccountability an easier target, and who often take it another step by equating unaccountability with unelectability. Only by rendering judges "accountable" to the public through the electoral process, say these opponents, can judges be made to correlate their decisions and their conduct with "current societal mores." It does not appear to have occurred to those particular opponents that judges were made to correlate their decisions with current societal mores in Hitler's Germany, as well as in King George's England.

Lest it be thought that no judge sees accommodation possible between maintenance of the constitutional independence of federal judges and creation of a mechanism for their accountability, Chief Judge Edward D. Re published his "Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980." [5] In that article, Judge Re opposes the views expressed by Judge Kaufman in "The Essence of Judicial Independence," supporting what he sees in the Act as a clear separation of independence and accountability, and pointing up the need for both in our modern, complex democracy.

2. 88 Yale L.J. 681 (1979).

3. 80 Colum.L.Rev. 671 (1980).

4. 493 F.2d 1124 (7th Cir.1974).

5. 8 N.Kentucky L.Rev. 221 (1981).

Ethical considerations come into play, in the independence-accountability dichotomy, in a variety of ways. Almost, if not all, "violations" of the Code of Conduct for Federal Judges are grist for the mill of "accountability" advocates. Obviously, a judge considered totally unaccountable for his or her conduct, except perhaps to God and history, would have neither need for nor interest in any ethical code or guidance. On the other hand, a judge worthy of canonization would so instinctively conform his or her conduct at all times to the highest of ethical principles as to require no ethical code or guidance. Fact is, of course, that judges are human and thus fallible beings. As such, they are subject to the same temptations toward insensitivity, arrogance, concupiscence, greed, pride, inattentiveness-to-all-but-work, and the like, that have plagued mankind since Adam's day.

That judges have adopted a Code and have established and are continuously using an advisory process, and that Congress in the Discipline Act has provided, with formal acquiescence of the judicial branch, a mechanism for public complaints of judicial misconduct, speak well for the notion that judges are presently holding themselves "accountable" for their conduct outside or separate from their decisionmaking. Though there is no method for removing a federal judge for unethical behavior short of that warranting impeachment, the Discipline Act does provide for public complaint and action by judicial councils against such behavior. In this sense, the Act is designed to spotlight accountability of judges for their ethics, and, at the same time, to preserve the independence and autonomy of the judiciary. The question comes on whether judicial compliance with procedures under the Act (App. B), will supply sufficient accountability, and be sufficiently seen as doing so, to destroy what is now seen by some as a dichotomy between judicial independence and judicial accountability.

ISOLATION v. INVOLVEMENT

In a seeming paradox, the American public is currently and simultaneously demanding (1) that judges through their judging get more and more involved in the management of society; and (2) that judges, when they are not judging, be more and more isolated from society.

The demand for increased judicial imposition has stemmed in part from frustration with what is viewed as legislative and executive failures to act, as well as from statutes establishing broad societal goals, giving government agencies broad authority to act toward those goals, and creating new causes of action in favor of anyone dissatisfied with agency action. That is not to say that all judges have been dragged kicking and screaming into the social management morass. Some have. Others have cheerfully rushed in, out of a compelling sense of duty to decide and a perceived call to render justice.

The demand for isolation is not so described, but is inherent in the increased interest in the ethical conduct of judges engendered by post-Watergate disenchantment with officialdom in general and from highly

publicized incidents of apparent misconduct by three federal and three or four state judges. That the numbers are small is not a compelling argument against a demand for ethical conduct and guideline codes to serve as aids in defining that conduct. The small-number factor does, however, raise a caveat concerning the value trade-off involved in the isolation of judges. Query: If total isolation of all judges from all societal contact off the Bench would guarantee a totally ethical judiciary, what would be the cost?

The increased involvement of judges in the management of society's affairs through judicial decisions is not the involvement intended for discussion here. The current reaction to what is viewed in some quarters as "judicial activism" and "the imperial judiciary" will in time work toward some semblance of balance in measuring the roles of our judicial, legislative, and executive branches of government.

The involvement intended for discussion here is that of the individual judge and his family as persons in the everyday affairs of the community. It is from that arena that ethical considerations have served, and are serving, to isolate federal judges. The dichotomy arises from the felt need of judges for familiarity with the affairs of men and women beyond that gleanable from TV and newspapers, and insofar as that familiarity would assist in decisionmaking. Judges in their judging must on occasion ignore public clamor, current fads, and what may be asserted by vociferous groups to be "modern societal mores." To do that they must be independent. But that is not to say that judges should be attempting to interpret and apply the law to a society of strangers. Absent some fair level of familiarity, the language and thrust of judicial decisions could appear to be so far ahead or behind the march of society as to cause the people to be "turned off," to cause the people to simply disregard judicial decisions because they seem just too "far out." It is unlikely, for example, that the people would, or with safety could, put all their eggs in a judicial basket carried by a man or woman from outer space, or newly arrived from outer Mongolia. The example emphasizes with exaggeration, but not too much, for most of the Canons in the Code of Conduct for Federal Judges deal with and tend to limit the involvement of the judge as a person in community affairs. Further, the opinions published by the Advisory Committee of the Judicial Conference have supplied similarly limiting interpretation and applications of the Code.

Under the Code, the Commentaries to the Code, and the published Advisory Opinions, for example, a federal judge should not:

1. Do anything that may interfere with performance of his or her judicial duties.
2. Do anything that may enable others, or appear to enable others, to exploit his or her judicial position.
3. Volunteer as a character witness.
4. Initiate recommendations of others for appointment, promotion, parole, admission to school, etc.

5. Join certain types of clubs.
6. Do any fund raising of any kind for any organization or purpose whatsoever.
7. Join any organization that is a potential litigant or financer of litigation.
8. Increase the bases for disqualification by associating with former partners and lawyer-friends, or by making certain investments.
9. Sit in a case in which his or her impartiality might "reasonably be questioned," and shall absolutely not sit when any one of some 14 specific circumstances exist.
10. Advise a trustee of a family estate on investments, unless the judge had a close familial relationship with the deceased.
11. Testify on legislation as a citizen. Testimony as a judge and on legislation dealing with the courts and administration of justice is alone permissible.
12. Speak, be a guest of honor, or accept an award, at any fund raising event.
13. Engage in financial or business dealings with lawyers or persons likely to come before his or her court.
14. Serve as officer, director, partner, manager, advisor, or employee of a business or corporation.
15. Accept any gift, favor, or loan, except under specified, very limited circumstances.
16. Serve as executor, administrator, trustee, or guardian of any trust or estate, except that of a family member, and then only if the trust or estate is not likely to come before the judge.
17. Act as arbitrator or mediator, or practice law, or accept appointment to a non-judicial governmental committee or commission, local, state, or federal.
18. Advise any member of the legislative or executive branches on any subject.
19. Serve on the board of a community legal aid bureau.
20. Serve as co-trustee of a pension trust.
21. Fail to report to the public all of his or her income and investments and those of the judge's family.
22. Lead or hold office in any political organization, local, state, or federal.
23. Speak for or endorse any political candidate.
24. Contribute money to any political organization or candidate.
25. Attend or buy tickets for political gatherings.
26. Run for political office without first resigning his or her judicial office.

27. Fail to caution a spouse against appearance of involvement of the judge in the spouse's political activities.
28. Lunch once a year at a political club.
29. Serve as counsel to a local United Way charity.
30. Hire as law clerk the child of another judge of the court.
31. Attend an educational seminar financed by frequently litigating corporations.

The foregoing list is by no means exhaustive. The list of "no-no's" would grow beyond the limits of this short paper if it were to include the advice given in confidence to the hundreds of judges who have submitted specific inquiries to the Advisory Committee, which publishes its opinions only in relation to repetitive situations likely to be encountered by most or all judges. The list appears of sufficient length and breadth, however, to warrant discussion of the isolation-involvement dichotomy.

PRESUMPTION OF IMPARTIALITY v. PRESUMPTION OF PARTIALITY

In talking, about five years ago, with a judge of the High Court of England, an American judge exhibited shock when the British judge said his son had argued a case before him. Noting the American's expression, the British judge in turn expressed shock that anyone might even question the impartiality of a judge of the High Court on the mere and sole premise that his son represented one side. The American responded that the same was probably true in the earlier days of his country, but it is true no more.

The view that justice includes the appearance of justice has increasingly gained adherents over the years, until it is now accepted wisdom. The appearance of justice is today seen not as separate from, but as an integral part of justice itself. John P. MacKenzie, now of the New York Times, set forth the rational basis for that view in the clearest terms in his book "The Appearance of Justice." It simply is not enough that justice be actually done. It must be seen to have been done. Our British friend felt free to sit in his son's case precisely because his public would not, apparently, view that event as raising even the possibility that injustice would be done by the judge. On this side of the Atlantic, the public has acquired what some would call a more realistic view of human nature. Others might call the American view jaundiced. In any case, we seem to think it not only possible but probable, if not certain, that a judge sitting in his son's case would either favor his son's client or, because our public is "realistically suspicious," the judge would lean overmuch the other way to avoid an appearance of doing so. It was not always so.

The great Chief Justice Marshall, without quibble or concern, sat on the appeal of decisions he had rendered as trial judge and served a role as Secretary of State in the midnight Judge Scenario that led to his justly famous decision in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60.

As now documented by Bruce Murphy in "The Brandeis-Frankfurter Connection," those famous and familiar justices of more recent days apparently felt perfectly free to participate up to their elbows in political appointments and political policy-making while on the Bench. That the latter were active in recent times may account for what may have been an attempt to protect the Court, an attempt evidenced by their yeoman efforts to mask their political activities. Though those efforts may indicate that concern for judicial ethics was beginning to be felt in America during and post World War II, that concern was obviously not yet of sufficient strength, or sufficiently widespread, to cause Justices Brandeis and Frankfurter to refrain from or even limit their political activities. Indeed, Murphy ends "Connection" with a quasi-absolution of the two justices on the ground that they had no reason to expect exposure and thus no reason to fear injury to the Court. Given the absence of investigative reporters and widespread public interest in judicial ethics, such an expectation of the justices was reasonable and the cover-up efforts documented in the book were in fact successful at the time.

What may now be seen as a past public faith in American judges may have been something quite different. It may have been mere apathy, aided by lack of communications and minimal contact with the courts as compared with today's litigious society. In any event if it did previously exist here, a public presumption of impartiality cannot be expected to return as part of America's view of its judges. The problem now is to consider whether we are in danger of going, or may have already gone, too far in the direction of a public presumption of partiality.

It is not too much to say that most persons tend to live up, or down, to the reputation given them and to do the expected. There may be something to be said for the proposition that judges should be given at least an initial presumption of rectitude, if not quite the presumption of innocence given those indicted for crimes. Do we run the risk of attracting less than the best to the Bench if we confront them throughout their remaining lives with our expressed expectation that they are likely to act unethically? Is it enough to say that the best would have nothing to fear from that expectation? It may yet be too early to tell, but perhaps a continuing study of the effect of such an expectation on judges' lives, on their self-image, on refusals of the best to accept appointments, and on resignations, would be justified.

Canon 3 C(1) and 28 U.S.C. § 455(a) say, for example, that a judge is disqualified if his or her impartiality might "reasonably" be questioned. What means "reasonably"? 28 U.S.C. § 455(b) says the judge is absolutely disqualified if he or she or a family member in the household has an involved financial interest "however small." Whether it is reasonable to expect that a judge will violate his or her oath of office for ten cents is irrelevant under 28 U.S.C. § 455(b). The irrebuttable presumption of partiality in section (b) thus tends to be carried into applications of the general section (a) and to interpretations of "reasonably" in that section.

It would, of course, be possible to establish a presumption that judges act honorably and ethically. Certainly the vast majority of judges work daily toward that end. Canon 1 recognizes that it is the conduct of judges that either preserves or destroys the perceived integrity and the continued independence of the judiciary. It does seem unfair, though doubtless inevitable, that "the judiciary," and all its members, are tarnished when one judge goes astray. It seems even more unfair when an individual judge, after twenty-five years of outstanding, totally ethical service, is presumed incapable of rendering justice in a case in which his wife has inherited .00000000012% of the stock of Exxon (an actual case). It may also be unwise, for the taxpayers must arrange to replace that judge in that case, and, multiplied by the hundreds, the time and paperwork costs seem excessive.

Last year, Federal District Judge Muecke was forced by 28 U.S.C. § 455(b) to step aside after years and years of presiding over a complex anti-trust class action, when it was learned that his wife owned a few shares in one of some 2000 corporate parties identified long after the suit was filed. In doing so, he issued a lengthy memorandum opinion outlining what can only be here called the unwisdom of the "however small" provision in section 455(b). He pointed out that a new judge and the parties would have to virtually "start over," down a road already paved with massive expenditures of time and money by the parties and the taxpayers. Having made the calculations, he included in his memorandum a statement that the maximum possible effect on his wife's financial interests could not, under even a worst-case scenario, exceed $4.69!

Because of section 455(b) and the public disclosure of judge-and-family stockholdings required by the "Ethics in Government Act," lawyers are enabled to implead or intervene an applicable corporation, or arrange filing by a corporate *amicus curiae*, at a late stage, should things appear to be going badly before the presiding judge. Because the judge or the judge's family owns stock in that corporation, the lawyers may thereby acquire a new judge and a fresh start. There are no studies and no proofs that this maneuver is yet widespread, but the events in certain cases raise a strong basis for the belief that it has been carried out in some cases, where the stock ownership of the judge and the availability of the right corporation dovetailed. Whether yet widely used, it is obviously available in some cases, and a lawyer's dedication to what is perceived as the client's interest will lead to its use in some of those cases.[6]

The Judicial Conference of the United States has submitted to the Congress a proposed amendment to section 455(b), which would permit a

6. Some judges have simply divested themselves of all stockholdings in corporations, in an effort "to avoid the problem." Others are unable to do so, either because of heavy attendant losses and taxes, or because the stock is owned by a spouse or household family member who declines the invitation to divestment. Query: if no judge or judge's family owned any stock in any American corporation, what would be the effect of that further isolation from society's affairs (in this instance, its economic affairs)?

judge to weigh the public interest present in his decision to step aside or continue with the case. The amendment would apply only in certain limited circumstances. Congress has thus far been too involved with other matters to take any action whatever on the proposal. The proposal is but a tiny inroad on the presumption of partiality inherent in the requirement that a judge recuse himself to avoid being influenced by $4.69. It does not, of course, destroy the dichotomy between presumptions of impartiality and partiality.

Perhaps the move now should be toward such revisions in the Code and Statutes as would tend toward some diminution in the presumption of partiality and at least some slight movement, where feasible, toward a salutory presumption of impartiality.

APPEARANCE v. REALITY

The dichotomy between presumptions of impartiality and partiality exists on a "wholesale" level. At the "retail" level, where individual judges confront specific circumstances, a dichotomy between appearance and reality resides.

As above indicated, the appearance of justice cannot be divorced from justice itself. A corollary has grown up: "the appearance of unethical conduct cannot be divorced from the conduct itself." Perhaps ninety-five percent of the work of the Advisory Committee on Codes of Conduct deals with "appearance" questions. When contemplated conduct is advised against, it is almost always because that conduct could reasonably present to a watching and suspicious public, or to a segment thereof, the appearance of impropriety, or the appearance that the judge may be partial, or may be subject to an influence, or may be advancing the private or political interests of a person or party, or may have made an appointment on a basis other than merit, or may have an interest in the outcome of a case before him. Similarly, when the Committee advises that no ethical impediment precludes the conduct, it is almost invariably because no such appearance is reasonably possible.

In either case, the reality is irrelevant. The question is rarely whether the conduct is itself unethical. Most if not all unethical conduct is rejected out of hand by judges and no inquiry to the Committee is necessary or useful. No doubt a judge knowingly engaged in clearly unethical conduct, if such judge there be, would not be likely to seek the advice of the Committee. The inquiring judge, in most instances has determined that the contemplated conduct would probably be in fact fully ethical, but seeks the Committee's advice respecting the appearance aspect. Similarly, the Committee has often specifically recognized the ethical purity of the conduct in question, while advising against its undertaking because of the appearances that step would create.

Does it matter that judges are precluded from what is otherwise ethical conduct because that conduct might reasonably create an untoward facade or appearance? It does to some judges. In the throes of accepting the code and some of its provisions, some judges, certain of

their own rectitude, objected to the very concept of a code. That position was variously stated, extending from an assertion that some provisions violated a judge's First Amendment right of free association, to the more common assertion that the code was simply unnecessary, because the conduct of most judges already matched its provisions, and that any expectedly rare infraction could be dealt with on a case-by-case basis. The last was based on a quasi-burden of proof approach, i.e., if someone had any reason to think a particular judge was acting improperly it was up to that person to come forward and assert such charges as were thought appropriate, while the other judges went on acting properly, without codes, advisory opinions, and committees. Recognizing the existence of earlier codes, the burgeoning public interest in the ethics of government officials, including judges, and a need for some guidance, at the very least to aid new judges, the Judicial Conference adopted the present Code in April, 1973.

Though judges have, as above noted, fully accepted the code and advisory system, the notion that, "I know I am doing right. I have been appointed by the President and confirmed by the Senate. Why can't I be trusted?" has not entirely died, particularly among the more experienced judges who add a reference to their years of distinguished and totally ethical service on the Bench. Alongside that notion may be placed the concept, quietly and privately expressed by a tiny minority of small but roughly equal numbers of both experienced and inexperienced judges, that judges should be judged solely on their performance as judges. Holders of the latter concept readily accept guidelines relating to their demeanor in court, their treatment of litigants, counsel and witnesses, their work habits, and in general their approach to the work of judging. To them those are the realities, and the only realities, to which ethical considerations should apply. To them it doesn't matter with whom a judge associates (barring criminals and the like), or which clubs he joins, or whether he sits in a case involving a corporation in which he owns substantial stock or in which his recent partner and continuing good friend appears as counsel. Certain of their ability to judge with integrity and impartiality regardless of circumstances, to comply with their oaths of office even when compliance injures their interests, they find it at least somewhat incongruous for the courts to hold that homosexuality, communist party membership, and similar circumstances do not warrant denial of government employment unless the circumstance affects the person's performance on the job, while judges are assumed to be "incapable" of "doing their job" on the basis of mere appearances.

I hasten to add that even the tiny minority desiring to be judged solely on job performance have accepted the Code and are complying with it. They simply view it as unnecessary and somewhat demeaning.

Those entertaining the "performance on the Bench is all that counts" concept would, in any event, be likely to find few adherents to that concept among other judges and virtually none among today's general public. First, judging is not merely a "job," like plumbing, or carpentering, or whatever. Judges are given the privileged joy of working at the

heartbeat of a free society, the law. They deal daily with society's most precious asset, justice. The property, the liberty, the fortunes, and the very lives of citizens, are often in their hands. In the dichotomy of appearances and realities, the public's current approach to its judges does not permit it to perceive that justice is being done if the public be limited to observation of the performance of the judge qua judge. Few of the public understand the judicial process or are capable of distinguishing the good judge from the poor solely on the quality of his or her judging. For much of the public, appearances are all it has to go by. It is conceivable, for example, that a judge might do an outstanding "job" on the Bench, while appearing drunk in a public bar three nights a week, but few if any of the public would believe it—and the few who might would still prefer that their judges, however good their judicial performance, not be chosen from drunkards. In virtually every instance of reasonably asserted conflict between unethical appearances and ethical realities, appearances must win.

There is, however, some hope for at least a partial resolution of the appearances—realities dichotomy. Passage of the Discipline Act may serve to ameliorate both public and judicial concern for what to some may appear an overemphasis on appearances and an unwarranted disregard of realities. It has the potential for stripping away appearances and unearthing the underlying realities, whatever the latter may be.

The Act expands the powers and duties of the Judicial Councils of the Circuits. It requires the Chief Judge of each circuit to call a meeting of the circuit judicial council at least twice a year. It provides for selection of council members, to include district judges. If the number of circuit judges is less than six, the number of district court judges must be at least two. If the number of circuit judges is more than six, the number of district court judges must be at least three. The council is authorized to hold hearings, receive testimony and issue subpoenas. The Act requires that all judicial officers and employees of the circuit "promptly carry into effect all orders of the judicial council."

Under the Act, "any person" may complain that a circuit or district judge, a bankruptcy judge, or a magistrate "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or ... that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability." The complaint must be written and filed with Clerk of the Court of Appeals of the circuit. The complaint is then transmitted by the Clerk to the Chief Judge of the circuit.

The Chief Judge may dismiss those complaints not addressed to conduct prejudicial to the administration of justice or disability, those complaints directed to the merits of a case or a procedural ruling, and those complaints that are clearly frivolous.[7] He may conclude the

7. In the first eighteen months of the Act, very few complaints have been filed, a circumstance due possibly to public unfamiliarity with the Act. The vast majority have been dismissed because they were filed by losing litigants alleging error in the judgment against them.

proceeding if "appropriate corrective action has been taken" by the Chief Judge.

When the Chief Judge dismisses a complaint, copies of his written order are sent to the complainant and to the judge or magistrate complained against. When the Chief Judge decides that the complaint requires investigation, he appoints himself and other judges to a "special committee to investigate the facts and allegations." To preserve their rights, the judge and complainant are given notice in writing of the committee's actions.

The judicial council receives a "comprehensive written report" of the special committee's investigation and recommendations. The council may then conduct "any additional investigation which it considers to be necessary," and "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts." The council may take one or more different actions, including: certifying disability of the judge; requesting voluntary retirement; ordering a temporary halt in assignment of cases to the judge; private or public censure or reprimand; and "such other action as it considers appropriate," except removal from office of an Article III judge. The parties receive written notice of the council's actions.

In more serious cases, the council may refer the complaint and its recommendations to the Judicial Conference of the United States. When the council has determined that a judge's conduct "might constitute grounds for impeachment," the council must refer the matter to the Judicial Conference of the United States. Written notice of a referral to the Conference must be given to the parties "unless contrary to the interests of justice."

The Judicial Conference may take any action takeable by the councils, and may transmit the record to the House of Representatives when impeachment is a possibility.

Complainants, judges, or magistrates aggrieved by final orders of a Chief Judge or a judicial council may petition the judicial council or the Judicial Conference of the United States for review. Denials of such petitions are final, safeguarding the judge from harassment, and binding a sanctioned judge to the decision.

The judicial councils have prescribed procedural rules for carrying out the Act (App. B). The rules guarantee the judge prior written notice of any investigation, and allow the judge to appear at proceedings, present evidence, compel attendance of witnesses and present oral and written evidence and argument. The rules may allow complainants to appear at proceedings "if the panel concludes that the complainant could offer substantial information." The rules are made public record, and available from the Clerk of Court, to facilitate their use by the public.

The act is not intended to establish an adversary procedure. It does not require that the complainant be given a hearing, or the opportunity to cross-examine witnesses. The council investigates the complaint and controls the inquiry as appropriate under the circumstances. The proceeding is intended to be "inquisitorial-administrative" rather than "accusatorial-adversary."

Perhaps the most important provision of the Act is its recognition of the need to preserve judicial independence. By providing a complaint mechanism operated entirely by and within the judiciary, and by specifically denying removal action except by impeachment, the Act makes clear that inroads on judicial independence are not intended.

The Act also seeks to preserve independence of judicial decisionmaking by providing for summary dismissal of complaints directed against judgments and procedural rulings. It has been said that the availability of an appeal from district court judgments, and of petitions for rehearing, rehearing *en banc*, and *certiorari* in relation to appellate court judgments, make redundant the Act's separation of complaints on subject matter properly assertable by appeal or petition. If so, a little redundancy cannot hurt the setting up of this new and potentially sensitive complaint mechanism, particularly when the redundancy is directed toward judicial independence. Moreover, summary dismissal by the circuit Chief Judge frees the judge complained of from the interruption of the judge's judicial work that would occur if the judge were required to review and respond to such complaints.

Like most legislative efforts, the Act is not a panacea. Questions respecting its implementation surfaced almost immediately upon its passage. In "The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer," [8] Eric Neisser asked numerous questions: What constitutes a council "meeting" and "quorum"? Must the chief judge preside? What are and who sets the terms for council membership? Who chooses the method of selecting council members? Who decides on inability of a council member to serve? What can be done if one refuses to obey a council order? How does the government itself file a complaint? Are anonymous complaints permissible? Are impeachable and criminal offenses proper subjects for this mechanism? What if any time limits are intended by "promptly" and "expeditiously" and how can a complainant confront dilatoriness? Who can serve on an investigating committee and on its staff? Are that committee's findings binding on the council? Can a council impose more than one sanction, or conduct more than one proceeding, for the same Act? How can the requirement for publication of orders be reconciled with the provision for a "private" reprimand? Can or should disciplinary orders be stayed? Who can serve on the Judicial Conference of the United States' standing committee? What rules will be applicable to the review procedure?

Doubtless other questions will arise as the councils gain experience with the Act. Legislative modification may also be indicated. For our purposes here, it is enough to note that one probable effect of procedures under the act is to nudge the public's approach to judicial ethics in the direction of actual realities in specific cases. Appearances will not down, of course, nor should they. A large part of the consideration of a

8. Judicature, Vol. 65, No. 3, September 1981, pp. 142–160.

complaint about specific conduct will be played by the appearances that may have prompted the complaint. Conceivably, a Chief Judge may dismiss a complaint because it does not allege conduct that is in reality "prejudicial to the effective and expeditious administration of the business of the courts," and still privately counsel the complained of judge to avoid whatever appearances may be involved. Perhaps the Act will not raise realities to an entitlement of "equal billing" with appearances, but it can, by spotlighting realities in specific cases, resolve at least part of the appearance—reality dichotomy.

CONCLUSION

I close on a personal note. Having had the inestimable privilege of getting to know many if not most federal judges, through eleven years on the Judicial Conference, through sitting repeatedly with every court of appeals, through committee work, through service on the Judicial Center Faculty, and through phone calls related to the work of the advisory committee, I can report that I have never met an unethical federal judge. That is not to guarantee that none exists. Nor is it to say that I am authorized, qualified or sufficiently informed to assess the ethics of all federal judges or of any one judge. I am not. I have not met the three judges whose names have "made the press" in connection with untoward conduct, but every one of the hundreds of judges I have met impresses me as singularly dedicated to a desire that has haunted his or her dreams since the day the robe was donned—a desire to decide every case correctly, to render equal justice under law to all persons and institutions.

Indeed, I have often said, "No one would ever work as hard as judges do for money!" In the last decade, as is still too little known, the workload of the federal judiciary has quadrupled. With grudging, long-after-the-fact and minimal additions of judges, and long-delayed-but-still-inadequate increases in compensation, the federal judiciary, under the outstanding and innovative administrative leadership of The Chief Justice, has established an edifying record of dedicated, selfless public service. Yeoman in-house efforts have been made to keep up with an ever burgeoning caseload, to develop and adopt new procedures, new staffing, new rules. To consider, modify, disseminate, and adopt new procedures and rules has required devotion of many hours on top of those needed for the pure work of judging in four times the number of cases faced in 1970. It is doubtful that any institution, private or governmental, can point to a finer record of dedicated performance of duty.

Yet, through it all, the federal judiciary has been fully conscious of the requirement that it not only act ethically but that it be seen as acting ethically at all times and under all circumstances. As said at the outset, I speak only for myself, but I am confident that if I were to speak for the entire federal judiciary, I would be authorized to welcome any and all suggestions for even further improvement. The judiciary's door is in my

view wide open to any and every means by which the American people can be continuously assured that their judicial servants are not only interpreting and applying the law independently and properly, but that they are doing so out of lives lived in accord with the highest ethical standards.

APPENDIX A

CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES

PART I. CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES[1]

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

The Judicial Conference of the United States has endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination. A judge should carefully consider whether the judge's membership in a particular organization might reasonably raise a question of the judge's impartiality in a case

[1] By resolution of the Judicial Conference of the United States this Code has been made applicable to Bankruptcy Judges and to United States Magistrates.

APPENDIX A—Continued

involving issues as to discriminatory treatment of persons on the basis of race, sex, religion, or national origin. The question whether a particular organization practices invidious discrimination is often complex and not capable of being determined from a mere examination of its membership roll. Judges as well as others have rights of privacy and association. Although each judge must always be alert to the question, it must ultimately be determined by the conscience of the individual judge whether membership in a particular organization is incompatible with the duties of the judicial office.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

COMMENTARY

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex-parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief amicus-curiae.

(5) A judge should dispose promptly of the business of the court.

COMMENTARY

Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

APPENDIX A—Continued

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

COMMENTARY

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR7–107 of the Code of Professional Responsibility.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, or for the perpetuation of a record; and

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

B. Administrative Responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

COMMENTARY

Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

COMMENTARY

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification

(1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

APPENDIX A—Continued

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding.

COMMENTARY

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(e) he has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

COMMENTARY

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

D. Remittal of Disqualification

A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree

APPENDIX A—Continued

in writing that the judge's disqualification should be waived, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

CANON 4

A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

COMMENTARY

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

COMMENTARY

Complete separation of a judge from extra-judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic

APPENDIX A—Continued

organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

COMMENTARY

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund-raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

COMMENTARY

A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.

C. Financial Activities

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, active partner, manager, advisor, or employee of any business other than a business wholly owned by members of the judge's family all of whom are related to the judge or his or her spouse within the third degree of relationship calculated according to the civil law system.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

APPENDIX A—Continued

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "members of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

COMMENTARY

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" means any relative of a judge by blood, adoption, or marriage or any other person treated by a judge as a member of his family who resides, or has resided, in his household.

COMMENTARY

Mere residence in the household of a judge is insufficient for a person to be considered a member of the judge's family for purposes of this canon. The person must not only be treated by a judge as a member of his family but must have resided in the judge's household for a sufficient length of time and under such circumstances as to make it apparent that it was his principal place of abode.

As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

COMMENTARY

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

COMMENTARY

A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon

APPENDIX A—Continued

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. A judge should not practice law.

G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if his governmental duties would interfere with the performance of his judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

COMMENTARY

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

The dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious where the appointment of a judge is required by legislation. Such assignments ordinarily do not involve excessive commitments of time, and they typically do not pose a serious threat to the independence of the judiciary. Moreover, it is hardly the function of a Code of Judicial Conduct to compel judges to refuse, without careful regard to the circumstances, tasks Congress has seen fit to authorize as appropriate in the public interest. Accordingly, although legislatively prescribed extra-judicial assignments should be discouraged, where Congress requires the appointment of a judge to perform extra-judicial duties, the judge may accept the appointment provided that his services would not interfere with the performance of his judicial responsibilities or tend to undermine public confidence in the judiciary.

CANON 6

A JUDGE SHOULD REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

APPENDIX A—Continued

CANON 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. Political Conduct in General

(1) A judge should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.

(2) A judge should resign his office when he becomes a candidate either in a primary or in a general election for any office.

(3) A judge should not engage in any other political activity; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4.

APPENDIX B

RULES FOR PROCESSING COMPLAINTS OF JUDICIAL MISCONDUCT

JUDICIAL COUNCIL OF THE D.C. CIRCUIT

RULES FOR PROCESSING COMPLAINTS OF JUDICIAL MISCONDUCT

Preface. The following rules are adopted in conformity with and pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, (P.L. 96-458, Oct. 15, 1980), 28 U.S.C. § 372(c).

Rule 1 Any person alleging that a circuit, district, or bankruptcy judge or a magistrate has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of a mental or physical disability, may file with the Clerk of the Court of Appeals of the Circuit a written complaint containing a brief statement of the facts constituting such conduct.

Rule 2 Upon receipt of a complaint filed under Rule 1, the Clerk shall promptly transmit such complaint to the Chief Judge of the Circuit, or, if the conduct complained of is that of the Chief Judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of these rules, included in the term "Chief Judge"). The Clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

APPENDIX B—Continued

Rule 3 After expeditiously reviewing a complaint, the Chief Judge, by written order stating the reasons therefor, may:

(A) dismiss the complaint, upon finding it to be (i) not in conformity with Rule 1, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous, or

(B) conclude the proceeding upon determining that appropriate corrective action has been taken.

(C) Notice of the written order of the Chief Judge shall be transmitted to the complainant and to the judge or magistrate whose conduct is the subject of the complaint. The Chief Judge shall report to the Council on complaints dismissed or closed.

Rule 4 If the Chief Judge does not enter an order under Rule 3, such judge shall promptly—

(A) appoint a special committee composed of the Chief Judge and equal numbers of circuit and district judges of the Circuit to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this rule.

Rule 5 (A) Each committee appointed under Rule 4 shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the Judicial Council of the Circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the Judicial Council of the Circuit.

(B) The judge or magistrate whose conduct is the subject of the complaint shall be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.

(C) The judge or magistrate whose conduct is the subject of an investigation shall receive payment of attorney's fees in accordance with procedures established by the Director of the Administrative Office of the United States Courts.

(D) The complainant may be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

(E) A complainant appearing before an investigating panel may, at the discretion of the panel, be authorized to request payment of attorney's fees by the Director of the Administrative Office of the United States Courts.

Rule 6 Upon receipt of a report filed under Rule 5, the Judicial Council—

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the Circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the Judicial Council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under 28 U.S.C. § 372(b);

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under 28 U.S.C. § 371 shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement;

APPENDIX B—Continued

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the Council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordannce with 28 U.S.C. § 631, and any removal of a bankruptcy judge shall be in accordance with 28 U.S.C. § 153; and

(C) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this rule.

Rule 7 (A) In addition to the authority stated in Rule 6, the Judicial Council may, in its discretion, refer any complaint under these rules, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the Judicial Council determines, on the basis of a complaint and an investigation under these rules, or on the basis of information otherwise available to the Council, that a judge appointed to hold office during good behavior has engaged in conduct—

(i) which might constitute one or more grounds for impeachment under article I of the Constitution; or

(ii) which, in the interests of justice, is not amenable to resolution by the Judicial Council, the Judicial Council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) The Judicial Council acting under authority of this rule shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this rule.

Rule 8 In conducting any investigation under these rules, the Judicial Council, or a special investigating committee appointed under Rule 4, shall have full subpoena powers as provided in 28 U.S.C. § 332(d). Enforcement of such subpoenas shall be as provided in Rule 45(f), Federal Rules of Civil Procedure.

Rule 9 All papers, documents, and records of proceedings related to investigations conducted under these rules shall be confidential and shall not be disclosed by any person in any proceeding unless—

(A) the Judicial Council of the Circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(B) release of such material in whole or in part is authorized in writing by the judge or magistrate who is the subject of the complaint and by the Chief Judge of the Circuit, the Chief Justice, or the chairman of the standing committee established under 28 U.S.C. § 331.

Rule 10 (A) A complainant, judge, or magistrate aggrieved by a final order of the Chief Judge under Rule 3 may petition the Council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the Judicial Council under Rule 6 may petition the Judicial Conference of the United States for review thereof.

(B) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before the Judicial Council under these rules.

Rule 11 Each written order to implement any action under Rule 6(B), which is issued by the Judicial Council, shall be made available to the public through the Clerk's Office of the Court of Appeals. Unless contrary to the interests of justice, each such order issued under this paragragh shall be accompanied by written reasons therefor.

Rule 12 These rules shall become effective October 1, 1981.

Sen. Res. 120

Citation | Rank(R) | Database | Mode
141 Cong.Rec. S6823-01 | R 4 OF 58 | CR | Page
1995 WL 298415 (Cong.Rec.)
(Cite as: 141 Cong. Rec. S6823-01)
Congressional Record --- Senate
Proceedings and Debates of the 104th Congress, First Session
Wednesday, May 17, 1995

***S6823** SENATE RESOLUTION 120-ESTABLISHING A SPECIAL COMMITTEE ADMINISTERED BY THE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

Mr. D'AMATO (for himself and Mr. DOLE) submitted the following resolution; which was considered and agreed to:

S. RES. 120

Resolved,

SECTION 1. ESTABLISHMENT OF SPECIAL COMMITTEE.

(a) ESTABLISHMENT.-There is established a special committee administered by the Committee on Banking, Housing, and Urban Affairs to be known as the " Special Committee to Investigate Whitewater Development Corporation and Related Matters" (hereafter in this resolution referred to as the "special committee").

(b) PURPOSES.-The purposes of the special committee are-

(1) to conduct an investigation and public hearings into, and study of, whether improper conduct occurred regarding the way in which White House officials handled documents in the office of White House Deputy Counsel Vincent Foster following his death;

(2) to conduct an investigation and public hearings into, and study of, the following matters developed during, or arising out of, the investigation and public hearings concluded by the Committee on Banking, Housing, and Urban Affairs prior to the adoption of this resolution-

(A) whether any person has improperly handled confidential Resolution Trust Corporation (hereafter in this resolution referred to as the "RTC") information relating to **Madison Guaranty** Savings and Loan Association or Whitewater Development Corporation, including whether any person has improperly communicated such information to individuals referenced therein;

(B) whether the White House has engaged in improper contacts with any other agency or department in the Government with regard to confidential RTC information relating to **Madison Guaranty** Savings and Loan Association or Whitewater Development Corporation;

(C) whether the Department of Justice has improperly handled RTC criminal referrals relating to **Madison Guaranty** Savings and Loan Association or Whitewater Development Corporation;

(D) whether RTC employees have been improperly importuned, prevented, restrained, or deterred in conducting investigations or making enforcement recommendations relating to **Madison Guaranty** Savings and Loan Association or Whitewater Development Corporation; and

(E) whether the report issued by the Office of Government Ethics on July 31, 1994, or related transcripts of deposition testimony-

(i) were improperly released to White House officials or others prior to

their testimony before the Committee on Banking, Housing, and Urban Affairs pursuant to Senate Resolution 229 (103d Congress); or

(ii) were used to communicate to White House officials or to others confidential RTC information relating to **Madison Guaranty** Savings and Loan Association or Whitewater Development Corporation;

(3) to conduct an investigation and public hearings into, and study of, all matters that have any tendency to reveal the full facts about-

(A) the operations, solvency, and regulation of **Madison Guaranty** Savings and Loan Association, and any subsidiary, affiliate, or other entity owned or controlled by **Madison Guaranty** Savings and Loan Association;

(B) the activities, investments, and tax liability of Whitewater Development Corporation and, as related to Whitewater Development Corporation, of its officers, directors, and shareholders;

(C) the policies and practices of the RTC and the Federal banking agencies (as that term is defined in section 3 of the Federal Deposit Insurance Act) regarding the legal representation of such agencies with respect to **Madison Guaranty** Savings and Loan Association;

***S6824** (D) the handling by the RTC, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Savings and Loan Insurance Corporation of civil or administrative actions against parties regarding **Madison Guaranty** Savings and Loan Association;

(E) the sources of funding and the lending practices of Capital Management Services, Inc., and its supervision and regulation by the Small Business Administration, including any alleged diversion of funds to Whitewater Development Corporation;

(F) the bond underwriting contracts between Arkansas Development Finance Authority and Lasater & Company; and

(G) the lending activities of Perry County Bank, Perryville, Arkansas, in connection with the 1990 Arkansas gubernatorial election;

(4) to make such findings of fact as are warranted and appropriate;

(5) to make such recommendations, including recommendations for legislative, administrative, or other actions, as the special committee may determine to be necessary or desirable; and

(6) to fulfill the constitutional oversight and informational functions of the Congress with respect to the matters described in this section.

SEC. 2. MEMBERSHIP AND ORGANIZATION OF THE SPECIAL COMMITTEE.

(a) MEMBERSHIP.-

(1) IN GENERAL.-The special committee shall consist of-

(A) the members of the Committee on Banking, Housing, and Urban Affairs; and

(B) the chairman and ranking member of the Committee on the Judiciary, or their designees from the Committee on the Judiciary.

(2) SENATE RULE XXV.-For the purpose of paragraph 4 of rule XXV of the Standing Rules of the Senate, service of a Senator as the chairman or other member of the special committee shall not be taken into account.

(b) ORGANIZATION OF SPECIAL COMMITTEE.-

(1) CHAIRMAN.-The chairman of the Committee on Banking, Housing, and Urban Affairs shall serve as the chairman of the special committee (hereafter in this resolution referred to as the "chairman").

(2) RANKING MEMBER.-The ranking member of the Committee on Banking, Housing, and Urban Affairs shall serve as the ranking member of the special committee (hereafter in this resolution referred to as the "ranking member").

(3) QUORUM.-A majority of the members of the special committee shall constitute a quorum for the purpose of reporting a matter or recommendation to the Senate. A majority of the members of the special committee, or one-third of the members of the special committee if at least one member of the minority party is present, shall constitute a quorum for the conduct of other business. One member of the special committee shall constitute a quorum for the purpose of taking testimony.

(c) RULES AND PROCEDURES.-Except as otherwise specifically provided in this resolution, the special committee's investigation, study, and hearings shall be governed by the Standing Rules of the Senate and the Rules of Procedure of the Committee on Banking, Housing, and Urban Affairs. The special committee may adopt additional rules or procedures not inconsistent with this resolution or the Standing Rules of the Senate if the chairman and ranking member agree that such additional rules or procedures are necessary to enable the special committee to conduct the investigation, study, and hearings authorized by this resolution. Any such additional rules and procedures shall become effective upon publication in the Congressional Record.

SEC. 3. STAFF OF THE SPECIAL COMMITTEE.

(a) APPOINTMENTS.-To assist the special committee in the investigation, study, and hearings authorized by this resolution, the chairman and the ranking member each may appoint special committee staff, including consultants.

(b) ASSISTANCE FROM THE SENATE LEGAL COUNSEL.-To assist the special committee in the investigation, study, and hearings authorized by this resolution, the Senate Legal Counsel and the Deputy Senate Legal Counsel shall work with and under the jurisdiction and authority of the special committee.

(c) ASSISTANCE FROM THE COMPTRCLLER GENERAL.-The Comptroller General of the United States is requested to provide from the General Accounting Office whatever personnel or other appropriate assistance as may be required by the special committee, or by the chairman or the ranking member.

SEC. 4. PUBLIC ACTIVITIES OF THE SPECIAL COMMITTEE.

(a) IN GENERAL.-Consistent with the rights of persons subject to investigation and inquiry, the special committee shall make every effort to fulfill the right of the public and the Congress to know the essential facts and implications of the activities of officials of the United States Government and other persons and entities with respect to the matters under investigation and study, as described in section 1.

(b) DUTIES.-In furtherance of the right of the public and the Congress to know, the special committee-

(1) shall hold, as the chairman (in consultation with the ranking member) considers appropriate and in accordance with paragraph 5(b) of rule XXVI of the Standing Rules of the Senate, hearings on specific subjects, subject to consultation and coordination with the **independent counsel** appointed pursuant to chapter 40 of title 28, United States Code, in Division No. 94-1 (D.C. Cir.

August 5, 1994) (hereafter in this resolution referred to as "the **independent counsel**");

(2) may make interim reports to the Senate as it considers appropriate; and

(3) shall make a final comprehensive public report to the Senate which contains-

(A) a description of all relevant factual determinations; and

(B) recommendations for legislation, if necessary.

SEC. 5. POWERS OF THE SPECIAL COMMITTEE.

(a) IN GENERAL.-The special committee shall do everything necessary and appropriate under the laws and the Constitution of the United States to conduct the investigation, study, and hearings authorized by section 1.

(b) EXERCISE OF AUTHORITY.-The special committee may exercise all of the powers and responsibilities of a committee under rule XXVI of the Standing Rules of the Senate and section 705 of the Ethics in Government Act of 1978, including the following:

(1) SUBPOENA POWERS.-To issue subpoenas or orders for the attendance of witnesses or for the production of documentary or physical evidence before the special committee. A subpoena or order may be authorized by the special committee or by the chairman with the agreement of the ranking member, and may be issued by the chairman or any other member of the special committee designated by the chairman, and may be served by any person designated by the chairman or the authorized member anywhere within or outside of the borders of the United States to the full extent permitted by law. The chairman, or any other member of the special committee, is authorized to administer oaths to any witnesses appearing before the special committee. If a return on a subpoena or order for the production of documentary or physical evidence is incomplete or accompanied by an objection, the chairman (in consultation with the ranking member) may convene a meeting or hearing to determine the adequacy of the return and to rule on the objection. At a meeting or hearing on such a return, one member of the special committee shall constitute a quorum. The special committee shall not initiate procedures leading to civil or criminal enforcement of a subpoena unless the person or entity to whom the subpoena is directed refuses to produce the required documentary or physical evidence after having been ordered and directed to do so.

(2) COMPENSATION AUTHORITY.-To employ and fix the compensation of such clerical, investigatory, legal, technical, and other assistants as the special committee, or the chairman or the ranking member, considers necessary or appropriate.

(3) MEETINGS.-To sit and act at any time or place during sessions, recesses, and adjournment periods of the Senate.

(4) HEARINGS.-To hold hearings, take testimony under oath, and receive documentary or physical evidence relating to the matters and questions it is authorized to investigate or study. Unless the chairman and the ranking member otherwise agree, the questioning of a witness or a panel of witnesses at a hearing shall be limited to one initial 30-minute turn each for the chairman and the ranking member, or their designees, including majority and minority staff, and thereafter to 10-minute turns by each member of the special committee if 5 or more members are present, and to 15-minute turns by each

member of the special committee if fewer than 5 members are present. A member may be permitted further questions of the witness or panel of witnesses, either by using time that another member then present at the hearing has yielded for that purpose during the yielding member's turn, or by using time allotted after all members have been given an opportunity to question the witness or panel of witnesses. At all times, unless the chairman and the ranking member otherwise agree, the questioning shall alternate back and forth between members of the majority party and members of the minority party. In their discretion, the chairman and the ranking member, respectively, may designate majority or minority staff to question a witness or a panel of witnesses at a hearing during time yielded by a member of the chairman's or the ranking member's party then present at the hearing for his or her turn.

(5) TESTIMONY OF WITNESSES.-To require by subpoena or order the attendance, as a witness before the special committee or at a deposition, of any person who may have knowledge or information concerning any of the matters that the special committee is authorized to investigate and study.

(6) IMMUNITY.-To grant a witness immunity under sections 6002 and 6005 of title 18, United States Code, provided that the **independent counsel** has not informed the special committee in writing that immunizing the witness would interfere with the ability of the **independent counsel** successfully to prosecute criminal violations. Not later than 10 days before the special committee seeks a Federal court order for a grant of immunity by the special committee, the Senate Legal Counsel shall cause to be delivered to the **independent counsel** a written request asking the **independent counsel** promptly to inform the special committee in writing if, in the judgment of the **independent counsel,** the grant of immunity would interfere with the ability of the **independent counsel** successfully to prosecute criminal violations. The Senate Legal Counsel's written request of ***S6825** the **independent counsel** required by this paragraph shall be in addition to all notice requirements set forth in sections 6002 and 6005 of title 18, United States Code.

(7) DEPOSITIONS.-To take depositions and other testimony under oath anywhere within the United States, to issue orders that require witnesses to answer written interrogatories under oath, and to make application for the issuance of letters rogatory. All depositions shall be conducted jointly by majority and minority staff of the special committee. A witness at a deposition shall be examined upon oath administered by a member of the special committee or an individual authorized by local law to administer oaths, and a complete transcription or electronic recording of the deposition shall be made. Questions shall be propounded first by majority staff of the special committee and then by minority staff of the special committee. Any subsequent round of questioning shall proceed in the same order. Objections by the witness as to the form of questions shall be noted for the record. If a witness objects to a question and refuses to answer on the basis of relevance or privilege, the special committee staff may proceed with the deposition, or may, at that time or at a subsequent time, seek a ruling on the objection from the chairman. If the chairman overrules the objection, the chairman may order and direct the witness to answer the question, but the special committee shall not initiate procedures leading to civil or criminal enforcement unless the witness refuses to answer after having been ordered and directed to answer.

(8) DELEGATIONS TO STAFF.-To issue commissions and to notice depositions for

staff members to examine witnesses and to receive evidence under oath administered by an individual authorized by local law to administer oaths. The special committee, or the chairman with the concurrence of the ranking member, may delegate to designated staff members of the special committee the power to issue deposition notices authorized pursuant to this paragraph.

(9) INFORMATION FROM OTHER SOURCES.-To require by subpoena or order-

(A) any department, agency, entity, officer, or employee of the United States Government;

(B) any person or entity purporting to act under color or authority of State or local law; or

(C) any private person, firm, corporation, partnership, or other organization;

to produce for consideration by the special committee or for use as evidence in the investigation, study, or hearings of the special committee, any book, check, canceled check, correspondence, communication, document, financial record, paper, physical evidence, photograph, record, recording, tape, or any other material relating to any of the matters or questions that the special committee is authorized to investigate and study which any such person or entity may possess or control.

(10) RECOMMENDATIONS TO THE SENATE.-To make to the Senate any recommendations, by report or resolution, including recommendations for criminal or civil enforcement, which the special committee may consider appropriate with respect to-

(A) the willful failure or refusal of any person to appear before it, or at a deposition, or to answer interrogatories, in compliance with a subpoena or order;

(B) the willful failure or refusal of any person to answer questions or give testimony during the appearance of that person as a witness before the special committee, or at a deposition, or in response to interrogatories; or

(C) the willful failure or refusal of-

(i) any officer or employee of the United States Government;

(ii) any person or entity purporting to act under color or authority of State or local law; or

(iii) any private person, partnership, firm, corporation, or organization;

to produce before the special committee, or at a deposition, or at any time or place designated by the committee, any book, check, canceled check, correspondence, communication, document, financial record, paper, physical evidence, photograph, record, recording, tape, or any other material in compliance with any subpoena or order.

(11) CONSULTANTS.-To procure the temporary or intermittent services of individual consultants, or organizations thereof.

(12) OTHER GOVERNMENT PERSONNEL.-To use, on a reimbursable basis and with the prior consent of the Government department or agency concerned, the services of the personnel of such department or agency.

(13) OTHER CONGRESSIONAL STAFF.-To use, with the prior consent of any member of the Senate or the chairman or the ranking member of any other Senate committee or the chairman or ranking member of any subcommittee of any committee of the Senate, the facilities or services of the appropriate members of the staff of such member of the Senate or other Senate committee or subcommittee, whenever the special committee or the chairman or the ranking

member considers that such action is necessary or appropriate to enable the special committee to conduct the investigation, study, and hearings authorized by this resolution.

(14) ACCESS TO INFORMATION AND EVIDENCE.-To permit any members of the special committee, staff director, counsel, or other staff members or consultants designated by the chairman or the ranking member, access to any data, evidence, information, report, analysis, document, or paper-

(A) that relates to any of the matters or questions that the special committee is authorized to investigate or study under this resolution;

(B) that is in the custody or under the control of any department, agency, entity, officer, or employee of the United States Government, including those which have the power under the laws of the United States to investigate any alleged criminal activities or to prosecute persons charged with crimes against the United States without regard to the jurisdiction or authority of any other Senate committee or subcommittee; and

(C) that will assist the special committee to prepare for or conduct the investigation, study, and hearings authorized by this resolution.

(15) REPORTS OF VIOLATIONS OF LAW.-To report possible violations of any law to appropriate Federal, State, or local authorities.

(16) EXPENDITURES.-To expend, to the extent that the special committee determines necessary and appropriate, any money made available to the special committee by the Senate to carry out this resolution.

(17) TAX RETURN INFORMATION.-To inspect and receive, in accordance with the procedures set forth in sections 6103(f)(3) and 6104(a)(2) of the Internal Revenue Code of 1986, any tax return or tax return information, held by the Secretary of the Treasury, if access to the particular tax-related information sought is necessary to the ability of the special committee to carry out section 1(b)(3)(B).

SEC. 6. PROTECTION OF CONFIDENTIAL INFORMATION.

(a) NONDISCLOSURE.-No member of the special committee or the staff of the special committee shall disclose, in whole or in part or by way of summary, to any person other than another member of the special committee or other staff of the special committee, for any purpose or in connection with any proceeding, judicial or otherwise, any testimony taken, including the names of witnesses testifying, or material presented, in depositions or at closed hearings, or any confidential materials or information, unless authorized by the special committee or the chairman in concurrence with the ranking member.

(b) STAFF NONDISCLOSURE AGREEMENT.-All members of the staff of the special committee with access to confidential information within the control of the special committee shall, as a condition of employment, agree in writing to abide by the conditions of this section and any nondisclosure agreement promulgated by the special committee that is consistent with this section.

(c) SANCTIONS.-

(1) MEMBER SANCTIONS.-The case of any Senator who violates the security procedures of the special committee may be referred to the Select Committee on Ethics of the Senate for investigation and the imposition of sanctions in accordance with the rules of the Senate.

(2) STAFF SANCTIONS.-Any member of the staff of the special committee

who violates the security procedures of the special committee shall immediately be subject to removal from office or employment with the special committee or such other sanction as may be provided in any rule issued by the special committee consistent with section 2(c).

(d) STAFF DEFINED.-For purposes of this section, the term "staff of the special committee" includes-

(1) all employees of the special committee;

(2) all staff designated by the members of the special committee to work on special committee business;

(3) all Senate staff assigned to special committee business pursuant to section 5(b)(13);

(4) all officers and employees of the Office of Senate Legal Counsel who are requested to work on special committee business; and

(5) all detailees and consultants to the special committee.

SEC. 7. RELATION TO OTHER INVESTIGATIONS.

(a) PURPOSES.-The purposes of this section are-

(1) to expedite the thorough conduct of the investigation, study, and hearings authorized by this resolution;

(2) to promote efficiency among all the various investigations underway in all branches of the United States Government; and

(3) to engender a high degree of confidence on the part of the public regarding the conduct of such investigation, study, and hearings.

(b) SPECIAL COMMITTEE ACTIONS.-To carry out the purposes stated in subsection (a), the special committee is encouraged-

(1) to obtain relevant information concerning the status of the investigation of the **independent counsel,** to assist in establishing a hearing schedule for the special committee; and

(2) to coordinate, to the extent practicable, the activities of the special committee with the investigation of the **independent counsel.**

SEC. 8. SALARIES AND EXPENSES.

A sum equal to not more than $950,000 for the period beginning on the date of adoption of this resolution and ending on February 29, 1996, shall be made available from the contingent fund of the Senate out of the Account for Expenses for Inquiries and Investigations for payment of salaries and other expenses of the special committee under this resolution, which shall include not more ***S6826** than $750,000 for the procurement of the services of individual consultants or organizations thereof, in accordance with section 5(b)(11). Payment of expenses shall be disbursed upon vouchers approved by the chairman, except that vouchers shall not be required for the disbursement of salaries paid at an annual rate.

SEC. 9. REPORTS; TERMINATION.

(a) COMPLETION OF DUTIES.-

(1) IN GENERAL.-The special committee shall make every reasonable effort to complete, not later than February 1, 1996, the investigation, study, and

hearings authorized by section 1.

(2) EVALUATION OF PROGRESS.-The special committee shall evaluate the progress and status of the investigation, study, and hearings authorized by section 1 and, not later than January 15, 1996, make recommendations with respect to the authorization of additional funds for a period following February 29, 1996. If the special committee requests the authorization of additional funds for a period following February 29, 1996, the Majority Leader and the Democratic Leader shall meet and determine the appropriate timetable and procedures for the Senate to vote on any such request.

(b) FINAL REPORT.-

(1) SUBMISSION.-The special committee shall promptly submit a final public report to the Senate of the results of the investigation, study, and hearings conducted by the special committee pursuant to this resolution, together with its findings and any recommendations.

(2) CONFIDENTIAL INFORMATION.-The final report of the special committee may be accompanied by such confidential annexes as are necessary to protect confidential information.

(3) CONCLUSION OF BUSINESS.-After submission of its final report, the special committee shall promptly conclude its business and close out its affairs.

(c) RECORDS.-Upon the conclusion of the special committee's business and the closing out of its affairs, all records, files, documents, and other materials in the possession, custody, or control of the special committee shall remain under the control of the Committee on Banking, Housing, and Urban Affairs.

SEC. 10. COMMITTEE JURISDICTION AND RULE XXV.

The jurisdiction of the special committee is granted pursuant to this resolution, notwithstanding the provisions of paragraph 1 of rule XXV of the Standing Rules of the Senate relating to the jurisdiction of the standing committees of the Senate.

141 Cong. Rec. S6823-01, 1995 WL 298415 (Cong.Rec.)

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Citation | Rank(R) | Database | Mode
1995 WL 455181 (F.D.C.H.) | R 6 OF 18 | USTESTIMONY | Page

Verbatim Transcript
August 01, 1995

Senate
Special Senate Whitewater Committee
Hearing

Day Seven of the Special Hearings Into Investments Made by President and Mrs. Clinton and Articles Allegedly Removed from the Office of Vince Foster.

WHITEWATER SPECIAL COMMITTEE

AUGUST 1, 1995

SPEAKERS LIST: SENATOR ALFONSE D'AMATO, R-NY
SENATOR PAUL SARBANES, D-MD
ROBERT LANGSTON, U.S. PARK POLICE CHIEF
DEBORAH GORHAM, EXECUTIVE ASSISTANT TO VINCE FOSTER

[*]
D'AMATO: ...statement that he wants to make. Senator Sarbanes.

SARBANES: Mr. Chairman, first of all, happy birthday.

D'AMATO: Thank you.
SARBANES: Secondly, and more ... I'm very much concerned about this leak problem. I've raised this before, but now we've had a situation in which apparently actual deposition transcripts were given to the press. These are the, as I understand it, the actual documents or copies of the documents, and it directly contravenes every procedure of the Committee, which were worked out very carefully and for very good reason.

Now, section six of the resolution provides for the protection of confidential information and states non-disclosure, and no member of the Special Committee or the staff shall disclose in whole or in part to any person other than other staff or other members various material. Then there's a non-disclosure agreement which members of the staff sign. Now this isn't the...we've had previous problems here that I've raised where people have disclosed information, often erroneous information. So you've had articles then written that completely misstate the situation. Witnesses suffer as a consequence of that.

That was drawn out in the course of previous testimony here. Ms. Mathews, for instance, was written up as having said certain things which she didn't say and which became very clear in her testimony. And now we have a situation in which apparently the actual transcript of the deposition itself is being given out.

This is rather important, and it's kind of interesting, because I was reading, you know, these become available to the members the night before under our procedures. So I was reading through one of the depositions of one of the witnesses here this morning, and just to underscore why it's important for the witnesses, let me just read from that transcript very quickly. One of the deponents, one of the witnesses on our first panel, they asked about the release of the transcripts, and were told by Mr. Jiuffra, who was doing the questioning at that point for the **Committee,** "Know the **depositions** will be treated as **Committee-confidential** until that time," meaning the time of the testimony here, meaning only a limited number of people can see the deposition, that people have signed confidentiality agreements. And then later the witness herself said, was asked whether they understood what had just been said about the procedures, and said I do.

There are, however, leaks obviously because we continue to read about them in the paper, the people that you've deposed to dates. So where is the confidentiality being violated? And Mr. Jiuffra said, "do you want to go off the record for a second?" And then they went off the record, a discussion ensued, and then Mr. Jiuffra, when they came back on the record, just to briefly summarize, we discussed some of the procedures that the Committee has in place to protect the confidentiality of deposition transcripts. That's what the depondent was told. And, of course, the Committee did put those procedures in place last summer.

Now, if the procedures, they're obviously not being adhered to and I must say, Mr. Chairman, I think there's a problem which requires looking, very intense looking into on the part of the Committee, because obviously someone is breaking all of our, breaking all of our procedures here. We had the...

D'AMATO: Well, I wish that all of our members were here to hear the concern that you have very aptly and correctly raised. I believe that this is a betrayal of the work of our counsels and their staff and indeed of the Committee and its members.

(SPEAKER CORRECTION)

D'AMATO: Senators, from both sides, were endeavoring to get the facts, and to do it in a way that is not prejudicial. I can only say that I will work with you, and ask our two counsels to do anything and everything they can necessary, to find a manner in which to secure

whatever of the depositions and testimony has been given. It is difficult, if not impossible, without the good faith of those people, not only on the committee but the staffers. I do not believe that any senator, on either side, has violated the sacred trust.

I do believe that there is a staffer or staffers who for their own reason, whether it is to aggrandize themselves with the media, get their little oar in the water, show what kind of pull or knowledge they have, has undertaken this. It undermines the credibility of all of the work that we undertake when they engage in this kind of activity.

I think we can continue to lament about it, but I'd like to suggest that we see if we can't--I don't know what else we can do--except keep everything under lock and key to the point that they can't even remove any documents, not even to work. I know there have been certain procedures. And I just spell out to the lame brain who has undertaken this kind of thing, that they do terrible damage to the entire process and to the people who come and who do testify.

And again, to this committee and to every member of the committee they undermine. I don't know what to say. I've spoken. I've sought out individuals. I've spoken to staffs. Maybe we'll have to get them together again. Maybe we'll have to --What do they do when they have a criminal trial? They put all the people, keep them incommunicado from getting certain information. Maybe we'll have to get the staffs in the senate to. What do we call that? Maybe we'll have to sequester. And the staff now, I mean this really is incredible. I don't think we should. It is important. I share your concern. And if Mr. Ben-Veniste and Mr. Chertoff and yourself or I can attempt to impose better security, why I would look for anything I can in that nature within reason to insure that.

SARBANES: Well, Mr. Chairman, I think we can focus this in much more finally. As I understand our procedures, which I assume have been followed, an agreement was worked out whereby the deposition transcripts would not be given to the members of the committee or their staff until the evening before the witnesses appearance in front of the committee.

In other words, last night we, the members, received the transcripts for the witnesses who are coming in today. Now the transcripts that were leaked were for witnesses who weren't even coming this week. They're coming next week. So presumably, if the procedures were followed, and I have no reason to think they weren't, members and member's staffs do not have access to those transcripts.

SARBANES: The only people having access to those transcripts would be staff of the committee. so it seems to me that we can, we

can focus in very directly there. And I think that your suggestion to Mr. Chertoff and Mr. Ben-Veniste undertake to do that, in consultation with us is, is a very good suggestion. Particularly, when as I just quoted you had one deponent who asked about this very issue and was given assurances by Mr. Jiuffra with respect to it.

D'AMATO: Well, I'm -- again I renew the, the agreement that we undertake this together. Have our counsels pursue this matter and see if we can't narrow and maybe even get a better idea as to who exactly was responsible for this. We're just working too hard and doing too much good work to have this jeopardized in this kind of manner. Yes, Senator.

(UNKNOWN): Mr. Chairman, I think it is even a little more complicated than Senator Sarbanes suggests because here. You have Mr. Margolis, who is clearly one of the key players in all this. I ask my staff some time ago if we had a deposition, they said no, I think he had a triple bypass. We did not have a deposition.

But this is not the leak from a deposition. It's from E-Mail, which I don't think my staff doesn't seem to have. I don't think other staffs have, and it is the selective and distorted leaking that I think does concern us. And I appreciate your attitude and I know it is difficult in this body to prevent leaking. But I think we should try to, so that we get balance out there and not a distorted picture of what's taking place.

D'AMATO: I share the Senators concern and I'm going to ask that again that our counsels see -- we're going to have a vote at 10 o'clock. My initial intent was to see if we could not get the witnesses up, swear them in, maybe we'll take their testimony and adjourn for that, that vote.

But I'm going to ask counsels to pursue the matter, see what we can do. And, and accept again, to the staffers, staffers are doing this. You're not doing anything but really jeopardizing these hearings. And I have to tell you what we will do in the future, will be to be even more restrictive, as it relates to the, the depositions. And the availability of the deposition, because it's become obvious to this Senator, that they will not be able to be made available at the staffers. And that only Senators at certain times, if we have to keep it to that, to that manner of modality, we'll have the ability to see them until the night before.
Now, that will necessarily make it more difficult for the participation of the full committee. But I see no other recourse, certainly at this particular time. There's little that we can do, as it relates to those depositions that have already been taken. And the access that has been afforded at this point.

But I'm going to ask that our counsels review the matter and give

us some recommendations. Then we'll confer with all of the members of the committee, as it relates to the manners in which we will proceed to, to provide as much in the way of, of secrecy, so to speak or guarding the contents of these documents, so that they are not selectively released.

D'AMATO: I have not read any of these depositions, because I didn't want to be in the position of inadvertently responding to a question, recall something that I may have read that would not be appropriate, and put that in a response. So I have deliberately refrained from that. I don't think it comes from any of the members, but I do think there is at least a staffer who thinks he's playing some wonderful public service. And he or she is not doing that.

Why don't we get our witnesses up -- the first panel, and we'll get any statement they want to make, we'll swear them in, and I don't think it's worthwhile starting, because we will have a vote at 10:00, but immediately after that vote, we'll come back and resume.

I think we have Deborah Gorham and Linda Tripp. Please remain standing. Raise your right hand. Do you swear and affirm that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

GORHAM/TRIPP: I do.

D'AMATO: Deborah Gorham, you are an assistant to the associate counsel to the President, a former assistant to the deputy counsel to the President, Vincent Foster. Is that correct?

GORHAM: I'm sorry, Chairman D'Amato.

D'AMATO: You were formerly the executive assistant to the deputy counsel to the President, Vincent Foster?

GORHAM: I was.

D'AMATO: Do you have a statement you'd like to give, Ms. Gorham?

GORHAM: Yes, sir, I do. My name is Deborah Gorham. I now work at a private law firm in Washington, DC. I worked for Vincent Foster as an executive assistant for a very brief period of time -- from March 8, 1993 until July 20, 1993.

During that time, we had a very professional working relationship. I had great respect for Vincent Foster, and his death was a tragic loss. It affected me deeply, and I feel great sympathy for the Foster family and hope that this matter will soon be put to rest. I am here to cooperate fully to the best I can. Thank you.

D'AMATO: Thank you very much, Ms. Gorham. Linda Tripp.
TRIPP: Yes, Chairman.

D'AMATO: Do you have a statement, Linda?

TRIPP: I do, briefly.

D'AMATO: We'll be happy to receive it.

TRIPP: My name is Linda Tripp. From April 93 through April 94, I served as executive assistant to the counsel to the President, Bernie Nussbaum. I worked in the same suite of offices as Vince Foster at the time he died. I am prepared at this time to answer any questions you have regarding the handling of documents following the death of Mr. Foster. Thank you.

D'AMATO: May I ask you, do you still work at the White House?

TRIPP: I work for the Department of Defense at the Pentagon.

D'AMATO: First of all, let me say that we very much appreciate your cooperation, and if you have been placed in any inconvenience as a result of anybody putting out, I don't believe to date there's been any leaking of your depositions, we certainly are concerned about that.

D'AMATO: We certainly are concerned about that. I have been informed by staff that you have been most cooperative, both of you. And we deeply appreciate your cooperation and understand the sensitivity of this matter. Now, I'm going to ask the ranking member if he thinks we should begin or should we take a break now, given that the vote is supposedly going to start in five minutes. OK, we're going to take a break. We'll probably be back at about quarter after ten to resume. Mr. Chertoff will then put some questions to you. No trick questions, OK?

We stand in recess until the conclusion of the vote that's about to start.

GORHAM: It's simply based on recollections in, over the last two years.

CHAFFE: Putting aside the particular day, and I should tell you we have some independent evidence that the two of them were actually in the office on the 22nd, which would be the week of Mr. Foster's death, would you tell us what you recall of the occasion on which Mr. Nussbaum and Ms. Williams were in Mr. Foster's office?

GORHAM: Mr. Nussbaum had called me into Mr. Foster's office and asked me to state to him what was in, what were the file drawers, what were the file folders in the file drawer that contained the President's and First Lady's personal and financial documents.

CHAFFE: Was Mr. Nussbaum alone at that point?

GORHAM: He was not.

CHAFFE: Was Mr. Nussbaum alone at the point?

GORHAM: He was not.

CHAFFE: Who was with him?

GORHAM: Miss Maggie Williams.

CHAFFE: Where were they in the office when you were called in?

GORHAM: Mr. Nussbaum was seated at a club chair in front of Mr., in the front of Mr. Foster's desk. Miss Williams was standing on the other side of the table of the club chair in front of Mr. Foster's sofa.

CHAFFE: And would you tell us what you said to Mr. Nussbaum, and what happened?

GORHAM: I stated if I would, and walked around Mr. Foster's desk, and pulled open the drawer that contained the President's and First Lady's personal and financial documents.

CHAFFE: Where was that drawer?

GORHAM: If you were seated at Mr. Foster's desk, it was to the left, and there were four drawers and a cabinet and it was the farthest left at the top.
CHAFFE: When you pulled open the drawer, what did you see?

GORHAM: I saw Pendaflex folders and file folders. And I did not see a index that normally would have been there, listing the names of the files.

CHAFFE: What index are you referring to?

GORHAM: I maintained indexes for all file drawers that I recall. And listed the contents of the names of each of the folders in each drawer.

CHAFFE: And you say when you opened the drawer on that day, in

the presence of Mr. Nussbaum and Miss Williams that index was not where you normally kept it?

GORHAM: No, sir, it was not in that drawer.

CHAFFE: Did you see that index anywhere else that day?

GORHAM: No, sir.

CHAFFE: Now, after you had opened the drawer, what did you do?

GORHAM: I started to tell Mr. Nussbaum, read him the name of those file folders, at which time after the first few names to ask me to stop and stated to me that he would take care of that himself.

CHAFFE: And then what did you do?

GORHAM: I left the office of Mr. Foster's.

CHAFFE: Now, do you remember how long Mr. Nussbaum and Miss Williams remained in the office after you left?

GORHAM: I do not recall exactly how long it was?

CHAFFE: Was there a point that you were called back in by Mr. Nussbaum?

GORHAM: I don't believe so. That he would called me back in.

CHAFFE: And tell us what happened there?

GORHAM: I sat down at Mr. Foster's desk. And I opened his metal desk drawer and in there I found personal items such as checks that were written to Mr. Foster, and his life insurance policy.

CHAFFE: And, why did you do that?

GORHAM: I do not recall if, why I sat down at his desk an did that.

CHAFFE: At the point that you went back in to open up the middle desk drawer, was Ms. Williams still there with Mr. Nussbaum?

GORHAM: She was.

CHAFFE: What did you do after you opened the door?

GORHAM: I looked in, and then I closed it, and then left the office.

CHAFFE: Do you remember seeing during this period of time, either the first or second time you went into the office, a box or boxes in the offices?

GORHAM: I'm sorry, would you repeat the question?

CHAFFE: During either the first time you went in, or the second time you went in on this occasion, with Mr. Nussbaum and Ms. Williams, did you see a box, or boxes in the office?

GORHAM: Yes, sir, I did.

CHAFFE: And, did there come a point later that something happened with those boxes?

GORHAM: Yes, sir.

CHAFFE: Tell us about that.

GORHAM: Mr. Nussbaum asked me to have the boxes moved out of Mr. Foster's office, and I asked Mr. Tom Castleton if he would carry them.

CHAFFE: And who was Tom Castleton?

GORHAM: Mr. Castleton was a staff assistant in our office.

CHAFFE: Can you tell us what happened?

GORHAM: Mr. Castleton picked them and carried them out behind Miss Williams. And the last the that I saw of them, noticed them was in the door just outside of our suite.

CHAFFE: Did you know where the boxes were the boxes were going?

GORHAM: No, sir.

CHAFEE: At any point on that day, getting your attention back to this index you've described, did you access your computer and revise that index on that day?

TRIPP: I don't recall if I accessed my computer in any way. I do not recall, I do not recall looking at that index on the hard drive.

CHAFEE: Now, let me turn to you, Miss Tripp, for a moment. Were you around on the day that Maggie Williams, the chief of staff for the First Lady and Mr. Castleton took a box or boxes out of Mr. Foster's office?

TRIPP: I recall Tom Castleton removing a box.

CHAFEE: And, what do you recall about the circumstances of that?

TRIPP: My recollection is that the box or boxes were placed in front of Deb Gorham's desk. My next recollection is that Tom Castleton is physically carrying a box out of the safe.

CHAFEE: What was your understanding at that time of where the box or boxes were going?

TRIPP: Until I asked, I had no idea where they were going.

CHAFEE: Who did you ask?

TRIPP: I asked Deb Gorham and later Tom Castleton when he returned.

CHAFEE: And what did you learn?

TRIPP: That the boxes were going and had been delivered to the residence.

CHAFEE: That's the White House resident?

TRIPP: Yes, sir.

CHAFEE: I also, Miss Tripp, just to turn from you for a moment, and focusing your attention on . . .

(UNKNOWN): Mr. Chairman, can we ask how big a box are we talking about, bigger than a bread box, or a file cabinet? How many files are we talking about?

TRIPP: A box. I can't define the size of the box. It wasn't a two-man box. One person could easily carry the box.

CHAFEE: Were these files standing vertically? Were they lying down? Was the box 10 inches tall so that the files could be vertically, or was it three inches tall? How many documents, is what I'm after. I really don't care about the size of the box.

TRIPP: I don't know.

CHAFEE: Ms. Gorham, maybe you, do you remember how big the box was and what it was like?

GORHAM: To the best that I could recall the size of the boxes were the size of a small box that would hold approximately four or five reams of photocopy paper.

D'AMATO: OK, that's helpful. Thank you, I'm sorry to interrupt.

CHAFEE: Let me keep your attention focused on this same time period, Ms. Tripp, this two-day period between Mr. Foster's death and funeral. Do you remember Susan Thomases making calls to Bernard Nussbaum during that period of time?

TRIPP: I have a recollection of speaking with Susan Thomases during that time.

CHAFEE: What about the First Lady? Do you have a recollection of her having a telephone conversation with Mr. Nussbaum?

TRIPP: I don't have a clear recollection of the First Lady speaking to him during that timeframe.

CHAFEE: Do you have some kind of a recollection of it?

TRIPP: I know at one point, there was a telephone conversation between Mr. Nussbaum and Mrs. Clinton. I don't recall when that was.

CHAFEE: Do you recall that it occurred during this period of time in a day or two after Mr. Foster's death?

TRIPP: I thought so, yes.

CHAFEE: Do you remember what the subject of that conversation was, or did you ever learn the subject of that conversation between the First Lady and Mr. Nussbaum in the day or two after Mr. Foster's death?

TRIPP: No, sir, I would have had no reason to know that.

CHAFEE: Do you remember how long the conversation was?

TRIPP: No, sir, I don't.

CHAFEE: Now, Ms. Tripp, I also want to ask you in this period of time, do you recall an occasion you had a conversation with Ms. Gorham concerning something that was seen in the bottom of Mr. Foster's briefcase?

TRIPP: Yes, sir.

CHAFEE: Would you tell us what you recall about the circumstances of that conversation?

TRIPP: I am uncertain as to what day and what time this

conversation took place.

CHAFEE: When you say what day, you mean it could have either been the Wednesday or the Thursday following Mr. Foster's death?

TRIPP: To the best of my recollection, it was one of those two days, yes, sir.

CHAFEE: Tell us about the circumstances.

TRIPP: The conversation followed Deborah's return to the reception area suite after having been called into one of the two principal's offices, either...

CHAFEE: You said...I'm sorry, go ahead.

TRIPP: Either Mr. Nussbaum's or Mr. Foster's, I'm unclear as to it. When she returned, I asked her, had there been anything found, was there any indication as to why, a note anything. And she said, no. And I pursued it, and said did you look everywhere? Did you look in the briefcase? And she said, the briefcase was empty. There was nothing in there but a bunch of little yellow sticky notes.

CHAFEE: Now, you say this conversation occurred after Ms. Gorham came out of a meeting with, that either took place inside Mr. Nussbaum's office or inside Mr. Foster's office.

TRIPP: Yes, sir.

CHAFEE: Does the fact that the conversation you had with her had to do with searching for any note or searching for an indication of motivation help you to remember that it's likely this meeting occurred in Mr. Foster's office?

TRIPP: I just don't know, sir.

CHAFEE: You'd agree with me, at least, that there was no reason to search in Mr. Nussbaum's office for evidence of a note or anything of that sort. Correct?

TRIPP: Again, I don't know. I don't know what had transpired prior to that, whether something had perhaps been moved to Mr. Nussbaum's office. I had clearly no idea.

CHAFEE: But your recollection is in any event that after Ms. Gorham came out of this meeting, you initiated the questions about whether there had been a search for a note or some other kind of indication of why Mr. Foster killed himself?

TRIPP: Absolutely.

CHAFEE: And it was in connection with that that Ms. Gorham said to you, again, as precisely as you can recall, what about the briefcase?

TRIPP: I don't recall Deborah saying she looked in the briefcase. I recall her saying either it was empty or there is nothing in there, followed by, except for a bunch of little yellow sticky notes, she may have said, at the bottom. My understanding was there was nothing else but scattered little yellow sticky notes.

CHAFEE: Ms. Gorham, do you recall this conversation with Ms. Tripp?

GORHAM: No, I'm sorry, I do not.

CHAFEE: So, you can't, you can't help us anymore with this conversation?

GORHAM: No, I just don't recall the conversation.

CHAFEE: Let me now take you forward to Monday, which was Monday the 26th of July, which is the Monday of the following week. Ms. Gorham, do you remember in the afternoon on that day Mr. Neuwirth, who is one of the associate counsels to Mr. Nussbaum, coming out of Mr. Foster's office with a briefcase?

GORHAM: I recall Mr. Neuwirth coming out of Mr. Foster's office with a briefcase. I don't recall if it was in the afternoon or the morning.

CHAFEE: And where did he go with the briefcase?

GORHAM: He went into Mr. Nussbaum's office and slammed the door.

CHAFEE: And then tell us what you saw of the comings and goings thereafter.

GORHAM: To the best of my memory, Mr. Neuwirth came out and asked one of the assistants to find Mr. Nussbaum. Later, Mr. Nussbaum returned to the office, went into his office, slammed the door. A few minutes later, Mr. Nussbaum opened the door, exited, slammed the door, and walked down the hallway.

CHAFEE: And then what else happened?

GORHAM: And then, I believe Mr. Burton, Bill Burton, might have appeared next, going into Mr. Nussbaum's office. And then other people, I think, came in, straggling, but I don't recall who they

were.

CHAFEE: And was the office closed? Was the door to Mr. Nussbaum's office closed except when people were coming and going?

GORHAM: Yes, sir.

CHAFEE: Ms. Tripp, do you remember this occurrence on Monday?

TRIPP: I remember Steve Neuwirth opening the door, yes.

CHAFEE: And asking for somebody?

TRIPP: Yes, sir.

CHAFEE: And you remember Mr. Burton coming in?

TRIPP: I didn't have an independent recollection Mr. Burton coming back to our suite until I went over the E-mail traffic.

CHAFEE: And that refreshed your memory?

TRIPP: It did.

CHAFEE: Do you remember the First Lady coming into that, into Mr. Nussbaum's office during that same period?

TRIPP: Again, I did not have an independent recollection until I read the E-mail traffic.

CHAFEE: But now you do remember that?

TRIPP: Yes, sir.

CHAFEE: During that same period of coming and going, did you have a discussion with Mr. Clifford Sloan about something?

TRIPP: Actually, are you referring to that particular time period?

CHAFEE: Yes.

TRIPP: No, sir.

CHAFEE: How about later that day?

TRIPP: Later that evening I did.

CHAFEE: Tell us about that.

TRIPP: It was later in the evening. I was in the reception area. The door to Bernie's office was closed. At one point in time, Cliff Sloan came out of Bernie's office and asked me if it was possible to remove one of the typewriters to bring back into Bernie's office.

CHAFEE: And what did you say?

TRIPP: I asked him why it was necessary to try to do that when we had five computers in the outer office.

CHAFEE: And what did he say?

TRIPP: That he wanted the typewriter.

CHAFEE: And so what happened?

TRIPP: Well, we had two typewriters, and I explained to him that the way they were configured and plugged in under all the massive furniture with taping to the carpet and the co-mingling of all the various cable underneath, that it would be a very difficult endeavor, and that I offered to get him a typewriter, excuse me, from elsewhere.

CHAFEE: And what did he say?

TRIPP: He indicated he, that was not something he chose for me to do at that point, and he went back in the office.

CHAFEE: Went back into Mr. Nussbaum's office?

TRIPP: Yes, sir.

CHAFEE: And he closed the door.

TRIPP: He did.

CHAFEE: At that point, was Mr. Nussbaum, were Mr. Nussbaum and Mr. Neuwirth still in Mr. Nussbaum's office?

TRIPP: It was my understanding that those are two others in the office.

CHAFEE: And you're quite sure it was Mr. Sloan who came out that evening and not Mr. Neuwirth?

TRIPP: To the best of my recollection, it was Mr. Sloan.

CHAFEE: Now, I also want to keep your attention, Ms. Gorham, focussed on the same afternoon or evening. After the, you had observed the briefcase being taken out of Mr. Foster's office and the

various comings and goings, did there come a time that Mr. Nussbaum had asked you to come into his office, either later that day or early the next morning?

GORHAM: Yes.

CHAFEE: Would you tell us about that.

GORHAM: Mr. Bernie, Mr. Nussbaum asked me to sit at the chair on the opposite side of his table and asked me if I had seen anything in the bottom of Vince's briefcase. And I told him that I had only seen the color yellow and I had seen the top of a gold kraft third-cut folder, and that is all I had seen.

CHAFEE: Now when you say a gold kraft third-cut folder, you mean a folder like this, a manila type folder?

GORHAM: Yes, sir.

CHAFEE: And you told Mr. Nussbaum you had seen that in Mr. Foster's briefcase at an earlier time?

MORE

SENATOR ALFONSE D'AMATO
Chairman
Special Senate Whitewater Committee
Washington, D.C.
1995 WL 455181 (F.D.C.H.)
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Citation
141 Cong.Rec. S6771-02
1995 WL 298394 (Cong.Rec.)
(Cite as: 141 Cong. Rec. S6771-02)

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Congressional Record --- Senate
Proceedings and Debates of the 104th Congress, First Session
Wednesday, May 17, 1995

***S6771** ESTABLISHING A SPECIAL COMMITTEE TO INVESTIGATE WHITEWATER DEVELOPMENT CORP. AND OTHER MATTERS

Mr. D'AMATO.

Mr. President, I send the resolution to the desk on behalf of myself and Senator DOLE-and I know others would like to join-and I ask for its immediate consideration.

The PRESIDING OFFICER.

The clerk will report.

The bill clerk read as follows:

A resolution (S. Res. 120) establishing a special committee administered by the Committee on Banking, Housing, and Urban Affairs to conduct an investigation involving Whitewater Development Corp., **Madison Guaranty** Savings & Loan Association, Capital Management Services, Inc., the Arkansas Development Finance authority, and other related matters.

The PRESIDING OFFICER.

Is there objection to the immediate consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution.

Mr. D'AMATO.

Mr. President, Whitewater is a very serious matter. Some questions raised by Whitewater go to the very heart of our democratic system of government. We must determine whether the public trust has been abused. We must ascertain whether purely private interests have been placed above the public trust. The American people have a right to know the full facts about Whitewater and related matters.

After the Banking Committee's hearings last year, many important questions still remain. The American people have a right and a need to know the answers to these questions.

Congress has the responsibility to serve as the public's watchdog. We would be derelict in our duties if we did not pursue these Whitewater questions. The Senate must proceed in an evenhanded, impartial, and thorough manner. We have a constitutional responsibility to resolve these issues.

Mr. President, we now bring before the Senate a resolution that authorizes a special committee administered by the Banking Committee to continue the Whitewater inquiry that was started but not completed during the last Congress.

I thank my distinguished colleague, Senator SARBANES, for his hard work and cooperation in the preparation of this resolution. We have jointly prepared a resolution that is balanced and fair and that will allow the special committee to search for the truth. I am confident that Senator SARBANES and I will continue the Banking Committee's bipartisan approach to the Whitewater matter.

Mr. President, our pursuit of these questions must be and will be fair, straightforward, and responsible. The American people expect and deserve a thorough inquiry committed to the pursuit of truth. That is the American way.

Last summer, the Banking Committee met these vigorous requirements. Our

examination of the Whitewater matter was impartial, balanced, and thorough. That is our goal in this Congress. I am confident that we will meet these goals.

During last summer's hearings, many facts were uncovered. We learned that certain top administration officials were not fully candid and forthcoming with the Congress. That is an undisputed fact. The public has a right to expect more from those in positions of trust. We also learned that senior Treasury Department and Clinton White House officials mishandled confidential law enforcement information concerning **Madison Guaranty.** That is another undisputed fact. Madison is now defunct; it is a defunct S&L at the heart of the Whitewater matter. The failure of this Arkansas S&L eventually cost American taxpayers more than $47 million.

Mr. President, the American people have a right to know the answers to ***S6772** many serious questions still remaining about Whitewater and related matters. We have a constitutional obligation to seek the answers to these questions. That is why I am offering this resolution today.

Now I will briefly outline some of the matters that this resolution authorizes the special committee to investigate. We will begin with the handling of the papers in deputy White House counsel Vince Foster's office following his death. Who searched Mr. Foster's office on the night of his death? What were they looking for? What happened to Mr. Foster's papers? Were any papers lost or destroyed? And who authorized the transfer of Mr. Foster's Whitewater file to a closet in the First Family's residence? The public has a right to the answers to these questions.

Mr. President, this resolution encourages the special committee to coordinate its activities with those of the **independent counsel,** Kenneth Starr. Senator SARBANES and I have met with the **independent counsel.** Judge Starr has indicated to us that he has no objection to the special committee's plan to inquire into the handling of Mr. Foster's papers. Senator SARBANES and I are committed to coordinating the committee's activities with those of the special counsel.

This resolution authorizes the special committee to pursue answers to other questions raised during the Banking Committee's hearings last year.

We will explore the scope and impact of the improper dissemination of confidential law enforcement information concerning **Madison Guaranty.** How widely did the Clinton administration officials communicate this confidential information? Did any high-ranking officials inform targets of criminal investigations? If so, did this impact any ongoing investigations? The public has a right to know the answers to these questions.

The special committee will also examine whether there were any improper contacts between the Clinton White House and the Justice Department regarding **Madison Guaranty.**

We know that Paula Casey, the U.S. attorney in Little Rock, declined to pursue criminal referrals involving Madison. That is an undisputed fact. We also know that Webster Hubbell, who has pleaded guilty to mail fraud and tax evasion, was the No. 3 official at the Justice Department at this critical time. This is another undisputed fact.

The committee will ascertain whether Mr. Hubbell contacted Paula Casey about Madison. And who else, if anyone, knew about these contacts with the U.S. attorney. The public has the right to know.

Mr. President, this resolution authorizes the special committee to explore whether the Resolution Trust Corporation and other officials in Washington tried to interfere improperly with RTC staff in Kansas City responsible for investigating wrongdoing at Madison. If such interference occurred, who authorized it, and why? The public deserves answers to these questions.

During last summer's hearings, the Banking Committee learned that the Treasury inspector general furnished the Clinton White House, at the White House counsel's request, transcripts of the inspector general's depositions. That is an undisputed fact.

The committee will now look into whether these deposition transcripts were used to coach administration witnesses before they appeared in front of the committee. That would be wrong. The public has a right to know if it happened.

All of these matters that I have discussed so far involve events that occurred after January 1993 when President Clinton took office. There are also serious questions regarding events that occurred in Arkansas in the 1980's when President Clinton was Governor. This resolution also authorizes the special committee to examine these matters. Some of these Arkansas matters are complex and will require the committee's close review of many thousands of pages of documents.

We will review the operations and regulations of **Madison Guaranty.** Did James McDougal, Madison's chairman and Governor Clinton's business partner, improperly divert Madison's funds to himself and others? Did any of this money find its way into the White House real estate project in which McDougal and Governor Clinton were partners? Did McDougal misuse Madison funds to cover any losses the First Family suffered on their Whitewater investment? The public has a right to know the answers to these questions.

Mr. President, the resolution further authorizes the special committee to examine the Rose law firm's representation of both Madison and RTC, and senior partners at the Rose law firm, including Larry Rodham Clinton, Webster Hubbell, and Vince Foster. The committee must ascertain whether the Rose law firm properly handled the RTC civil claims concerning Madison.

Did the firm have a conflict of interest, and did American taxpayers lose money in the process?

We will also examine Capital Management Services and its president, David Hale, a former Arkansas judge and Clinton appointee. Hale has publicly charged that the President pressured him to make Small Business Administration loans that were used to prop up Madison.

Did this happen? Did Hale also make improper Small Business Administration loans to current Arkansas Gov. Jim Guy Tucker?

Then there is the matter of the financing of the 1990 Arkansas gubernatorial campaign. We now know that the president of the Perry County Bank, Neal Ainley, has pleaded guilty to violating Federal laws in connection with the handling of certain large cash transactions for the Clinton campaign. Ainley claims he did so at the direction of campaign officials. The public has a right to know who authorized this activity and why.

Mr. President, this resolution will authorize the special committee to examine these and related matters. We will take every reasonable step to complete this inquiry promptly. We hope that the administration cooperates with us in this regard. But we also intend to be thorough and comprehensive.

This resolution provides $950,000 to fund the special committee through

February 29, 1996. If additional money is needed, the special committee will make a recommendation not later than January 15, 1996, and the majority and minority will meet to determine the time for any vote.

Mr. President, we expect to hold public hearings into the handling of the papers of Vince Foster's office in late June or early July. We will continue our inquiry by subject matter until it is completed. In doing so, we will make every effort not to interfere with the **independent counsel's** criminal investigation.

Mr. President, the American people deserve to know the full facts about Whitewater and related matters. As I said at the outset, we will conduct this inquiry in a fair, evenhanded, and impartial manner.

That is what the American people want, expect, and deserve. I urge the approval of this resolution.

I see that my distinguished colleague and ranking member, Senator SARBANES, is here. We have allocated up to 2 hours, equally divided.

I yield the floor.

Mr. SARBANES.

Mr. President, may I ask what the time situation is?

The PRESIDING OFFICER (Mrs. HUTCHISON).

There are 2 hours, of which 15 minutes has already been used.

Mr. SARBANES.

There is an hour now remaining on this side?

The PRESIDING OFFICER.

That is correct.

Mr. SARBANES.

I thank the Chair.

Madam President, it is not my intention to use the entire hour. I hope at some point both sides might be able to yield back time and proceed to final consideration of the resolution.

Let me say at the outset that the resolution we are considering today, which authorizes a special committee to be administered by the Committee on Banking, Housing, and Urban Affairs, is really a carrying out of resolutions that were adopted last year by this body. I think it is important to consider this resolution in the context of those resolutions-actions taken by the Senate last year.

On March 17, 1994, a little over a year ago, the Senate adopted a resolution by a vote of 98-0 expressing the sense of the Senate that hearings should be held on all matters relating to Madison, to Whitewater, and to Capital Management.

Then, to carry out that resolution, at least in part, on June 21 of last year, ***S6773** the Senate agreed to Senate Resolution 229, which authorized hearings to be held into certain areas. Those hearings were done last summer. We had 6 days of public hearings. We had extensive analysis of documents that were provided to the inquiry committee in order to enable it to carry out its responsibilities.

Now, one of the things that was authorized to be looked into by the June 21 resolution was the handling of the Foster documents. That was later deferred, in response to a request from the **independent counsel** who contacted the committee and indicated that, given the nature of his inquiry, it would be preferable if the Committee did not go ahead with that hearing. Accordingly, we

held off.

Now the distinguished chairman has indicated that it would be the first item which will be considered in the hearings that will now take place under the resolution we are considering here today.

So this resolution is in effect a continuation of our earlier work. It authorizes the completion of work specified in last year's resolution, as well as matters developed during and arising out of the hearings that were held last summer, and also a number of matters my colleague has enumerated that carry forth on the sense-of-the-Senate commitment last year to investigate all matters pertaining to Madison.

I want to go through some other aspects of this resolution, just to lay them out on the record. The chairman of the Banking Committee, Senator D'AMATO, has gone through a number of matters that have been provided for in this resolution to be examined by the special committee. The special committee, administered by the Banking Committee, shall consist of all of the members of the Banking Committee plus two members added from the Judiciary Committee. The chairman and ranking members of the Committee on the Judiciary, or their designees, will join with the members of the Banking Committee to constitute the special committee which will be administered by the Banking Committee. So it is essentially-or primarily, let me say-a Banking Committee activity, since most of the areas to be examined clearly fall under the jurisdiction of the Banking Committee. But we did add from the Judiciary Committee last year. A member came on in order to help carry out the inquiry. And there are some matters that are contained in the resolution, to be examined that, it could well be argued, are under the jurisdiction of the Judiciary Committee. So, to bring that together, we are bringing on two members from the Judiciary Committee, the chairman and ranking member or their designees. They will be designating someone else to handle this responsibility if they choose to do so, and I do not know at this point what Chairman HATCH and ranking member BIDEN intend to do in that regard. But obviously we will abide by their decision.

We have also provided in the resolution which is now before us, and which shortly will be adopted, for rules and procedures of this committee which essentially will be the rules and procedures of the Senate, the Standing Rules of the Senate, and the rules of procedure of the Committee on Banking, Housing, and Urban Affairs. That is, in effect, the rules framework, procedural framework within which we will operate. There are in the resolution sections that cover aspects of the process that the special committee will follow; these are matters it was deemed important that we spell out in the resolution how they were going to be dealt with. Those involve questions of subpoena powers, questions of how the hearings will be conducted-important questions about immunity. I want to underscore that because that is a matter we have had to address before.

We provide that to grant a witness immunity-I want to read this section because it is an important matter. The special committee has the power: "To grant a witness immunity under section 6002 and 6005" of title 18, United States Code, "provided that the **independent counsel** has not informed the special committee in writing that immunizing the witness would interfere with the ability of the **independent counsel** successfully to prosecute criminal violations."

We also provide for staffing of the committee. There is power to appoint

special committee staff including consultants, assistance from the Senate legal counsel, assistance from the Comptroller General. There is a provision whereby the committee can draw on other Government agencies, Government personnel, and on other congressional staff. And we hope, through a combination of all of these sources, that we will have an adequate staff to carry out a proper inquiry and investigation.

There is also, of course, special provision for the protection of confidential information, since we will be interacting with the **independent counsel** and others and we think it is important to have such provisions.

Finally, the money asked for in this resolution, just under $1 million, $950,000, is to cover the salaries and other expenses of the special committee carrying out this inquiry, beginning on the date of the adoption of this resolution-I assume today-and ending February 29, 1996.

If it is judged that additional money is needed, that the inquiry needs to go forward and additional money is required in order to fund it, the special committee will recommend that. Of course there will have to be a further vote for the providing of additional moneys to the special committee.

Mr. President, let me just make a couple of further, more general observations. I have very quickly gone through the resolution and I think most of it is straightforward. I think Members of the Senate upon reviewing it will conclude that is the case. Many of the provisions are what one might call boilerplate for such an inquiry, and track previous provisions that have been used in various Senate resolutions establishing committees to carry out inquiries or investigations of the sort that is being authorized here.

I listened to the chairman with great interest and I was particularly encouraged by his very strong statement of the need to conduct impartial, balanced and thorough hearings, which is exactly what I think needs to be done. There are a lot of allegations that are swirling around and there are a lot of questions that are being raised. We see them from time to time raised in the press and in the media. And, of course, one could sit around all day long and conjure up one question after another. It is not difficult, it is very easy. It is not difficult just simply to say, "Well, suppose this happened or suppose that happened; or if this or if that." Of course, one of the purposes of these hearings is to get a good, tough-minded examination of these various allegations to see if there is anything to them. It needs to be appreciated, that it is very easy to make the allegations. Whether the allegations are in fact substantiated by the facts is a tougher question to determine, and that does require an impartial, balanced and thorough hearing. In fact, the President himself has said the best way to address these matters is to look at the facts candidly, and that is what I very much hope and expect that this committee will be able to do.

I do think last summer we conducted hearings that were perceived by all as being thorough and fair and impartial. We went at it, in effect, to find out what the facts were, to ascertain the truth. I think we pressed that issue in a resolute manner, and I would expect the special committee will do so in the case that is-in the instance that is before us.

These hearings will make an effort to get the facts out fully and impartially. We anticipate that the administration will cooperate with this effort. They certainly have indicated that is what they intend to do. Last year they made every document available that was requested, as I recall. I think I

am correct in that statement. Now the time has come to move forward, to begin our hearings, to begin, in effect, to examine these various questions and allegations and ascertain with respect to each of them whether there is any factual grounding behind them or whether they simply raise questions that people can ask. And that, of course, is the purpose of the inquiry which we will be undertaking here with this provision of $950,000 to carry out this investigation in the period between now and February 29. The resolution provides that the special committee shall make every reasonable effort to complete, ***S6774** not later than February 1, 1996, the investigation, study, and hearings authorized by section 1.

This resolution does provide the basis for carrying out a full and proper, impartial, and balanced hearing.

I think our challenge now is to move ahead in carrying out our responsibilities in the special committee. It is a heavy burden to add to the responsibilities that Members already have but is one that obviously we are charged with responding to.

As I said, we adopted resolutions last year addressing this matter. This, in effect, carries forward on those resolutions. It is a continuation, in effect, of that work. But I hope that if we apply ourselves to it over the coming months, we will be able to work through all of these matters and, in effect, bring this issue to closure in the sense that the Members of the Senate and the American people know that the various questions have been raised and thoroughly examined, that it has been done with a great deal of balance and fairness and impartiality, and that these are what the facts are as a consequence of that investigation and inquiry.

Madam President, I yield the floor.

Madam President, I suggest the absence of a quorum. Will time be equally charged?

The PRESIDING OFFICER.

Only by unanimous consent.

Mr. SARBANES.

I ask unanimous consent to put in a quorum call and that the time be equally charged to both sides.

The PRESIDING OFFICER.

Is there objection? Hearing none, it is so ordered. The time will be charged to both sides equally.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FAIRCLOTH.

Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER.

Without objection, it is so ordered.

Mr. FAIRCLOTH addressed the Chair.

The PRESIDING OFFICER.

Who yields time to the Senator from North Carolina?

Mr. D'AMATO.

I yield to the Senator from North Carolina whatever time he needs, Madam President.

The PRESIDING OFFICER.

(Cite as: 141 Cong. Rec. S6771-02, *S6774)

The Senator from North Carolina is recognized.

Mr. FAIRCLOTH.

Madam President, I want to begin my remarks by saying that I plan to enthusiastically support the Whitewater resolution.

I think it is a good resolution. I am concerned, however, that a few key things have been left out of it. Nevertheless, I think that before the hearings are over, we will wind up working them in.

Nothing in this resolution allows us to probe the circumstances surrounding the death of Vince Foster. When we held the hearings last year in the Senate, a key witness, Captain Hume, simply did not show up at the hearings the day he was supposed to be there. The hearings had been planned for months. Captain Hume was out of town that day. He was supposed to be there. Our ranking member at the time demanded that they bring him back for several days. But they did not bring him back. The hearings adjourned and we never heard from him. I do not think this was a thorough airing of the issues, and I think we need to do it again.

I understand that Mr. Starr is looking at this again. I hope that he will, given the miserable job that Mr. Fiske did of investigating.

Madam President, the Congress also needs to probe the $100,000 profit in the commodities market that came to Mrs. Clinton courtesy of Red Bond and Jim Blair, the general counsel of Tyson Foods. This is not mentioned in the resolution, and it should be.

Just recently, I discovered that a friend of the Clintons, Barbara Holum, was conveniently installed as acting head of the CFTC before the story of Mrs. Clinton's commodity trades broke.

There are many confusing issues. Now we find that Red Bond, who did the commodity trading, who is practically bankrupt, was able to pay off $7 million in back taxes just 2 months before the commodity trading story became public. To me, the evidence on this is just too much to believe that all of this is a coincidence.

Madam President, this resolution does not allow us to probe the failure of First American Savings & Loan in Illinois.

If you can believe this, Vince Foster and Mrs. Clinton were hired by the Federal Government to sue Dan Lasater. The same Dan Lasater that was a close friend of the Clintons. That is right, Mrs. Clinton was hired by the Federal Government to sue Dan Lasater in connection with the failure of First American Savings & Loan in Illinois. Mrs. Clinton participated in the decision to lower the amount of money the Government would recover from Dan Lasater from $3.3 million to $200,000, and we do not know yet what percentage of that went to her as attorney's fee because the records were sealed.

The Government spent over $100 billion to resolve the savings and loan crisis. With crooks like Dan Lasater involved and with Mrs. Clinton acting on behalf of the taxpayers, suing a friend, it is no wonder the cost was so high.

I want to again state my strong support-and I say this not necessarily in the language as we often use in the Senate-but of my good friend, fellow member of the Banking Committee and our chairman, ALFONSE D'AMATO. He truly is a good friend, and he has given us the leadership we need.

I hope, and I know that before this hearing is over, under his leadership, we will have probed all aspects of Whitewater in a fair manner so that the American people understand what happened, when it happened, and who knew it

when it happened. I look forward to the hearings.
Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER.
The Senator from New York is recognized.
Mr. D'AMATO.
Madam President, I know of my good friend, Senator FAIRCLOTH's concern that there be ample scope to look into all of the matters that are relevant, and I share that concern. I think that this resolution very fairly embodies us with the authority-and I would refer to page 4.
As my friend raises, we did not attempt to spell out every single area. Page 4, line 12, says:
Subsection 3. To conduct an investigation and public hearings into and study all matters that have any tendency to reveal the full facts about . . .
Then we go through all of the various areas. There are other Senators who are going to speak, but I believe it is important to summarize those areas. Senator SARBANES has. The fact is that we include the ability to look into the bond underwriting contracts between the Arkansas Development Finance Authority and Lasater & Co., and all of those activities to which my friend has referred. But there must be a connection, and if there is a connection, well, then, we will look into the area, and I will touch on these areas in more detail before our time is up.
So I share my friend's concern. This will be thorough. It will be thoughtful. And when subpoenas are issued-and I must tell you that the specific instance that he raises is troubling, that of a witness who failed to respond to a subpoena, especially one who works for the Government, who was given notice, and who gave the committee, either the majority or the minority or our staff, no reason to believe that he would not be there. That will not be tolerated. If we run into a situation like that, I can assure you, and I know that the ranking member shares this same concern, we want people to respond to subpoenas. We will not issue them frivolously.
I think in that case a subpoena might not have even been issued because we assumed that he was going to be there. So it is not a bad track record to have almost everybody respond, including even those who were not subpoenaed. But, we will remain vigilant in seeking this kind of cooperation.
I see that Senator BOND is in the Chamber, and he is on the Banking Committee and was an integral part of last year's hearings, and I yield to him 10 minutes from my time.
The PRESIDING OFFICER.
The Senator from Missouri is recognized.
Mr. BOND.
Madam President, I thank my good friend, my colleague from New York.
Madam President, as we begin the debate on this resolution authorizing a second round of Whitewater hearings, I thought it would be helpful to review why the Senate and the committee need these issues to be aired.
***S6775** I wish to summarize for my colleagues some points that are particularly important to me and have come from my experience with the first round of hearings and also with the hearing back in February where we asked the questions that began some of the process in finding out what has gone on in the administration.

As most of the Nation now knows, **Madison Guaranty** was a Little Rock savings and loan which went belly-up at the cost of nearly $50 million, and was owned by James McDougal-the business partner of the Clintons' in the Whitewater real estate deal.

Madison Guaranty was the classic S&L story of insider dealing, reckless loan policies and ultimate failure with the U.S. taxpayers picking up the tab. It is a part of the $105 billion cost of the S&L debacle, and in that way is a story repeated in many communities around the country.

But one part of this case has made it famous-many of its borrowers, directors, and counsel were prominent figures in Arkansas politics and government.

The tangled web of Madison, Jim McDougal, and the Clintons has led to two sets of criminal referrals, an ongoing civil liability investigation by the RTC, a potential conflict of interest case for the First Lady's former law firm, a conviction of a Little Rock judge who improperly loaned SBA money to McDougal and Whitewater, several other recent guilty plea agreements and an ongoing investigation by **independent counsel** Starr.

Since these issues first came to light, I have said over and over that the American people have a right to know what happened to the millions of dollars lost, and we, in Congress, must fulfill our obligation and get the facts out into the open.

Last year the Senate was engaged in a lengthy struggle over what questions and areas the Banking Committee would be allowed to address as Whitewater-Madison hearings begin. Unfortunately, the Democratic leadership at that time did everything in their power to limit the scope of the hearings, and to block our efforts to get at the truth-particularly as it relates to what Clinton administration officials have done to control or interfere with investigations.

The questions we asked last year remain as relevant today as they did last May:

Did Whitewater Development Corp. benefit from taxpayers insuring of **Madison Guaranty** deposits?

Did any of Madison's federally insured funds go to benefit the Clinton campaigns?

Were the bank regulatory agencies operating in an impartial and independent manner as they handled **Madison Guaranty?**

How did the Resolution Trust Corporation handle the criminal referrals on Madison-both under the Bush administration as well as the Clinton administration?

How did the Resolution Trust Corporation and the FDIC handle potential civil claims against Madison-both under the Bush administration as well as the Clinton administration?

How did the Department of Justice handle the RTC criminal referrals it received, again both under the Bush administration and the Clinton administration?

What were the sources of funding and lending practices of Capital Management Services, and how did the SBA regulate and supervise it, particularly as it related to loans to Susan McDougal and her company, Master Marketing.

Full hearings on the Whitewater-Madison affair are needed so that all these questions can be fairly asked and answered. What happened in Arkansas, what happened in the 1992 Clinton campaign in their efforts to keep the lid on about

the actions in Arkansas, and what has the administration done to manage the Madison-Whitewater issues since they took office.

If we are to finally get to the bottom of the story as to what happened with the criminal referrals, I believe that we need to start with the first criminal referral on **Madison Guaranty** which was already in the Justice Department awaiting action when the Clinton administration took office.

Remember, **Madison Guaranty** had failed in 1989 and had been first taken over by the FDIC, and then in August 1989 when Congress passed the S&L bailout bill the newly created RTC took over Madison.

The RTC's mission was to close down failed thrifts, sell the assets, pay off the depositors and then seek out criminal or civil wrongdoing that may have occurred. If they found criminal wrongdoing-fraud, or attempts to enrich, they referred their findings to the Department of Justice for further action.

If they found civil wrongdoing-for example, law firms or accounting firms who helped institutions stay open by providing misleading, incomplete or incorrect information to regulators or the S&L's board members-the RTC would pursue those cases.

Thus from August 1989 the RTC had **Madison Guaranty** on its plate. No action was taken by the RTC on potential civil claims, but several criminal referrals were developed. In one case Jim McDougal and two others were accused of fraud, but were acquitted, in another case a board member plead guilty to falsifying documents.

Then came March 1992 when the New York Times reported a series of potential misdealings in **Madison Guaranty** and spurred the RTC to take another look at the institution. This second look caused the first criminal referral to be sent to Justice in the fall of 1992, and it was this referral which awaited final action when the Clinton administration came into office in January 1993.

I give this brief history in order to put things into perspective. Last year, Senator SPECTER and I offered amendments to the Whitewater Committee resolution which would have allowed the Banking Committee to pick up story at this point, and follow the trail of the first referral as it made its way through the Government, and then to follow the trail of the second referral as it was developed throughout 1993, up to and including the improper contacts by Treasury officials with White House staff. This of course would entail questioning the RTC officials involved, Justice Department officials involved, as well as Treasury and White House staff.

Because we must remember that on the day that the Clinton administration officials walked in the door on January 21, 1993, a criminal referral on **Madison Guaranty** was sitting in the Department of Justice.

I for one still want to know:

How did the Department of Justice handle this referral?

Was the White House informed and if so when and by whom?

Who in Justice was assigned to monitor the Madison case, and what actions did they take?

And then, as we know now, just months after taking office, a second set of referrals was being developed-and it too was sent off to the Clinton Justice Department by RTC officials in Kansas City.

I want to know why the RTC decided to stay on the case. What happened to get a series of RTC officials reassigned and taken off the case? Is there a pattern of special treatment for politically sensitive cases? And again, how did the

Department of Justice handle the second referral?

I want to know why did the Clinton appointed Little Rock U.S. attorney Paula Casey, along with Webb Hubbell, delay their recusals until after the decision not to prosecute Madison was made? I also want to know the details about Paula Casey and Webb Hubbell's phone contacts during the period when Casey was deciding what to do with the referrals, and did either one of them have any contact with the White House on the referrals at any time?

And now, just in the past weeks we have seen reported by the Associated Press that:

Preparing for televised Whitewater hearings last summer, White House attorneys consulted confidential depositions from a Treasury investigation in an effort to reconcile differing accounts of administration officials who were about to testify.

Former White House counsel Lloyd Cutler acknowledged this week that the depositions were used to identify discrepancies in the recollections of presidential aides before the congressional hearings.

White House lawyers would then "confront" the aides with information they had obtained from the depositions without revealing the sources, he told The Associated Press.

"If we found inconsistencies, we would go back to White House officials, and go back over testimony they gave us," Cutler explained. "and then we would say 'we have heard other reports."'

***S6776** This of course brings into play several other issues which I have been following since the close of the hearings last August. As we know now, confidential information was again turned over by Treasury to the White House-this time under the guise of a Treasury Department inspector general's investigation.

This calls into question not only the independence of the IG, but also the willingness of this administration to politicize what is supposed to be an internal watchdog.

It also calls into question the entire testimony offered by White House officials before the Senate Banking Committee-as they were given another heads up in order to best tailor their testimony to help the boss.

Last November I wrote to then Chairman Riegle and ranking member D'AMATO about what I had discovered. In my letter I stated:

As you know, over these past several months I have continued my efforts to resolve outstanding questions which were raised during the Banking Committee's Whitewater hearings. Initially I became concerned upon discovering during our hearings that the Treasury Inspector General had turned over to the White House-at Lloyd Cutler's specific request-transcripts of all the testimony taken by the investigators a full week before the Office of Government Ethics (OGE) report was made public. At the time we learned this, several former Inspectors General expressed amazement at this unprecedented action. However, no further review of the incident was undertaken.

During my investigation of this disclosure, I discovered that not only were the documents released to the White House at the specific request of White House Counsel Lloyd Cutler, but, in doing so, the Treasury turned over confidential RTC information to the White House.

On Saturday, July 23, 1994, the Department of the Treasury gave the White House all of the sworn depositions of Treasury, White House, and RTC personnel.

These depositions were unedited.

According to the RTC, it was not until July 26 or 27 that the RTC became aware of the fact that RTC depositions had been provided to the White House.

July 26, after reviewing the information provided by the Treasury I.G., Lloyd Cutler testified before the House Banking Committee.

July 28 and 29, Counsel to the RTC Inspector General Patricia Black redacted all the Treasury, RTC, and White House depositions in order to remove confidential RTC information.

July 31 the OGE report, with edited testimony, was provided to Congress and subsequently made public.

Given that the focus of our hearings this past August was the improper transmittal of confidential information from the RTC to the White House regarding **Madison Guaranty** and the Clintons, I must tell you I am appalled that the same Treasury Department, acting under specific direction from Secretary Bentsen, would again provide nonpublic information about the **Madison Guaranty** case directly to the White House.

In addition, I found it extraordinary that the White House, which was itself under investigation, would be given nonpublic information prior to Congressional hearings-particularly when Congress itself was not given the information.

And now of course we have discovered that Mr. Cutler and others used this information not only to assist in the drafting of Mr. Cutler's testimony-but to help White House staff with the inconsistencies in their own stories.

I find this entire episode just another example of the extraordinary lengths the White House was willing to go to keep the facts from Congress, keep the facts from the American people, and ultimately to protect the administration.

As I have said on this floor before, breaching the public trust is as serious an offense as committing a crime, or being found liable for financial penalties. Governments in free societies have a fundamental pact with the governed. In exchange for the powers and responsibilities which is given the Government, the people expect fairness, evenhanded justice, impartiality, and they held the innate belief that those in power can be trusted to be good stewards of their power.

Our form of democracy relies on checks and balances to keep too much power from ending up in just one place-and Congress, as the people's closest link to their Government has the responsibility to keep a sharp eye out for abuses and breaches of the people's trust.

Thus every Member of Congress takes an oath of office, to uphold the Constitution-and certainly part of that duty to be ever watchful for abuses of power. Interestingly, and not surprisingly, it nearly always falls to the party out of power to be the more diligent in watching out for abuses.

No one disputes this.

But one other fact should also be noted. As important it is for the general public to believe in and trust that their elected leaders are performing their jobs in an ethical, truthful, and fair manner-we, in Congress, must also believe that those in high positions of responsibility are telling us the truth. When we ask questions or make inquiries we must trust that administrations will tell the truth, will be honest, and that when we get an answer, it is a full and complete one.

Unfortunately, Madam President, it is this standard that inevitably some

administration officials seem unable to comprehend.

Instead of cooperation and truthfulness we have seen evasions, omissions, misstatements, and possibly outright lies.

And the story of potential abuse of the public trust, the politicization of independent agencies and investigations, the use of confidential material for political gain-it only seems to get worse the deeper you look.

Madam President, the next rounds of hearings will go a long way toward clearing the air, and I commend the chairman of the Banking Committee for brining this matter back into the public eye.

I reserve the remainder of my time and I yield the floor.

Mr. DODD addressed the Chair.

The PRESIDING OFFICER.

Who yields time?

Mr. SARBANES.

Madam President, I yield 5 minutes to the distinguished Senator from Connecticut.

The PRESIDING OFFICER.

The Senator from Connecticut is recognized for 5 minutes.

Mr. DODD.

Thank you, Madam President, and I thank my colleague from Maryland.

Madam President, let me begin these brief remarks by commending our colleagues from New York and Maryland for what I think is a very fair and balanced resolution. Obviously, matters such as this are a source of deep controversy and can get out of hand. The fact that they have presented us with a resolution that is balanced and fair is a credit to both the Senator from Maryland and the Senator from New York. Any discussion of this ought to begin with an expression of appreciation on the part of all of us in this body, particularly those of us who will serve on the special committee and who will be working during this calendar year to carry out the mandates and requirements of this resolution. Now I would like to make a few brief observations about the resolution.

As my colleagues know, Madam President, there was a vote by 98 to 0 on March 17 of last year to look into these matters, and what we are talking about here is a continuation of that process. This resolution is simply another step in a process designed to help the American public know the facts about Whitewater.

Second, I would like to point out, Madam President, that the President has fully cooperated in this process. We ought to commend him for this unprecedented level of cooperation.

Many of us recall other Presidents who, when confronted with similar situations, have clogged up the courts of this land, fighting everything along the way. This administration has not done that. In fact, the administration has been entirely forthcoming.

As we discuss these matters, it is important to make it clear that, unlike previous situations where there was a constant conflict between the executive branch and the legislative branch over documents and testimony, that has not been the case here. The administration has complied with every document request, answered every question that has been submitted to it, and I am confident is ready and willing to cooperate in this second stage of the proceeding.

I think that is an important point to make because, as we look down the road, there is the potential for a prolonged and nasty conflict between the executive and legislative branch.

Third, Madam President, I think last year's hearings, despite moments of passion and emotion, were credible and fair. I think it is important to point out and to state emphatically that it was the conclusion of the committee ***S6777** last year that there had been no violation of criminal statutes or ethical standards.

Of course, individual Members may have their own particular opinions on those matters, and certainly that is their right. But, as a conclusion of the committee, let me restate, Madam President, there were no violations of any criminal statute or any ethical standards. That was the conclusion of last year's hearings.

Now we are going to go to a second phase. I have listened to some who are suggesting that there must have been some wrongdoing, or, even worse, they have already reached the conclusion that there was wrongdoing. Quite simply, that is inappropriate. The purpose of the hearings is to determine whether there was wrongdoing-we must not prejudge the matter.

We do not want to end up appearing like that famous character from the West, Judge Roy Bean. Everyone will remember Judge Roy Bean. He used to say, "We'll hang 'em first and try 'em later."

Sometimes that can happen in congressional proceedings, and I know it is not the intention of anyone on the committee to have that be the case.

So let us avoid partisan wrangling and get the facts on the table. Now the presumption of innocence may not apply to congressional hearings in the same way as in our court system, but there ought to at least be an effort to fully consider matters, and let people have their say, before we reach any conclusions.

Last year, the Senate held thorough hearings, as I mentioned earlier. The committee heard from 30 witnesses, generating 2,600 pages of testimony; 38 witnesses were deposed, generating some 7,000 additional pages of testimony.

It is very difficult to sort through that much material and I want to thank the staff for the work they did. That was a herculean effort. Both the majority and minority staff had to work extremely long hours on this matter, Madam President, and they deserve our appreciation.

Obviously, Madam President, the Senate's integrity and credibility are at stake. The American public has a right to know the facts about Whitewater and the Senate has a constitutional obligation to see that they do.

Last year, the facts were presented fully and impartially. That must be our goal this year. The public, in my view, is fed up with the partisanship that seems to cloud every issue.

As we go through this process, I urge my colleagues to avoid that partisan pitfall. Because we are entering a presidential campaign cycle, that may be difficult for some. But we must all try. The President is sadly correct, and I suspect most of my colleagues, regardless of their political persuasion, would agree when he says that the politics of personal attack are alive and well. I agree with the President that the best way to put this matter behind us is to address the facts candidly.

Madam President, I ask for 2 additional minutes.

Mr. SARBANES.

I yield whatever time the Senator requires.

Mr. DODD.

I thank my colleague. I will wrap this up.

Madam President, the public wants us to present the facts impartially, come to our conclusions and then move on. And it bears repeating that after going through such a process last year, the Banking Committee concluded that there had been no violation of criminal statutes or ethical standards.

During this next stage, we must not get into political diversions and drag this thing out. The American people want us to get on with the business of creating jobs and expanding economic opportunity, of dealing with health care issues and education. They want us to tackle the hard problems that they face every day.

I think it was there sense of frustration with politics as usual, more than anything else, that created the changes in the Congress. We now have a Republican leadership, and every committee is chaired by that party. They now have an even greater responsibility to the public. They must elevate the good of the nation above politics and I hope that they will do so in proceeding with this matter.

Once again, I commend Senator D'AMATO and Senator SARBANES for putting together a fair resolution and for stating their determination to wrap this matter up by February of next year. I hope we can stick to that schedule and finish this job efficiently.

Finally, while the subject of the **independent counsel** statute is not the subject of this particular resolution, Madam President, I want to suggest that we revisit that legislation as soon as we can.

The idea of appointing an **independent counsel** was to keep politics out of these issues. Unfortunately, it seems that the statute may invite fishing expeditions. We need to be very careful about spending the taxpayers dollars in this way. Otherwise we will have some questionable expenditures. I was told the other day that someone was looking at a witnesses' grade school and high school transcripts. I hope that report is inaccurate because there is just no way to justify that kind of expenditure.

There is the potential for an **independent counsel** to run wild and we need to carefully monitor these matters. I caution those who would like to use **independent counsels** for political gain-regardless of whether it was a previous administration or this administration-that whatever goes around comes around. We would be well advised, in my view, to take a hard look at how some of these operations are being run.

Of course, Congress spends a great deal of money on these investigations. The Banking Committee spent about $400,000 last year, and this resolution authorizes another $950,000. But even that amount is only a fraction of what the **independent counsel** is spending. We are looking at almost $10 million spent by the **independent counsel** and that is just the beginning of it. That figure will go higher.

Of course, the Federal Government must investigate serious accusations of wrongdoing to maintain the public trust. But when it appears there are more Federal agents operating in Little Rock than there are in high-crime areas in certain parts of our country, then one ought to pause and look carefully at what we are doing.

Again, I know that the **independent counsel** statute is not the subject of

this resolution. I do not want to inject a whole new subject of debate. But I think we ought to take another look at that law and make sure it is operating properly.

Again, I commend the chairman of the Banking Committee, my friend from New York, Senator D'AMATO, and my colleague and friend from Maryland, Senator SARBANES, for the fine job they have done in working out this resolution. We have a very difficult job in front of us. Hopefully, we will conduct our work thoroughly, fairly, and promptly, and in a manner that brings credit to this great body. I look forward to the effort.

Several Senators addressed the Chair.

The PRESIDING OFFICER.

The Senator from New York.

Mr. D'AMATO.

Madam President, at this time, I ask for the yeas and nays.

The PRESIDING OFFICER.

Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. D'AMATO.

I yield to the Senator from Pennsylvania 10 minutes.

The PRESIDING OFFICER.

The Senator from Pennsylvania has 10 minutes.

Mr. SPECTER.

Madam President, I thank the distinguished chairman for yielding me this time. I support the resolution and commend the chairman and the ranking member of the Banking Committee for presenting a resolution which I understand will have wide bipartisan support.

I believe it is important to have a congressional inquiry on this in the broad terms which are described in the resolution. It is with some regret, I note, that it has taken us more than a year to get to this point. But it is better late than never, and these are matters where congressional oversight is important.

I recognize the sensitivity of a congressional inquiry on a matter which is being handled by an **independent counsel,** also known as the special prosecutor. But the functions are very, very different where you have an investigation which is handled through grand jury proceedings which are secret and which are directed at indictments. I know that field with some detail, having been a district attorney myself and ***S6778** having run grand jury investigations. That is very, very different from a congressional inquiry where we are inquiring into matters in the public record for the public to see what is going on in Government with a view to legislative changes.

The thrust and focus are entirely different between a grand jury investigation conducted by **independent counsel** and a congressional inquiry which will be handled through the Banking Committee. I am glad to see that the composition of the committee will be expanded to include the chairman and ranking member of the Judiciary Committee, or their designees.

Madam President, the issues involved here have long been a concern of many of us in this Chamber, and I refer to statements which I made last year dated March 17, June 9, June 16, and June 21. I will not incorporate them because that would unduly burden the RECORD, but a good many of my thoughts were

expressed last year on the matter.

I was particularly concerned about issues involving the RTC as to their inclusion, which was not handled last year, and I am glad to see that the Resolution Trust Corporation is included in the scope of the inquiry which we are about to undertake.

This matter was one that I focused on when we had an oversight hearing on the Department of Justice on July 28 of last year, and I ask unanimous consent, Madam President, that a number of documents be printed in the RECORD which have not been made a part of the RECORD heretofore: My letter dated July 26, 1994, to Attorney General Reno; the attachment of a list of documents which I had wanted to inquire into during the proceedings before the Judiciary Committee; the response which was made by Robert Fiske, who was then **independent counsel;** and a portion of the transcript dated July 28, 1994 before the Senate Judiciary Committee.

The PRESIDING OFFICER.

Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER.

I thank the Chair.

Madam President, these documents will show on their face concerns which were on the record and which were apparent from such documents: that there were considerable issues to be investigated in the RTC at that time. It is unfortunate, in a sense, that there has been the long delay, because we all know, as a matter of investigative procedure, that leads grow cold and witnesses' memories diminish and that the best investigation is a prompt investigation. But the time factor is something that cannot be altered at this time, and at least now we will have a congressional inquiry which will move forward into these very, very important matters.

I agree with the distinguished Senator from Connecticut when he talks about the presumption of innocence. I think that is indispensable as a matter of fairness to all concerned. But these are questions which need to be answered, and questions do not imply an answer of any sort; they raise issues which ought to be answered. We ought to let the chips fall where they may. And in a Government based on a Constitution which elevates the separation of powers among the Congress in article I, and the executive branch in article II, and the judiciary in article III, the congressional oversight function is a very, very important function. Now, finally, we will be in the context where we will be able to inquire into these matters and to find out what those answers are.

I am confident that there will be a fair, judicious, quality inquiry conducted by the committee, and this resolution is one which I think ought to be supported broadly by the U.S. Senate.

I thank the Chair and yield the floor.

EXHIBIT 1

U.S. SENATE, COMMMITTEE ON THE JUDICIARY, WASHINGTON, DC, JULY 28, 1994

(The following is a partial transcript of the above proceedings)

Senator SPECTER. Thank you, Mr. Chairman. Attorney General Reno, as you

know, I had intended to ask you questions about the handling by the Department of Justice in the matter involving David Hale in this oversight hearing, and I may be able to cover the principal points of my interest without undue specification, or at least undue specification from your point of view.

At the outset, I would like to put into the record my letter to you dated July 26, 1994, together with the chronology of events and all the attachments which I sent over to you, except for numbers 20 and 21. I may get into 20 and 21. I think the balance have been in the record in one form or another, and even if they haven't I think they are appropriate for the public record.

<The letter referred to follows:>

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 26, 1994.
Hon. JANET RENO,
Attorney General, Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL RENO: I have just noted that you are scheduled to testify before the Judiciary Committee on Thursday, July 28, at 2:00 p.m. at an oversight hearing.

In that hearing I intend to ask questions on the Justice Department's role in investigations of **Madison Guaranty** and/or "Whitewater." While I have not had access to many of the relevant documents, I have seen a few and am alerting you to those documents which will formulate at least some of the basis for my questions.

Some of the documents are referred to in my floor statement on June 21. Other documents that I may refer to are listed on the attached index.

Sincerely,
ARLEN SPECTER.

Senator SPECTER. I would also want to put into the record the faxed letter from Robert Fiske, **Independent Counsel,** to me, dated July 27, 1994.

<The letter referred to follows:>

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE **INDEPENDENT COUNSEL,**
Little Rock, AR, July 27, 1994.
Hon. ARLEN SPECTER,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR SENATOR SPECTER: The Department of Justice has sent over to me a copy of your letter of July 26, 1994 to Attorney General Reno, together with the index of documents enclosed with it.

It is apparent from a review of the documents on that index that they relate to the handling by the Department of Justice of a particular criminal referral from the RTC. Based upon interviews we have had with representatives from the Kansas City Field Office of the RTC, we are currently actively investigating this matter. Accordingly, I would respectfully request that you not go into this subject with the Attorney General at your hearing tomorrow since to do so might prejudice our ongoing investigation. (For similar reasons we request that you not go into the matter referenced by documents #20 and #21.)

We have made a similar request to both the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Banking, Finance and Urban Affairs which, as you know, are in the process of conducting Whitewater hearings. Both of those Committees have agreed not to go into this

subject until we have completed our investigation.

Respectfully yours,

ROBERT B. FISKE, Jr.,

Independent Counsel.

Senator SPECTER. At the outset, I want to say for the record that I do not agree with the deference which the Congress has accorded the **independent counsel** because I believe that Congress has independent status, and at least equal status, if not more important status, on matters of public policy than the criminal prosecutions. But the Senate has decided otherwise as a political matter, in my opinion.

As I reviewed the charter of Mr. Fiske, it seemed to me that questions about oversight on what happened with David Hale were not within his charter, his charter being to investigate matters of possible criminal or civil wrongdoing. I am advised to the contrary on that, and we may get into that in some specificity.

So let me start in an effort to ask the questions in a generalized way, but candidly as they arise on David Hale's matter. I refer to a memorandum from RTC investigator Jean Lewis to Richard Iorio which quotes officials within the Department of Justice, which is why I ask you about this; specifically, Ms. Donna Henneman in the Office of Legal Counsel. Without making anything more specific as to the Hale matter, my question to you as a general matter is, any time a referral comes in to the Department of Justice that would make the Department look bad or has political ramifications, it goes to the Attorney General. Is that true?

Attorney General RENO. I don't know whether any time something comes in to the Department that would make the Department look bad it comes to the Attorney General.

Senator SPECTER. Well, if you don't know, who does, Attorney General Reno?

Attorney General RENO. I would suspect that each one of the 95,000 people who hear something that might make the Department look bad. I think your question is a little bit broad. I cannot answer it. As I have tried to say from the very beginning, when I appointed Mr. Fiske I tried to make sure that he was as independent as possible. I have continued to try to do that, and I think the ***S6779** worst thing that I could do would be to comment or talk about matters that he is pursuing. I should be happy, because I have great respect for the Senate and for you, at the conclusion of the matter to try to respond to anything, including the specifics.

Senator SPECTER. Well, I don't think that is sufficient, Attorney General Reno, because I think this is a legitimate matter for Judiciary Committee oversight, and we don't have very much of it. But I accept your point that my question was too general, so I will be specific.

The investigator, L. Jean Lewis, of RTC, had many conversations with representatives of the Department of Justice, as reflected in the number of the memoranda which I sent on to you. So if it is too general as to whether any time a referral comes in that would make the Department look bad or has political ramifications it goes to the Attorney General, I would ask you, were you personally informed about the referral from the RTC on the check kiting case involving **Madison Guaranty?**

Attorney General RENO. As I indicated to you, Senator, I made a determination when I appointed Mr. Fiske that I would not comment or make any

comment. He has expressed to you that he would prefer that I not comment on the specific matters. I do not want to do anything that would impair has independence. I do think you have an oversight function with respect to the Department of Justice, and when it would be appropriate for me to comment I would look forward to the opportunity to do so.

Senator SPECTER. Well, tell me, Attorney General Reno, has would it impair Mr. Fiske's investigation or prosecution for you to answer a question as to whether you had personal knowledge of a referral to the Department of Justice?

Attorney General RENO. I can't tell you, sir, because I have tried to do everything in my power to make sure that Mr. Fiske's investigation is independent and I don't know what his investigation involves. Therefore, I am not going to say anything that could possibly interfere with his investigation.

Senator SPECTER. Well, my question to you is how could it possibly interfere with his investigation to answer a question as to when you had knowledge of a referral to the United States Department of Justice.

Attorney General RENO. I don't know, sir, because I am not going to take the chance of interfering with it. You would have to ask Mr. Fiske because I don't want to do anything at this time that would interfere or impair that investigation. I do not know the nature of the process of that investigation and it would be inappropriate for me to comment, but I do--

The CHAIRMAN. Put another way, Senator, how would it shed any light in this oversight if the Attorney General answered that question? What the hell difference does it make now?

Senator SPECTER. Well, the hell difference that it makes now is on an earlier question which I asked that whenever there is a matter with political ramifications that it goes to the Attorney General-and I asked that question in its broadest terms and was told that it was too general, so that is when I came back to the specific question.

The CHAIRMAN. Let me ask the question the other way to the Senator. Mr. Fiske's investigation in this matter is likely to be wrapped up. He has been moving expeditiously. Does it matter to the Senator whether or not the Attorney General speaks to this issue today or in two weeks or a month, or whenever it is when Mr. Fiske settles this part of his investigation? I don't know when he is going to settle that, but I mean he has been moving very rapidly.

In terms of oversight for next year's budget and last year's actions, it seems to me the Senator would have plenty of time to ask these questions as it would impact on the outcome of the Senator's view as to what the Attorney General should or shouldn't do in the future.

Senator SPECTER. Well, I would be glad to respond to the chairman. It does make a difference to me, and it makes a difference to me because this is an oversight hearing and the request to the committee chairman to have oversight on these matters was declined. There has been a charter which is very, very narrow before the Banking Committee, and this does not involve, to my knowledge, a matter which is within the charter of Mr. Fiske until when I sent a letter to the Attorney General, I suddenly find a reply from Mr. Fiske.

I had two detailed conversations with Mr. Fiske, the thrust of which-and I would be glad to detail them-led me to the conclusion that there was absolutely no interference with the criminal prosecution, a subject that I have had some experience with.

So when I asked the Attorney General a question as to when she has knowledge

of a referral, I can't conceive that it interferes with an investigation, and that is why I am asking an experienced prosecutor who is now the Attorney General how could it conceivably interfere with a pending investigation.

Attorney General RENO. An experienced prosecutor, Senator, doesn't comment about something that she doesn't know about. I don't know about the details of Mr. Fiske's investigation. But if Mr. Fiske doesn't have any problem with it, what I would suggest that we do is prepare the questions, submit them to Mr. Fiske. If he has no objection to my answering them, then we will try to answer them because I honor your oversight function and I would want to be able to honor that and to not interfere with Mr. Fiske's investigation.

Senator SPECTER. Attorney General Reno, I did not say that Mr. Fiske did not have a problem. He specifically told me that he would like the field to be totally left alone. What I said to you was that after talking to Mr. Fiske, I had no doubt that these questions were appropriate, in my judgment, on oversight by the Judiciary Committee.

Let me ask you this, Attorney General Reno. In terms of the charter that Mr. Fiske has about investigating matters which may involve a violation of the criminal or civil law, is the handling by the Department of Justice of David Hale's matter something that falls within that charter?

Attorney General RENO. I have tried to, again, let Mr. Fiske define that based on the charter that we described so that I would not in any way impair his independence.

Senator SPECTER. Well, do you have any interest in whether any current employees of the Department of Justice are subject to an investigation which might be within Mr. Fiske's charter for possible criminal wrongdoings?

Attorney General RENO. Yes.

Senator SPECTER. Well, if that were so, would you have a duty as the head of the Department of Justice to take some action on those matters before a long investigation was concluded?

Attorney General RENO. It depends on what they are, sir.

Senator SPECTER. Well, suppose they were obstruction of justice?

Attorney General RENO. It depends on the nature of the facts and the circumstances, sir

Senator SPECTER. Well, do you know anything about that on the Hale matter?

Attorney General RENO. Again, sir, I can't comment on the Hale matter.

Senator SPECTER. I am not asking you to comment on the Hale matter. I am asking you whether you know anything about the Hale matter.

Attorney General RENO. That would be commenting, sir, and what I would suggest, if we want to pursue this, is that you pose the questions and then let's see whether Mr. Fiske thinks that they would in any way interfere with the investigation. I am delighted to answer them if they don't interfere.

Senator SPECTER. Well, I am not going to follow the way you would like me to proceed. I make a judgment as to what I think a Senator ought to do by way of oversight, and if you have a concern about that I am prepared to discuss it with you, but I am not prepared to take your instruction or your suggestion.

The question that I pose on an investigation by Mr. Fiske as **independent counsel** within his charter to investigate crimes, obstruction of justice, within the Department of Justice is not something which bears on anything which could conceivably implicate the underlying facts on what David Hale is doing.

Is Ms. Paula Casey-I understand that she is, but can you confirm for me that she is still the United States attorney?

Attorney General RENO. Yes, sir, she is.

Senator SPECTER. Is she the subject of a criminal investigation by Mr. Fiske?

Attorney General RENO. You would have to talk to Mr. Fiske.

Senator SPECTER. Do you know whether or not she is the subject of a criminal investigation by Mr. Fiske?

Attorney General RENO. You would have to talk to Mr. Fiske. I have avoided having anything to do with Mr. Fiske's investigation in terms of any information that he may have so that I do not impair his independence.

Senator SPECTER. Would you continue a United States attorney operating actively if that United States attorney were the subject of a criminal investigation?

Attorney General RENO. It would depend on the circumstances.

Senator SPECTER. Well, under what circumstances would you terminate such an attorney?

Attorney General RENO. It would depend on the circumstances. Again, you get into a situation of hypotheticals and it is far better that we look at the actual facts, and I would be happy at the appropriate time to do that with you.

Senator SPECTER. Well, Attorney General Reno, I consider your responses, as I see them, totally unsatisfactory, and I consider them totally unsatisfactory because I am not asking you anything about a pending investigation. I am asking you questions as to what came to your knowledge as the Attorney General of the United States Department of Justice.

I am asking you questions about what you know and about what your policy would be if there were charges of criminal wrongdoing, and I don't ask these questions in a vacuum or for no purpose. I ask these questions in the context of having initiated an inquiry on oversight on something which is outside the charter of the **independent counsel.**

The CHAIRMAN. In your opinion, Senator, right, is that correct? In your opinion?

Senator SPECTER. Everything I say is in my opinion. You can add that to everything. I don't speak for anybody but myself, but I do speak independently for myself.

I took a look at an extensive series of correspondence which has gotten to the Department of Justice and gotten to the FBI and gotten to the United States attorney's office and gotten to the executive office and gotten to the Office of Legal Counsel, according to these documents, which I sent to you as soon ***S6780** as I knew there would be this hearing so you would have an opportunity to review them. I promptly advised the chairman as to what I intended to do there would be no surprises about it.

The CHAIRMAN. That is correct.

Senator SPECTER. When I pursue the matter and find I have a telephone call and a letter from the **independent counsel,** I call him and then I am told that it is within his charter, that there is an investigation which is underway for obstruction of justice.

As I review the facts of this matter, I am struck with wonderment as to how officials in the United States attorney's office decline to have immunity granted to David Hale, and then **independent counsel** comes in and in a short

time has a grant of immunity. Then officials in the United States attorney's office in Little Rock recuse themselves in a later matter, and I wonder how can they recuse themselves in a later matter without having recused themselves in an earlier matter, given their relationship to subjects of the investigation.

I ran a big office myself as a prosecutor, and if I had any reason to believe anybody in my office had any problem, I wouldn't wait for anybody to cleanse it totally and thoroughly and immediately. I do not believe that the charter to the **independent counsel** takes away any of the authority or the responsibility of the Attorney General to act in that circumstance.

In my opinion-everything I say is in my opinion-the questions which I have asked you are entirely appropriate questions, and I give some additional background because I think these are matters which ought to be answered, and I intend to pursue them and I don't intend to wait.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

General, I think you have answered totally appropriately, in my opinion. I think were you to do otherwise, in light of Mr. Fiske's comments, you would be excoriated by Mr. Fiske and anyone else. I guarantee you, you would have an article saying that you have interfered if you went in and, quote, "cleansed," were there a need to cleanse. You would be accused of whitewashing to avoid Mr. Fiske being able to fully look at the matter.

You are answering, in my opinion, totally appropriately, and you have done what I don't know many others have been willing to do. You have said to this committee, without having to have some big show on the floor, that when Mr. Fiske says he is finished with this phase of the investigation you will come back and you will answer questions. It seems to me you are being totally appropriate, but that is why there are Democrats and Republicans, chocolate and vanilla, good and bad, right and wrong, different points of view. Our opinions are different.

I respect this man. He did notify me. Stick to your guns, don't answer his questions, in my opinion.

Senator SPECTER. If I might have just one sentence?

The CHAIRMAN. Yes. You may have more than one sentence.

Senator SPECTER. I don't think this matter has anything to do with good and bad or chocolate and vanilla.

The CHAIRMAN. Well, it may not have to do with good and bad, but it has to do with what one considers to be the appropriate way for you to respond. I think you are responding appropriately because I think you are in the ultimate catch-22 position. At the request of all of us in the Senate, you appointed a Republican named Fiske. Now, the Republican named Fiske tells you, please don't respond to anything having to do with this. You are being asked to respond to something having to do with this, and if you respond or don't respond, you are in deep trouble in the minds of whoever wants to view you as being in trouble. I think you are doing just fine. My view is worth no more, probably a little less in this circumstance, than the Senator from Pennsylvania's, but good job, General.

INDEX

1. RTC Chronology of Criminal Investigation.

2. Letter of September 1, 1992 from L. Richard Iorio (RTC-KC) to Steve Irons (FBI) transmitting criminal referral.

3. Letter of September 1, 1992 from L. Richard Iorio (RTC-KC) to Charles A. Banks (DOJ) transmitting criminal referral.

4. RTC Internal Memorandum, May 3, 1993. Background remarks and conversation with AUSA Bob Roddey's Office re: **Madison Guaranty** Savings referral.

5. RTC Internal Memorandum, May 19, 1993. Additional conversation with Office of Legal Counsel for U.S. Attorney's U.S. Justice Department, Washington, D.C. No record of Madison criminal referral at Washington DOJ.

6. RTC-KC E-Mail, May 19, 1993. Madison matter forwarded to Donna Henneman in "Legal Counsel." Referral submitted to that office "because of the political ramifications and political motivations."

7. RTC-KC E-Mail, May 26, 1993. Follow-up call from Donna Henneman (DOJ). RTC advised by an FBI agent in Little Rock that it was a 'very solid case of check kiting, and was highly prosecutable." Henneman was growing increasingly frustrated by the situation, because she had seen the information, knew that it had come in, and couldn't understand why she was having such a hard time tracking where the referral and exhibits had gone.

8. RTC-KC E-Mail, June 8, 1993. Conversation with Donna Henneman (DOJ). Madison Referral has reappeared on her desk. Criminal Division has sent memo to Doug Frazier (in Depty. Atty. General Heyman's office) advising him that there was "no identifiable basis for recusal of the U.S. Attorney in the Eastern District of Arkansas." Referral sent to Frazier for review and final decision.

9. RTC-KC E-Mail, June 23, 1993. Conversation with Donna Henneman (DOJ). Package returned from Frazier. Frazier appointed U.S. Attorney in Florida.

10. RTC-KC E-Mail, June 23, 1993. Further conversation with Donna Henneman (DOJ). Spoke with Doug Frazier. Decision made to return the referral back to the Arkansas U.S. Attorney. No basis for recusal.

11. RTC-KC E-Mail, June 29, 1993. Source indicates Madison referral has been returned to Little Rock. Acting U.S. Attorney will not act on referral. It is being held until U.S. Attorney designee Paula Casey takes office.

12. RTC-KC E-Mail, September 23, 1993. Conversation with Donna Henneman (DOJ). Washington DOJ would like to be copied on all future transmittal letters concerning Madison referrals with an additional one paragraph summary of the content of the referrals with the transmittal letters, so that Henneman will be aware of those with "sensitivity issues."

13. RTC-KC E-Mail, September 29, 1993. Conversation with Donna Henneman (DOJ). DOJ would like copies of all future Madison referrals sent to Washington in addition to sending to U.S. Attorney in Little Rock. Henneman will confirm this in writing.

14. RTC-KC E-Mail, September 29, 1993. Conversation with Donna Henneman (DOJ). Washington DOJ withdrawing request for referrals to be sent directly to Washington, but would still like copies of transmittal letters with addendum summary paragraph.

15. RTC-KC E-Mail, October 27, 1993. Conversation with Donna Henneman (DOJ). Inquiry on whether declination letter had arrived from Little Rock U.S. Attorney.

16. Letter of October 27, 1993 from Paula J. Casey (U.S. Attorney) to L. Jean Lewis (RTC). Declination letter on the Madison referral.

17. Letter of November 1, 1993 from L. Jean Lewis (RTC) to Paris J. Casey

(U.S. Attorney). Confirmation of declination letter and the stipulation from October 27th letter that the matter was concluded prior to the beginning of Paula Casey's tenure and that the RTC had never been advised of such result. Chronology of correspondence between RTC and DOJ.

18. RTC-KC E-Mail, November 15, 1993. Transmittal of white paper outlining chronology of events related to 1992 Madison referral. Challenges news article indicating that decision to decline Madison referral had been prior to Paula Casey's appointment.

19. RTC-KC E-Mail with attachment, January 6, 1994. Discussion of contact with reporter.

20. Letter of September 15, 1993 from Randy Coleman (David Hale Attorney) to Paula Casey. Coleman has been trying to negotiate a plea and senses that Casey is reluctant because of "political senitivity."

21. Letter of September 20, 1993 from Randy Coleman to Michael Johnson. Reiterates interest in plea negotiations, offering David Hale's information and willingness to participate in undercover activities.

Mr. SARBANES.

What is the time situation, Mr. President?

The PRESIDING OFFICER.

The Senator from Maryland has 31 minutes; the Senator from New York has 20 minutes.

Mr. SARBANES.

Mr. President, I yield 10 minutes to the Senator from Arkansas, Senator PRYOR.

Mr. PRYOR.

Mr. President, we have come to a point in this debate when we are about to vote on this particular resolution. If I might, I would like to talk for a few moments about the public's right to know, as the distinguished chairman of the Banking Committee from New York has made reference to.

He says the public has a right to know what happened in the Whitewater matter. The public has a right to know who did what, when, and whatever. I can assure you that the Senator from Arkansas does not disagree.

But I think also the public has a right to know something else. I think the public has a right to know in this case exactly how much money of the taxpayers' dollars we are spending in the so-called Whitewater matter. I think the public has a right to know that with this resolution, if it passes and if the funding goes through-and we all assume it will-the Senate alone will have spent, up through January or maybe February of next year, in the Whitewater matter $1.350 million of Senate money to investigate this matter. I do not have available the amount of money the House of Representatives has spent and will spend in the future. And we do not know exactly how much the cost of the **independent counsel** will be. But here are some figures I might throw out for the RECORD at this time. To the best of our knowledge, Mr. ***S6781** President, thus far, as of August 31. 1994, the **independent counsel,** Mr. Starr and Mr. Fiske, combined, spent $1.879 million. Projected funding for the **independent counsel** for the 1995 fiscal year is $6.3 million, which is a subtotal of $8.129 million, and a total, adding all the figures up, Mr. President, for both the Senate and the **independent counsel** to investigate so-called Whitewater, comes to almost $10 million in taxpayers' dollars.

Mr. President, I think there is something else the public has a right

to know. I think the public has a right to know that this White House, this President, this First Lady, this administration, has never one time been accused of lack of cooperation. In fact, our President has pointed out, as one of our colleagues has already mentioned, that to be candid and truthful in this matter is going to be the quickest and best way to get to the bottom of it.

In the first round of hearings last summer, the committee heard from 30 witnesses generating 2,600 pages of testimony, deposing 38 witnesses, generating 7,000 pages of testimony.

The administration has produced thousands of pages of documents for committee review. This administration has complied with every document request. They have answered every question posed to it. The administration is ready and willing to cooperate on this second round of hearings and it bears emphasis, I think, that after the long days of hearings and pages of documents reviewed, that the Banking Committee concluded at the end of this hearing, in phase 1, that there had been no violation of a criminal statute and no violation of an ethical standard.

Mr. President, I think, too, it needs to be added that at no time during any of these investigations or any of these hearings, whether it be in Little Rock or Washington, the Banking Committee or the special counsel, wherever, to the best of our knowledge, not one witness, not one person has taken the fifth amendment.

I think that this speaks loudly and clearly about this administration's position, wanting to get on with the important business of our country.

Mr. President, let me compliment our friend, Senator SARBANES, for working out what I think-and going forward with-is a fairly reasonable proposal in trying to attack this problem and to set up these hearings. I think that there are some things, however, that I must state that I do not feel are fair. I do not feel that it is fair for one of the members of the committee, as he did earlier in this debate, to come to the floor and say what should have been within the scope of this hearing and then start talking about those particular issues as if to condemn them, even though they are not in the scope of these particular hearings.

Mr. President, I think for a Senator to come to the floor who is a member of the Banking Committee and to make a statement like he knows for a fact, or he has knowledge that Kenneth Starr, the special counsel, is now going to reinvestigate the death of Vince Foster, I think the public has a right to know how that particular Senator from North Carolina has knowledge of this so-called fact, Mr. President. I think the Senator from North Carolina needs to explain how he knows Mr. Kenneth Starr is now looking or relooking at the death of Vincent Foster.

Mr. President, we hope that these hearings will be fair. We hope they will be soon. We hope that they will be done in a very efficient manner. I am just hoping above all, Mr. President, that in this hearing, these issues are not going to be bogged down in the political morass that we have seen some other hearings conclude with. I would like to say, also, Mr. President, that I think for us to go back to the 1990 Governor's campaign, I think is stretching it a bit. I do not know what that has to do with Whitewater. I think some of my colleagues would like to see us investigate Bill Clinton when he was the attorney general of Arkansas. Maybe we would like to go back to look at his campaign of 1974 when he ran for the U.S. Congress and was defeated. There

might be some who have no limits on how far back in time we should go.

I hope we can keep our eye on the ball. I am hoping, Mr. President, that we can keep our eye focused on the issue of Whitewater and the particular mission under which carefully this resolution has basically pointed out would be the scope of this particular hearing.

I am also concerned that one of our colleagues has referred to the "the miserable job of Mr. Fiske." Those remarks were made earlier on this floor. Of course, they refer to Mr. Fiske, who was allegedly fired from this investigation as special counsel because he was not finding out enough, bringing forward enough, to satisfy some of our colleagues.

Mr. President, I will conclude once again, as I have done other times on this floor, by quoting a note that Vince Foster wrote. It is his last note. It was his last sentence in this note, when he said "Here"-reference to Washington-"ruining people is considered sport." Those were the words written by the late Vincent Foster.

I am hoping, Mr. President, that when this investigation begins, every person involved with that investigation, from top to bottom, will realize these are human beings; they have families; they have hopes and desires; they have beliefs; and they have reputations. Hopefully, we will not treat lightly those reputations, and hopefully we will make certain that the character and the nature of these hearings seek fairness and justice.

I yield the floor.

Mr. SARBANES.

Mr. President, I yield such time as he may consume to the minority leader.

Mr. DASCHLE.

Mr. President, I thank the ranking member. Let me say, I did not have the opportunity to hear all of his remarks, but let me commend the distinguished Senator from Arkansas for what I have heard him say. Let me associate myself with each and every one of his words. He speaks from the heart, and he certainly speaks for all Members in representing what we hope will be the ultimate goal of this committee as we begin this ever once more.

This resolution provides a sum of $950,000 for the purpose of completing the work on the Whitewater matter. I think it needs to be emphasized again, as we consider the funding, that this resolution includes every issue related to Whitewater that has any credence whatever. There ought not be any question about its work, its scope, and the effort undertaken after today by the Banking Committee.

The funding will expire on February 29 of next year. It is an adequate amount to fund and an ample allowance of time to permit comprehensive and thorough hearings, while providing also for the completion of this issue.

In the 103d Congress, the Senate voted on March 17, 1994, on a bipartisan vote of 8 to 0, to authorize hearings on the Whitewater matter. Senate Resolution 229, adopted in June of last year, authorized a first round of hearings which were subsequently held by the Banking Committee.

The new resolution creates a special committee, administered by the Banking Committee, to conduct the final round of these hearings. The committee will be comprised of the full membership the Banking Committee, with the addition of one Republican and one Democratic member of the Judiciary Committee.

Chairman D'AMATO will also chair this special committee. Senator SARBANES will serve as the ranking member.

Last year, the Banking Committee heard from a substantial number of witnesses and took thousands of pages of testimony. Last year's hearings were thorough, fair, and bipartisan. They are the model which this year's hearings must emulate.

The majority, which conducted the hearings last year, were fair and judicious in their approach. The new majority in this Senate has the obligation to follow that record in exactly the same manner.

It is important to be thorough and comprehensive, because the American people have a right to know all the facts about this matter; but it is equally important that hearings be fair and responsible. We must all strive to remember and draw the distinction between an unproven allegation and a known, verifiable fact.

What is at stake is the integrity and credibility of the U.S. Senate. The last Senate recognized this by voting unanimously to authorize hearings when questions were raised that deserved examination. This Senate should follow that example.

***S6782** The Senate has the constitutional obligation to see that the facts are brought out. It has the moral obligation to do so fully and impartially. If we do less, we risk reinforcing the unfortunate impression that Senators care more about partisanship than about conducting the Nation's business in the best interests of all the people.

The President has said that in an era of attack politics, the best way to put this matter behind America is to address the facts candidly. He is entirely right.

The administration cooperated fully and extensively with hearings last year and stands ready to do so again this year. Last year, the President ordered his administration to cooperate and all parties did so. Every document request was honored. Every question raised by the committee was answered.

Americans have the right to know the facts of Whitewater. But Americans care about other matters which are also on the Senate agenda a great deal more than they do about this.

Americans are now facing a budget which seeks to dramatically alter Medicare and student aid programs, as well as virtually every other thing the Government does. They are anxious about the future, because so many millions of Americans are either Medicare enrollees or have parents who are Medicare enrollees. They are anxious to see the Senate begin the debate over the budget soon.

Americans expect the Senate to devote the bulk of our efforts to the issues that are of most importance to the majority of American people. I agree. That should be our priority. Today, no issue is more critical than resolving the budget debate.

Mr. President, I urge prompt action on this resolution. I hope it allows for completion of this matter with fairness and impartiality, so that Senators can focus their attention on the issues that deserve it most, the problems facing the American people.

I thank the ranking member for yielding.

Mr. D'AMATO.

Mr. President, I did not mean to unduly delay acting on this resolution, because I think most things that have been said summarize where we are at, what we are attempting to do, and the scope of the investigation and the manner in which we hope to conduct it.

I think is important to point out that what one of my colleagues, the Senator from North Carolina, Senator FAIRCLOTH, pointed out is a matter of public record. That is that Judge Starr is reexamining all matters reviewed by Special Counsel Fiske, including Vincent Foster's death.

I think he alluded to that, and I think he did so in that context. That is not an area we intend to revisit unless there are some very special circumstances, which I certainly do not envision. However, I think we have to at least put it in that context.

As it relates to what the committee did and did not find last year, I think it is important to note that the Republican minority did make findings on the three major areas where there were questions of misconduct and malfeasance. I will not attempt to enunciate all of them now, but that was a very strong finding.

I would also like to point out that the majority made some findings and recommendations as it related to the need to indicate very clearly that before Congress, all executive branch members and others who testified are "required to be fully candid and forthcoming," and testify "truthfully, accurately, and completely."

The committee recommends that the President issue an Executive order reinforcing this obligation and setting forth procedures requiring the prompt correction, amplification and/or supplementation of congressional testimony to ensure that it is accurate, thorough and completely responsive.

Why did they do that? Without going through the entire history, it was because it was clear and evident-and, by the way, we have sent to Mr. Fiske and to his successor, Mr. Starr, those areas, we being the Republicans on the committee, the minority-that those areas of concern, that, at the very least, there was testimony that was disingenuous, if not outright false. And that is being reviewed.

So, to say that there were no findings of any wrongdoing, that everything was OK, or to imply that there was nothing wrong, is simply an oversimplification and is not an accurate or fair representation of the situation.

Now, I do not intend, nor is it my job and duty, to defend the work of the special counsel. The special counsel was appointed because the Attorney General concluded that it was necessary. It was not this Congress. I thought it was. I believe it was. There were leading Democrats who spoke to the necessity-Senator MOYNIHAN, Senator BRADLEY, and others-as it relates to dealing with this. But as it relates to the expenditures of money, let us look at the record.

This committee, I think, has been very judicious. The Democratic leadership working with Republicans last year authorized $400,000. We only spent $300,000. This year we have set $950,000. I hope we spend less than that. We have been very judicious in using taxpayers' money. So to date we have spent $300,000. Although that is not an inconsequential sum, we have been extremely judicious.

With regard to the expenditures and what has taken place with the special counsel, let me just indicate, first, that David Hale pleaded guilty. He was a municipal judge and has made some extremely serious allegations. The special counsel is reviewing his allegations with respect to why he made certain loans that were illegal or inappropriate, who asked him to do so, and so forth.

Webster Hubbell, the third ranking official in the Attorney General's

office, pleaded guilty to charges that emanated, again, from this investigation.

Neil Ainley, president of the Perry County Bank, where large sums of money, $180,000, were taken out to fund campaign activities, pleaded guilty.

Chris Wade, a real estate agent who was the sales agent for Whitewater Development, pleaded guilty in a bankruptcy matter. Robert Palmer, last December, a Little Rock real estate appraiser, pleaded guilty to conspiracy charges relating to backdating and falsifying appraisals for **Madison Guaranty.**

I make these remarks because I do not believe that it is fair to leave the impression that this has just been a big waste of time and that there was no wrongdoing. Five individuals, at this early and preliminary stage of these investigations, have already pleaded guilty, some in very high, responsible positions. That is the work of the special counsel. He has to defend the appropriateness of the expenditures which he makes.

However, I think for the record it is fair to reflect that several individuals have pleaded guilty to various charges. As it relates to our work, I am going to reiterate that I believe this committee has properly set forth the venue, the scope and the way in which it intends to move forward in a bipartisan manner to find out the truth and get the facts. Was there an attempt to impede legitimate investigations undertaken at RTC? Why were certain people taken off the case? Why were certain RTC investigators disciplined? Why was information about confidential criminal referrals made public? Was there a failure to go forward? These are legitimate questions. There may be appropriate reasons. But, then again, we might discover inappropriate action.

So these areas are within the scope. We are not going to attempt to dig up something that does not appear to be really connection to the matters that we have set forth. And it is our hope, depending upon the schedule of the special counsel as he goes through the materials, that we can wind this up sooner rather than later, and conduct the business of the people in a manner which reflects credibly on our constitutional obligations as Senators.

Mr. President, I am prepared to yield the remainder of my time. My colleague may have something to do. I am prepared to vote on the resolution.

The PRESIDING OFFICER.

The Senator from Maryland.

Mr. SARBANES.

Mr. President, I will take just a couple of minutes, I say to my distinguished colleague from New York.

First of all, I want to underscore the positive and constructive way in which the chairman of the Banking Committee and members of his staff interacted with us in trying to address the question of working out a resolution that we would bring to the floor of the Senate. Obviously, it is not an easy thing to do, and Members of the Senate have ***S6783** differing views about this matter. But I do think we were able to, in the end, work out a rational approach to this inquiry and investigation, which I indicated in a sense had been committed to last year.

Obviously, you always have to work out carefully the scope questions, which has been done in this resolution, because the scope could be infinite, in a sense, if you leave it to people's imagination. So there were candidates for scope that I think went beyond the horizon, and they are not included. But we have tried to, in effect, put a focus here.

In fact, some of the questions the distinguished Senator from New York just raised, that he felt emerged out of the previous hearings-and he made reference to last year's minority statement in the report-have in fact been spelled out here as matters that could be looked into under this resolution.

There were other candidates, of course, that were not included. We have tried to be rational here. We have tried to be reasonable. The matters specified herein have been the outcome of that process.

Second, I want to say the resolution has been put together in a way that presumes that the two sides will work together cooperatively in carrying out the inquiry, that the staffs will interact in that fashion, that material will be generally available and so on. We are trying to get an inquiry here in which everyone is joined in trying to find out what the facts are. A lot of questions are raised, and will be looked into. If you did not raise questions, you would not have an inquiry, so I recognize that. But our job, I think, is to probe the factual matter behind those issues.

I was interested that my colleague earlier used the word "allegations," and that is what it is until you actually get the facts that sustain it. And that is the process we are going to engage in. Some things, you know, when you finally examine them, turn out to be fairly innocent. At least I think. We had this point about Captain Hume, who did not appear when he was supposed to be a witness.

Well, what happened-obviously there was a slip-up, but I think that is what it was, a slip-up. Captain Hume was deposed. He had over 300 pages of deposition testimony. Apparently at his deposition he said he was about to take a-go on a vacation. After that the hearing date was set. Everyone sort of assumed that Captain Hume could be brought back in for the hearing. A subpoena, I do not think, was issued for him.

Mr. D'AMATO.

I do not think it was issued.

Mr. SARBANES.

I do not think it was issued for him so he did not, as it were, ignore a subpoena. And he went on a hunting and fishing trip and could not be located, is what happened.

In the end, I think it was judged that given we had 300 pages worth of deposition it was not worth having another hearing simply to bring Captain Hume in. I mean it is a small matter, but I only mention it to show that sometimes when you really examine the facts you discover that something that looked amiss at first has a very simple, plausible, and reasonable explanation for it.

We expect, as I understand it, now to move forward with this. I know that the chairman and his staff will be talking with our staff to begin to plan the first set of hearings which I think will probably be in the next month or so, and then we can proceed from there as we schedule other matters which have been stipulated here in the resolution as being within the scope of the inquiry which this special committee will now undertake.

But I do again want to underscore the, I think, responsible way in which the chairman and members of the staff have worked with us in order to try to frame a resolution which we could bring to the floor of the Senate today which I think carries forward the legitimate requirements imposed upon us in terms of carrying out an investigation without straying beyond what most people regard as reasonable bounds.

Mr. President, with that, I made my statement. I see the distinguished Senator from Arkansas, and I would like to yield time to him.

Mr. President, how much time is remaining?

The PRESIDING OFFICER.

Ten minutes.

Mr. SARBANES.

Mr. President, I yield 4 minutes to the Senator from Arkansas.

The PRESIDING OFFICER.

The Senator from Arkansas.

Mr. BUMPERS.

Mr. President, I thank the distinguished Senator from Maryland for yielding.

Mr. President, when I was a student in law school I remember studying criminal law. There never had been a lawyer in my family. So I knew nothing about any kind of law. But I remember the professor about the second day said, "Remember, the presumption of innocence is the hallmark of our system of criminal jurisprudence." It is not presumption of guilt.

I asked the question, "Should I defend somebody if they came into my office and told me they were guilty?'

He said that will be a personal call, but you bear one thing in mind. That person may not know whether he or she is guilty under the law. They may think they are and are not.

I am going to vote for this resolution. I have no objection whatever to a fair, open hearing giving everybody a chance to answer the questions of this committee. But I have heard some names thrown around here this morning.

Mr. President, in cases like this, all you have to do is throw out a name. Oftentimes you have destroyed a person or at least destroyed their reputation. And there has been entirely too much of that surrounding this case.

So let me admonish my friends in the U.S. Senate, and especially on this special committee, lawyers and nonlawyers, to ask yourself when you are making some of these speeches and you are throwing out names, why did not this happen, why did not that happen? Well, hindsight is a wonderful thing. But ask yourself when you are throwing names around and wondering whether or not you are destroying that person, a perfectly innocent person for life, you ask yourself this question: "How would you like to be in that somebody's shoes and hear your name bandied around on the floor of the Senate which carries with it the connotation of some wrongdoing or some guilt?"

I hope the Members of this body will rise above that sort of thing, and when they say something and use some of these names in regard to this hearing, make awfully sure they are not destroying some innocent person needlessly and wrongfully.

I look forward to the hearings. I look forward to the people having an opportunity to say what they want to say and answer the questions of the Members of this committee. But for God's sakes do not prejudge everybody that is going to be called as a witness before they get there and have an opportunity to answer the questions.

I yield the floor.

Mr. SARBANES.

Mr. President, I yield 2 minutes to the Senator from Arkansas.

The PRESIDING OFFICER.

The Senator from Arkansas.

Mr. PRYOR.

Mr. President, I thank the distinguished chairman for yielding me 2 minutes. I had not planned to speak again. But the distinguished chairman of the committee made reference to three or four individuals who have either pled guilty or have been indicted, et cetera. I would like to talk about some of those.

Neil Ainley worked with a bank in Perryville about 50 miles from Little Rock. He pled guilty to four counts, but not one of those counts related to Whitewater; not even close to Whitewater. One was his so-called failure to file with the Internal Revenue Service a withdrawal of cash for the 1990 Clinton campaign; nothing whatsoever to do with Whitewater.

The second individual the distinguished chairman mentioned is Chris Wade. If I am not mistaken, Chris Wade was a real estate broker I believe in Mountain Home near the Whitewater development area. Chris Wade, subsequent to these many years of dealing with the lots at Whitewater, filed bankruptcy; not related to Whitewater in any way. But in the bankruptcy filing he failed to disclose either an asset or a debt. I do not know all the facts but this matter is unrelated, totally unrelated to Whitewater; no relationship whatsoever to the President and Mrs. Clinton. But yet ***S6784** the prosecution has now had him plead guilty.

The third person referred to was Webb Hubbell. We know that case. Webb Hubbell has pled guilty. It is a sad day. He is a good friend. But it was nothing that related to Whitewater Development Corp., absolutely nothing that related to **Madison Guaranty,** nothing whatsoever. Web Hubbell pled guilty to overbilling his clients; nothing to do with the RTC, nothing to do with Whitewater; totally irrelevant.

If we continue spreading this dragnet out further, if we go after every person that has ever had contact with Bill Clinton or Hillary Clinton or James McDougal or whatever, if they have ever made a phone call to them, if they have ever borrowed money or given them a campaign contribution, Lord only knows how long this investigation is going to go. It will go beyond the year 2000.

I just hope that our colleagues on the Banking Committee will realize that we must focus this investigation as it relates to Whitewater and to its original mission.

Mr. President, I thank the distinguished Senator, ranking member, and the distinguished chairman for yielding me this time.

I yield the floor.

Mr. SARBANES.

Mr. President, I am prepared to yield back time.

Mr. D'AMATO.

Mr. President, we yield back the remainder of our time.

The PRESIDING OFFICER.

All time having been yielded, the question is on agreeing to the resolution.

On this question, the yeas and nays have been ordered, and the clerk will call the roll.

Mr. FORD.

I announce that the Senator from Massachusetts <Mr. KENNEDY> is necessarily absent.

The legislative clerk called the roll.

The PRESIDING OFFICER (Mr. SANTORUM)

. Are there any other Senators in the Chamber who desire to vote?
The result was announced-yeas 96, nays 3, as follows:

<Rollcall Vote No. 171 Leg.>

YEAS-96

Abraham Akaka Ashcroft Baucus Bennett Biden Bond Boxer
Bradley Breaux Brown Bryan Bumpers Burns Byrd Campbell
Chafee Coats Cochran Cohen Conrad Coverdell Craig D'Amato
Daschle DeWine Dodd Dole Domenici Dorgan Exon Faircloth
Feingold Feinstein Ford Frist Gorton Graham Gramm Grams
Grassley Gregg Harkin Hatch Hatfield Heflin Helms
Hollings Hutchison Inhofe Inouye Jeffords Johnston Kassebaum
Kempthorne Kerrey Kerry Kohl Kyl Lautenberg Leahy Levin
Lieberman Lott Lugar Mack McCain McConnell Mikulski
Moseley-Braun Moynihan Murkowski Murray Nickles Nunn Packwood
Pell Pressler Pryor Reid Robb Rockefeller Roth Santorum
Sarbanes Shelby Simpson Smith Snowe Specter Stevens
Thomas Thompson Thurmond Warner Wellstone

NAYS-3

Bingaman Glenn Simon

NOT VOTING-1 Kennedy

So the resolution (S. Res. 120) was agreed to.
Mr. D'AMATO.
Mr. President, I move to reconsider the vote by which the resolution was agreed to.
Mr. SARBANES.
I move to lay that motion on the table.
The motion to lay on the table was agreed to.
Mr. THURMOND addressed the Chair.

The PRESIDING OFFICER.
The Senator from South Carolina.
Mr. THURMOND.
Mr. President, I ask unanimous consent to speak as in morning business.
The PRESIDING OFFICER.
Without objection, it is so ordered.
Mr. THURMOND.
I thank the Chair.
(The remarks of Mr.

THURMOND pertaining to the introduction of S. 812 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. DOLE addressed the Chair.

18 U.S.C. §371

Conspiracy / Statute of Limitations

CONSPIRACY / STATUTE OF LIMITATIONS

ERIC JASO

ATTORNEY WORK PRODUCT

Memorandum **Office of the Independent Counsel**

DRAFT

To : T. J. Mayopoulos Date 3/23/95

From : E. H. Jaso

Subject: Conspiracy (18 U.S.C. 371) statute of limitations--overt acts of concealment

Issue: Whether an act done to conceal a past crime may be viewed as an overt act in furtherance of an ongoing conspiracy for the purposes of tolling the statute of limitations.

Short answer: Under the facts present here, yes. Where the unlawful object of the conspiracy itself is to conceal information from the Government, acts of concealment may be viewed as overt acts reasonably contemplated in the course of the conspiracy.

FOIA(b)(7) - (C)

FOIA(b)(7) - (C)

Analysis

Statute of limitations for conspiracy under § 371

The five-year statute of limitations applicable to conspiracy under 18 U.S.C. § 371 (conspiracy to defraud the Federal Government) runs from the date the last overt act committed in furtherance of the conspiracy occurs. Grunewald v. U.S., 353 U.S. 391, 396-97 (1957), see also Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984). As pertains to any particular defendant, the commission of such an overt act by any of the co-conspirators brings that defendant's crime within the limitations period unless that defendant can prove he withdrew from the conspiracy prior to the running of the limitations period. See U.S. v. Edwards, 994 F.2d 417, 421 (8th Cir. 1993) (conspiracy "presumed to exist until there has been an affirmative showing that it has terminated, and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn") (citations omitted), cert. denied, 114 S. Ct. 701 (1994); U.S. v. Lash, 937 F.2d 1077, 1083 (6th Cir.) ("[w]ithout affirmative action to disavow or defeat the purposes of the conspiracy, liability continues for all actions in

furtherance of the conspiracy by the other conspirators"), cert. denied, 502 U.S. 949 (1991); see also, e.g., U.S. v. Hauck, 980 F.2d 611, 614 (10th Cir. 1992) (even where defendant did no further business with co-conspirators within limitations period, defendant still liable where fraudulent sales that defendant conspired to facilitate continued into limitations period, and defendant had taken no affirmative steps to withdraw from conspiracy).

FOIA(b)(7) - (C)

Concealment as an "overt act"

Grunewald held that, in most instances, subsequent acts undertaken to conceal a conspiracy may not be considered acts "in furtherance of" the conspiracy.

> "[A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspirators took care to cover up their crime in order to escape detection and punishment." 353 U.S. at 401-02.

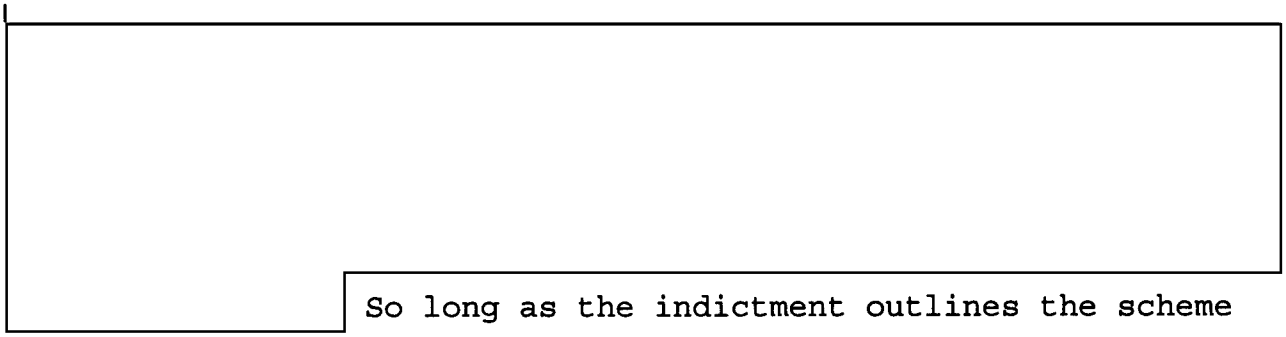
However, the Court distinguished "acts of concealment done in furtherance of the main conspiracy" from "acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime". Id. at 405. Where "the successful accomplishment of the crime necessitates concealment", acts of concealment may be viewed as overt acts in furtherance of the conspiracy. Id.

FOIA(b)(7) - (C)

which under Grunewald may not constitute an "overt act" in furtherance of the original conspiracy.

In anticipating and successfully countering both objections, the Government must draft its indictment, and prosecute its case,

FOIA(b)(7) - (C)



So long as the indictment outlines the scheme in this fashion (and the Government is able to prove the initial agreement was made) the statute casts a broad net: even where the underlying overt acts are technically legal (not the case here), a conviction may be had under § 371 so long as the object of the conspiracy is illegal. See, e.g., U.S. v. Bucey, 876 F.2d 1297, 1312 (7th Cir.) (under § 371, "the government need not charge or prove that [defendant] agreed to commit, or actually did commit a substantive offense. He merely must have agreed to interfere with or obstruct one of the government's lawful functions by deceit, craft or trickery, or at least by means that are dishonest"), cert. denied, 493 U.S. 1004 (1989).

A situation similar on its facts was at issue in U.S. v. Walker, 871 F.2d 1298 (6th Cir. 1989). The defendant, a bank president, arranged for loans to be approved in the name of a third party, but with the intention that the proceeds go to his

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[1] Once the conspiracy is hatched (that is, by the existence of an agreement and the commission of at least one overt act in furtherance thereof), co-conspirators are liable for all illegal acts related to the conspiracy. See U.S. v. Gleason, 616 F.2d 2, 17 (2d Cir. 1979) ("If, in the course of the conspiracy, there occur other illegal acts not specifically contemplated by an individual conspirator but reasonably akin to the anticipated illegality and in furtherance or in consequence of the scheme, the conspirator may not on that account escape liability for participation in the conspiracy"), cert. denied, 444 U.S. 1082 (1980).

own use and benefit. To this end, Walker (among other acts) denied on an FDIC "questionnaire" (apparently a bank certification) that the bank had made "extensions of credit made . . . for the accommodation of others than those whose names appear on bank's records or on credit instruments in connection with such extension". 871 F.2d at 1300. Defendant was charged with conspiracy to make false entries in bank records under § 371, and (in a separate count) making false statements to the FDIC under § 1005. While the court did not squarely address whether the false certification to the FDIC constituted an "overt act" in furtherance of the conspiracy alleged,[2] it nonetheless seemed to consider that act one in the continuing series of acts defendant did in perpetration of the crime. In rejecting Walker's argument that his conspiracy count be dismissed as time-barred, his contention being that the crime was complete with the issuing of the loans, the court noted: "[a]lthough the loans . . . were made in 1981, Walker continuously attempted to conceal his interest in them. . . . The government thus established that repayment of the loans and concealment of Walker's interest in them were objectives of the conspiracy". Thus, while the case does not squarely address the legal issue at hand, the facts are quite similar, and the court seemed to consider the false certification as one of many acts in furtherance of the

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[2] The false certification only was raised as an issue where defendant argued (unsuccessfully) that he had answered the questionnaire "truthfully", since he claimed to believe the question as to whether such loans existed "since the last bank examination" included state examinations. 871 F.2d at 1307.

conspiracy.

Also similar on its facts was U.S. v. Gleason, 616 F.2d 2 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980). There, officers of the Franklin National Bank ("FNB"), in an effort to conceal heavy losses from creditors and from the Government in order to obtain financing and government approval for an acquisition, falsified bank financial statements and other records. The defendants were convicted under 18 U.S.C. §§ 371, 1001, and 1014. As in Walker, the court did not directly address the question at hand, but it did note, in the context of challenged jury instructions regarding the conspiracy charge and a sufficiency-of-the-evidence argument, that each falsification of bank records constituted an overt act for which each of the co-conspirators was liable. The court stated:

> "It hardly necessitated any great mental gymnastics for any reasonable person logically to conclude in the present case that when a bank officer participated in the falsification of bank entries . . . he did so for the purpose of enabling the bank to falsify its quarterly financial statement, not for his own edification or to alter the bank's internal bookkeeping system but to mislead others who would normally rely on the statement as a true representation of the

bank's financial picture. Any major participant aware of the ultimate objective and its achievement through one type of false entry could also reasonably foresee that other types of entry falsification . . . might well be used to achieve that goal." 616 F.2d at 18.

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[redacted]

Perhaps the best legal and factual analogy can be drawn to cases involving tax evasion, which are commonly prosecuted as conspiracies to defraud the Government under § 371. As in this case, tax evasion is a crime of concealment, concealment of money (and, more importantly, information) from the Government. Tax evasion defendants have typically argued that the applicable statute of limitations (six years) has elapsed since all or some

[3] See also n.1, supra.

of the tax returns in question had been filed longer than six years ago. The Eighth Circuit carved out a broad exception to Grunewald in U.S. v. Gleason, 766 F.2d 1239 (8th Cir. 1985), cert. denied, 474 U.S. 1058 (1986), a tax case where defendant sought reversal on the ground that co-conspirator statements regarding a "cover-up" of the crime had been improperly admitted as hearsay exceptions. The court distinguished Grunewald, quoting its exception for crimes where "the successful accomplishment of the crime necessitates concealment", 766 F.2d at 1242 (quoting Grunewald, 353 U.S. at 405) and holding that "a conspiracy covered by 18 U.S.C. § 371, such as the one charged here, necessarily contemplates acts of concealment to accomplish its objectives", id. (citing cases) (emphasis added). The holding is broad indeed, considering that § 371 plainly applies to more than tax evasion cases, but is principled to the extent that the crime of defrauding the Government "necessarily" involves concealment; nothing about tax fraud suggests the principle should not apply to other contexts of defrauding the Government.[4]

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[4] Other courts have held similarly. See, e.g., U.S. v. Bucey, 876 F.2d 1297, 1313 (7th Cir.) (failure to file CTRs and falsification of filed CTRs part of "overall scheme to circumvent the currency reporting laws and to prevent the IRS from collecting accurate data, reports and income taxes"), cert. denied, 493 U.S. 1004 (1989); U.S. v. Mackey, 571 F.2d 376, 383 (7th Cir. 1978) ("the indictment alleged and the prosecution proved a broad effort to evade taxes which by its nature required a substantial effort at concealment"); U.S. v. Diez, 515 F.2d 892, 897-98 (5th Cir. 1975) ("in the present case the central aim of the conspiracy was to deceive officials of the Internal Revenue Service, there inducing them to accept fraudulent tax returns as truthful and accurate. In light of the substantial possibility that the returns would be audited and investigated, the filing of the returns did not fully accomplish the purpose of

One additional line of cases which may be of use arises in the context of mail and wire fraud. In these cases, the courts have held that, where defendant has perpetrated a fraud, additional mailings or communications intended to "lull" the victim into a false sense of security or confidence, such that the victim does not discover the fraud or initiate investigation, constitute criminal acts of fraud rather than subsequent acts of concealment. See, e.g., U.S. v. Lane, 474 U.S. 438, 452-53 (1986) ("[m]ailings occurring after the receipt of goods obtained by fraud are within the statute if they 'were designed to lull the victims into a false sense of security, postpone their ultimate complain to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place'") (quoting U.S. v. Maze, 414 U.S. 395, 403 (1974)). This principle has been applied to the context of conspiracy, where defendant argued (citing Grunewald) that his

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the main conspiracy, which, by its very nature, called for concealment") (citing the exception in Grunewald) (quoted in Gleason, 766 F.2d at 1242 (8th Cir.)), cert. denied, 423 U.S. 1052 (1976). Tax evasion has also been considered a "continuing conspiracy" wherein the object is not only to conceal income by filing false tax returns, etc. but also to evade detection, e.g., by lying to auditors, falsifying government documents, etc. See, e.g., U.S. v. Pinto, 838 F.2d 426, 435 (10th Cir. 1988) ("the indictment was based on one continuing conspiracy, the central object of which was not merely to evade taxes on marijuana income in 1978, but rather to immunize defendants from prosecution for tax evasion") (distinguishing Grunewald); U.S. v. Feldman, 731 F. Supp. 1189, 1195 (S.D.N.Y. 1990) ("the government alleges an ongoing course of conduct that constitutes the affirmative act of [tax] evasion. In essence, that course of conduct consisted of a series of lies and acts of concealment. . . . The government is not required by the statute of limitations to parse out that course of conduct in order to find the date of the first misstatement to an accountant").

subsequent acts of concealment were not overt acts falling within the statute of limitations. See U.S. v. Rogers, 9 F.3d 1025, 1029-30 (2d Cir. 1993) ("the conspiracy to commit wire fraud . . . was not complete until after the [fraudulent] June 1985 telexes were submitted. . . . As such, the June 1985 communications . . . were overt acts of the conspiracy that took place within the statute of limitations"), cert. denied, 115 S. Ct. 95 (1994).

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Feb. 2, 1994.

(No. 93-1602)

The suggestion for rehearing en banc is denied.

[17] The petition for rehearing by the panel is also denied with the following explanation. In its petition for rehearing, Black Hills Institute of Geological Research (Black Hills) relies on *United States v. Good*, —— U.S. ——, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), for the claim that it was entitled to an adversary hearing before the Department of Justice seized the fossil "Sue" from it. In *Good*, it was undisputed that Good owned the real property that the government had seized without first providing Good with an adversary hearing. *See id.* at ——————, 114 S.Ct. at 496. This fact distinguishes *Good* from the instant case, where the panel determined that Black Hills did not own the property in question. *See Black Hills Inst. of Geological Research v. United States Dep't of Justice*, 12 F.3d 737, 742–43 (8th Cir.1993).

UNITED STATES of America, Plaintiff–Appellee,

v.

Arthur James WESSELS, Defendant–Appellant.

No. 93–2678.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 11, 1993.

Decided Dec. 16, 1993.

Rehearing and Suggestion for Rehearing En Banc Denied Feb. 9, 1994.

Defendant was convicted in the United States District Court, Southern District of Iowa, Charles R. Wolle, Chief Judge, of conspiracy to distribute marijuana, of conspiracy to distribute methamphetamine, and of using and carrying firearm in relation to drug trafficking crime, and he appealed. The Court of Appeals, Susan Webber Wright, District Judge, sitting by designation, held that: (1) evidence supported convictions; (2) indictment was not fatally defective; (3) no double jeopardy violation occurred; (4) defendant was not entitled to jury instruction on abandonment of conspiracy; (5) statutory penalties were properly applied; but (6) court should not have taken judicial notice of type of methamphetamine involved.

Affirmed and remanded for further findings.

1. Conspiracy ⇐24.15

Mere inactivity does not end a conspiracy.

2. Conspiracy ⇐44.2

Defendant has burden to withdrew from conspiracy.

3. Conspiracy ⇐47(12)

Substantial evidence supp sion that defendant had not wit conspiracy to distribute meth and, thus, supported conviction fendant's contention that, by the arrested all other participants h rested, had ceased their activi withdrawn from conspiracy; sea fendant's dwelling revealed mar notes, scale, and several weapons participants were in custody or h tively withdrawn from conspiracy first search.

4. Weapons ⇐17(4)

Substantial evidence suppor tion for carrying and using firearms in relation to drug trafficking offense; during searches of defendant's dwelling, police found marijuana, drug notes, scale, and three loaded firearms, one of which was located about three feet away from the marijuana.

5. Criminal Law ⇐1144.13(3), 1159.2(5)

Jury verdict must be sustained if there is substantial evidence, taking view most favorable to government, to support it.

6. Indictment and Information ⇐176

There was no fatal variance between indictment which charged defendant with using and carrying firearms in relation to drug trafficking offense on one date and evidence at trial that defendant had carried firearms on other occasions during course of same drug offense; evidence of additional instances of gun use during the offense did not prove "materially different" facts from those alleged in indictment and, thus, did not amount to "variance."

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

7. Indictment and Information ⇐55

Indictment is sufficient on its face if it contains all essential ele ts of offense defendant of alleges suffi- dant to plead o subsequent t ordinarily is fective that it ble construc- ch defendant

n ⇐121.1(1)

f particulars e of charges ninimize ele- ll of particu- is not to be e of govern-

⇐171

"Variance between indictment and proof," which does not require reversal if variance is harmless, occurs when essential elements of offense set forth in indictment are left unaltered but evidence offered at trial proves facts materially different from those alleged in the indictment.

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

10. Criminal Law ⇐1167(1)

Variance between indictment and proof is harmless if it is minor in character and fairly apprised defendant of charges against him.

11. Criminal Law ⇐814(3)

Defendant was not entitled to instruction on theory of case which lacked evidentiary support.

12. Criminal Law ⇐772(6)

Defendant is entitled to have jury instructed on his theory of defense if proposed instruction correctly states applicable law and is supported by evidence.

13. Criminal Law ⇐863(1)

District court has wide discretion in deciding which supplemental instructions to submit to jury.

14. Double Jeopardy ⇐151(2)

Prosecution for conspiracy to distribute methamphetamine did not violate right against double jeopardy of defendant who had pled guilty to conspiracy to distribute marijuana, even though defendant was charged with conspiracy to distribute marijuana or methamphetamine; since defendant had pled guilty to marijuana charge, jury was only required to determine whether methamphetamine was also an object of the conspiracy and, therefore, verdict on each allegation was unanimous and independent of the other. U.S.C.A. Const.Amend. 5.

15. Double Jeopardy ⇐131

Government may bring alternative charges against defendant, and conviction for both charges does not violate prohibition against double jeopardy, so long as verdict on each allegation is unanimous and independent of the other. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐1206.3(1)

Sentencing enhancement provision contained in Comprehensive Drug Abuse Prevention and Control Act of 1970 for defendants with prior drug convictions applies to defendants convicted of drug conspiracies. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b), 406, 21 U.S.C.A. §§ 841(b), 846.

17. Criminal Law ⇐273.1(2)

Government's withdrawal of consent to oral plea agreement to move for reduction of sentence did not entitle defendant to relief from sentence imposed; whatever benefits

defendant intended to reap from agreement were entirely contingent upon district court's approval and acceptance thereof.

18. Criminal Law ⇐1237

District court sentencing defendant for conspiracy to distribute methamphetamine and marijuana could use sentencing provisions penalties applicable to methamphetamine as opposed to those applicable to marijuana, where indictment for conspiracy to distribute each substance was not duplicitous. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b), 406, 21 U.S.C.A. §§ 841(b), 846.

19. Conspiracy ⇐51

District court sentencing defendant for conspiracy to distribute methamphetamine and marijuana could base computation of statutory penalties on amount of drugs attributable to entire conspiracy, rather than on greatest amount of drugs involved in any single transaction in course of the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b).

20. Conspiracy ⇐51

In computing statutory penalties for defendant convicted of conspiracy to distribute drugs, district court may include not only amount of drugs involved in transactions which were known to defendant, but also amount of drugs involved in transactions which were reasonably foreseeable to defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b).

21. Conspiracy ⇐51

Evidence supported district court's determination that, for purposes of sentencing defendant for conspiracy to distribute methamphetamine, defendant was responsible for three and one-half pounds of methamphetamine; coconspirator testified that he had personally supplied defendant with three and one-half to four pounds of methamphetamine during course of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b).

22. Criminal Law ⇐304(1), 1311

District court sentencing defendant under Sentencing Guidelines for conspiracy to distribute methamphetamine should not have taken judicial notice of type of methamphetamine involved; government had burden of proof on that issue, since it affected length of sentence to be imposed. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

Dean Stowers, Des Moines, IA, argued, for defendant-appellant.

Counsel who presented argument on behalf of the appellee was Clifford D. Wendel, Des Moines, IA, argued (Christopher D. Hagen and Ronald M. Kayser, on the brief), for plaintiff-appellee.

Before FAGG and WOLLMAN, Circuit Judges and WRIGHT,* District Judge.

SUSAN WEBBER WRIGHT, District Judge.

Arthur James Wessels pleaded guilty to conspiracy to distribute marijuana and was convicted of conspiracy to distribute methamphetamine and of using and carrying a firearm in relation to a drug trafficking crime. He was sentenced to 240 months in prison on the conspiracy count and sixty months in prison on the firearms count, the terms to be served consecutively. He now appeals both the judgment of conviction and the sentence. We affirm his conviction on both counts and remand for further findings on the type of methamphetamine involved.

I.

On December 17, 1992, the grand jury filed a two-count indictment charging Wessels with conspiracy to distribute marijuana or methamphetamine and with using and carrying a firearm in relation to a drug trafficking crime. The indictment provided as follows:

Count 1

From on or about the 1st day of January, 1989 up to and including the 17th day of December, 1992, the exact dates to the Grand Jury unknown, in the Southern District of Iowa and elsewhere, two or more persons, known and unknown to the Grand Jury, including ARTHUR JAMES WESSELS, did conspire to commit an offense against the United States, namely to knowingly and intentionally distribute marijuana, a Schedule I controlled substance or a mixture or substance containing methamphetamine, a Schedule II controlled substance in violation of Title 21, United States Code, Section 841(a)(1).

This is a violation of Title 21, United States Code Section 846.

THE GRAND JURY FURTHER CHARGES:

Count 2

That from on or about the 1st day of January, 1989 up to and including the 17th day of December, 1992, the exact dates to the grand jury unknown, in the Southern District of Iowa and elsewhere, defendant, ARTHUR JAMES WESSELS did knowingly and unlawfully during and in relation to a drug trafficking crime, to wit: conspiracy to distribute marijuana, a Schedule I controlled substance or a mixture or substance containing methamphetamine, a Schedule II controlled substance, use or carry a firearm.

This is a violation of Title 18, United States Code, Section 924(c).

Wessels was arraigned on January 4, 1993, and pleaded not guilty. On March 1, 1993, he entered a guilty plea to the marijuana conspiracy and went to trial on the methamphetamine portion of count 1 and on the weapons count. The jury found Wessels guilty on both counts and the district court sentenced and entered judgment against Wessels on June 22, 1993.

II.

For his first point on appeal, Wessels challenges his conviction under count 2 of the indictment. He contends there was insufficient evidence to convict him of use of a firearm in relation to a drug conspiracy and that the indictment was vague and testimony was admitted in violation of the bill of particulars. He also argues the district court erred in failing to instruct the jury on abandonment of a conspiracy.

Upon Wessels' motion and pursuant to an order of the district court, the government filed a bill of particulars on the weapons count. This bill of particulars provided the following with regard to Wessels' use of a firearm:

1. Each and every time the defendant, Arthur James Wessels sold methamphetamine or marijuana to Steven Grade, Brett Rork or Sharon Jones, he had a gun present.

2. During the search of his residence on or about February 25, 1992, guns were found during the search of the defendant's residence and cabin.

On the eve of trial, the government provided Wessels with a memorandum which set forth further details as to its witnesses' expected testimony concerning possession of firearms during various drug transactions. The memorandum stated:

2. Steve Grade will testify that between the first of January, 1990, and June 26, 1991, when he was arrested, he and Art Wessels trafficked in methamphetamine on the average of one to two times per week. Fifty percent of the time, Grade would travel to Kirkville, Iowa. Wessels always travelled with a weapon under his seat. Grade believes the firearm was a large caliber revolver. Wessels kept a loaded rifle by the door at his cabin in Eddyville as did he likewise at his house in R.R. Oskaloosa. In the winter of 1990, Wessels arrived at Grade's house carrying two MAC 10 semi automatic weapons strapped around his neck. On that occasion, Wessels and Grade did a methamphetamine transaction.

3. Further, Sharon Jones will likewise testify about the incident in the winter of 1990 when Wessels arrived at the Grade residence in possession of the MAC 10 semi automatic weapon.

*The HONORABLE SUSAN WEBBER WRIGHT, United States District Judge for the Eastern District of Arkansas, sitting by designation.

Wessels' motion to dismiss count 2 for failure to comply with the court's order granting a bill of particulars and for variance between the bill of particulars and the indictment was denied.[1]

[1–4] At trial, the evidence showed that numerous firearms were seized in the search of Wessels' residence on February 26, 1992, and that he was in possession of an automatic weapon in the winter of 1990 at the trailer home of friends in Kirkville, Iowa. Wessels argues there was insufficient evidence to show that these firearms were used in the alleged drug conspiracy and that all the major players except for himself had been arrested or had dropped out of the conspiracy by the summer of 1991. The government maintains, and this court agrees, that mere inactivity does not terminate a conspiracy and that Wessels has the burden of proving withdrawal from a conspiracy. *United States v. Askew*, 958 F.2d 806, 812 (8th Cir. 1992) (quoting *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir.1979)). Wessels did not present evidence that he had affirmatively withdrawn from the conspiracy. He took the position that because all of his alleged co-conspirators had withdrawn, abandoned, or ceased their activities by the summer of 1991 there was no conspiracy.

[5] A jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *United States v. Sileven*, 985 F.2d 962, 967 (8th Cir.1993). This Court finds that substantial evidence supports the jury verdict. In addition to the search of Wessels' residence which revealed marijuana, drug notes, and a scale, the evidence showed that while several members of the conspiracy had been apprehended, not all of the participants were in custody or affirmatively out of the conspiracy at the time of the search. At the February 26 search, a loaded derringer was found on a shelf in Wessels' basement, a loaded .38 caliber revolver was found two to three feet from marijuana, and another loaded revolver was found in his garage. From this evidence, the jury could reasonably conclude not only that the conspiracy was still in existence but also that the firearms were used in connection with the conspiracy.

[6] Wessels also contends that the firearms possession at the trailer in the winter of 1990 was neither presented to the grand jury nor specified in the bill of particulars. He argues the indictment was unconstitutionally vague and that evidence outside the scope of the indictment and the bill of particulars was submitted to the petit jury.

[7, 8] An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution. *United States v. Young*, 618 F.2d 1281, 1286 (8th Cir.), *cert. denied*, 449 U.S. 844, 101 S.Ct. 126, 66 L.Ed.2d 52 (1980). An indictment will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted. *Id.* Likewise, the primary purpose of a bill of particulars is to inform the defendant of the nature of the charges against him and to prevent or minimize the element of surprise at trial. *United States v. Garrett*, 797 F.2d 656, 665 (8th Cir.1986). A bill of particulars, however, is not a proper tool for discovery, *United States v. Hester*, 917 F.2d 1083, 1084 (8th Cir.1990); it is not to be used to provide detailed disclosure of the government's evidence at trial. *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 405 (4th Cir.1985).

[9, 10] Wessels urges that the grand jury did not hear the same evidence as the petit jury. The only evidence presented to the grand jury, Wessels argues, was that firearms were discovered at his house on February 26, 1992; yet the indictment alleges weapon possession from January 1989 to December 1992. He contends the government was erroneously allowed to broaden the indictment to include events other than those of February 1992.

> [T]he acts proved at trial may not vary from those charged in the indictment. A variance 'occurs when the essential elements of the offense set forth in the indictment are left unaltered but the evidence offered at trial proves facts materially different from those alleged in the indictment.' Reversal is not required if the variance is harmless, that is, if 'the indictment fully and fairly apprised the defendant of the charges he or she must meet at trial.'

United States v. Huntsman, 959 F.2d 1429, 1435 (8th Cir.1992) (quoting *United States v. Begnaud*, 783 F.2d 144 (8th Cir.1986)).

> Tests of fatal variance are: Was defendant misled? Will defendant be protected against a future proceeding? 'Upon the question of variance between indictment and proofs, the controlling consideration should be whether the charge was fairly and fully enough stated to apprise defendant of what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his injury.'
>
> [T]he 'true inquiry ... is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused.'

United States v. West, 549 F.2d 545, 552 (8th Cir.1977) (citations omitted). *See also United States v. Yeo*, 739 F.2d 385, 387 (8th Cir.1984) (where there is a variance between the facts alleged in the indictment and the evidence offered at trial, the issue is one of fairness, and actual prejudice must be considered).

The grand jury was presented evidence of gun possession acquired through the search of Wessels' residence in February 1992; this evidence was sufficient to support the indictment. The bill of particulars set out that each and every time Wessels sold methamphetamine or marijuana to Grade, Rork, or Jones, he had a gun present and that guns were found in a search of his residence in February 1992. The government subsequently presented to the petit jury evidence showing additional instances of gun use during the conspiracy, i.e., the winter 1990 gun possession. This does not amount to a "variance" as the evidence did not prove facts "materially different" from those alleged in the indictment but did prove other facts in addition to those presented to the grand jury. The indictment and the bill of particulars fully and fairly apprised Wessels of the charges he would face at trial. In addition, Wessels failed to show how he was actually prejudiced.

[11–13] Wessels further argues that the district court erred in not giving his proposed jury instruction concerning abandonment of a conspiracy. Criminal defendants are entitled to an instruction on their theory of defense if the proposed instruction is a correct statement of the applicable law and is supported by the evidence. *United States v. Austin*, 915 F.2d 363, 365 (8th Cir.1990). The district court has wide discretion in deciding which supplemental instructions to submit to the jury. *United States v. Blumberg*, 961 F.2d 787, 790 (8th Cir.1992). Wessels' abandonment theory was based upon his argument that there was no conspiracy because there were no remaining active co-conspirators. The evidence, however, was not sufficient to allow a reasonable jury to find Wessels had abandoned the conspiracy, and we find the district court committed no error in denying the instruction.

III.

[14] For his second point, Wessels argues the district court violated his Fifth Amendment right against double jeopardy by allowing the government to proceed with a trial on the methamphetamine portion of count 1 after he had pleaded guilty to conspiracy to distribute marijuana under count 1. Wessels contends his right against double jeopardy was violated because he was convicted twice on the same count: once when the court accepted his guilty plea to conspiracy to distribute marijuana and again when he was tried on conspiracy to distribute methamphetamine. He argues that a count can-

1. Wessels had earlier moved to dismiss count 2 under Fed.R.Crim.P. 12(b)(2), arguing that the indictment was vague.

not contain more than one charge, and that the guilty plea should therefore have disposed of count 1 entirely.

In support of his argument, Wessels cites *United States v. Owens*, 904 F.2d 411 (8th Cir.1990) (*Owens*). The indictment in *Owens* charged the defendant with conspiracy to distribute and possess with intent to distribute "methamphetamine/amphetamine." The jury instructions repeated the ambiguous designation "methamphetamine/amphetamine" and the jury returned a general verdict of guilty. The problem then arose as to which substance should be used by the district court in determining the correct sentencing range. The guidelines provided disparate sentencing ranges for amphetamine and methamphetamine, with amphetamine having the lower range and the jury did not indicate which drug was the object of the conspiracy. Nevertheless, the district court concluded that methamphetamine was the object of the conspiracy and sentenced the defendant on that basis.

On appeal, we held that the sentence should have been calculated on the basis that the drug involved was amphetamine. *Id.* at 413–14. We concluded that by instructing the jury on an "either/or" basis with respect to the two substances and by failing to enable the jury to indicate by use of a special verdict form which of the two substances it found the conspiracy to have involved, the district court elicited an ambiguous verdict of guilty. *Id.* at 414. Under such circumstances, the court erred in sentencing the defendant based on the alternative which yielded a higher sentencing range. *Id.* at 414–15.

[15] Wessels' reliance on *Owens* is misplaced. *Owens* does not prohibit the government from charging a defendant in the alternative so long as the verdict on each allegation is unanimous and independent of the other. 904 F.2d at 414; *see also United States v. Page-Bey*, 960 F.2d 724, 727–728 (8th Cir.1992) (special verdict form not required where indictment charged defendant with conspiracy to distribute both cocaine and heroin when evidence indicated defendant supplied both and it would have made no difference in defendant's sentence) (per curiam). Here, there is no ambiguity in the jury's verdict. Because Wessels had already pleaded guilty to the marijuana conspiracy, the jury only needed to determine whether methamphetamine was also an object of the conspiracy, which it did. Accordingly, there was no violation of Wessels' Fifth Amendment rights.

IV.

[16] For his final point, Wessels raises several challenges to his sentence. He first argues that the enhancement provision for prior drug convictions set forth in 21 U.S.C. § 841(b) does not apply to persons convicted under the drug conspiracy statute, 21 U.S.C. § 846. Citing *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), Wessels argues that only the penalties applicable to the offense that was the object of the conspiracy, and not those applicable to the offender, apply by reference from § 846. This argument is without merit. As we noted in *United States v. Askew*, 958 F.2d at 812, the drug conspiracy statute has been amended since *Bifulco* to expressly provide that convicted drug conspirators are "subject to the same penalties as those prescribed for the [underlying substantive] offense." Thus, the enhancement provision of § 841(b) applies whether the conviction was for violating the substantive statute or for conspiring to violate the substantive statute.

[17] Wessels also argues the district court should not have applied the penalty enhancement because of an oral plea agreement upon which he detrimentally relied. Apparently, Wessels and the government had entered into an oral agreement whereby in exchange for Wessels' cooperation, the government would move for a reduction in Wessels' sentence. However, the government subsequently informed Wessels that it would not go through with the agreement and proceeded to file a notice of enhancement after learning that Wessels had a prior felony drug conviction. Wessels argues that the government breached the plea agreement, and in so doing, engaged in misconduct, gained an unfair advantage, and deprived him of due process and the effective assistance of counsel.

Wessels is not entitled to relief due to the government's withdrawal of its consent to the plea agreement. Whatever benefits Wessels intended to reap as a result of the agreement were entirely contingent upon the approval of the district court. *United States v. Walker*, 927 F.2d 389, 390 (8th Cir.1991).

> Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.

United States v. McGovern, 822 F.2d 739, 744 (8th Cir.) (*quoting United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir.1980)), *cert. denied*, 484 U.S. 956, 108 S.Ct. 352, 98 L.Ed.2d 377 (1987).

Wessels was not justified in relying on the terms of the plea agreement because it had not been approved and accepted by the district court.[2] In addition, he has not shown that the government gained an unfair advantage over him in withdrawing its consent to the agreement, such as by the use at trial of statements made during the course of the plea negotiations, nor has he shown a deprivation of due process in his subsequent trial. Wessels was not prejudiced by the government's withdrawal of its consent to the plea agreement and the district court committed no error when it increased the statutory penalty on account of Wessels' prior felony drug conviction.

[18] Wessels next argues the indictment was duplicitous and that the district court thus erred in utilizing the statutory penalties applicable to the conspiracy to distribute methamphetamine charge as opposed to those applicable to the marijuana conspiracy. In support of this argument, Wessels again cites *Owens*. However, we have already determined there was no ambiguity in the jury's verdict and that the jury properly determined that methamphetamine was an object of the conspiracy. Accordingly, the district court did not err in utilizing the penalties applicable to the charge of conspiracy to distribute methamphetamine.

[19] Wessels next argues the district court erred in determining that the penalties set forth in § 841(b) are based upon the amount of drugs attributable to the entire conspiracy. He argues that the penalty should be determined by using the greatest amount of any single transaction in the course of the conspiracy rather than by aggregating small amounts involved in numerous transactions. He additionally argues that the district court erred in determining the quantity of drugs involved based of the testimony of witness Steve Grade. We reject both of these arguments.

[20] One of the measures employed in determining the severity of a drug conspiracy offense is the amount of narcotics involved in the entire conspiracy. *United States v. Savage*, 891 F.2d 145, 151 (7th Cir.1989). Indeed, the amount of narcotics considered in sentencing for conspiracy includes not only the amount involved in the transactions that were known to the defendant but also those that were reasonably foreseeable, reflecting the fact that each conspirator is responsible for the acts and offenses of each one of his co-conspirators committed in furtherance of the conspiracy. *Id. See also United States v. Tolson*, 988 F.2d 1494, 1502 (7th Cir.1993) (finding that the defendant may be held responsible for all marijuana transactions [18,500 pounds] from 1986 through 1988 that were reasonably foreseeable to him). Wessels cites no authority requiring the court to determine the penalty by using only the greatest amount of any single transaction in the course of the conspiracy and nothing in § 841(b) imposes such a requirement. The district court properly determined that the

2. The district court denied Wessels' pretrial motion to enforce the plea agreement, stating that it cannot accept a plea of guilty based upon a plea agreement that asserts that the court knows to be false, and that it would not have accepted the plea agreement in this case because it omitted the notice of prior conviction.

penalties set forth in § 841(b) are based upon the amount of drugs attributable to the entire conspiracy.

[21] In addition, the district court did not commit error in its determination that Wessels was responsible for three and one-half pounds of methamphetamine. The court credited Grade's testimony that he personally supplied Wessels with three and one-half to four pounds of methamphetamine during the course of their drug trafficking activities. Grade's testimony, which was based upon his own personal knowledge, clearly established the amount of drugs involved. *See United States v. Galvan,* 961 F.2d 738, 740 (8th Cir.1992) (trial testimony used to estimate the amount of uncharged drugs must clearly establish either the dates of the transactions or the amounts of drugs involved) (citations omitted). Although Wessels argues that Grade's testimony should not have been credited, witness credibility is an issue for the sentencing judge that is virtually unreviewable on appeal. *United States v. Candie,* 974 F.2d 61, 64 (8th Cir.1992) (citations omitted). We conclude that the district court's findings regarding the quantity of methamphetamine involved were reasonably supported by the evidence and are not clearly erroneous.

[22] However, we do find the district court erred in taking judicial notice that the methamphetamine involved in this case was D-methamphetamine rather than L-methamphetamine.[3] The court acknowledged at the sentencing hearing that the government failed to present evidence on this issue, but noted that it had been involved in some 50 methamphetamine cases in the State of Iowa, none of which involved L-methamphetamine. Stating that under such circumstances the defense was obligated to do more than simply say the government had not proven that the substance was D-methamphetamine, the court, over Wessels' objections, took judicial notice that the methamphetamine involved was D-methamphetamine. This was error. While irrelevant to the question of guilt, the type of methamphetamine involved was essential to the calculation of the proper sentence, and the government rather than Wessels carried the burden of producing evidence on this issue. *United States v. Patrick,* 983 F.2d 206, 208 (11th Cir.1993) (citations omitted). *See also United States v. Koonce,* 884 F.2d 349, 353 (8th Cir.1989). Because the district court did not receive any evidence as to the type of methamphetamine involved, we remand for further findings on this issue.

V.

In sum, we affirm Wessels' conviction on both counts and remand for further proceedings consistent with this opinion.

3. Under the sentencing guidelines, the involvement of D-methamphetamine requires a sentence that is significantly more severe than that for an equal quantity of L-methamphetamine. U.S.S.G. § 2D1.1. *See United States v. Koonce,* 884 F.2d 349, 352 (8th Cir.1989).

J.B. HICKEY, Appellant,

v.

Sgt. REEDER; Pulaski County Jail, Little Rock, Arkansas; Deputy Marin, Jailor, Pulaski County Jail, Little Rock, Arkansas; Cpt. Carlton, Pulaski County Jail, Little Rock, Arkansas, Appellees.

No. 92-3737.

United States Court of Appeals, Eighth Circuit.

Submitted June 18, 1993.

Decided Dec. 20, 1993.

Rehearing Denied Feb. 1, 1994.

Inmate brought civil rights action against jail officials who shot him with stun gun when he refused to clean his cell. The United States District Court for the Eastern District of Arkansas, Jerry W. Cavaneau, United States Magistrate Judge, entered judgment for jail officials, and inmate appealed. The Court of Appeals, Beam, Circuit Judge, held that use of stun gun to enforce order to sweep violated inmate's constitution-

al right to be free from cruel and unusual punishment.

Reversed and remanded.

Bowman, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⚿776

Whether conduct, if done with required culpability, is sufficiently harmful to be cruel and unusual punishment in violation of Constitution is objective or legal determination which Court of Appeals decides de novo. U.S.C.A. Const.Amend. 8.

2. Federal Courts ⚿776

If objective element of harm is established to meet Eighth Amendment standard, actors' subjective state of mind becomes relevant and is question of fact which Court of Appeals reviews de novo. U.S.C.A. Const. Amend. 8.

3. Criminal Law ⚿1213.10(4)

Being shot with stun gun by jail officials supported objective pain component of inmate's claim under cruel and unusual punishment clause of Constitution. U.S.C.A. Const. Amend. 8.

4. Criminal Law ⚿1213.10(1)

Every malicious push or shove by jail officials does not amount to deprivation of inmate's constitutional rights to be free from cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

5. Criminal Law ⚿1213.10(1)

Pain maliciously inflicted by jail officials on inmate must be significant to violate constitutional prohibition of cruel and unusual punishment clause. U.S.C.A. Const.Amend. 8.

6. Civil Rights ⚿135

District court's finding that stun gun was used in good faith by jail officials against inmate to avoid violence was clearly erroneous, where officials used gun to force inmate to clean his cell, and inmate did not make any threats to physically assault officers. U.S.C.A. Const.Amend. 8.

7. Criminal Law ⚿1213.10(4)

Use of stun gun by jail officials against inmate to enforce order to sweep his cell violated his right to be free of cruel and unusual punishment. U.S.C.A. Const. Amend. 8.

8. Criminal Law ⚿1213.10(1, 4)

In reviewing inmate's cruel and unusual punishment claims, Court of Appeals extends wide ranging deference to judgment and policies of prison officials who must maintain internal order and discipline in prisons and who often make snap decisions in volatile and dangerous situations. U.S.C.A. Const. Amend. 8.

9. Criminal Law ⚿1213.1

Obdurate, wanton, or intentional inflictions of unnecessary pain, not mere inadvertence or good faith mistakes as to amount of force reasonably called for, violate cruel and unusual punishment clause of Constitution. U.S.C.A. Const.Amend. 8.

10. Criminal Law ⚿1213.10(1, 4)

Whether pain is wantonly and unnecessarily inflicted on inmate by prison officials depends, at least in part, on whether force could have plausibly been thought to be necessary to maintain order in institution and to maintain safety of prison personnel or inmates. U.S.C.A. Const.Amend. 8.

11. Prisons ⚿13(4)

Law does not authorize day-to-day policing of prisons by stun gun.

12. Prisons ⚿13(2)

Summary applications of force are constitutionally permissible when prison security and order, or safety of other inmates or officers, has been placed in jeopardy. U.S.C.A. Const.Amend. 8.

Howard B. Eisenberg, Little Rock, AR, argued, for appellant.

David M. Fuqua, North Little Rock, AR, argued, for appellees.

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

them unduly burdensome. The procedures severely penalize him, he argues, because they are excessively elaborate and costly given the fact he will be the *only* bidder at the impending sale. *See supra* note 1.

We disagree. The bidding procedures established by the bankruptcy court are the sort that routinely govern estate sales. Moreover, the court adopted those procedures precisely because of the perceived collusion between Fisher and Gould in crafting the bogus second offer. Fisher's attack on the rebidding procedures is largely a roundabout attack on the (unappealable) May 1989 order. The issue is not *whether* the property should be rebid, but *how* it will be rebid. Again, if Fisher believed that rebidding would be futile because he was the only potential bidder, the time to make that argument was in an appeal of the May 1989 order. Furthermore, we are not in a position on this record to say whether the location of the 7.5 acre parcel does in fact limit bids to the Weavers and Fisher. The bankruptcy court, fully apprised of the facts, attempted to find an equitable solution to the defects that infected both the first and second attempts to sell the property. Indeed, by establishing a procedure for claims resolution, the bankruptcy court took pains not to leave anyone, including Fisher, without recourse for damages resulting from the vacated sale; although Fisher complains that the rebidding procedures will prove time-consuming and costly, we cannot say, under the circumstances, that it was an abuse of discretion to adopt this approach.

[5] Finally, Fisher challenges the bankruptcy court's determination that he did not hold a claim for breach of warranty against Gould. Whether he did or not turns on whether the original sale was a judicial sale under Indiana law, *see, e.g., Vonderahe v. Ortman*, 128 Ind.App. 381, 147 N.E.2d 924, 926 (1958), or a sale in the ordinary course of business under the Bankruptcy Code. *See, e.g., In re Canyon Partnership*, 55 B.R. 520, 524 (Bankr. S.D.Cal.1985). The district court declined to address that issue, concluding that it was an integral part of the claims resolution process established by the bankruptcy court. We agree. As noted, the bankruptcy court specifically ordered that all proceeds from the sale of the 7.5 acre parcel be subject to the court's jurisdiction for distribution to potential claimants. Whether Fisher is entitled to recover for breach of warranty is properly left for that stage of the litigation.

AFFIRMED.

* Case number 91-2586, Roger Curry's appeal, was not argued but was submitted on the record and briefs.

UNITED STATES of America, Plaintiff-Appellee,

v.

Timothy S. CURRY, Samuel T. Harding, Don J. Leinenbach, Robert Holland and Roger S. Curry, Defendants-Appellants.

Nos. 91-2550, 91-2556, 91-2578, 91-2579 and 91-2586.

United States Court of Appeals, Seventh Circuit.

Argued May 21, 1992.*

Decided Sept. 24, 1992.

Rehearing and Rehearing In Banc Denied Oct. 23, 1992 in Nos. 91-2578 and 91-2579.

Rehearing and Rehearing En Banc Denied Oct. 28, 1992 in No. 91-2586.

Defendants were convicted in the United States District Court for the Southern District of Indiana, Gene E. Brooks, Chief Judge, of, inter alia, conspiracy to manufacture and possess with intent to distribute in excess of 50 kilograms of marijuana, and they appealed. The Court of Appeals, Cummings, Circuit Judge, held that: (1) joinder of one defendant's perjury counts with other defendants' conspiracy counts was proper; (2) expert testimony regarding eyewitness identification was properly excluded; (3) evidence was sufficient to support finding that each defendant participated in single, ongoing conspiracy; (4) certain testimony was properly admitted under exceptions to hearsay rule; and (5) sentences were not improper.

Affirmed.

1. Indictment and Information ⇐124(4)

Under rule permitting multiple defendants to be tried together only if their charged conduct arose from "same act or transaction" or "same series of acts or transactions," acts or transactions are considered part of "same series" if they are performed pursuant to common scheme or plan. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

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

2. Indictment and Information ⇐124(5)

Joinder of perjury counts with other defendants' conspiracy counts was proper under rule allowing multiple defendants to be tried together if charged conduct arose from same series of acts or transactions, in prosecution arising from alleged conspiracy to grow marijuana, regardless of number of years between end of alleged conspiracy and subsequent alleged perjury. Fed. Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

3. Indictment and Information ⇐124(4)

Conspiracy and its cover-up are considered parts of common plan, for purposes of rule allowing multiple defendants to be tried together if charged conduct arises from common scheme or plan. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

4. Criminal Law ⇐620(6)

Defendants in prosecution alleging conspiracy to grow marijuana were not entitled to severance of one defendant's perjury charges, even if trial were severed, testimony regarding perjury defendant's role in drug conspiracy would have been relevant and admissible to show that he committed perjury and, although evidence relating to perjury may not have been admissible in separate conspiracy trial, there was no severe prejudice. Fed.Rules Cr. Proc.Rule 14, 18 U.S.C.A.

5. Criminal Law ⇐469.1

Expert testimony is generally admissible under Federal Rule of Evidence 702 if it will assist trier of fact to understand evidence or to determine fact in issue, but district judge has broad discretion to exclude relevant evidence that is confusing or redundant under Rule 403. Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

6. Criminal Law ⇐338(7), 474.3(2)

Exclusion of expert testimony regarding reliability of eyewitness identifications was proper, whether under Rule of Evidence 702, governing expert testimony, or under Rule 403, governing exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time; intrusion of expert to comment on what was minor issue was not necessary, especially when record revealed that vigorous cross-examinations by defendants exposed weaknesses of identifications; moreover, defendants gave government only four days' notice of intent to call expert. Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

7. Conspiracy ⇐48.2(2)

Multiple conspiracy instruction was not required in prosecution of several defendants alleging conspiracy to manufacture, and to possess with intent to distribute, marijuana; defendants failed to show that they had been prejudiced by alleged variance between indictment and proof.

8. Conspiracy ⇐24(1)

Essence of conspiracy is agreement; to join conspiracy is to join agreement, not group.

9. Conspiracy ⇐24(2)

Multiple conspiracies exist when there is no agreement toward common goal, and

each conspirator's agreement constitutes end unto itself.

10. Conspiracy ⇐24(3)

Participants in conspiracy need not know all other members or participate in every aspect of conspiracy.

11. Conspiracy ⇐24(1), 24.5

Proof of conspiracy requires substantial evidence that particular defendant knew of illegal objective of conspiracy and agreed to participate in its achievement.

12. Conspiracy ⇐24(1), 47(2)

Because of secretive nature of conspiracies, formal agreement need not be proven; jury may infer agreement based solely on circumstantial evidence regarding relationship of parties and their overt acts.

13. Conspiracy ⇐24(3)

Parties may join or withdraw from conspiracy at any time without altering fundamental nature of conspiracy.

14. Conspiracy ⇐40

"Employee" of conspiracy is participant in conspiracy, since employee has agreed to perform certain duties in furtherance of conspiracy and because employee materially benefits from success of conspiracy.

15. Conspiracy ⇐47(12)

Evidence in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana was sufficient to support finding that defendant whose agreed duties were limited to tending marijuana plants and participating in harvest was participant in overall conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

16. Conspiracy ⇐47(12)

Evidence in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana was sufficient to support conclusion that attorney, who was involved in planting, harvesting, drying, packing, inspecting, and transplanting marijuana, joined the conspiracy alleged. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

17. Conspiracy ⇐47(12)

Evidence in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana was sufficient to support finding that owner of farm where marijuana was grown joined in the conspiracy alleged; although there was no evidence that defendant participated in harvesting, manicuring, or distributing marijuana, there was evidence that he harvested corn on his farm at night when others were harvesting marijuana, and that he had conversations with other defendants indicating his awareness of the marijuana-growing; jury was entitled to infer that defendant was compensated for allowing portion of land to be used for growing marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

18. Criminal Law ⇐417(15)

There is no need to redact inculpatory portion of hearsay admitted under exception for admissions against penal interest as long as that portion is closely related to incriminatory portion of statement, and other requirements of rule are met. Fed. Rules Evid.Rule 804(b)(3), 28 U.S.C.A.

19. Criminal Law ⇐422(5), 662.10

Testimony by government informant about codefendant's statements that inculpated defendant was properly admitted under exception to hearsay rule for admissions against penal interest, and admission of testimony did not violate confrontation clause, in prosecution arising from alleged conspiracy to grow marijuana; statements, which were not made in attempt to curry favor with law enforcement officers but were made to acquaintance, were sufficiently reliable. Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.; U.S.C.A. Const. Amend. 6.

20. Criminal Law ⇐662.60

Reading of codefendant's grand jury testimony to jury did not violate defendant's confrontation clause rights under *Bruton*, in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana; codefendant's grand jury testimony did not directly implicate any other defendant. U.S.C.A. Const. Amend. 6.

21. Criminal Law ⇐662.10

Admission of codefendant's statement to coconspirator that government had made mistake in indicting one person who had not even lived in Indiana did not, under *Bruton*, violate confrontation rights of defendant, whom jury allegedly knew was from Indiana, in prosecution arising from alleged conspiracy to grow marijuana; statement did not directly incriminate defendant, but at best, exculpated one defendant who was not from Indiana.

22. Criminal Law ⇐422(1)

Hearsay statement related to concealment activity begun while conspiracy was still ongoing was admissible under rule defining as nonhearsay those statements made by coconspirators within scope of conspiracy, in prosecution arising from alleged conspiracy to grow marijuana. Fed. Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

23. Criminal Law ⇐1166.22(4)

Any erroneous comments to jury by trial judge regarding evidence of marijuana-cultivating endeavors did not warrant reversal of convictions in prosecution arising out of alleged conspiracy to grow marijuana, even though comments were somewhat confusing and failed to distinguish clearly between two different hearsay exceptions.

24. Conspiracy ⇐24.15, 27

In conspiracy prosecution, government is not required to prove any overt acts with regard to particular defendant within limitations period; instead, government is required to prove that conspiracy existed into limitations period and that defendants did not withdraw before that period.

25. Constitutional Law ⇐268(10)
Witnesses ⇐88

District court was not required under due process clause to inquire specifically whether defendant was knowingly and intelligently waiving right to testify at trial. U.S.C.A. Const.Amends. 5, 14.

26. Criminal Law ⇐1177

It is only when it can be said with certainty that acceptance of responsibility has been shown that reversal of district court's denial of reduction under Sentencing Guidelines for acceptance of responsibility is warranted. U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

27. Criminal Law ⇐1252

Denial of reduction under guidelines for acceptance of responsibility was proper in prosecution for making false declarations before federal grand jury; sentencing judge made specific findings that defendant did not voluntarily withdraw from criminal activities in timely fashion, did not provide voluntary assistance to officials, and stated that he felt "pressured." U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

28. Perjury ⇐41

Defendant convicted for making false declarations before federal grand jury in connection with investigation into alleged marijuana-growing conspiracy was not illegally sentenced under guidelines as accessory after fact, even though defendant was principal in conspiracy; defendant was trying to protect others and not himself, as he was immunized for his testimony. U.S.S.G. §§ 2J1.3(c)(1), 2X3.1, 18 U.S.C.A.App.

29. Criminal Law ⇐1210(4)

Consecutive sentences for conviction on count of conspiracy to manufacture and possess with intent to distribute in excess of 50 kilograms of marijuana and count alleging manufacturing in excess of 50 kilograms of marijuana were permissible.

30. Criminal Law ⇐986(3)

District court did not err in sentencing defendant simply because it did not mention every mitigating factor listed in presentence report, especially when they were not mentioned by defendant or counsel at sentencing.

Melanie Conour (argued), C. Joseph Russell, Asst. U.S. Attys., Office of U.S. Atty., Indianapolis, Ind., for U.S.

Roger S. Curry, pro se.

Spiros P. Cocoves (argued), Toledo, Ohio, for Robert C. Holland.

Glenn A. Grampp (argued), Evansville, Ind., for Don J. Leinenbach.

Michael J. McDaniel (argued), New Albany, Ind., for Samuel T. Harding.

Robert Canada, Evansville, Ind., Daniel C. Hale, Miller, Hale & Harrison, Boulder, Colo., James W. Lawson (argued), Oteri, Weinberg & Lawson, Boston, Mass., for Timothy S. Curry.

Before CUMMINGS and FLAUM, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

CUMMINGS, Circuit Judge.

A jury found defendants Timothy Curry ("Tim"), Roger Curry ("Roger"), Don Jeffrey Leinenbach, and Samuel T. Harding guilty of conspiracy to manufacture and possess with intent to distribute in excess of fifty kilograms of marijuana in violation of 21 U.S.C. § 846. Tim, Roger, and Harding were also found guilty of manufacturing in excess of fifty kilograms of marijuana, in violation of 21 U.S.C. § 841(a)(1). The jury found defendant Robert Holland guilty of making false declarations before a federal grand jury in violation of 18 U.S.C. § 1623. The defendants raise a number of issues regarding the propriety of their convictions and sentences. We affirm.

I.

Co-conspirators Mary Lynch and Brenton Long provided the details surrounding the defendants' conspiracy to manufacture and possess with intent to distribute marijuana. Long testified at trial for the government under a grant of immunity. Defendant Lynch pleaded guilty pursuant to a plea agreement limiting her prison term to no more than three years, and was obligated to testify under the agreement.

In late 1982, Lynch and Long helped Tim and his wife, defendant Joyce Curry (who has not appealed from her conviction), and others hang marijuana to dry in the basement of Tim's Niwot, Colorado, residence. After the marijuana was dry, Lynch "manicured" (prepared) some of it for sale, earning $10.00 per hour from Tim. Tim told her that the marijuana came from Indiana.

In the spring of 1983, Tim hired Lynch and Long to help clone marijuana plants in his residence. After Tim taught them how to clone the plants, they (primarily Long) produced approximately 2,500 new marijuana plants from thirty to fifty mother plants. Long agreed to work for Tim in transporting, planting, and harvesting the marijuana. Tim, Long, defendant Holland, and another individual brought the new marijuana plants first to Nebraska, where they planted 500 of the plants, and then to Jasper, Indiana. In Jasper, Long met Tim's brother, Roger, and Long, Tim, Roger, and Holland subsequently planted the remaining 2,000 plants on defendant Leinenbach's farm in Otwell, Indiana. Long met and had conversations with Leinenbach in the spring of 1983, but Leinenbach did not participate directly in any of the planting activity. The spring planting was completed by June 21, 1983.

A person named "Rich Kelly" was mentioned on numerous occasions during trial. Testimony at trial indicated that Kelly is a fictional character created by the defendants to take blame for their marijuana growing, although at least some of the defendants apparently still contend that he is an actual person. A "Rich Kelly" purchased a farm in Velpen, Indiana, from the Jasper State Bank in September 1983. According to the Bank's president Joseph Miller, Roger vouched for Kelly, stating that he had known Kelly since boyhood. Miller testified that the real estate transaction with Kelly was "highly unusual" because no financial statement, credit report, or employment verification of Kelly was ever done. A checking account was opened in Kelly's name which listed Roger as the person who would know Kelly's location. In addition, Lynch testified that she, Tim, Roger, and Holland discussed the use of a fictitious person named Kelly during the summer of 1985. Lynch also testified that the continued use of a "Richard Kelly" as a scapegoat was discussed by Holland, Joyce and herself in 1987, and by Tim and herself

in 1989. In the spring of 1983, Tim had asked Long to play the role of Rich Kelly, in whose name certain property in Indiana was to be purchased, but Long refused.

During the fall of 1983, Long, Roger, Tim, and Holland harvested marijuana at Leinenbach's farm. To avoid detection, the marijuana was harvested at night while Leinenbach harvested the surrounding corn crop. The harvested marijuana was transported to the Velpen farm where it was hung to dry. When the marijuana was dry, Tim, Roger, Long, and Joyce packed it into over 100 boxes. At Tim's request, Long drove 56 of the boxes to Colorado. The boxes were eventually stored at Tim's home. The marijuana was transferred over a period of time to Lynch's home in Boulder, Colorado, where Lynch and others manicured it for sale in late 1983 and early 1984. Approximately 1,000 pounds of finished marijuana were produced for sale. Tim told Long that he (Tim) had made over one million dollars between the 1983 marijuana project and a "spec house" that he had built.

In May 1984, an electric company employee discovered hundreds of small marijuana plants growing in containers near the Velpen farmhouse. In June 1984, Roger asked Dennis Mehringer to estimate the cost of plumbing repairs at the Velpen farmhouse. Merhinger was introduced to a Richard Kelly at the farmhouse. Around September 1984, defendant Steven Bush (who was found not guilty at trial) showed Jeff Griffith where marijuana was growing at Leinenbach's farm. Griffith returned to Leinenbach's farm and stole marijuana at least three times in 1984. Bush told Griffith that the people who were growing the marijuana included Roger and Holland. In the fall of 1984, Tim again asked Lynch to manicure some of the marijuana from Indiana. She and others processed approximately 250 to 300 pounds of saleable marijuana in Colorado. Tim indicated that this was only part of the harvest.

In the spring of 1985, "Richard Kelly" purchased a farm in rural Martin County, Indiana, from Mark and Cindy Hewitt. The closing was attended by "Kelly," Tommy and Thelma Crane, Mark and Cindy Hewitt, and two realtors. Mark Hewitt identified Tim as the person who introduced himself as Kelly at the closing. One of the realtors and Thelma Crane reaffirmed their previous selections of Tim's photograph as Kelly, although neither could make a certain in-court identification. Thelma Crane noted that Kelly's hair was shorter and he did not have glasses. Lynch had earlier testified that Tim's hair was darker than usual and that he had not worn glasses previously. One of the previous residents at the Martin County farm testified that she saw Tim and Roger walking around the farm twice before the sale of the farm, and that Tim's hair had been lighter and he was not wearing glasses. Another previous resident also identified Tim as one of the two persons at the farm. This resident saw Roger at the farm after it was sold, and talked to Tim and defendant Samuel Harding. A neighbor also saw Harding at the Martin County farm.

In the summer of 1985, Tim offered Lynch $15,000 to come to the Martin County farm and "weed" marijuana because Harding had hurt his back. Lynch agreed and came to Jasper, where she met Holland and went to Roger's law office to get keys to the Martin County farm. She saw the marijuana growing room at the Velpen farmhouse while she was in Indiana, and helped Roger clean the house. During her visit, Holland helped Lynch weed around the marijuana plants, Tim gave her money for expenses, and Roger visited her.

Harding's former wife, Joan Hylinski, testified that Harding went to Jasper, Indiana, in May 1985, telling her that he was going to help some friends on a farm. In July of that year, Hylinski traveled to Jasper and stayed with Harding for approximately 10 days at the Martin County farm, helping Harding pull weeds from the marijuana fields there. Hylinski also went to Leinenbach's farm with Harding and Roger where they inspected the marijuana plants. Hylinski, Harding, and Roger transplanted marijuana plants in the growing room of the Velpen farmhouse.

In September 1985, Lynch, Tim, Roger, Harding, Holland, and one other person harvested the marijuana at the Martin County farm. Lynch acted as a lookout for the operation. She also assisted Tim, Harding, and others with the preparation of the barn for harvest, including putting plastic on the floors, stringing twine between the walls, cutting a ventilation hole in the side of the barn, and getting a large propane heater to dry the marijuana. When the marijuana from the Martin County farm was hung to dry, Tim, Roger, Harding, and Holland went to harvest Leinenbach's farm. They returned, however, and said the marijuana had been stolen.

To avoid discovery by police, the harvesters dismantled the growing room at the Velpen farm. The valuable items were returned to Colorado, as were some marijuana plants and some dried marijuana from the Martin County farm. During the clean-up of the Velpen farmhouse, Lynch used the central vacuum system at the house, but the bag was never emptied. Lynch returned to Colorado, where she and others manicured marijuana for approximately one month, producing about 250 pounds of saleable marijuana. Lynch sold some of this marijuana and observed Tim sell a "large portion" of it in late 1985. Tim paid Lynch $10,000 in cash and marijuana for her part in the undertaking.

In October 1985, Jeff Griffith told police about the marijuana operation and took police officers to Leinenbach's farm and the Velpen farm. Police officers found approximately 2,500 to 3,000 cut marijuana stalks among the corn plants and approximately 97 marijuana plants at Leinenbach's farm. At the Velpen farm, officers found personal documents related to Roger and Holland, high-intensity light fixtures, horticultural literature, handwritten notes regarding plant care, watering pipes, shears, and marijuana, including some found in the bag from the house's central vacuum system.

Also in October, Tim told Lynch that he was going to clean out the Martin County farm. Apparently before he was able to do so, police officers located the farm from documents found at the Velpen farmhouse and found approximately 5,000 cut marijuana stalks amid corn plants, noticed twine strung in the barn, and found personal documents relating to Lynch and Hylinski.

In 1987, at Tim's request, Lynch cloned approximately 250 marijuana plants for Tim and another 500 or so marijuana plants for Roger. In October 1988, Tim delivered approximately 900 pounds of marijuana to Lynch for manicuring.

On September 8, 1989, Holland appeared before a federal grand jury for the Southern District of Indiana pursuant to a grant of formal immunity. Roger, Tim, and Long were targets of the grand jury's investigation. Holland testified under oath that he had no knowledge that Roger, Tim, or Long were involved in the marijuana operation. After the indictment in this case was returned in September of 1990, Holland met with Lynch and attempted to give her a copy of the indictment with notes written on it, requesting Lynch to conform any statements she made to authorities to the notes.

An indictment was returned on September 13, 1990, charging Tim, Roger, Joyce, Don Jeffrey Leinenbach, Lynch, Charles E. Leinenbach, Harding, and Bush in Count I with conspiracy to manufacture and possess with intent to distribute in excess of fifty kilograms of marijuana, from about March or April 1983 through at least October 31, 1985. Count II alleged that Don Jeffrey Leinenbach's farm was forfeitable to the United States. Count III charged Tim, Roger and Harding with manufacturing in excess of fifty kilograms of marijuana in or about October 1985. Counts IV through VI charged Holland with making false declarations before the federal grand jury. Counts VII and VIII charged Roger with filing false federal income tax returns. A second superseding indictment was returned on February 19, 1991.

Lynch entered a plea of guilty pursuant to a plea agreement, and the remaining defendants pleaded not guilty. The district court severed Counts VII and VIII relating to Roger's alleged filing of false income tax returns. Trial began on February 25,

1991. At the end of the government's case, the court granted Charles E. Leinenbach's motion for judgment of acquittal. On April 6, 1991, the jury found all defendants guilty of all counts except Bush, who was found not guilty. Jeff Leinenbach's property was found to be forfeitable. Tim and Roger were each sentenced to 20 years with three years parole; Harding was sentenced to serve 12 years with three years parole; Jeff Leinenbach was sentenced to serve 18 months; and Holland was sentenced to serve 78 months.

II.

The defendants raise a number of issues, and all adopt issues raised by their co-defendants as applicable. Unless otherwise mentioned, the issues discussed below apply to all defendants.

A. *Joinder of Holland's Perjury Counts*

Defendants argue that Counts IV through VI of the superseding indictment, relating to Holland's perjury before the grand jury in 1989, were improperly joined with Counts I through III, which dealt with a marijuana conspiracy from 1983 to 1985. Rule 8(b) of the Federal Rules of Criminal Procedure provides that:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. * * * [A]ll of the defendants need not be charged in each count.

"Rule 8 is construed broadly to allow liberal joinder and thereby enhance the efficiency of the judicial system." *United States v. Isaacs*, 493 F.2d 1124, 1158 (7th Cir.1974), certiorari denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146. Joint trials are beneficial because they increase court efficiency, limit inconvenience to witnesses, and avoid delays in bringing defendants to trial. *United States v. Sophie*, 900 F.2d 1064, 1083 (7th Cir.1990), certiorari denied, — U.S. —, 111 S.Ct. 124, 112 L.Ed.2d 92. Joint trials may also be beneficial in presenting the "total story" to one jury, as opposed to bits and pieces of a story being presented to several juries. *Id.*

[1] Nevertheless, in order to avoid undue prejudice, under Rule 8(b) multiple defendants may be tried together only if their charged conduct arose from the "same act or transaction" or the "same series of acts or transactions." Acts or transactions are considered part of the "same series" if they are performed pursuant to a common scheme or plan. *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir.1985), certiorari denied, 475 U.S. 1021, 106 S.Ct. 1211, 89 L.Ed.2d 323. We decide this question based on the allegations in the indictment, not on the evidence adduced at trial. *Id.* at 1354 ("Rule 8 on its face is about pleading rather than proof, and there are practical reasons for maintaining the distinction").

[2, 3] The joinder of Holland's perjury counts with the other defendants' conspiracy counts was proper under Rule 8(b). Holland is prominently mentioned in the "overt acts" section of the superseding indictment as an unindicted coconspirator in the marijuana growing enterprise. Most pertinently, it is alleged that Holland and several of the defendants discussed the creation of a fictional character to be known as "Richard Kelly." Holland's perjury counts quote the statements that he made before the grand jury which indicate that Rich Kelly was the leader of the conspiracy. Although the indictment could have been clearer in spelling out the link, we think that the perjury counts sufficiently communicate that Holland's statements before the grand jury were made pursuant to a preconceived plan to cover up the identity of the conspirators. A conspiracy and its cover-up are considered parts of a common plan. *Velasquez*, 772 F.2d at 1354. Finally, the main allegation of perjury against Holland relates to his statements that Long, Tim, and Roger were not involved in the marijuana conspiracy. Therefore joinder is proper here because proof that these statements were false required proof of Long's, Tim's, and Roger's involvement in

the marijuana conspiracy, so that there is considerable overlap of evidence.[1]

The defendants argue that the conspiracy counts and the perjury counts were not part of a common plan because the perjury occurred almost four years after the end of the conspiracy alleged in Counts I and III. Counts may be joined under Rule 8(b) even if they could not have been charged as one conspiracy. *Sophie*, 900 F.2d at 1084. Indeed, several courts have specifically held that perjury counts may be considered part of the same series of acts or transactions as the underlying conduct which was misrepresented. *Isaacs*, 493 F.2d at 1159; *United States v. Swift*, 809 F.2d 320, 322 (6th Cir.1987); *United States v. Moeckly*, 769 F.2d 453, 465 (8th Cir.1985), certiorari denied, 475 U.S. 1015, 106 S.Ct. 1196, 89 L.Ed.2d 311; *United States v. Dekle*, 768 F.2d 1257, 1261–1262 (11th Cir.1985).[2] The number of years between the end of the alleged conspiracy and the subsequent alleged perjury is in our view irrelevant.

[4] Defendants' argument that the district court should have exercised its discretion to sever the counts relating to Holland pursuant to Rule 14 is also without merit.[3] "[S]evere prejudice is required for an order of severance and the trial judge's refusal to sever is rarely reversed." *Velasquez*, 772 F.2d at 1352. Holland is the only defendant who specifically argues that he was unduly prejudiced by joinder here for the purposes of Rule 14. We conclude that no defendant was unduly prejudiced, however. Holland only argues that the jury would have been confused and prejudiced by the numerous allegations in the indictment and the testimony regarding Holland's role in the conspiracy. But if his trial were severed, this testimony would have been relevant and admissible to show that he committed perjury. Furthermore, although evidence relating to Holland's perjury may not have been admissible in a separate conspiracy trial, there was no severe prejudice because Holland's grand jury testimony did not directly implicate any of the other defendants. Therefore the district court correctly denied defendants' motion to sever Holland's perjury counts.

B. *Exclusion of Expert Testimony Regarding Eyewitness Identification*

[5] The first in a number of evidentiary objections made by defendants relates to the decision by the district court to exclude the expert testimony of Dr. Elizabeth Loftus, a recognized authority on the issue of eyewitness identifications. Expert testimony is generally admissible under Federal Rule of Evidence 702 if it "will assist the trier of fact to understand the evidence or to determine a fact in issue * * *." However, "a district judge has broad discretion to exclude relevant evidence that is confusing or redundant" under Federal Rule of Evidence 403. *Krist v. Eli Lilly and Co.*, 897 F.2d 293, 298 (7th Cir.1990). For the reasons given below, we conclude that the district judge did not abuse his discretion here.

Dr. Loftus' testimony was offered to rebut the testimony of several witnesses who identified Tim, Roger, or Harding around the time of the purchase of the Martin County farm. In particular, Thelma Crane testified that she met a person introducing himself as Rich Kelly at the Martin County closing. She identified a photograph of Tim Curry as Rich Kelly about three years later. At trial, about six years after the closing, she was unable certainly to identify Tim as Kelly. Mark Hewitt was also present at the closing and identified Tim as Kelly at trial. Cynthia Hawkins testified that around the time of the closing, she saw on two different occasions two men examine the Martin County farm where she lived. At trial she identified Tim and Roger as these two men. Cynthia's husband Robert Hawkins testified that he talked to two men at the Martin County property in the spring of 1985. At trial he identified Tim and Harding as the men he had seen. Hewitt, Cynthia Hawkins, and Robert Hawkins all viewed photograph arrays and had identified photographs on one or more occasions before trial.

Dr. Loftus would have testified on a number of issues relating to the accuracy of these identifications. Among the propositions discussed in her offer of proof that are arguably beyond the understanding of an average person are: 1) witnesses invariably overestimate the duration of their observation of an individual; 2) a witness' confidence in his identification bears little or no relationship to the accuracy of the identification; 3) memory fades at a geometric rather than an arithmetic rate; 4) "post-event phenomena" may distort or supplant original memory, and memory is easily distorted by leading questions or other manipulations; 5) prior photographic identifications increase the likelihood that later in-person identifications will be erroneous; and 6) social alcohol and marijuana use hinders the ability of an individual to retain information.

The district court entered a written order denying the admissibility of Dr. Loftus' testimony, concluding that:

> [S]uch testimony may be properly excluded where the testimony addresses an issue of which the jury is generally aware. In the present controversy the jury was questioned during *voir dire* about recall and the ability to identify persons they had seen only briefly, or had not seen for a period of time. Additionally, all of the witnesses who identified defendants were thoroughly cross examined about the reliability of their identification, the length of time they saw the defendant, the conditions under which they saw the defendant, the length of time which elapsed between the witness seeing the defendant and the photos or the defendant in person, the number of times the witness saw the photo arrays, and when the witness was shown the photo array. Thus, the jury was made aware of many of the factors which may effect [sic] perception, retention and recall. * * * Thus, although the jury may not understand the intricacies of perception, recall and retention, the jury is generally aware of the problems with identification.

Government's Br.App. at 7. The district court's focus on what the jury is "generally aware" of could be a finding that Dr. Loftus' testimony would not assist the trier of fact under Rule 702, or it could be considered a finding that her testimony would be unduly confusing or a waste of time under Rule 403.[4] As has been noted, "The Rule 702 analysis * * * incorporates to some extent a consideration of the dangers, particularly the danger of unfair prejudice, enumerated in Fed.R.Evid. 403." *United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir.1985). The "helpfulness factor" under Rule 702 involves consideration whether the expert testimony would be misleading or confusing in the context of the trial. See *id.* at 1237.

[6] Dr. Loftus' testimony may not have been totally unhelpful; as the court noted, most persons do not understand the intricacies of perception, retention, and recall. The district court also apparently had no quarrel with her competency to testify or with the reliability of her scientific testimo-

1. The defendants argue that the district court erred by finding only a "logical relationship" between the conspiracy counts and the perjury counts. It is true that a mere "logical relationship" between counts cannot support the joinder of multiple defendants in a single trial. The district court here, however, specifically noted that "Holland is alleged to have been involved in the conspiracy * * *. It is about this very conspiracy which defendant Holland is alleged to have provided false testimony during the grand jury proceeding." Timothy Curry's Br.App. at 22.

2. The defendants rely on *United States v. Grey Bear*, 863 F.2d 572 (8th Cir.1988), where an equally divided *en banc* court affirmed the district court's decision to allow joinder. We believe that the facts in that case (which is without precedential value) are distinguishable in that the government did not allege any conspiracy.

3. Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part that:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

4. In an oral decision to deny reconsideration of his earlier written order, the district judge explicitly stated that the basis of his ruling was *both* Rule 702 and Rule 403. Tr. at 2503.

ny.[5] We conclude, however, that the district court's decision to exclude Dr. Loftus' testimony was a proper exercise of its discretion, whether under Rule 702 or Rule 403. The eyewitness testimony was far from the only evidence against the defendants. Indeed, as noted above, the bulk of testimony came from two government witnesses and co-conspirators, Brenton Long and Mary Lynch. The testimony of Joan Hylinski was also important. Although the eyewitness testimony bolstered the government's theory that there was no real Rich Kelly, it can fairly be described as minor and amounted to only one day in a four-week trial. The intrusion of an expert to comment on this minor testimony was not necessary, especially when the record reveals that vigorous cross-examination by the defendants exposed the weakness of the identifications.

In addition, the defendants gave the government only four days' notice of their intent to call Dr. Loftus. The Third Circuit held that it was not an abuse of discretion to exclude expert testimony when only five days' notice of a proposed proffer was given. *United States v. Dowling*, 855 F.2d 114, 118 (3d Cir.1988), affirmed, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708.

Defendants' reliance on our decision in *Krist* is misplaced. In *Krist*, we specifically noted that "in routine cases the trial judge is not required to allow wide-ranging inquiry into the mysteries of human perception and recollection." 897 F.2d at 298. *Krist* was not a routine case because it involved an individual's recollection of the color of pills she took forty years ago. Our case, on the other hand, *is* routine—the identifications were not of pills and took place no more than six years after the events in question. Although it is likely that it was within the discretion of the trial court to allow the eyewitness expert testimony here, we decline to hold that the court was required to do so.

C. *Sufficiency of the Evidence/Multiple Conspiracy Challenges*

[7–13] The defendants challenge the sufficiency of the evidence to support the finding that each participated in a single, ongoing conspiracy to manufacture and possess with an intent to distribute marijuana. Their challenge is sometimes styled as an allegation that the evidence at trial showed only multiple conspiracies, not a single conspiracy, and that there was therefore a fatal variance between the indictment and proof. In addition, they assert as unlawful the district court's decision not to give a multiple conspiracy instruction.

We initially reject the defendants' argument that the district court was required to give a multiple conspiracy instruction. The defendants cite *United States v. Kendall*, 665 F.2d 126, 136 (7th Cir.1981), certiorari denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140, where we stated that "if the possibility of multiple conspiracies exists, the trial judge must so instruct the jury." We have carefully limited this statement in more recent cases. In *United States v. Townsend*, 924 F.2d 1385, 1410 (1991), we noted that "[t]he failure to give a proposed multiple conspiracy instruction cannot, then, be error unless the defendants demonstrate that they have been prejudiced by the variance itself." Similarly, in *United States v. Grier*, 866 F.2d 908, 934 (1989), we stated that "[w]hile the district court could properly have instructed the jury on the possibility of multiple conspiracies, it was not required to do so." These cases teach that the lack of a multiple conspiracy instruction is simply one of several factors to be considered when deciding if a defendant has been prejudiced by a variance. Thus the district court did not err by failing to give a multiple conspiracy instruction.

Before examining the sufficiency of the evidence with regard to particular defendants, we briefly delineate some basic principles of conspiracy law. "A conspiracy consists of a combination or confederation between two or more persons formed for the purpose of committing, by their joint efforts, a criminal act." *United States v. Mealy*, 851 F.2d 890, 895 (7th Cir.1988) (citations omitted). The essence of a conspiracy is an agreement; to join a conspiracy is to join an agreement, not a group. *Townsend*, 924 F.2d at 1390.

"It is the nature and scope of the agreement that is the determinative factor in distinguishing between single and multiple conspiracies." *United States v. Sababu*, 891 F.2d 1308, 1322 (7th Cir.1989). Multiple conspiracies exist when there is no agreement toward a common goal, and each conspirator's agreement constitutes an end unto itself. *United States v. Paiz*, 905 F.2d 1014, 1020 (7th Cir.1990), certiorari denied, — U.S. —, 111 S.Ct. 1319, 113 L.Ed.2d 252. However, it is clear that the participants in a conspiracy need not know all the other members or participate in every aspect of the conspiracy. *Id.* at 1323. Indeed, the whole point of a conspiracy, and the reason why it is punished separately as a crime, is to enable several persons to cooperate and split duties in order to facilitate the object of the conspiracy. *Townsend*, 924 F.2d at 1394.

In evaluating a sufficiency of the evidence challenge, we review the evidence in the light most favorable to the government. If any rational jury could have found the defendant guilty beyond a reasonable doubt, the conviction will be affirmed. *United States v. Burrell*, 963 F.2d 976, 987 (7th Cir.1992). We require "substantial evidence that a particular defendant knew of the illegal objective of the conspiracy and agreed to participate in its achievement." *Id.* Because of the secretive nature of conspiracies, a formal agreement need not be proven. A jury may infer an agreement based solely on circumstantial evidence regarding the relationship of the parties and their overt acts. *Mealy*, 851 F.2d at 896.

It should be stressed that the conspiracy alleged in this case is not a complex distribution scheme encompassing wholesalers, middlemen, and retailers, nor is it one where persons who are arguably competitors (such as competing retailers) are alleged to be co-conspirators because of occasional cooperation. Instead, this case involves a conspiracy to manufacture and possess with an intent to distribute marijuana. In other words, the common purpose of the defendants in this case is clear—to grow marijuana and make money selling it. Cf. *Burrell*, 963 F.2d at 989 ("In the instant case, however, it is easier to establish mutual benefit and cooperation because the defendants were acting as a single economic unit—large-scale purchasers of narcotics.").

We reject an argument that the proof at trial showed three separate conspiracies each lasting one year. The defendants point to evidence that certain defendants explicitly agreed to work for one year, and that some defendants were paid for work done in a particular year. Defendants' argument is based on a fundamental misunderstanding of conspiracy law. Parties may join or withdraw from a conspiracy at any time without altering the fundamental nature of the conspiracy. *Sababu*, 891 F.2d at 1322. Furthermore, the fact that certain parties were paid for a year's work is only of marginal relevance. It would be artificial to divide a conspiracy to grow marijuana into several conspiracies simply because marijuana growing is seasonal in nature. Here, a core group of persons grew marijuana in the same general area over a number of years. A farmer does not start anew his or her farming business every year when the new crops are planted—it is the same farming business as the one initially started.

We now turn to an examination of the evidence, viewed in the light most favorable to the government, relating to each defendant (except Holland, who was not convicted on a conspiracy count) in order to

5. Although we make no specific assertion as to its reliability or general acceptance, a number of cases indicate that Dr. Loftus' field of study is now well accepted. See *Krist*, 897 F.2d at 296–297 (specifically citing work by Loftus); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) ("The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point."); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir.1984) (suggesting that eyewitness expert testimony is generally accepted), certiorari denied, 469 U.S. 868, 105 S.Ct. 213, 83 L.Ed.2d 143.

determine if it supports a joining of the conspiracy alleged here.

1. Timothy S. Curry

Tim makes no specific argument that the evidence is insufficient to support a finding that he joined the conspiracy. Indeed, the evidence strongly suggests that he was the leader of the conspiracy, and the other defendants point to him in this regard. There is no need to recount the numerous facts that support the jury's verdict as to Tim.

2. Samuel T. Harding

[14, 15] Harding states that he "was engaged as an employee of the conspiracy and his agreed duties were limited to tending the marijuana plants and participating in the harvest." Harding Br. at 8. We agree that the record supports this characterization, except for the suggestion that these duties were in any sense limited. Harding is apparently arguing that only "managers," and not "employees," are considered members of a conspiracy. An "employee" of a conspiracy, however, is in fact a participant in the conspiracy, since the employee has agreed to perform certain duties in furtherance of the conspiracy and because the employee materially benefits from the success of the conspiracy.[6]

Harding stresses his role as a "manufacturing employee" because he thinks the evidence cannot support the finding that he agreed to join any conspiracy to *distribute* marijuana. Count I of the indictment charged a conspiracy "to manufacture, and possess with intent to distribute marijuana, a Schedule I Non–Narcotic Controlled Substance, in a quantity of greater than fifty (50) kilograms." It would seem that manufacturing with the intent to distribute marijuana implies possession with an intent to distribute, since the cultivation of marijuana necessarily encompasses its possession.[7] In any event, Harding was involved not only with the harvesting of the marijuana but also with the drying and cultivating of the marijuana. The record, when read in a light favorable to the government, supports the conclusion that Harding joined the conspiracy and agreed to its underlying goals, which obviously included the distribution of marijuana at a profit.

Harding wisely does not argue that he should not be considered part of the alleged conspiracy because he did not join it until 1985. As has been noted, a party may join a conspiracy at any time during its life span.

3. Roger S. Curry

[16] Roger, an attorney, suggests that he did no more than act as legal counsel to some of the defendants. Roger's hands are literally much dirtier than that. In 1983, he and others planted around 2,000 plants at Leinenbach's farm. He was also involved in harvesting, drying, and packing the marijuana at Leinenbach's farm. In 1985, the evidence indicates that Roger inspected the marijuana plants at Leinenbach's farm, transplanted marijuana plants at the Velpen farmhouse, and harvested the marijuana at the Martin County farm and was prepared to harvest the marijuana at Leinenbach's farm.

This evidence, standing alone, would support the jury's conclusion that he joined the conspiracy alleged. Roger's argument that he only agreed to two smaller, stand-alone conspiracies in 1983 and 1985 has already been rejected. Even if Roger withdrew from the conspiracy in 1984 and rejoined the next year, his conspiracy conviction is sustainable. Although not necessary, the record supports the conclusion that Roger did not withdraw from the conspiracy in 1984. In that year, Roger asked a plumbing contractor to go to the Velpen farm house for a repair estimate. There is also hearsay testimony (the admissibility of which is discussed below) that Roger was involved with the 1984 operation at Leinenbach's farm. In sum, the conspiracy conviction against Roger is supported by substantial evidence.

6. Arguably, a more appropriate distinction is not between employee and manager, but between employee and independent contractor (unlike employees, independent contractors are not considered part of the organization for which they work).

7. It appears that the government crafted the indictment in this manner to avoid a possible statute of limitations problem. Federal criminal charges, unless otherwise specifically provided by law, must be brought within five years after the offense was committed. 18 U.S.C. § 3282. The original indictment here was returned on September 13, 1990, very close to five years from the end of the conspiracy alleged in the indictment (October 31, 1985). There is substantial evidence to support a finding that the 1985 harvest was in process after September 13; it is undisputed, however, that this marijuana was manicured for distribution ("possessed") after that date.

4. Don Jeffrey Leinenbach

[17] The government's case against Leinenbach is arguably the weakest. Leinenbach owned the farm where marijuana was grown in 1983, 1984, and 1985. It is also apparent that he knew of and supported the growing of marijuana on his farm. For example, he harvested the corn on his farm at night at the same time others were harvesting marijuana. He also had a number of conversations with the other defendants in this case that indicated his awareness of the marijuana-growing, including conversations where the best method of harvesting the marijuana was discussed. There is no evidence, however, that he participated in the harvesting, manicuring, or distribution of the marijuana.

We conclude that there is substantial evidence that Leinenbach joined the conspiracy as alleged. The jury was entitled to infer that Leinenbach was compensated for giving up a portion of his land, which could have been used to grow corn, to allow the other defendants to grow marijuana. This is especially true since Leinenbach allowed the marijuana-growing to occur for at least three years. The opposite inference would call for an unusual amount of generosity on Leinenbach's part.

D. *Admissibility of Hearsay Evidence/Application of the Bruton Rule*

Roger's brief identifies, in a somewhat confusing manner, testimony that he believes is unlawfully admitted hearsay. The other defendants adopt Roger's arguments, but some of them are applicable only to Roger. The discussion below is aimed at Roger but applies to all defendants as necessary. Roger objects to the following testimony:

1. Jeffrey Griffith's Statements

[18, 19] Government informant Griffith testified that Bush told him in 1984 that he (Bush) was working for people who had marijuana for him to sell and also told him that the main person was Roger Curry. Griffith also testified that in 1985 Bush told him that "those guys" were hiding marijuana from him, and that those guys included Roger Curry. The district court allowed this testimony as admissions against penal interest under Federal Rule of Evidence 804(b)(3).[8] Roger does not argue that Bush's statements do not meet the requirements of this rule; rather, he argues that the statements relating to his involvement in the conspiracy should have been redacted or otherwise not allowed in as evidence. In its order, the district court decided that all of Bush's statements could come in, except that under Rule 403 there could be no reference to Roger as the "ringleader." The court also noted that the jury would be instructed that the testimony was admissible only against Bush.

We recently examined the relationship between the Confrontation Clause of the Sixth Amendment and Rule 804(b)(3) in some detail in *United States v. York*, 933 F.2d 1343 (7th Cir.1991), certiorari denied, — U.S. —, 112 S.Ct. 321, 116 L.Ed.2d 262. York was on trial for mail fraud and arson. Two associates of York's partner (who was killed in the fire) testified at trial that she had told them of a plan concocted by York and herself to blow up the business and collect the insurance pro-

8. This rule provides in relevant part that:
A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

ceeds. *Id.* at 1360. This testimony was allowed in without redaction pursuant to Rule 804(b)(3). Faced with a confrontation clause challenge, we initially stated that the confrontation clause question and the Rule 804(b)(3) question were really one question, not two:

> To be admissible under rule 804(b)(3), then, the inculpatory portion of a statement against interest must be sufficiently reliable to satisfy the confrontation clause. There seems little reason to treat the requirement of reliability differently in each context. Such an approach would be needlessly complex, requiring two bodies of case law where one will do.

Id. at 1361. The decision in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, was not considered dispositive, since the ruling in that case rested upon the *inadmissibility* of the inculpatory confession against the defendant. *Id.* at 1362. We concluded that there is no need to redact the inculpatory portion of hearsay admitted under Rule 804(b)(3) as long as that portion is closely related to the incriminatory portion of the statement and the other requirements of Rule 804(b)(3) are met. *Id.* at 1364.

The facts in this case are similar to those in *York*, and we likewise affirm the district court's decision to allow all portions of Griffith's statement in as evidence. As in *York*, the statements by Bush to Griffith were not made in an attempt to curry favor with law enforcement officers but were made to an acquaintance. "[T]he advisory committee used that scenario as an example of an inculpatory statement that 'would have no difficulty in qualifying' for admission under 804(b)(3)." *Id.* at 1363. Because they were sufficiently reliable, Bush's inculpatory statements were admissible under Rule 804(b)(3) and did not violate Roger's rights under the Confrontation Clause.[9]

2. Holland's Grand Jury Testimony

[20] Roger also objects to the reading of Holland's grand jury testimony to the jury, claiming again that his rights under *Bruton* are implicated.[10] We disagree.

Holland's grand jury testimony was not facially inculpatory of any defendant. Indeed, the intent behind the government's perjury charge was to show that Holland was *lying* when he denied on numerous occasions Roger's and Tim's involvement in the marijuana manufacturing conspiracy and instead placed the blame on Rich Kelly. Roger points out that Holland admitted before the grand jury that he was friends with Roger and Tim, and that Roger had visited him at the Velpen farm house on up to ten occasions, and that Roger had lent him money. Contrary to Roger's assertions, these statements would not have supported a jury verdict against him. Instead, we agree with the government that "Holland's grand jury testimony did no more than put the government to its proof that Tim, Roger and Long were participants in the conspiracy as charged." Plaintiff's Br. at 26.

Because Holland's grand jury testimony does not directly implicate any other defendant, "the *Bruton* rule does not come into play." *United States v. Briscoe*, 896 F.2d 1476, 1501 (7th Cir.1990), certiorari denied, — U.S. —, 111 S.Ct. 173, 112 L.Ed.2d 137. The fact that Roger asked the jury to consider the transcript as to him supports a conclusion that it was not facially incriminatory to him. In addition, any statements that become incriminatory only when linked with other evidence do not fall under the *Bruton* rule. *Id.* at 1503. Thus Leinenbach's claim that Holland's statement regarding an "Otwell" farm incriminated him fails because it depends on evidence that Leinenbach was the owner of the Otwell farm.

3. Holland's Post–Conspiracy Statement

[21] Lynch testified that Holland told her after the first indictment came down that the government had made a mistake in indicting one of the people, who had not even lived in Indiana. Roger's *Bruton* challenge to this testimony, based on the fact that the jury knew he was from Indiana, fails for the same reason as his challenge to Holland's grand jury testimony. Simply put, Holland's statement does not directly incriminate Roger. At best, the statement objected to exculpated one of the defendants who was not from Indiana. But that does not mean that the remaining defendants are thereby incriminated. Since no defendant is specifically mentioned, and it is not obvious that any particular defendant is being singled out as being guilty, Roger's *Bruton* challenge to this statement is without merit.

4. Admission of Other Hearsay Under Rule 801(d)(2)(E)

[22] In scattershot fashion, Roger argues that a number of statements were erroneously admitted under Federal Rule of Evidence 801(d)(2)(E), which defines as non-hearsay statements made by co-conspirators within the scope of the conspiracy. Under Rule 801(d)(2)(E), "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not considered hearsay. To the extent that Roger's argument rests on the proposition that the proof at trial showed multiple conspiracies and not one single conspiracy, it fails for the reasons stated above.

Roger objects to a number of hearsay statements that occurred either before the beginning of the alleged conspiracy or after its end, contending that these statements do not fall within Rule 801(d)(2)(E). It is true that such statements could not be in furtherance of a conspiracy not in existence, and thus were not admissible under Rule 801(d)(2)(E). However, the statements were not admitted on the basis of that rule. Instead, it is clear that the statements were admitted pursuant to Rule 801(d)(2)(A) as admissions of party opponents.[11]

[23] In general, Roger complains that the limiting instructions regarding Rules 801(d)(2)(A) and 404(b) evidence were incomplete. Specifically, Roger complains that no contemporaneous limiting instructions were given regarding evidence of 1982, 1987, and 1988 marijuana-cultivating endeavors. The comments by the district judge at trial regarding this evidence were somewhat confusing, and failed to distinguish clearly between Rule 801(d)(2)(E) statements applicable to all defendants and Rule 801(d)(2)(A) statements applicable only to the person making the statement. For example, the district court stated at one point:

> [If] the witness says that one of the defendants told them something, it only applies to that particular defendant and it doesn't implicate the rest of them. These eight people here are separate * * * and if that defendant makes a statement or allegedly makes a statement and a witness testifies, you can only consider that evidence to that particular defendant and none other, unless it implicates another defendant. You can judge it based upon what they testify to and don't take that and use it to try to implicate the rest of the defendants.

Tr. at 1392. The phrase "unless it implicates another defendant" seems to contradict the rest of the instruction and caused

9. We decline Roger's invitation to overrule *York*, based on his reading of *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638; *Vincent v. Parke*, 942 F.2d 989 (6th Cir.1991); and *United States v. Gomez–Lemos*, 939 F.2d 326 (6th Cir.1991). Our decision in *York* is not inconsistent with *Wright*, which indeed was discussed in *York*. The Sixth Circuit cases are clearly distinguishable, in that one involved inculpatory statements made to a police officer and the other involved Rule 804(b)(5), not Rule 804(b)(3).

Griffith violated the court's order against referring to Roger as the ringleader when he testified that Bush told him that Roger was the "main person." The district court did not abuse its discretion when it denied Roger's motion for a mistrial and instead cautioned the jury that the statements of Bush may only be held against him and not any of the other defendants.

10. The district court instructed the jury to consider the grand jury testimony only against Holland. At Roger's request, the jury was instructed to consider it with respect to his case also. It was not to be considered against or for any other defendant.

11. One hearsay statement objected to by Roger related to concealment activity begun while the conspiracy was still on-going and was thus admissible under Rule 801(d)(2)(E). *United States v. Doerr*, 886 F.2d 944, 951 (7th Cir.1989).

Roger's counsel at trial to object again (the nature of the objection is not on the record, but this is the only part of the instruction not favorable to the defendants). A similar confusing contemporaneous instruction is in the record.

We conclude that any erroneous comments to the jury do not warrant reversal of the convictions. Detailed testimony by Lynch and Long spelled out the involvement of the various defendants in the conspiracy, the existence of which is corroborated by substantial physical evidence. In addition, the final instructions given to the jury lessen the impact of any error here. Instruction Number 34 stated that:

> You have heard evidence of acts alleged against several defendants other than those acts alleged in the indictment. You may consider this evidence only on the question of intent, preparation, plan, knowledge, absence of mistake, or accident. This evidence is to be considered by you only for these limited purposes, and only as to the defendants against whom it was offered.

Instruction Number 44 contains similar language. The judge recognized that his extemporaneous comments were not particularly helpful, and specifically told the jury on several occasions that they would be receiving final instructions in which matters would be clarified. Viewing the record as a whole, therefore, we conclude that the district court committed no reversible error.

E. *Leinenbach—Statute of Limitations*

[24] Leinenbach argues that he should have been dismissed from the case because there is no evidence to support a finding that he committed an overt act in furtherance of the conspiracy after September 13, 1985, and therefore the five-year statute of limitations was not satisfied as to him (see *supra* note 7). Leinenbach misstates the law. The government is not required to prove any overt acts with regard to a particular defendant within the limitations period; instead, the government is required to prove that the conspiracy existed into the limitations period and that the defendants did not withdraw before that period. *United States v. Read*, 658 F.2d 1225, 1232–1233 (7th Cir.1981). Leinenbach has not met his initial burden to produce some evidence of withdrawal, *id.* at 1234, and therefore no error has been committed.[12]

F. *Arguments Raised by Holland*

1. Conviction

[25] Holland raises two specific objections to his conviction. He first contends that the district court was required, under the Due Process clause in the Constitution, to inquire specifically whether he was knowingly and intelligently waiving his right to testify at trial. We have rejected this identical claim on numerous occasions. See, *e.g.*, *United States v. Brimberry*, 961 F.2d 1286, 1289–1290 (1992); *United States v. Thompson*, 944 F.2d 1331, 1345 (1991), certiorari denied, — U.S. —, 112 S.Ct. 1177, 117 L.Ed.2d 422. Holland does not give a persuasive reason for overruling these cases. Holland also claims error in that the second superseding indictment, returned less than a week before trial, changed certain dates relevant to him from 1984 to 1983. Holland does not rebut the government's assertion that these were clerical errors of which Holland should have been aware, and does not explain why he was prejudiced by the amendment. Therefore his claim of error is without merit.

2. Sentence

[26, 27] Holland also raises a number of issues regarding his sentence, which was calculated in accordance with the Sentencing Guidelines. He first argues that the district court erred by denying him a two-point reduction for acceptance of responsibility under Guidelines Section 3E1.1. Holland suggests that Judge Brooks did not properly exercise his discretion but rather "reject[ed] his plea out of hand" (Holland's Br. at 10). The record rebuts this contention. Judge Brooks accepted and evaluated both written and oral statements from Holland. The judge made specific findings that Holland did not voluntarily withdraw from his criminal activities in a timely fashion; he did not provide voluntary assistance to officials; and he stated that he felt "pressured." Holland's App. at 57–58. Holland's brief on appeal states that "it cannot be said with certainty that Mr. Holland is entitled to a reduction" (Holland's Br. at 10). Yet it is only when it *can* be said with certainty that acceptance of responsibility has been shown that reversal of a district court's denial is warranted. Judge Brooks' findings are not "without foundation," see *United States v. Delgado*, 936 F.2d 303, 308 (7th Cir.1991), certiorari denied, — U.S. —, 112 S.Ct. 972, 117 L.Ed.2d 137; § 3E1.1, app. note 5, and we therefore affirm the district court's decision to deny Holland credit for acceptance of responsibility.[13]

Holland also argues that his due process rights were violated because the judge made a finding regarding the number of plants involved in the conspiracy under a preponderance of evidence standard, rather than submitting the question to the jury under a reasonable doubt standard. This Court has rejected this claim, however, *United States v. McNeese*, 901 F.2d 585, 605 (1990); *United States v. Reynolds*, 900 F.2d 1000, 1003–1004 (1990), and we decline to revisit the question at this time, especially since Holland did not raise this issue in the district court.[14]

[28] Finally, Holland claims that he was illegally sentenced as an accessory after the fact under Sections 2J1.3(c)(1) and 2X3.1 of the Guidelines, because as a principal in the marijuana-growing conspiracy he could not also be sentenced as an accessory. *United States v. Huppert*, 917 F.2d 507 (11th Cir.1990), is cited as authority for this proposition. Huppert was convicted of two counts of obstructing justice in connection with the investigation of a money-laundering scheme in which he was engaged, and was sentenced pursuant to Section 2J1.2(c)(1), which like Section 2J1.3(c)(1) contains a cross-reference to Section 2X3.1. The court concluded that Huppert could not be sentenced as an accessory after the fact because he was protecting himself, not others, and it was clear that he was a principal in the money-laundering scheme. *Id.* at 510–511. See also *United States v. Pierson*, 946 F.2d 1044 (4th Cir. 1991) (affirming district court's decision not to apply Section 2X3.1 where defendant was convicted of perjury but acquitted of the substantive underlying offense; defendant obviously perjured to protect himself). Holland's case is different than *Huppert* and *Pierson*, because he was clearly trying to protect others, and not himself—he was immunized for his testimony, and thus had no reason to protect himself. We conclude that the analysis in those cases has no relevance here.[15]

G. *Non-Guidelines Sentencing Objections*

The other defendants received non-guideline sentences, since the conspiracy of

12. Similarly, application of 21 U.S.C. § 853, which was enacted on October 12, 1984, to Leinenbach does not create any *ex post facto* concerns because there is no evidence that he withdrew from the conspiracy before that date.

13. Holland's sentence was also enhanced for obstruction of justice under Section 3C1.1, because of his attempt to mold Lynch's testimony to be consistent with his grand jury testimony. Holland argues that "he merely attempted to determine the extent of her knowledge in the conspiracy and what information would be expected to be contained in her testimony." It was appropriate for the judge to reject this spin on the facts.

Application note 4 of Section 3E1.1 states that application of the obstruction of justice section "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 apply." There is nothing exceptional from Holland's case supporting the district court's decision to deny him credit for acceptance of responsibility.

14. In the case relied upon by Holland, *United States v. Rigsby*, 943 F.2d 631 (6th Cir.1991), certiorari denied, — U.S. —, 112 S.Ct. 1269, 117 L.Ed.2d 496, the court followed its own precedent and declined to hold that the jury must pass on the question of the number of plants involved in the narcotics conviction, although it expressed dissatisfaction with having to reach that result.

15. Holland does not raise on appeal the issue whether it was proper to sentence him as an accessory after the fact for an offense for which he had received immunity against his will, an issue he argued at sentencing.

which they were convicted ended in October 1985, before the adoption of the Guidelines. Roger and Harding raise issues regarding their sentences. Because neither claims that the sentences imposed were outside the statutory limit, the sentences will not be vacated "unless the sentencing judge relied upon improper considerations or unreliable information in exercising his discretion or failed to exercise any discretion at all in imposing the sentence." *Briscoe*, 896 F.2d at 1519. We now examine their claims of error.

1. Roger Curry

[29, 30] Roger was sentenced to 10 years under Count I, 10 years under Count III, to be served consecutively, and a special parole term of three years.[16] He argues that the court relied on "inaccurate information and erroneous assumptions" in deciding a proper sentence. We have carefully reviewed the record and conclude that the supposed errors are either taken out of context or were clearly not the basis for the court's ruling. For example, Roger argues that there is no evidence that he had a "special skill" which was used in connection with the purchase of the Velpen property. However, the district court specifically stated that "I don't think it would fit under special skills. I am not going to consider that in the sentencing in this matter." Roger's App. at 25. Other comments by the judge that may have been erroneous were in fact made in a question-and-answer fashion, and were not in the nature of findings.

Roger also contends that the district court "improperly" exercised its discretion for failing to consider mitigating factors, giving him consecutive sentences, blindly accepting government testimony, and handing out grossly disparate sentences for the various defendants. These arguments are without merit. First, Judge Brooks considered as a mitigating factor a number of letters he received from Roger's clients, and also noted that he was a skilled and hard-working attorney. Roger notes on appeal that he had no prior record, had the possibility of rehabilitation, showed remorse, and supported a wife and two children. However, there is no indication that the judge did not read the presentence report or consider these factors. We cannot hold that a district court erred simply because it did not mention every mitigating factor listed in the report, especially when they were not mentioned by Roger or his counsel at sentencing. It was also permissible for the district court to hand down consecutive sentences for Counts I and III. *United States v. Cerro*, 775 F.2d 908, 910 (7th Cir.1985). Finally, we find that the judge adequately supported the different sentences the various defendants received; indeed, we find the judge's version of the equities more plausible than Roger's proffered version.[17] In summary, the district court did not abuse its discretion in sentencing Roger.[18]

Finally, Roger argues that the district court failed to comply with Federal Rule of Criminal Procedure 32(c)(3)(D), which states that:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report * * *, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Roger points to three alleged Rule 32 errors. The first related to an allegation of Roger's special skills, which, as noted above, the district court specifically found would not be considered in sentencing. Apparently Roger's argument is that the allegation of special skills has not been totally expunged from his presentence report, as the district court ordered. Since it has offered to ensure that the corrections have been made, we direct the United States Attorney's Office for the Southern District of Indiana to do so. Roger's second argument relates to a statement in the presentence report that he obstructed justice by filing a lawsuit against a government witness. Again, the district court agreed with the substance of Roger's criticisms, and held that the characterization of Roger's lawsuit as an "obstruction of justice" was not a "fact" but a legal conclusion, and ordered Roger's interpretation of the suit to be included in the presentence report. Finally, with regard to the pounds of marijuana involved, the district court indicated that it would not consider that information in its sentencing decision, in accordance with part (ii) of Rule 32(c)(3)(D).

2. Samuel T. Harding

Harding was sentenced to consecutive 6-year terms under Counts I and III, with a special parole term of three years with regard to Count III. Harding's arguments about the propriety of his sentence are not materially different than Roger's arguments, and fail for the reasons noted above. It should be noted that his attempt to compare his sentence to Lynch's, who entered into a plea agreement, is without merit, because her plea was conditioned on the express promise that her sentence not exceed three years.

III.

For the foregoing reasons, the convictions and sentences of all defendants are affirmed.

16. He was also sentenced to serve three years for his income tax violations, to be served concurrently with his 20-year sentence under Counts I and III, after pleading guilty to severed Counts VII and VIII.

17. To cite one example, Roger states that Harding was equally culpable with himself even though Roger was involved for three years and Harding was involved only in 1985.

18. Roger also argues that Holland's guideline sentence was improper, and that his sentence was improperly compared to Holland's. Holland's sentence was affirmed above, so this argument has no merit. Roger argues that Holland's sentence was invalid because the sentencing court used the number of plants as opposed to the dry weight of the marijuana in arriving at Holland's base offense level. Even assuming Roger has standing to make this argument (which was not advanced by Holland), it fails on the merits. *United States v. Haynes*, 969 F.2d 569 (7th Cir.1992).

UNITED STATES of America, Plaintiff-Appellee,

v.

Henry J. CENTRACCHIO and Thomas E. Guth, Defendants-Appellants.

Nos. 91-1742, 91-1750.

United States Court of Appeals, Seventh Circuit.

Argued June 4, 1992.

Decided Oct. 2, 1992.

Defendants were convicted in the United States District Court for the Northern District of Illinois, Brian Barnett Duff, J., of narcotics offenses, and they appealed. The Court of Appeals, Harlington Wood, Jr., Senior Circuit Judge, held that: (1) evidence at sentencing hearing was sufficient to establish that cocaine transaction involved four to five kilograms of cocaine, and (2) remand was required for determination of whether defendant's conduct continued beyond effective date of Sentencing Guidelines.

Affirmed in part, vacated in part and remanded.

1. Criminal Law ⇐1158(1)

Court of Appeals will uphold sentences imposed under the Sentencing Guidelines, assuming Guidelines apply to conduct in case, if Guidelines are applied to factual conclusions that are not clearly erroneous. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

2. Criminal Law ⇐1158(1)

District court's determination of quantity of drugs involved in offense for sentencing purposes is factual determination subject to clearly erroneous standard. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

3. Drugs and Narcotics ⇐133

Evidence at sentencing hearing was sufficient to establish that cocaine transac-

FLINTKOTE COMPANY,
Plaintiff–Appellant,

v.

UNITED STATES of America,
Defendant–Appellee.

No. 91–16618.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 11, 1993.

Decided Oct. 18, 1993.

Taxpayer sued for refund of federal income taxes paid after Internal Revenue Service (IRS) disallowed business expense deduction based upon taxpayer's payment of settlement monies with respect to civil antitrust claims. The United States District Court for the Northern District of California, Fern M. Smith, J., entered judgment in favor of government. Taxpayer appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) civil and criminal antitrust actions against taxpayer concerned same antitrust violation so that civil settlement could not be deducted from taxpayer's income as business expense, and (2) conspiracy to which taxpayer admitted by his nolo contendere plea was continuing conspiracy coextensive in time with conspiracy alleged in civil actions, and thus, five-year statutory period for criminal prosecution did not commence until conspiracy's end.

Affirmed.

1. Internal Revenue ⇐3358

Civil and criminal antitrust actions against taxpayer concerned same antitrust violation, and thus, civil settlement amount could not be deducted from taxpayer's income as business expense, where taxpayer pled nolo contendere in criminal case to single, continuing conspiracy which occurred during time period coextensive with conspiracy alleged in civil suits. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; 26 U.S.C.A. § 162(g).

2. Criminal Law ⇐150

Antitrust conspiracy to which taxpayer admitted by his nolo contendere plea was continuing conspiracy coextensive in time with conspiracy alleged in civil antitrust actions, and thus, five-year statutory period for bringing criminal prosecutions against taxpayer did not commence until conspiracy's end. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; 18 U.S.C.A. § 3282.

3. Criminal Law ⇐150

As long as some part of antitrust conspiracy continued into five-year period preceding indictment, five-year statute of limitations for bringing criminal prosecution did not insulate taxpayer from criminal liability for actions taken more than five years prior to time of indictment. 18 U.S.C.A. § 3282.

4. Conspiracy ⇐24.15

Although five-year statute of limitations for criminal prosecutions for noncapital offense limits how much time government has to indict alleged violator once conspiracy is complete, it does not limit temporal scope of conspiracy for which violator is liable. 18 U.S.C.A. § 3282.

5. Internal Revenue ⇐3358

Civil and criminal antitrust actions against taxpayer concerned same antitrust violations so that civil settlement could not be deducted from taxpayer's net income as business expense, even though civil suits alleged violations of several, distinguishable antitrust provisions while criminal indictment charged violation of § 1 of Sherman Act, where same conduct affecting single product market was alleged to violate different statutes, civil plaintiffs suffered single antitrust harm, and there was no practical method of tracing amount of settlement payment attributable to each alleged offense. 26 U.S.C. § 162(g); Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

6. Monopolies ⇐29

Offenses under § 1 and § 2 of Sherman Act are legally distinct even though they may overlap. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

Norman W. Goldin and Joseph A. Rieser, Jr., Reed Smith Shaw & McClay, Washington, DC, James P. Kleier, Morrison & Foerster, San Francisco, CA, for plaintiff-appellant.

Teresa E. McLaughlin, Tax Div., Dept. of Justice, Washington, DC, for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before: NORRIS, HALL and FERNANDEZ, Circuit Judges.

OPINION

CYNTHIA HOLCOMB HALL, Circuit Judge:

The Flintkote Company ("Flintkote") appeals from the district court's judgment in favor of the government following cross-motions for summary judgment in this action for refund of federal income taxes plus interest paid by Flintkote for the years 1970–73. Flintkote contests the Internal Revenue Service's ("IRS") partial disallowance of Flintkote's deduction of $3.5 million paid to settle a large number of civil antitrust treble damage actions. The parties to this action dispute whether, within the meaning of 26 U.S.C. § 162(g), the civil suits involved the same violation as was charged in a subsequent criminal indictment against Flintkote.

The district court had jurisdiction under 28 U.S.C. § 1346(a)(1), and this court has jurisdiction of this timely appeal under 28 U.S.C. § 1291. We affirm.

1. The actual text of section 162(g) relevant to this action provides:

> If in a criminal proceeding a taxpayer is convicted of a violation of the antitrust laws, or his plea of guilty or nolo contendere to an indictment or information charging such a violation is entered or accepted in such a proceeding, no deduction shall be allowed under subsection (a) for two-thirds of any amount paid or incurred—
>
> (2) in settlement of any action brought under [section 4 of the Clayton Act] on account of such violation or related violation.

I.

In 1973, Flintkote agreed to settle a large number of civil antitrust treble damage actions brought in the late 1960s against it and other manufacturers of gypsum wallboard. Flintkote paid $3.5 million as its share of the settlement payment, and then deducted that amount from its federal income taxes as a business expense. Relying on 26 U.S.C. § 162(g), the IRS disallowed $ 2,013,809 of that deduction. The disallowance was based on the fact that a month after the civil settlement became final, a grand jury in Pennsylvania handed down a criminal indictment against Flintkote which raised factual allegations essentially identical to those in the civil complaints. Flintkote pled nolo contendere to the indictment. In this action, Flintkote contests the disallowance.

This case requires us to interpret section 162(g), which provides that a taxpayer who is convicted of a criminal antitrust violation (or who pleads guilty or nolo contendere to an indictment charging such) may not deduct two-thirds of any civil antitrust damages or settlement monies paid on account of "such violation or any related violation." [1] This provision is an exception to the general rule that damages or settlement payments are deductible as business expenses.

II.

We review the district court's grant of summary judgment de novo. *Maisano v. U.S.*, 908 F.2d 408, 409 (9th Cir.1990). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

26 U.S.C. § 162(g).

Only two reported cases interpret section 162(g); neither answers the question presented in this appeal. *See Federal Paper Board Co., Inc. v. Commissioner of Internal Revenue*, 90 T.C. 1011, 1988 WL 46843 (1988), and *Fisher Companies, Inc. v. Commissioner of Internal Revenue*, 84 T.C. 1319, 1985 WL 15365 (1985), aff'd mem., 806 F.2d 263 (9th Cir.1986).

III.

The question we consider is whether the IRS properly disallowed under section 162(g) Flintkote's deduction for money paid to settle civil antitrust actions on the ground that the settlement concerned the same violation to which Flintkote pled nolo contendere in a criminal antitrust action.[2]

Flintkote advances two principal arguments to support its assertion that the civil antitrust actions and the criminal indictment did not concern the same violations. Flintkote first contends that because the statute of limitations for criminal antitrust actions is five years,[3] Flintkote's conviction on the criminal indictment only concerned conduct within the five-year period preceding the 1973 return of the indictment. Thus, for purposes of calculating the disallowance, the settlement payment, which released Flintkote of liability for alleged conspiratorial conduct lasting from the late 1950s until 1973, should be apportioned between the five-year statutory period (1968–1973) and the years prior to that.[4] Flintkote asks this court to hold that a deduction should be allowed for the portion of the settlement payment attributable to the prior years. Essentially, Flintkote argues that because it was not criminally liable for conduct beyond the five-year statutory period, it was not convicted of any violation occurring in the years before 1968 and thus the pre–1968 violations on which the civil settlement was based were not the same as any criminal violation.

Flintkote's second argument is that because the civil suits alleged violations of several separate antitrust laws, including section 1 of the Sherman Act, and the criminal indictment charged only a violation of section 1, a portion of the settlement payment should be allocated to violations other than of section 1 and a deduction permitted for that portion. In other words, Flintkote asserts that section 162(g) should not apply to the portion of the settlement payment attributable to violations of statutory provisions not alleged in the criminal indictment.

A. Were the violations not the same because they involved different time periods?

[1] The district court found that the indictment charged misconduct occurring during the same time period as that alleged in the civil cases. The court found further that by pleading nolo contendere to the indictment, Flintkote admitted every essential element of the offense pleaded in the indictment, including the allegation that the conspiracy extended back to the early 1960s.[5]

2. Section 162(g) permits disallowance on settlement monies paid on either the same *or* related violations. A "related" violation within the meaning of this section is governed by Treasury Regulation 1.162–22(c) (stating that a violation of the Federal antitrust laws is related to a subsequent violation if 1) with respect to the subsequent violation the United States obtains both a judgment in a criminal proceeding and an injunction against the taxpayer, and 2) the taxpayer's actions which constituted the prior violation would have contravened such injunction if such injunction were applicable at the time of the prior violation). Under this specific definition, both parties agree that the settlement clearly arose out of violations that were *not* "related" to the violation charged against Flintkote in the subsequent criminal indictment. Thus, the question presented is whether the settlement was on account of the same violation—i.e. "such violation"—as that charged in the criminal indictment.

3. 18 U.S.C. § 3282, which applies here, provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

4. In Flintkote's opening brief, it argued that the settlement only covered conduct continuing up until 1968, and that the time periods covered by the criminal indictment and by the civil settlement were therefore completely distinct. In Flintkote's reply brief, however, it acknowledged in a footnote that "pursuant to the settlement agreement, the antitrust plaintiffs released all claims they had against Flintkote up to July 1, 1973, the date of that agreement." Flintkote conceded that section 162(g) thus applies to the settlement payment to the extent that it is attributable to violations within the five-year period preceding the indictment. The question remains, however, whether the indictment actually covered the entire alleged conspiracy or just conduct from 1968 to 1973.

5. Specifically, the indictment stated in the section titled "Offense Charged" that the antitrust conspiracy counted "beginning sometime prior to or to 1960 and continuing thereafter at least until sometime in 1973." In the section titled "Jurisdiction and Venue" the indictment stated that the "aforesaid combination and conspiracy was carried out . . . within five years next preceding the return of this indictment."

Noting that the criminal antitrust laws have a five-year limitations period, the court concluded that Flintkote's present troubles are traceable to its own mistake in failing to limit the scope of its nolo contendere plea to its post–1968 activities. The court found that Flintkote had "ample opportunity, in 1973, to consider the tax consequences of its plea and adjust its plea accordingly," but instead chose not to contest the allegations in the indictment. The district court held that by not raising the affirmative defense of statute of limitations when entering its plea, Flintkote waived that defense for future proceedings.

The district court correctly determined that the violations alleged in the civil suits and charged in the criminal indictment were the same, but erred in focussing on the question of waiver in reaching that result. Flintkote is not arguing after the fact that prosecution was barred by the statute of limitations—that is, Flintkote is not trying to raise in this action a limitations defense to the form of indictment or the conviction. Moreover, as discussed below, Flintkote never had a statute of limitations defense to begin with, thus no affirmative defense existed for it to raise or waive at the plea hearing. The question here is not whether Flintkote can now limit its conviction by invoking the statute of limitations. Rather, Flintkote raises the question of what the scope of its conviction was in the first place. We can answer this question without considering waiver doctrine.

[2] Flintkote argues that by pleading nolo contendere it only admitted allegations of conduct within the five years preceding the return of the indictment, because under the statute of limitations that is the only time period for which it could possibly have been criminally liable. *See United States v. Heller*, 579 F.2d 990, 998 (6th Cir.1978) (by plea of nolo contendere appellant admitted every essential element of the offense well pleaded in indictment). Flintkote's argument fails because the conspiracy to which it admitted by its plea was a *continuing* conspiracy (co-extensive in time with the conspiracy alleged in the civil actions),[6] and therefore the five-year statutory period did not commence until the conspiracy's *end*.

[3, 4] As long as *some* part of the conspiracy continued into the five-year period preceding the indictment, the statute of limitations did not insulate Flintkote from criminal liability for actions taken more than 5 years prior to the time of indictment. *See United States v. Dynalectric Co.*, 859 F.2d 1559, 1563–65 (11th Cir.1988), *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989); *United States v. United States Gypsum Co.*, 600 F.2d 414, 417–18 (3d Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979); *United States v. Walker*, 653 F.2d 1343, 1347 (9th Cir.1981), *cert. denied*, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982); *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir.1981), *cert. dismissed*, 454 U.S. 1167, 102 S.Ct. 1045, 71 L.Ed.2d 324 (1982). In other words, although the statute limits how much time the government has to indict an alleged violator once a conspiracy is complete, it does not limit the temporal scope of a conspiracy for which a violator is liable. *See United States v. All Star Industries*, 962 F.2d 465, 476–77 (5th Cir.) (statute of limitations does not limit antitrust defendants' liability for restitution to losses occurring within five years preceding indictment; defendants ordered to pay restitution for losses from entire conspiracy), *cert. denied*, — U.S. —, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992).

Because Flintkote pled nolo contendere to a single, continuing conspiracy which occurred during a time period co-extensive with the conspiracy alleged in the civil suits, we conclude that the civil and criminal actions

6. As the government points out, the Supreme Court held in *United States v. Kissel*, 218 U.S. 601, 607–08, 31 S.Ct. 124, 125–26, 54 L.Ed. 1168 (1910), that a conspiracy in violation of the Sherman Act is a single event that has "continuance in time," and is not a "cinematographic series of

against Flintkote concerned the same antitrust violation.

B. Were the violations not the same because they involved different antitrust laws?

[5, 6] Flintkote asserts that the civil suits alleged violations of several separate, distinguishable antitrust provisions,[7] while the criminal indictment only charged a violation of section 1 of the Sherman Act. Flintkote accurately notes that offenses under section 1 and section 2 of the Sherman Act are legally distinct even though they may overlap. *See American Tobacco Co. v. United States*, 328 U.S. 781, 788, 66 S.Ct. 1125, 1128, 90 L.Ed. 1575 (1946) (section 1 and section 2 are separate statutory offenses and "require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap"); *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59, 60 S.Ct. 811, 846 n. 59, 84 L.Ed. 1129 (1940) ("the crime under § 1 is legally distinct from that under § 2 . . . though the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1"). The government argues in response that though the various antitrust laws are separately punishable, they overlap significantly, and conduct that violates section 1 of the Sherman Act can violate other provisions as well.

Because the civil suits alleged separate violations of the antitrust laws, Flintkote's argument that section 162(g) should be applied only to the portion of the settlement payment attributable to a violation of section 1 of the Sherman Act has some surface appeal. However, Flintkote has not suggested any method by which the settlement payment could be apportioned. Flintkote cites *Federal Paper Board*, 90 T.C. at 1011, 1988 WL 46843, for the proposition that the settlement payment should be allocated among the various alleged statutory violations, but the differences between that case and this one highlight the problem inherent in Flintkote's position.

In *Federal Paper Board*, the company was indicted for antitrust violations involving price-fixing in the market for folding cartons and settled civil litigation in which it was alleged to have conspired to fix prices of both folding cartons and milk cartons. The Tax Court determined that the violation giving rise to the criminal action was not the same in all material respects as that giving rise to the civil actions. The court therefore allocated the company's settlement payment between milk carton claims and folding carton claims, based on the aggregate sales by all the settling defendants to the settling plaintiffs in the civil class action. The court held that section 162(g) applied only to the portion of the payment allocable to the folding carton claims.

In the circumstances of *Federal Paper Board*, the antitrust harms to the folding carton and milk carton markets were distinct, and by comparing sales and purchases in each market, the court could readily ascertain an actual proportion to use in allocating the settlement payment. Federal Paper Board's misconduct in each of the different product markets was, in effect, different misconduct, even though the civil plaintiffs alleged a single conspiracy. In Flintkote's situation, however, the same conduct affecting a single product market was alleged to violate different statutes. Though the civil plaintiffs alleged separate offenses, they suffered a single antitrust harm. Thus, we see no practical method of tracing the amount of the settlement payment attributable to each alleged offense. Moreover, the various claims in the civil case were, essentially, different ways of characterizing the results of a single set of core activities in which the conspirators engaged. We see no legal justification for allocating the damages even if an allocation could somehow be approximated.

We conclude that even though the civil actions alleged violations of antitrust laws in addition to section 1 of the Sherman Act, those actions alleged a single conspiracy arising from a single set of facts—the same conspiracy and facts which formed the basis of the criminal indictment. Flintkote has presented no basis for determining that the civil actions and criminal indictment involved different violations.

IV.

We hold that the IRS properly disallowed Flintkote's deduction for money paid to settle civil antitrust actions on the ground that the settlement concerned the same violation to which Flintkote pled nolo contendere in a criminal antitrust action. The violations alleged in the civil suits and charged in the criminal indictment resulted from the same continuing conspiracy, and therefore did not involve different time periods. In addition, the civil and criminal violations were the same because both involved section 1 of the Sherman Act, and because the additional statutory offenses alleged in the civil actions are not practicably separable from the section 1 offense.

AFFIRMED.

7. Flintkote states that "[a]lthough the civil complaints claimed a violation of section 1 of the Sherman Act, many of them also alleged claims of monopolization and attempts to monopolize in violation of section 2 of the Sherman Act, restrictive dealing arrangements in violation of section 3 of the Clayton Act, and price discrimination in violation of the Robinson–Patman Act." *Id.* at 607, 31 S.Ct. at 125.

Charles H. HENDERSON, Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION; National Transportation Safety Board, Respondents.

No. 91-70511.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 3, 1993.

Decided Oct. 18, 1993.

Helicopter pilot sought review of suspension of license by National Transportation Safety Board. The Court of Appeals, Poole, Circuit Judge, held that: (1) aerial photography exception to Part 135 regulations was applicable even though, after flight commenced, pilot learned that passengers desired a landing as well as the opportunity to take photographs; (2) evidence sustained finding that pilot operated helicopter below minimum safe altitude, regardless of the likelihood of a power unit failure; and (3) evidence sustained finding that pilot did not use reasonable judgment in flying the helicopter very low at a slow speed over congested area.

Affirmed in part and reversed in part.

1. Aviation ⇐35

Court's review of National Transportation Safety Board's decisions is narrow and court will uphold them unless they are arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law; NTSB factual findings are conclusive when support by substantial evidence in the record, but purely legal questions are reviewed de novo.

2. Aviation ⇐33

If pilot knows, prior to departure, that passengers desire landing in addition to aerial photography, flight is not exempt from Part 135 regulations governing altitude for helicopters in congested areas but, where pilot hired for aerial photography finds out only in the air that the passengers desire landing, the aerial photography exception applies.

3. Aviation ⇐33

When plans for landing in addition to aerial photography are unknown to helicopter pilot before departure, pilot is exempt from Part 135 regulations governing altitude no matter when during the flight the pilot learns of the plans to land.

4. Aviation ⇐33

Fact that news photographers told pilot that they did not need to have door removed from helicopter and that they would shoot through the window did not show that helicopter pilot knew before departure that photographers would desire a landing in addition to aerial photography so as to prevent appli-

ing a lower rate to customers who would not otherwise be steam heat customers was rationally related to the legitimate goal of ensuring the economic viability of the steam loop.

[7] Besides helping ensure the survival of the steam loop, the classification was also rationally related to another legitimate governmental purpose: promoting the loop's efficiency. Customers who have on-premises boilers have the ability to provide their own heat without using the steam loop. For this reason, the interruptible rate service agreements, unlike the standard rate agreements, contained a provision granting Bi–State the right to terminate steam service for any reason on ten days' notice. This provision allowed Bi–State to continue to attract new customers while retaining the ability to ration steam in the event of a shortage; during periods where steam usage is extremely high, for example, Bi–State can satisfy the needs of standard rate customers by terminating service to interruptible rate customers. We need not speculate, as BLF would have us do, about whether there will ever be such a shortage of steam heat. The salient point is that Bi–State could have believed that offering a lower rate to customers with boilers in exchange for the right to interrupt service at will would encourage supply to meet demand while at the same time ensuring necessary flexibility in the system. Thus, interruptible rate customers received a lower rate for two good reasons: they would not have become Bi–State's customers otherwise at a time when the steam loop needed new customers to survive and, unlike the standard rate customers, they could tolerate service interruptions in the event of an emergency. For this reason, the classification is immunized from BLF's equal protection challenge.

BLF's final claim is that Bi–State and Thermal arbitrarily applied the interruptible rate. It argues that Thermal amended the interruptible rate service agreements of "certain customers" by eliminating the provision granting Bi–State and Thermal authority to terminate service on ten days' notice. Appellant's Br. at 15. Under the amended agreements, these customers retained the immediate right to become standard rate customers in the event of a steam shortage, eliminating the possibility of a service disruption. The only customers who BLF claims received such favorable treatment, however, were interruptible rate customers in the first place. If BLF is arguing that it was treated differently to the extent Thermal did not offer it an amended interruptible rate agreement, we reject such a claim because BLF did not qualify for the interruptible rate and thus is not similarly situated to those customers who negotiated amended agreements. *See E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir.1987) (explaining that "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause"), *cert. denied*, 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988).

Alternatively, BLF could be arguing that the amended agreements undermine the efficiency rationale behind the dual rate system. As to customers with amended interruptible rate service agreements, Bi–State cannot terminate their service selectively in the event the steam loop is overextended because they may elect to become standard rate customers and continue service. Thus, BLF asserts, these customers did not receive a lower rate in exchange for Bi–State's right to interrupt service at will; rather, they impermissibly received a lower rate than standard rate customers whose service contracts were functionally identical.

[8] We have already explained, however, that the Constitution does not prohibit the government from charging different rates for the same service if there is a rational basis for doing so. Even absent the contract provision allowing service interruption at the discretion of Bi–State, a rational basis existed for offering the lower rate to these customers: the need to attract new customers and preserve the steam loop. If anyone has a right to complain about the amended agreements, it is the similarly situated interruptible rate customers who are still subject to service termination on ten days' notice. That several interruptible rate customers had contracts eliminating the risk of service interruption, however, does not render Bi–State's application of the dual rate system arbitrary or irrational as to BLF. *Cf. Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 932–33 (5th Cir.1988) (applying rationality test to claim that government selectively imposed additional requirements on some applicants seeking land annexation).

[9] At bottom, BLF's claim is that it had a right to the same rate for steam heat as customers with gas-fired boilers. The Constitution accords it no such right. Under rational basis review, the government has wide latitude to distinguish between different groups to further legitimate interests. Here, Bi–State and Thermal could have believed that distinguishing between steam customers who had gas-fired boilers and those who did not would allow the steam loop to survive for the refuse-to-energy plan and to function efficiently. Whether or not these objectives actually motivated defendants to develop the dual rate system, we cannot say that the classification was irrational on its face or that Bi–State and Thermal applied it arbitrarily as to BLF. Thus, we hold that defendants are entitled to summary judgment on BLF's equal protection claim.

B. Attorney's Fees

Bi–State and Thermal claim that they are entitled to attorney's fees under 42 U.S.C. § 1988. Under § 1988, "the court, in its discretion, may allow the prevailing party [in a § 1983 action], other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). To the extent defendants request attorney's fees for services performed in connection with the proceedings in district court, we reject such a claim. They cite no authority for the proposition that the court of appeals may in the first instance award attorney's fees for legal services performed in district court.

[10, 11] We may, however, award attorney's fees to the prevailing party on appeal for legal services performed in connection with the appeal. *See Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 699 (8th Cir. 1982). A prevailing defendant-appellee is entitled to attorney's fees "only if the plaintiff's appeal is frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." *Munson v. Friske*, 754 F.2d 683, 698 n. 10 (7th Cir.1985). Although BLF did not have a strong claim, we cannot say that its appeal was frivolous, unreasonable or without foundation. BLF had plausible, though unavailing, legal arguments. This is not "one of the few cases where defendant-appellees [are] entitled to attorney['s] fees for appellate work." *Id.*

III. CONCLUSION

We affirm the district court's order granting summary judgment to Bi–State and Thermal and deny defendants' request for attorney's fees under § 1988.

UNITED STATES of America, Appellee,

v.

Daniel Anthony FETLOW, Appellants.

UNITED STATES of America, Appellee,

v.

Winston G. MORRISON, Appellant.

UNITED STATES of America, Appellee,

v.

Robert Mark FERGUSON, Appellant.

UNITED STATES of America, Appellee,

v.

Bernard Anthony VALENTINE, Appellant.

Nos. 93–2377, 93–2536, 93–2558 and 93–2763.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 16, 1993.

Decided April 7, 1994.

Rehearing Denied June 24, 1994 in Nos. 93–2558, 93–2763.

Defendants were convicted in the United States District Court for the Eastern District

titioner suffer a fraud unique from other accountholders by Franklin's assurances that its certificates would be collateralized by government securities. The record establishes that at least one other accountholder, the Benedictine Sisters of the Annunciation, received similar assurances.

Finally, there is no equitable basis for the Petitioner's argument that it deserves priority over other accountholders because it stands to suffer the most substantial loss. We simply can find no basis in equity for giving the Petitioner a disproportionate advantage over other Franklin shareholders who also suffered losses.

IV.

Based on the foregoing, we conclude that the Petitioner was properly classified as a member to the extent of its uninsured shares and that it is not entitled to the imposition of a constructive trust in its favor. Accordingly, the judgment of the National Credit Union Board is affirmed.

UNITED STATES of America, Appellee,

v.

Raul Leyja GALVAN, Appellant.

UNITED STATES of America, Appellee,

v.

Enrique Ruiz SILVA, Appellant.

Nos. 91–2444, 91–2445.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 12, 1991.

Decided April 9, 1992.

Defendants were convicted in the United States District Court for the Southern District of Iowa, Charles R. Wolle, J., of conspiracy to distribute cocaine, and aiding and abetting the distribution of cocaine. Defendants appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) district court did not err in calculating defendant's offense level as 26 under Sentencing Guidelines; (2) defendants' conviction for conspiracy was supported by evidence; and (3) prosecutor's remarks during closing argument did not infringe on defendant's right not to testify.

Affirmed.

1. Criminal Law ⇐1158(1)

When appeal is based on factual grounds, Court of Appeals reverses sentence imposed by district court only if it concludes that factual findings on which district court relied are clearly erroneous.

2. Criminal Law ⇐1158(1)

Whether uncharged drugs are part of common scheme or plan is factual finding subject to clearly erroneous standard.

3. Criminal Law ⇐1244

Where uncharged drugs are found to be part of common scheme or plan, sentencing court is not limited by amount seized and may sentence according to estimation based upon trial testimony; however, trial testimony used to estimate amount of uncharged drugs must clearly establish either dates of transactions or amounts of drugs involved.

4. Drugs and Narcotics ⇐133

When conviction for violating federal drug statutes is involved, trial court may consider amounts of drugs involved in conviction of coconspirators.

5. Drugs and Narcotics ⇐133

Calculation of defendant's base offense level as 26 was supported by testimony which clearly attributed at least 19 ounces of cocaine to defendant. U.S.S.G. § 2D1.1(c)(9), 18 U.S.C.A.App.

6. Criminal Law ⇐1144.13(8), 1159.2(10)

In reviewing conspiracy conviction for sufficiency of evidence, Court of Appeals views evidence in light most favorable to government, giving it benefit of all reasonable inferences drawn from evidence that supports jury's verdict; evidence need not exclude every reasonable hypothesis except guilt, and jury's verdict must be upheld if there is interpretation of evidence which would allow a reasonable-minded jury to conclude guilt beyond reasonable doubt.

7. Conspiracy ⇐24(1), 27

"Conspiracy" consists of agreement between two or more people to violate law and overt act in furtherance of conspiracy; person becomes member of conspiracy when he knowingly contributes his efforts to conspiracy's objective.

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

8. Conspiracy ⇐47(12)

Defendants' convictions for conspiracy to distribute cocaine were supported by evidence that defendants were roommates in two different places for over one year, that both defendants sold cocaine, that defendants traveled together to Chicago for purpose of buying cocaine, that defendants gave one another money from sales of cocaine, and that both frequently had large sums of money at their disposal.

9. Drugs and Narcotics ⇐123(3)

Defendant's conviction for aiding and abetting distribution of cocaine was supported by evidence that defendant and codefendant engaged in conspiracy to distribute cocaine and that defendant directed drug enforcement agent disguised as prospective buyer to codefendant for purchase of cocaine.

10. Conspiracy ⇐24(8)

Jury could convict defendant of conspiracy with his girlfriend, even though grand jury knew about her and did not name her as unindicted coconspirator; grand jury may not name unindicted coconspirator in indictment.

11. Criminal Law ⇐721(6)

Prosecutor's statement during closing argument that codefendant had not called "mutual friend or mutual employee" to testify regarding alleged romantic relationship between codefendant and government informant did not infringe on defendant's right not to testify, even though defendant was only person who was both mutual friend and mutual employee; prosecutor's remark was directed to codefendant's failure to call witness who could substantiate his claim that he had romantic relationship with informant, and judge properly instructed jury that defense did not have burden of proof or burden to produce evidence.

Mark Godwin, Des Moines, Iowa, argued (Karla Fultz, on the briefs), for appellants.

Stephen Patrick O'Meara, Asst. U.S. Atty., Des Moines, Iowa, argued, for appellee.

Before JOHN R. GIBSON, Circuit Judge, FRIEDMAN,* Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

Raul Leyja Galvan and Enrique Ruiz Silva appeal their convictions for conspiracy to distribute cocaine.[1] Silva also appeals his conviction for aiding and abetting the distribution of cocaine. On appeal, Galvan argues that: (1) the evidence was insufficient to support the district court's[2] finding of the amount of cocaine involved; (2) the evidence was insufficient to support his conspiracy conviction; (3) the district court erred when it failed to give a requested jury instruction; and (4) the government, in its closing argument, impermissibly shifted the burden of proof by alluding to the fact that Galvan did not testify. Silva argues that the evidence is insufficient to support both his conspiracy and his aiding and abet-

* THE HONORABLE DANIEL M. FRIEDMAN, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

1. Galvan was also convicted of distribution of cocaine and carrying a firearm during a drug trafficking crime. He does not contest his convictions on these charges.

2. The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

ting conviction, and he adopts all other arguments made by Galvan. We affirm.

I.

A. Amount of Cocaine[3]

[1–5] Galvan claims that the district court erred in calculating his offense level as 26 under § 2D1.1 of the Sentencing Guidelines because there was insufficient evidence to support the district court's findings that thirty-eight ounces of cocaine were attributable to him.[4] When an appeal is based on factual grounds, we reverse the sentence imposed by the district court only if we conclude that the factual findings on which the court relied are clearly erroneous. *United States v. Pou*, 953 F.2d 363, 370 (8th Cir.1992) (citing 18 U.S.C. § 3742(e) (1988); *United States v. Lawrence*, 915 F.2d 402, 406 (8th Cir.1990)). Whether uncharged drugs are part of a common scheme or plan is also a factual finding subject to the clearly erroneous standard. *Lawrence*, 915 F.2d at 406. Where uncharged drugs are found to be part of a common scheme or plan, the sentencing court is not limited by the amount seized and may sentence according to its estimation based on trial testimony. *United States v. Duckworth*, 945 F.2d 1052, 1054 (8th Cir.1991) (citing *United States v. Evans*, 891 F.2d 686, 687 (8th Cir.1989), *cert. denied*, 495 U.S. 931, 110 S.Ct. 2170, 109 L.Ed.2d 499 (1990)). Trial testimony used to estimate the amount of uncharged drugs, however, must clearly establish either the dates of the transactions or the amounts of drugs involved. *United States v. Hewitt*, 942 F.2d 1270, 1274 (8th Cir.), *reh'g denied*, No. 90–5578 (8th Cir. Oct. 1 1991); *United States v. Phillippi*, 911 F.2d 149, 151 (8th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 702, 112 L.Ed.2d 691 (1991). In this case, trial testimony clearly attributed at least nineteen ounces (538.65 grams) of cocaine to Galvan. Because a base offense level of twenty-six applies to amounts of at least 500 grams but less than two kilograms of cocaine, U.S.S.G. § 2D1.1(c)(9), we do not need to reach the question of whether the government proved the additional amounts. *United States v. Regan*, 940 F.2d 1134, 1136 (8th Cir.1991); *see also Phillippi*, 911 F.2d at 151 (erroneous inclusion of drugs harmless error where base offense level remained the same after improperly included amounts omitted). We conclude the district court correctly assigned Galvan a base offense level of twenty-six.

B. Conspiracy

Galvan and Silva both argue that there was insufficient evidence of a conspiracy.[5] They claim that the evidence failed to show that an agreement existed, with each other or with others, to distribute cocaine. Galvan claims that there was no proof that anyone else had a stake in the outcome of his actions or got paid for participating in his distribution of cocaine. Silva argues that the government did not show that he "knowingly contributed [his] efforts in the furtherance" of selling cocaine, *United States v. Mims*, 812 F.2d 1068, 1075 (8th Cir.1987), or that he was a party to any actual agreement, tacit or explicit, to distribute cocaine.

[6, 7] In reviewing a conspiracy conviction for sufficiency of the evidence, the court views the evidence in the light most favorable to the government, giving it the benefit of all reasonable inferences drawn from the evidence that support the jury's verdict. *Duckworth*, 945 F.2d at 1053; *United States v. Newton*, 756 F.2d 53, 54 (8th Cir.1985). The evidence need not exclude every reasonable hypothesis except guilt. *Newton*, 756 F.2d at 54. The jury's verdict must be upheld if there is an interpretation of the evidence that would allow a reasonable-minded jury to conclude guilt beyond a reasonable doubt. *United States v. Rodriguez*, 812 F.2d 414, 416 (8th Cir. 1987). A conspiracy generally consists of an agreement between two or more people to violate the law and an overt act in furtherance of the conspiracy. *United States v. Watts*, 950 F.2d 508, 512 (8th Cir.1991). A person becomes a member of a conspiracy when he knowingly contributes his efforts to the conspiracy's objectives. *Duckworth*, 945 F.2d at 1053; *Mims*, 812 F.2d at 1075.

[8] Here, there was sufficient evidence that a conspiracy existed between Galvan and Silva to sustain the conviction. They were roommates in two different places for over a year. Brad Wiegand, a former customer, testified that several times when he had taken people to buy cocaine from Galvan, Silva answered the door and told them Galvan was not there. After some discussion, however, Silva would sell them cocaine. In addition, Wiegand testified that once, when he went to buy from Galvan, Silva was present and Galvan gave Silva the money from the sale. Deborah Benninger, Galvan's ex-girlfriend, testified that she bought cocaine from both men. She also testified that Galvan sometimes sent her to Silva to buy cocaine when he needed more to distribute. Benninger stated that Silva had been present sometimes when Galvan sold cocaine to other people, and that she had overheard conversations between the two men about cocaine and how much money they made. She said that she had seen them counting large amounts of money. She also testified about a trip to Chicago she had taken with Galvan, Silva and another man called Tito. They went to a bar called "Cerveza Frio." Tito and Galvan went into the back room, where Silva joined them briefly. They left the bar almost immediately after the three men rejoined her. When they got into the car, Galvan stuffed something between the seats. Then, they all "did" some cocaine. When they arrived home, Galvan left, announcing that he was going to go make money. Benninger understood that to mean that he was going to sell cocaine because he was unemployed at the time and she believed the trip had been for the purpose of buying drugs. Stacy Williams, a government informant, testified that on one occasion when she went to make a buy from Galvan, he went into the bedroom with Silva and another man for a few minutes, then called her to the bedroom door and sold her the cocaine she wanted. On another buy, she went to the apartment looking for Galvan, and Silva told her Galvan had just left to meet her.

We believe that the evidence, taken in the light most favorable to the government, is sufficient to allow a jury to find that Galvan and Silva conspired with each other to distribute cocaine. Therefore, we affirm their convictions.

C. Aiding and Abetting

[9] Silva argues that the evidence is insufficient to support his conviction of aiding and abetting. The government claims that Silva aided and abetted the distribution of cocaine to a drug enforcement agent. Stacy Williams testified that she had made arrangements to meet Galvan at a motel to introduce him to a buyer, who was really a drug enforcement agent. When Galvan did not arrive at the agreed time, she and the agent drove to Galvan's apartment. Silva answered the door and told her that Galvan had just left to meet her.

Although we agree that, standing alone, this would not be sufficient to sustain a conviction, we must look to the evidence as a whole to determine whether a reasonable jury could have found that Silva aided and abetted Galvan in this sale. Given the evidence of conspiracy, and the fact that the jury found there was a conspiracy, the verdict was reasonable. We affirm.

D. Jury Instruction

[10] Galvan contends that the district court erred because it failed to give a jury instruction he requested. The instruction would have told the jury that they could not convict him of conspiracy with Ben-

3. Silva adopted this argument and the arguments addressed in Parts D and E of this opinion by reference pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure. Because we find that the district court did not err, we do not address these issues separately for Silva.

4. When a conviction for violating federal drug statutes is involved, the trial court may consider amounts of drugs involved in the conviction of co-conspirators. *United States v. Holland*, 884 F.2d 354, 358 (8th Cir.), *cert. denied*, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 549 (1989).

5. Because appellants' arguments on this point are so similar, we address them together.

ninger because the grand jury knew about her and did not name her as an unindicted co-conspirator. He argues that the government suggested that Benninger was a co-conspirator, and that the jury may have convicted him of conspiring with her rather than with Silva. He admits, however, that he could be indicted and convicted for conspiring with unnamed co-conspirators if the grand jury did not know their identity.

Galvan's position is without legal merit. The case he relies on for support, *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975), is directly opposed to his proposition. In that case, the court held that the grand jury could never name an unindicted co-conspirator in an indictment. Any unindicted co-conspirators must remain unnamed. *Id.*[6]

E. Comment on Failure to Testify

[11] Galvan's last argument is that the government impermissibly shifted the burden of proof to the defense, constituting an infringement of his Fifth Amendment right not to testify. *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965); *United States v. Neumann*, 887 F.2d 880, 887 (8th Cir.1989). Both Galvan and Silva met Stacy Williams, the government informant, prior to 1990 through work. Williams had been hospitalized with mental and emotional problems during 1989 due to the breakup of a past relationship. Silva testified that he had had a romantic relationship with her during most of 1990.[7] He claimed that Williams had threatened him when they broke up, saying "I'll see you soon." He testified that he believed Williams was trying to get revenge. During closing argument, the government attorney said, "The defendant [Silva] has brought no one of what might be [sic] their mutual friend [sic] or mutual employees to tell you about their relationship." Galvan claims that because he was the only person the jury knew about who was both a mutual friend and a mutual employee, the government was impermissibly pointing out the fact that he had not testified.

Galvan's right not to testify was not infringed by the prosecutor's remark in this case. We have read the prosecutor's remarks with great care. The remark was directed to defendants' failure to call a witness in the context of discussing Silva's credibility. The prosecutor used the disjunctive "or" in his remark. His comment simply pointed out that, in considering Silva's credibility, the jury should remember that no one who knew both Williams and Silva, either as a friend or as a co-worker, had testified that there had been a romantic relationship between the two. In addition, the judge properly instructed the jury, both in the final instructions and at the time of the remark, that the defense did not have a burden of proof or a burden to produce evidence. Given the context and the phraseology of the remark, and the judge's instructions to the jury, we do not think that the remark was improper. *See Neumann*, 887 F.2d at 887; *Moore v. Wyrick*, 760 F.2d 884 (8th Cir.1985) (prosecutor's inviting jury to draw adverse inference from defendant's failure to call certain witnesses did not deprive defendant of a fair trial).

II.

Because we find no errors of fact or law, we affirm the district court.

6. Galvan also relies on *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951). This case does not stand for his proposition either. It simply notes, in dicta, that a person can be convicted of conspiracy with an unnamed person. *Id.* at 375, 71 S.Ct. at 443.

7. Williams denied having any such relationship with Silva.

UNITED STATES of America, Appellee,
v.
Roderick L. GARRETT, Appellant.

UNITED STATES of America, Appellee,
v.
Joe Louis WILLIAMS, Appellant.

Nos. 90-3092, 91-1016.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 7, 1992.
Decided April 9, 1992.

Defendants were convicted of drug and firearm offenses, following jury trial in the United States District Court for the Western District of Missouri, D. Brook Bartlett, J., and they appealed. The Court of Appeals, Arnold, Chief Judge, held that: (1) disruptive and unorthodox trial tactics of codefendant did not entitle defendant to mistrial or severance; (2) sufficient evidence connected defendant with cocaine and gun found in car in which he was riding; and (3) trial court could deny untimely motions to suppress evidence.

Affirmed.

1. Criminal Law ⇐1166(6)

Denial of severance is not grounds for reversal unless clear prejudice and abuse of discretion are shown.

2. Criminal Law ⇐622.2(6, 7, 11)

Mere fact that there is hostility among defendants, or one defendant may try to save himself at expense of another, or that evidence against one defendant is more damaging than evidence against another, is not sufficient grounds to require separate trials.

3. Criminal Law ⇐622.2(8)

In order to justify severance, defendant must make showing of real prejudice by demonstrating that jury was unable to compartmentalize evidence as it related to him and his codefendant.

4. Criminal Law ⇐622.2(7, 8, 12)

Defendant was not entitled to severance, even though codefendant's counsel conducted noisy, disruptive, unorthodox defense and introduced incriminating testimony concerning defendant, where defendant was represented by professional, highly effective counsel, defendant's defense of general denial did not conflict with that of codefendant, and trial involved only two defendants and five counts and lasted only three and one-half days; danger that jurors would be unable to compartmentalize the evidence was minimal.

5. Weapons ⇐17(4)

Constructive possession of firearm need not be proved by direct evidence, but rather may be premised upon circumstantial evidence.

6. Criminal Law ⇐552(4)

Circumstantial evidence is intrinsically as probative as direct evidence.

7. Drugs and Narcotics ⇐123(2)
Weapons ⇐17(4)

Evidence supported convictions for possession with intent to distribute cocaine base, and firearms offenses, despite contention that nothing connected defendant with crack cocaine and gun found in car in which he was riding, where defendant was located right next to arm rest containing crack cocaine and directly in front of area of dashboard in which gun was hidden, and defendant would not respond to police officer's commands to get out of vehicle for approximately 15 to 45 seconds, during which time he was seen bending forward in car towards area where gun was hidden. 18 U.S.C.A. §§ 922(g)(1), 924(a)(2); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(1), (b)(1)(A, B), 21 U.S.C.A. § 841(a)(1), (b)(1), (b)(1)(A, B).

8. Criminal Law ⇐394.6(3)

Defendant was not entitled to grant of his untimely motions to suppress evidence, where defendant presented no valid reason why motions were not filed on time. Fed. Rules Cr.Proc.Rule 12(c, f), 18 U.S.C.A.

taxpayer a tax advantage over others who have not merged. We conclude that petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses.[9]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

Statute of limitations issue --

FOIA(b)(7) - (C)

[9] We do not pass on situations like those presented in *Northway Securities Co.* v. *Commissioner*, 23 B. T. A. 532; *Alprosa Watch Corp.* v. *Commissioner*, 11 T. C. 240; *A. B. & Container Corp.* v. *Commissioner*, 14 T. C. 842; *W A G E, Inc.* v. *Commissioner*, 19 T. C. 249. In these cases a *single* corporate taxpayer changed the character of its business and the taxable income of one of its enterprises was reduced by the deductions or credits of another.

GRUNEWALD *v.* UNITED STATES.

NO. 183. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued April 3–4, 1957.—Decided May 27, 1957.

1. The three petitioners were convicted in a federal district court of violating 18 U. S. C. § 371 by conspiring to defraud the United States by preventing the criminal prosecution of certain taxpayers for fraudulent tax evasion. They had succeeded in obtaining "no prosecution" rulings from the Bureau of Internal Revenue in 1948 and 1949, and their subsequent activities were directed at concealing the irregularities through which these rulings were obtained. They were not indicted until October 25, 1954. *Held:* If the main objective of the conspiracy was to obtain the "no prosecution" rulings, petitioners' prosecution was barred by the three-year statute of limitations, since no agreement to conceal the conspiracy after its accomplishment was shown or can be implied on the record in this case to have been a part of the conspiracy. Pp. 399–406.

   (a) After the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal the crime may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. *Krulewitch* v. *United States*, 336 U. S. 440; *Lutwak* v. *United States*, 344 U. S. 604. Pp. 399–402.

   (b) On the record in this case, nothing more is shown than (1) a criminal conspiracy carried out in secrecy, (2) a continuation of the secrecy after accomplishment of the crime, and (3) attempts to cover up after the crime began to come to light. Pp. 402–404.

   (c) The duration of a conspiracy cannot be lengthened indefinitely for the purpose of the statute of limitations merely because the conspiracy is kept secret and the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished. Pp. 399, 404–405.

2. The judge's charge to the jury was not adequate to justify petitioners' conviction on the theory that the main objective of the conspiracy was not merely to obtain the initial "no prosecution"

*Together with No. 184, *Halperin* v. *United States*, and No. 186, *Bozza* v. *United States*, also on certiorari to the same court.

rulings but to obtain *final immunity* of the taxpayers from criminal prosecution by preventing their prosecution until after expiration of the six-year statute of limitations applicable to their tax-evasion offenses, which did not expire until less than three years before petitioners were indicted for conspiracy—since the judge's charge left it open for the jury to convict even though it found merely (1) that the central aim of the conspiracy was accomplished in 1949, and (2) that the subsequent acts of concealment were motivated exclusively by petitioners' fear of a conspiracy prosecution. Pp. 406–415.

3. Petitioner Halperin was also convicted on other counts of the indictment charging him with violating 18 U. S. C. § 1503 by endeavoring corruptly to influence certain witnesses before a grand jury which was investigating matters involved in the conspiracy. At his trial, he answered certain questions in a manner consistent with innocence and then, over his objection, was subjected to cross-examination which revealed that he had refused to answer the same questions, on grounds of possible self-incrimination, while he was appearing before a grand jury, under subpoena, without benefit of counsel, without the right to summon witnesses and without any opportunity to cross-examine witnesses testifying against him. *Held:* In the circumstances of this case, it was prejudicial error for the trial judge to permit cross-examination of Halperin on his plea of the Fifth Amendment privilege before the grand jury. *Raffel* v. *United States*, 271 U. S. 494, distinguished. Pp. 415–424.

233 F. 2d 556, reversed and remanded.

Edward J. Bennett argued the cause for petitioner in No. 183. With him on the brief was *Harold H. Corbin.*

Henry G. Singer argued the cause for petitioner in No. 184. With him on the brief was *Harry Silver.*

Rudolph Stand argued the cause for petitioner in No. 186. With him on the brief was *Frank Aranow.*

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The three petitioners were convicted on Count 1 of an indictment brought under 18 U. S. C. § 371 [1] for conspiracy to defraud the United States with reference to certain tax matters. Petitioner Halperin was also convicted on Counts 5, 6, and 7 of the same indictment, charging him with violating 18 U. S. C. § 1503 [2] by endeavoring corruptly to influence certain witnesses before a grand jury which was investigating matters involved in the conspiracy charged in Count 1 of the indictment. Each petitioner was sentenced to five years' imprisonment and fined under Count 1. On each of Counts 5, 6, and 7, Halperin was sentenced to two years' imprisonment and a fine of $1,000, the prison sentences on these Counts and that on Count 1 to run concurrently. The Court of Appeals for the Second Circuit affirmed, with the late Judge Frank dissenting. 233 F. 2d 556. We granted certiorari, 352 U. S. 866, in order to resolve important questions relating to (a) the statute of limitations in conspiracy

[1] This section provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] 18 U. S. C. § 1503 provides, in relevant part: "Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States . . . in the discharge of his duty . . . or corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both." Grunewald and Bolich were acquitted on these Counts.

prosecutions, as to which the decision below was alleged to be in conflict with this Court's decisions in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604; and (b) the use on Halperin's cross-examination of his prior claim of the Fifth Amendment's privilege against self-incrimination before a grand jury. For the reasons discussed hereafter, we conclude that these convictions must be reversed, and the petitioners granted a new trial.

On October 25, 1954, a grand jury returned an indictment, Count 1 of which charged petitioners and others with conspiring among themselves and with others "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption . . . ." The indictment further charged that a part of the conspiracy was an agreement to conceal the acts of the conspirators.[3] Overt acts within three years of the date of the indictment were charged. Counts 5, 6, and 7 of the indictment charged petitioners with violating 18 U. S. C. § 1503 in the manner already indicated.

The proofs at the trial presented a sordid picture of a ring engaged in the business of "fixing" tax fraud cases

[3] Paragraph 7 of the indictment alleged: "It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body . . . of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, bribery, improper influence and corruption of government employees, the giving of false testimony, [etc.] . . . ."

Paragraph 13 alleged: "It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy."

by the use of bribes and improper influence. In general outline, the petitioners' scheme, which is set forth in more detail in the Court of Appeals' opinion,[4] was as follows:

In 1947 and 1948 two New York business firms, Patullo Modes and Gotham Beef Co., were under investigation by the Bureau of Internal Revenue for suspected fraudulent tax evasion. Through intermediaries, both firms established contact with Halperin, a New York attorney, and his associates in law practice. Halperin in turn conducted negotiations on behalf of these firms with Grunewald, an "influential" friend in Washington, and reported that Grunewald, for a large cash fee, would undertake to prevent criminal prosecution of the taxpayers. Grunewald then used his influence with Bolich, an official in the Bureau, to obtain "no prosecution" rulings[5] in the two tax cases. These rulings were handed down in 1948 and 1949. Grunewald, through Halperin, was subsequently paid $60,000 by Gotham and $100,000 by Patullo.[6]

Subsequent activities of the conspirators were directed at concealing the irregularities in the disposition of the Patullo and Gotham cases. Bolich attempted to have the Bureau of Internal Revenue report on the Patullo case "doctored," and careful steps were taken to cover up the traces of the cash fees paid to Grunewald. In 1951 a congressional investigation was started by the King Committee of the House of Representatives; the conspirators felt themselves threatened and took steps to hide their traces. Thus Bolich caused the disappearance

[4] 233 F. 2d, at 559–562.

[5] A "no prosecution" ruling is an internal decision by the investigative branch of the Bureau of Internal Revenue not to press criminal charges against a taxpayer.

[6] The payments were made in cash. In order to raise the money and leave no traces, the taxpayers made unrecorded sales, the profits of which were again unreported income. Further large fees were paid to Halperin and his associates.

of certain records linking him to Grunewald, and the taxpayers were repeatedly warned to keep quiet. In 1952 the taxpayers and the conspirators were called before a Brooklyn grand jury. Halperin attempted to induce the taxpayers not to reveal the conspiracy, and Grunewald asked his secretary not to talk to the grand jury. These attempts at concealment were, however, in vain. The taxpayers and some of Halperin's associates revealed the entire scheme, and petitioners' indictment and conviction followed.[7]

The first question before us is whether the prosecution of these petitioners on Count 1 of the indictment was barred by the applicable three-year statute of limitations.[8]

The indictment in these cases was returned on October 25, 1954. It was therefore incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed after that date.[9] For where substantiation of a conspiracy charge

[7] Petitioner Bolich was also convicted on Count 2 of the indictment, which charged him and two other Bureau of Internal Revenue employees with conspiracy in violation of 26 U. S. C. § 4047 (e)(4). He was sentenced to three years' imprisonment and a $5,000 fine on this Count, the prison sentence to run concurrently with the five-year sentence on Count 1. The Court of Appeals held that both Counts related to the same conspiracy, and set aside the separate fine on Count 2.

[8] The governing statute was 18 U. S. C. § 3282, which provided: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within three years next after such offense shall have been committed."

[9] On September 1, 1954, the statute of limitations was amended to provide for a five-year limitation period. 68 Stat. 1145, 18 U. S. C. (Supp. III) § 3282. Since the amending statute was by its terms made applicable to offenses not barred on its effective date, that is,

requires proof of an overt act, it must be shown both that the conspiracy still subsisted within the three years prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period. Hence, in both of these aspects, the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.[10]

Petitioners, in contending that this prosecution was barred by limitations, state that the object of the conspiratorial agreement was a narrow one: to obtain "no prosecution" rulings in the two tax cases. When these rulings were obtained, in October 1948 in the case of Gotham Beef, and in January 1949 in the case of Patullo Modes, the criminal object of the conspiracy, petitioners say, was attained and the conspirators' function ended. They argue, therefore, that the statute of limitations started running no later than January 1949, and that the

September 1, 1954, it would seem that in fact the crucial date here is September 1, 1951, rather than October 25; in other words, if the conspiracy was still alive after September 1, it was not barred. However, the case was tried on the theory that October 25 was the crucial date, and we so treat it in this opinion. The error, of course, was favorable to the petitioners and was therefore harmless. On the other hand, since we hold that petitioners must have a new trial, the error may be corrected.

[10] See, in general, *Lutwak* v. *United States*, 344 U. S. 604; *Krulewitch* v. *United States*, 336 U. S. 440; *Bollenbach* v. *United States*, 326 U. S. 607; *McDonald* v. *United States*, 89 F. 2d 128; *United States* v. *Manton*, 107 F. 2d 834; Cousens, Agreement as an Element in Conspiracy, 23 Va. L. Rev. 898; Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393; Note, 62 Harv. L. Rev. 276; Note, 56 Col. L. Rev. 1216.

prosecution was therefore barred by 1954, when the indictment was returned.[11]

The Government counters with two principal contentions: First, it urges that even if the main object of the conspiracy was to obtain decisions from the Bureau of Internal Revenue not to institute criminal tax prosecutions—decisions obtained in 1948 and 1949—the indictment alleged,[12] and the proofs showed, that the conspiracy also included as a subsidiary element an agreement to conceal the conspiracy to "fix" these tax cases, to the end that the conspirators would escape detection and punishment for their crime. Says the Government, "from the very nature of the conspiracy . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . each and every aspect of the conspiracy . . . ." It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal were performed well within the indictment period, the prosecution was timely.

Second, and alternatively, the Government contends that the central aim of the conspiracy was to obtain

[11] In support of this theory, petitioners point to evidence showing that the administrative practice of the Bureau of Internal Revenue was that only recommendations to prosecute would be reviewed at a higher echelon, whereas a determination of no prosecution would, for all practical purposes, end the case. They also emphasize that payment to Grunewald was made under the terms of an escrow which released the money when the "no prosecution" rulings came down.

Petitioners further urge that the acts of concealment occurring after 1949 show at most that a new and separate agreement to conceal was entered into after 1949, an agreement which was not charged in the indictment. Cf. *United States* v. *Siebricht*, 59 F. 2d 976. In view of our disposition of the case, we need not deal with this contention.

[12] See n. 3, *supra*.

for these taxpayers, not merely a "no prosecution" ruling, but absolute immunity from tax prosecution; in other words, that the objectives of the conspiracy were not attained until 1952, when the statute of limitations ran on the tax cases which these petitioners undertook to "fix." The argument then is that since the conspiracy did not end until 1952, and since the 1949–1952 acts of concealment may be regarded as, at least in part, in furtherance of the objective of the conspirators to immunize the taxpayers from tax prosecution, the indictment was timely.

For reasons hereafter given, we hold that the Government's first contention must be rejected, and that as to its second, which the Court of Appeals accepted, a new trial must be ordered.

I.

We think that the Government's first theory—that an agreement to conceal a conspiracy can, on facts such as these, be deemed part of the conspiracy and can extend its duration for the purposes of the statute of limitations—has already been rejected by this Court in *Krulewitch* v. *United States*, 336 U. S. 440, and in *Lutwak* v. *United States*, 344 U. S. 604.

In *Krulewitch* the question before the Court was whether certain hearsay declarations could be introduced against one of the conspirators. The declarations in question were made by one named in the indictment as a co-conspirator after the main object of the conspiracy (transporting a woman to Florida for immoral purposes) had been accomplished. The Government argued that the conspiracy was not ended, however, since it included an implied subsidiary conspiracy to conceal the crime after its commission, and that the declarations were therefore still in furtherance of the conspiracy and binding on

co-conspirators. This Court rejected the Government's argument. It then stated:

> "Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each other to conceal facts in order to prevent detection, conviction and punishment. Thus the [Government's] argument is that even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective.
>
> "We cannot accept the Government's contention. . . . The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence." [13]

Mr. Justice Jackson, concurring, added:

> "I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose. . . .
>
> "It is difficult to see any logical limit to the 'implied conspiracy,' either as to duration or means . . . . On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, [etc.] . . . .
>
> "Moreover, the assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitations. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibility, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue." [14]

[13] 336 U. S., at 443–444.

The *Krulewitch* case was reaffirmed in *Lutwak* v. *United States, supra.* Here again the question was the admissibility of hearsay declarations of co-conspirators after the main purpose of the conspiracy had been accomplished; again the Government attempted to extend the life of the conspiracy by an alleged subsidiary conspiracy to conceal. Although in *Lutwak,* unlike in *Krulewitch,* the existence of a subsidiary conspiracy to conceal was charged in the indictment, the Court again rejected the Government's theory, holding that no such agreement to conceal had been proved or could be implied.

The Government urges us to distinguish *Krulewitch* and *Lutwak* on the ground that in those cases the attempt was to *imply* a conspiracy to conceal from the mere fact that the main conspiracy was kept secret and that overt acts of concealment occurred. In contrast, says the Government, here there was an *actual* agreement to conceal the conspirators, which was charged and proved to be an express part of the initial conspiracy itself.

We are unable to agree with the Government that, on this record, the cases before us can be distinguished on such a basis.

The crucial teaching of *Krulewitch* and *Lutwak* is that after the central criminal purposes of a conspiracy have

[14] *Id.*, at 455–456.

been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

A reading of the record before us reveals that on the facts of this case the distinction between "actual" and "implied" conspiracies to conceal, as urged upon us by the Government, is no more than a verbal tour de force. True, in both *Krulewitch* and *Lutwak* there is language in the opinions stressing the fact that only an *implied* agreement to conceal was relied on.[15] Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to deduce an "actual" agreement to conceal reveals nothing beyond that adduced in prior cases. What is this evidence?

[15] See 336 U. S., at 444, 455–458; 344 U. S., at 616.

First, we have the fact that from the beginning the conspirators insisted on secrecy. Thus the identities of Grunewald and Bolich were sedulously kept from the taxpayers; careful steps were taken to hide the conspiracy from an independent law firm which was also working on Patullo's tax problems; and the taxpayers were told to make sure that their books did not reflect the large cash payments made to Grunewald. Secondly, after the "no prosecution" rulings were obtained, we have facts showing that this secrecy was still maintained. Thus, a deliberate attempt was made to make the above-mentioned independent law firm believe that it was *its* (quite legitimate) efforts which produced the successful ruling. Finally, we have the fact that great efforts were made to conceal the conspiracy when the danger of exposure appeared. For example, Bolich got rid of certain records showing that he had used Grunewald's hotel suite in Washington; Patullo's accountant was persuaded to lie to the grand jury concerning a check made out to an associate of the conspirators; Grunewald attempted to persuade his secretary not to talk to the grand jury; and the taxpayers were repeatedly told by Halperin and his associates to keep quiet.

We find in all this nothing more than what was involved in *Krulewitch*, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions.

In effect, the differentiation pressed upon us by the Government is one of words rather than of substance. In *Krulewitch* it was urged that a continuing agreement to conceal should be implied out of the mere fact of conspiracy, and that acts of concealment should be taken as overt acts in furtherance of that implied agreement to

conceal. Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from which it can be inferred that there was from the beginning an "actual" agreement to conceal. As we see it, the two arguments amount to the same thing: a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment.[16] There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.

Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.[17] The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch* v. *United States*, *supra*. It is these considerations of policy which govern our holding today. As this case was tried, we have before us a typical example of a situation where the Government,

[16] One might cite as an example Grunewald's attempt at influencing his secretary not to talk to the grand jury, accompanied by an offer to "pay her expenses." Under the Government's *Krulewitch* theory, the argument would have been (in Mr. Justice Jackson's words) that the "law will impute to the confederates a continuing conspiracy to defeat justice," and that therefore the other confederates are "bound by another's unauthorized and unknown . . . bribery of a juror or witness." But no different result is achieved by saying that the attempted bribe of the witness is evidence from which one can infer an "actual" conspiracy to "defeat justice." In both cases the essential missing element is a showing that the act was done in furtherance of a prior criminal agreement among the conspirators.

[17] *Delli Paoli* v. *United States*, 352 U. S. 232; *Lutwak* v. *United States*, *supra*; *Krulewitch* v. *United States*, *supra*; *Bollenbach* v. *United States*, 326 U. S. 607.

faced by the bar of the three-year statute, is attempting to open the very floodgates against which *Krulewitch* warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.

By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime. Thus the Government argues in its brief that "in the crime of kidnapping, the acts of conspirators in hiding while waiting for ransom would clearly be planned acts of concealment which would be in aid of the conspiracy to kidnap. So here, there can be no doubt that . . . all acts of concealment, whether to hide the identity of the conspirators or the action theretofore taken, were unquestionably in furtherance of the initial conspiracy . . . ." We do not think the analogy is valid. Kidnapers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the successful accomplishment of the crime necessitates concealment.[18] More closely analogous to our case would be conspiring kidnapers who cover their traces after the main conspiracy is finally ended—*i. e.*, after they have abandoned the kidnaped person and then take care to escape detection. In the latter case, as here, the acts of covering up can by

[18] See *Rettich* v. *United States*, 84 F. 2d 118; *McDonald* v. *United States*, 89 F. 2d 128.

themselves indicate nothing more than that the conspirators do not wish to be apprehended—a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord.

We hold, therefore, that, considering the main objective of the conspiracy to have been the obtaining of "no prosecution" rulings, prosecution was barred by the three-year statute of limitations, since no agreement to conceal the conspiracy after its accomplishment was shown or can be implied on the evidence before us to have been part of the conspiratorial agreement.

II.

In view of how the case was submitted to the jury, we are also unable to accept the Government's second theory for avoiding the statute of limitations. This theory is (1) that the main objective of the conspiracy was not merely to obtain the initial "no prosecution" rulings in 1948 and 1949, but to obtain *final immunity* for Gotham and Patullo from criminal tax prosecution; (2) that such immunity was not obtained until 1952, when the statute of limitations had run on the tax-evasion cases which the petitioners conspired to fix;[19] (3) that the conspiracy therefore did not end until 1952, when this object was attained; (4) that the acts of concealment within the indictment period were overt acts in furtherance of this conspiracy; and (5) that the prosecution was thus timely.[20] In short, the contention is that the agreement

[19] The tax evasion cases were governed by a six-year statute of limitations, 26 U. S. C. (1940 ed.) § 3748, which began to run when the last return, pertaining to the year 1946, was filed by the taxpayers.

[20] The Government also suggests a further theory under which this conspiracy could be deemed to have lasted into the indictment period. Under this theory, the central aim of the conspiracy was not specifically to "fix" the tax troubles of Gotham and Patullo, but to engage in the continuing business of fixing any and all tax-fraud

to conceal was to protect the *taxpayers* rather than the *conspirators*, and as such was part of the main conspiracy rather than a subsidiary appendage to it, as under the Government's first theory.

The Court of Appeals accepted this theory of the case in affirming these convictions. It stated:

> "What the fixers had to sell was freedom from criminal prosecution for tax frauds. What the taxpayers bargained for was protection from a tax evasion prosecution.
>
> . . . . .
>
> "This conspiracy is wholly unlike the ordinary illegal scheme in that the jury may well have inferred that the official announcement that there would be no criminal prosecution of the taxpayers

cases. If this were the aim of the conspiracy, acts of concealment could have been in furtherance of this aim by enabling the ring to stay in business so that it could get new cases. Evidence supporting this theory, says the Government, is that in 1950, after the "no prosecution" rulings in the Patullo and Gotham cases, Halperin engaged in negotiations with another firm which was in tax difficulties. Although these negotiations came to nothing, due to disagreement about the fee to be paid to the conspirators, the incident is presented as evidence that the conspirators were actively soliciting future tax clients in 1950 and were thus still "in business."

We cannot accept this theory of the Government. The trouble is not only that the theory was never submitted to the jury, but that no overt act done to further the purpose of engaging in "new" business was charged or proved to have occurred after October 25, 1951. If one of the purposes of the conspiracy was to engage in the business of fixing tax cases generally, it must be deemed to have been abandoned in 1951, when investigations of the petitioners started in Congress, since the 1951 and 1952 activities of the conspirators consisted merely of covering up old ventures rather than seeking new ones, and since there is no indication that there was an intent to resume operations after the investigations had ended. Indeed, upon the oral argument the Government seemed to abandon this theory.

was merely the delivery of a substantial installment of what appellants agreed to deliver for the huge sums paid. The six-year Statute of Limitations . . . did not run in favor of the taxpayers until some time after the commission of the overt acts relied upon. In the interval there was no assurance, other than continuing efforts by Grunewald, Bolich and the others, that the whole nefarious business might not be brought to light, followed by the revocation of the decision not to criminally prosecute the taxpayers. This is a significant element in the proofs adduced by the government, as concealment of the conspiratorial acts was necessary not only to protect the conspirators from a conspiracy prosecution but also to protect the taxpayers from a tax evasion prosecution." 233 F. 2d, at 564–565.

We find the legal theory of the Court of Appeals unexceptionable. If the central objective of the conspiracy was to protect the taxpayers from tax-evasion prosecutions, on which the statute of limitations did not run until 1952, and if the 1948 and 1949 "no prosecution" rulings were but an "installment" of what the conspirators aimed to accomplish, then it is clear that the statute of limitations on the conspiracy did not begin to run until 1952, within three years of the indictment.[21]

Furthermore, we agree with the Court of Appeals that there is evidence in this record which would warrant submission of the case to the jury on the theory that the central object of the conspiracy was not attained in 1948 and 1949, but rather was to immunize the taxpayers completely from prosecution for tax evasion and thus continued into 1952. The many overt acts of concealment occurring after 1949 could easily have been motivated at

[21] The indictment was clearly sufficient to cover submission of this theory to the jury. See n. 3, *supra*.

least in part by the purpose of the conspirators to deliver the remaining "installments" owing under the bargain—to wit, the safeguarding of the continued vitality of the "no prosecution" rulings.[22] Furthermore, there is evidence showing that from the beginning the aim of the scheme was not restricted to the merely provisional and necessarily precarious "fixing" of the taxpayers' troubles which was achieved in 1948 and 1949.[23] A jury might therefore

[22] One might cite as a typical example an incident in the record occurring in November 1949, 10 months after the "no prosecution" ruling was handed down in the Patullo case. The Special Agent who had been working on the case wrote a final report on it, which stated that Patullo was not prosecuted solely because of Bolich's decision. This report was sent to Bolich, who thereupon called the Chief of the Conference Section and asked him to write an explanatory memorandum on the case so as to "take a little heat off the situation." This attempt to "doctor" the report might easily have been motivated not only by fear for himself, but by a purpose to safeguard the "no prosecution" ruling from change in order to maintain the immunity of the taxpayers.

[23] The negotiations between Halperin and his associates and the taxpayers were never very specific as to what exactly was to be accomplished. The tenof of the discussions was that if the taxpayers would hire the mysterious "influential" man in Washington, the matter "would be ended," the "prosecution end of the case" would be avoided, the matter would be settled "in a civil way without criminal prosecution." In the same tenor, the accountant of Gotham Beef testified that "nothing at all was to be paid unless the criminal prosecution had been eliminated. It was further understood that they were not at all concerned with the amount of the tax that might result by way of assessment, but it was either that they were completely successful in eliminating criminal prosecution . . . or there would be no fee at all." In other words, there is little indication that it was the specific and narrow end of obtaining the "no prosecution" rulings which was to be the *quid pro quo*.

This is further buttressed by the fact that the taxpayers were well aware of the precarious nature of the 1948 and 1949 rulings; it is quite clear that they realized that this did not "end" the danger of criminal prosecution. Thus the Patullo taxpayers were aware that the continued investigation of their books for the purposes of civil

fairly infer that it was part of the conspiratorial agreement that Grunewald and Bolich would make continuing efforts to safeguard the fruits of the partial victories won in 1948 and 1949 by trying to immunize the "no prosecution" rulings from change. In other words, we think a jury could infer from this evidence that the conspirators were prepared and had agreed to engage in further frauds and bribery if necessary in order to maintain in effect the tentative rulings obtained in 1948 and 1949.[24]

tax liability exposed them to constant danger of "tipping the applecart." They were warned to "keep their mouths shut," and a further payment of $25,000 was made for the "boys in New York" so that no one would "raise a fuss about the phony deal that had been put through." Another Patullo officer testified that, after the "no prosecution" ruling, "we still were not at ease about the thing. We knew that we were elated over the results, but we still were worried about it. There was cooperation to take care of. We had to make this payoff for the New York boys. We were not through with it at that time. We never knew when something else was going to come up. We weren't through at all. . . . For two years after that we still weren't through with the thing." And, referring to the payment for the "New York boys" in 1949: "[W]e never felt too sure about anything because the civil settlement still had to be made and we knew there were people that had to go through it and pass on it and everything, and while this was going on we were told that we would have to get up some more money."

A jury could thus easily infer that the conspirators' function did not end in January 1949, and that the conspiratorial agreement contemplated further efforts to immunize the taxpayers from tax prosecution.

[24] It should be mentioned that the Court of Appeals was unanimous in finding that there was sufficient evidence in the record to warrant the submission of the case to the jury on the theory that the central objectives of the conspiracy were not achieved until the statute of limitations ran on the tax-evasion charges. Judge Frank, while dissenting on the ground that the charge to the jury was inadequate in putting the case to the jury on this basis—a view which we share, see *infra*, p. 413—agreed that under a proper charge the jury might infer that the conspiracy was still alive through 1951. See 233 F. 2d, at 592–596.

If, therefore, the jury could have found that the aim of the conspiratorial agreement was to protect the taxpayers from tax prosecution, and that the overt acts occurring in the indictment period were in furtherance of that aim, we would affirm. We do not think, however, that we may safely assume that the jury so found, for we cannot agree with the Court of Appeals' holding that this theory of the case was adequately submitted to the jury.

The trial judge's charge on the problem of the scope and duration of the conspiracy was as follows:

> "You will recall that the indictment states, among other things, that it was part of the conspiracy that the defendants and co-conspirators would make 'continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative, and judicial of tax frauds perpetrated by the defendants and co-conspirators through the use of any means whatsoever including but not limited to . . . the influencing, intimidating, and impeding of prospective witnesses to refrain from disclosing the true facts.' In other words, the indictment alleges that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate. This is an important element of the first count of the indictment which you must take into consideration, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954, and some overt act was performed within that three-year period, the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the

taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Congress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment. On this issue, it will be necessary for you to determine whether, beyond a reasonable doubt, you can conclude that the conspiracy was of the nature described in the first count of the indictment and comprehended an agreement to conceal and whether some overt act took place in the period of three years prior to October 25, 1954 to carry out such purpose of the conspiracy.

. . . . .

"To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo [*sic*] Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that

such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One."

We are constrained to agree with Judge Frank that this charge did not adequately enlighten the jury as to what they would have to find in order to conclude that the conspiracy was still alive after October 25, 1951. For the charge as given failed completely to distinguish between concealment in order to achieve the central purpose of the conspiracy (that is, the immunization of the taxpayers from tax-evasion prosecution), and concealment intended solely to cover up an already executed crime

(that is, the obtaining of the "no prosecution" rulings). The jury was never told that these overt acts of concealment could be taken as furthering the conspiracy only if the basic criminal aim of the conspiracy was not yet attained in 1949. On the charge as given, the jury might easily have concluded that the petitioners were guilty even though they found merely (1) that the central aim of the conspiracy was accomplished in 1949, and (2) that the subsequent acts of concealment were motivated exclusively by the conspirators' fear of a conspiracy prosecution. As far as we know, therefore, the present convictions were based on the impermissible theory discussed in the first part of this opinion—namely, that a subordinate agreement to conceal the conspiracy continued after the central aim of the conspiracy had been accomplished.

Furthermore, if the convictions were based on a finding that the overt acts of concealment were done with the single intention of protecting the conspirators' own interests, then it is irrelevant that these acts in fact happened to have the effect also of protecting the taxpayers against revocation of the "no prosecution" rulings. For overt acts in a prosecution such as this one are meaningful only if they are within the scope of the conspiratorial agreement. If that agreement did not, expressly or impliedly, contemplate that the conspiracy would continue in its efforts to protect the taxpayers in order to immunize them from tax prosecution, then the scope of the agreement cannot be broadened retroactively by the fact that the conspirators took steps after the conspiracy which incidentally had that effect.

We thus find that the judge's charge left it open for the jury to convict even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime. And this, we think, was fatal error. For the facts in this record are equivocal. The jury might easily have

concluded that the aim of the conspiracy was accomplished in 1949, and that the overt acts of concealment occurring after that date were done pursuant to the alleged conspiracy to hide the conspirators. As we have said, a conviction on such a theory could not be sustained. Under such circumstances, therefore, it was essential for the judge to charge clearly and unequivocally that on these facts the jury could not infer a continuing conspiracy to conceal the conspiracy, whether actual or implied. Further, it was incumbent on the judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the *taxpayers* from tax prosecution, that this objective continued in being through 1951, and that the overt acts of concealment proved at trial were at least partly calculated to further this aim.

Since, under the judge's charge, the convictions on Count 1 might have rested on an impermissible ground, we conclude that they cannot stand, and the petitioners must be given a new trial as to this Count.

III.

What we have held as to the statute of limitations disposes of the conviction of the three petitioners under Count 1, but does not touch Halperin's conviction on Counts 5, 6, and 7 for violating 18 U. S. C. § 1503.[25] As to those Counts, Halperin, who took the stand in his own defense at the trial, contends (a) that the Government was improperly allowed to cross-examine him as to the assertion of his Fifth Amendment privilege before a grand jury investigating this conspiracy, before which he had been called as a witness,[26] and (b) that the evidence did

[25] See n. 2, *supra*.

[26] Grunewald and Bolich also make this contention on their own behalf.

not justify his conviction on these Counts. For the reasons given hereafter we think that the first contention is well taken, but that the second one is untenable.

In 1952 Halperin was subpoenaed before a Brooklyn grand jury which was investigating corruption in the Bureau of Internal Revenue. Testimony had already been received by the grand jury from the Patullo and Gotham taxpayers, which linked Halperin with the tax-fixing ring. Halperin was asked a series of questions before the grand jury, including, among others, such questions as whether he knew Max Steinberg (an employee of the Bureau of Internal Revenue and a co-defendant in the charge under Count 1); whether he knew Grunewald; whether he had held and delivered escrow money paid to Grunewald by Gotham after the "no prosecution" ruling; and whether he had phoned Grunewald to arrange a meeting between one of his own associates and Bolich. Halperin declined to answer any of these questions, on the ground that the answers would tend to incriminate him and that the Fifth Amendment therefore entitled him not to answer. He repeatedly insisted before the grand jury that he was wholly innocent, and that he pleaded his Fifth Amendment privilege only on the advice of counsel that answers to these questions might furnish evidence which could be used against him, particularly when he was not represented by counsel and could not cross-examine witnesses before the grand jury.

When the Government cross-examined Halperin at the trial some of the questions which he had been asked before the grand jury were put to him.[27] He answered

[27] The questions were: (1) Whether petitioner held escrow money which was subsequently delivered to Grunewald; (2) whether petitioner knew Grunewald; (3) whether petitioner made a telephone call to Grunewald relative to an appointment between Bolich and one Davis, a member of the conspiracy; (4) whether petitioner had

each question in a way consistent with innocence. The Government was then allowed, over objection, to bring out in cross-examination that petitioner had pleaded his privilege before the grand jury as to these very questions. Later, in his charge to the jury, the trial judge informed them that petitioner's Fifth Amendment plea could be taken only as reflecting on his credibility, and that no inference as to guilt or innocence could be drawn therefrom as to Halperin or any co-defendant.[28]

filed a power of attorney in the Glover case; (5) whether he had ever met one Oliphant, an official in the Treasury; (6) whether he knew Steinberg; (7) whether he knew Tobias, the accountant of Gotham Beef; (8) whether he had ever met Grunewald in the Munsey Building in Washington.

[28] The charge as to this point was as follows:

"During the cross examination of one of the defendants, the government questioned the defendant as to his previous statements before the Brooklyn Grand Jury in which he refused to answer certain questions on the ground that answers to them might tend to incriminate him. These questions related to matters similar to those to which the defendant testified at this trial when he took the stand. No witness is required to take the stand or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may use this evidence of a defendant's prior assertions of the Fifth Amendment for the sole purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously invoked his privilege.

"The defendant had the right of asserting the Fifth Amendment when he appeared before the Grand Jury, and I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion. However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of

In thus allowing this cross-examination, the District Court relied on *Raffel* v. *United States*, 271 U. S. 494, where this Court held that a defendant's failure to take the stand at his first trial to deny testimony as to an incriminating admission could be used on cross-examination at the second trial, where he did take the stand, to impugn the credibility of his denial of the same admission. In upholding the District Court here, the Court of Appeals likewise relied on *Raffel*, and also on one of its own earlier decisions.[29] Halperin attacks these rulings on these principal grounds: (a) *Raffel* is distinguishable from the present case; (b) if *Raffel* permitted this cross-examination, then the trial court erred in refusing to charge, as Halperin requested, that "an innocent man may honestly claim that his answers may tend to incriminate him"; (c) in any case *Raffel* has impliedly been overruled by *Johnson* v. *United States*, 318 U. S. 189; and (d) compelling Halperin to testify before the grand jury, when he had already been marked as a putative defendant, violated his constitutional rights, so that, by analogy to the rule of *Weeks* v. *United States*, 232 U. S. 383, his claim of privilege could in no event be used against him. We find that in the circumstances presented here *Raffel* is not controlling, and that this cross-examination was not permissible.

It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. 3 Wigmore, Evi-

his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege. It is not to be considered in a determination of the guilt or innocence of any co-defendant."

[29] *United States* v. *Gottfried*, 165 F. 2d 360, 367.

dence, § 1040. And so the threshold question here is simply whether, in the circumstances of this case, the trial court erred in holding that Halperin's plea of the Fifth Amendment privilege before the grand jury involved such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes.[30] We do not think that *Raffel* is properly to be read either as dispensing with the need for such preliminary scrutiny by the judge, or as establishing as a matter of law that such a prior claim of privilege with reference to a ques-

[30] When the trial court first ruled that the Government could cross-examine as to petitioner's Fifth Amendment plea, it did not do so on the grounds of inconsistency reflecting on credibility. In fact the implication to be drawn from the record is that the court at that time felt that the jury might use this evidence for any purpose at all, including the drawing of inferences as to guilt or innocence. When the Government first embarked on this method of cross-examination, the judge overruled objections in these words:

"The Court: I know the Government's position. As I see it, Mr. Corbin [a defense attorney], no witness can be compelled to testify against himself. The witness is called before the grand jury and the answer was, I refuse to answer something on the ground that if I answer that question it will incriminate me.

"Mr. Corbin: Tend to incriminate.

"The Court: Or tend to incriminate. A witness can make that statement. No witness has to take the witness stand, as I understand the law and if a witness has so stated, then he could not be compelled to take the stand here, but if a witness voluntarily takes the stand and is asked in a previous proceeding did you say any testimony on this subject would incriminate you, that can be considered by the jury for such benefit or such worth as the jury may want to give it."

When the defendants asked that at the very least the use of this evidence be restricted to the question of credibility, the judge contented himself with asking for a memorandum of law on the subject. Thus, although later, in the charge to the jury, the matter was specifically restricted to the issue of credibility, there was no inquiry by the judge at the time of the initial admission of this evidence as to whether a sufficient showing of inconsistency had been made.

tion later answered at the trial is always to be deemed to be a prior inconsistent statement, irrespective of the circumstances under which the claim of privilege was made. The issue decided in *Raffel* came to the Court as a certified question in quite an abstract form,[31] and was really centered on the question whether a defendant who takes the stand on a second trial can continue to take advantage of the privilege asserted at the first trial. This Court held, in effect, that when a criminal defendant takes the stand, he waives his privilege completely and becomes subject to cross-examination impeaching his credibility just like any other witness: "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." The Court, in *Raffel*, did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility. In other words, we may assume that under *Raffel* Halperin in this case was subject to cross-examination impeaching his credibility just like any other witness, and that his Fifth Amendment plea before the grand jury could not carry over any form of immunity when he voluntarily took the stand at the trial. This does not, however, solve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of Halperin's credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury.[32] As we consider that in the

[31] The certified question was: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?" 271 U. S., at 496.

[32] In *Raffel* this Court assumed that the defendant's failure to testify at the first trial could not be used as evidence of guilt in the second trial, 271 U. S., at 497. The Court further stated that "the

circumstances of the present case, the trial court, in the exercise of a sound discretion, should have refused to permit this line of cross-examination, we are not faced with the necessity of deciding whether *Raffel* has been stripped of vitality by the later *Johnson* case, *supra*, or of otherwise re-examining *Raffel*.

We need not tarry long to reiterate our view that, as the two courts below held, no implication of guilt could be drawn from Halperin's invocation of his Fifth Amendment privilege before the grand jury. Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men. Griswold, The Fifth Amendment Today, 9–30, 53–82. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann* v. *United States*, 350 U. S. 422, 426. See also *Slochower* v. *Board of Higher Education*, 350 U. S. 551, when, at the same Term, this Court said at pp. 557–558: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

When we pass to the issue of credibility, we deem it evident that Halperin's claim of the Fifth Amendment privilege before the Brooklyn grand jury in response to questions which he answered at the trial was wholly consistent with innocence. Had he answered the questions put to him before the grand jury in the same way he subsequently answered them at trial, this nevertheless

trial judge might appropriately instruct the jury that the failure of the defendant to take the stand in his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny." As already indicated, p. 418, *supra*, here the trial judge refused to charge that "an innocent man may honestly claim that his answers may tend to incriminate him."

would have provided the Government with incriminating evidence from his own mouth. For example, had he stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent and even though his friendship with Grunewald was above reproach. There was, therefore, as we see it, no inconsistency between Halperin's statement to the grand jury that answering the question whether he knew Grunewald would tend to furnish incriminating evidence against him, and his subsequent testimony at trial that his acquaintance with Grunewald was free of criminal elements. And the same thing is also true, as we see it, as to his claim of privilege with respect to the other questions asked him before the grand jury and his answers to those same questions when they were put to him at the trial. These conclusions are fortified by a number of other considerations surrounding Halperin's claim of privilege:

First, Halperin repeatedly insisted before the grand jury that he was innocent and that he pleaded his Fifth Amendment privilege solely on the advice of counsel.

Second, the Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. See Griswold, *supra*, at 62. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.

Finally, and most important, we cannot deem Halperin's plea of the Fifth Amendment to be inconsistent with his later testimony at the trial because of the nature of this particular grand-jury proceeding. For, when Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant. The taxpayers whose cases had been "fixed" by the conspiratorial ring had already testified before the grand jury, and they gave there largely the same evidence as they did later, at trial. The scheme was thus in essence already revealed when Halperin was called to testify. Under these circumstances it was evident that Halperin was faced with the possibility of an early indictment, and it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself. It was thus quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred.

We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as

it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter. Cf. *McNabb* v. *United States*, 318 U. S. 332.

We hold that under the circumstances of this case it was prejudicial error for the trial judge to permit cross-examination of petitioner on his plea of the Fifth Amendment privilege before the grand jury, and that Halperin must therefore be given a new trial on Counts 5, 6, and 7.

Finally, we find no substance to Halperin's contention that he was in effect convicted for advising, as a lawyer, some of the witnesses before the grand jury that they had a right to plead their Fifth Amendment privilege. The evidence against Halperin under these Counts was quite sufficient to make out a case for submission to the jury.

For the reasons given we hold that the judgments below must be reversed, and the cases remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join, concurring.

I concur in the reversal of these cases for the reasons given in the Court's opinion with one exception.

In No. 184, the petitioner, Halperin, appeared before a grand jury in response to a subpoena. There he declined to answer certain questions relying on the provision of the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself."

Later, at his trial, Halperin took the stand to testify in his own behalf. On cross-examination the prosecuting attorney asked him the same questions that he had refused to answer before the grand jury. This time Halperin answered the questions; his answers tended to show that he was innocent of any wrong-doing. The Government was then permitted over objection to draw from him the fact that he had previously refused to answer these questions before the grand jury on the ground that his answers might tend to incriminate him.

At the conclusion of the trial the judge instructed the jury that Halperin's claim of his constitutional privilege not to be a witness against himself could be considered in determining what weight should be given to his testimony—in other words, whether Halperin was a truthful and trustworthy witness. I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly

RIES

oyer to continue in effect an
actice that routinely results
itral decisions," *Emporium*
Western Addition Commu-
U.S. 50, 68, 95 S.Ct. 977,
d 12 (1975), we decline to
or arbitration awards based
this case. In concluding our
he issue in *Honeywell*, we

ccasion arise when an em-
such expectations and delib-
sts in conduct in clear viola-
or arbitration award, which
ion without an appropriate
will have to face squarely
of whether such circum-
constitute an exception to
of the *Steelworkers* trilogy.
228. Such an occasion does
elf based on the facts of the
The union has not alleged
regious facts which can al-
plant the arbitral process.
believe that the district court
the union's motion for sum-
it. However, we want to
that we are deciding solely
the instant case and do not
possibility that a party could
it facts to avoid the arbitral
ifferent situation.

IV.

on also argues that the court
ing the defendants' motion
judgment because there are
of material fact. Specifical-
laims that there is a genuine
rial fact on the degree of
between the instant dispute
red by the Gibson and Sabel-

discussed above, the pres-
al dispute does not preclude
gment "unless the disputed
ne determinative under the
." *Egger*, 710 F.2d at 296.
unable to establish that a
over the degree of factual
the awards is outcome de-
nder the law. While we

"overall scheme" to defraud Treasury & circumvent reporting laws (NB - even if underlying acts were legal)

agree that the union has alleged that the factual basis of the arbitration awards in its favor are "substantially identical" to the facts in the instant dispute, it has failed to allege that the awards were intended to apply prospectively and that the companies' "conduct constitutes wilful and persistent disregard of the arbitration awards." *Honeywell*, 522 F.2d at 1227. Therefore, we believe the district court properly granted the companies' motion for summary judgment.[5]

V.

For all the foregoing reasons, the district court's judgment is

AFFIRMED.

WEST KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff-Appellee,

v.

Wesley BUCEY, Defendant-Appellant.

No. 88-1912.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 11, 1989.

Decided June 8, 1989.

Rehearing and Rehearing En Banc Denied July 13, 1989.

Defendant was convicted in the United States District Court for the Northern District of Illinois, Ann C. Williams, J., of various offenses stemming from his participation in money laundering scheme. On appeal, the Court of Appeals, Cudahy, Circuit Judge, held that: (1) defendant did not violate substantive currency reporting statutes, and (2) evidence supported convictions for mail fraud and conspiracy.

Affirmed in part, reversed in part and remanded with directions.

1. United States ⇐34

Defendant accused of laundering money was not "financial institution," and thus could not be convicted for failing to file currency transaction reports upon receipt of currency in excess of $10,000; statute, defining "financial institution" as "agency, branch, or office" of person acting in one of listed capacities, was inapplicable to individual. 31 U.S.C.A. § 5313(a).

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

2. Fraud ⇐68.10(1)

Defendant accused of participating in money laundering scheme did not willfully conceal or falsify material fact when he listed himself on currency transaction report as individual conducting transaction with bank, though transaction may have been carried out on behalf of third party, in that it was defendant who was responsible for carrying out money laundering operation, who received commission for his services, who controlled bank account used, and who was solely authorized to make necessary deposits. 18 U.S.C.A. §§ 2(b), 1001.

3. Fraud ⇐68.10(1)
United States ⇐34

Defendant charged with participating in money laundering scheme was not re-

5. While appellant has raised an additional issue, whether the court erred in failing to enter judgment for it because the arbitration awards "draw their essence" from the collective bargaining agreement, we will not discuss this issue because it is lacking in merit. A court can review an arbitral award solely to determine if it "draws its essence from the collective bargaining agreement." *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). However, neither party challenges the validity of either of the two, prior arbitration awards. Furthermore, the union never alleges that the defendants failed to comply with the terms of the Gibson and Sabella awards. The union does not dispute the fact that the defendants complied with the awards by paying the miners the appropriate back pay. Instead, appellant is asking us to enforce the prior awards in this subsequent dispute. As discussed throughout the text of this opinion, this is something we decline to do based on the facts of the instant case.

quired to disclose source of funds involved in transaction on currency transaction report; defendant could reasonably believe that report requirement that he list "organization for whom this transaction was completed" could be satisfied by listing his own organization, whose bank account was being used. 18 U.S.C.A. §§ 2(b), 1001.

4. Post Office ⇐48(4)

Allegation that defendant charged with mail fraud in connection with money laundering devised scheme to deprive federal Government of tax dollars was sufficient to allege deprivation of money or property within meaning of mail fraud statute. 18 U.S.C.A. § 1341.

5. Post Office ⇐35(9)

Defendant could be convicted of mail fraud, based upon allegation that he schemed to deprive federal Government of tax revenues, though his tax evading "clients" were in fact undercover government agents and thus Government was not in fact deprived of tax revenues; statute punished scheme to defraud, with ultimate success of scheme being unnecessary to constitute violation. 18 U.S.C.A. § 1341.

6. Conspiracy ⇐43(12)

When indictment alleges conspiracy with multifarious objectives, conviction will be sustained so long as evidence is sufficient to show that defendant agreed to accomplish at least one of the alleged objectives. 18 U.S.C.A. § 371.

7. Conspiracy ⇐33(2)

Defendant charged with conspiracy in connection with his participation in money laundering scheme could be convicted of conspiracy to defraud Government, even if he did not violate substantive currency laws, where there was evidence that defendant and accomplice had engaged in overall scheme to circumvent currency reporting laws and prevent IRS from collecting accurate data, reports and income taxes. 18 U.S.C.A. § 371.

8. Obstructing Justice ⇐4

Defendant could be convicted of obstructing justice, though allegedly influenced grand jury witness was in fact undercover government agent; statute proscribed "endeavor" to influence witness, regardless of defendant's ability to succeed. 18 U.S.C.A. § 1503.

9. Criminal Law ⇐16

Finding that defendant charged with obstructing grand jury possessed requisite corrupt intent to influence administration of justice was sufficiently supported by evidence that defendant, knowing of ongoing grand jury investigation, instructed witness to provide false and misleading testimony to grand jury. 18 U.S.C.A. § 1503.

10. Criminal Law ⇐338(4)

Evidence that money laundering defendant's "clients" were purportedly involved in narcotics trafficking was admissible as serving to explain purpose of and circumstances surrounding money laundering scheme.

Susan L. Satter, Chicago, Ill., for Wesley Bucey.

Anton Valukas, U.S. Atty., Chicago, Ill., David J. Stetler, Chief, Victoria J. Peters, and Howard M. Pearl, Deputy Chiefs, John S. Brennan, Asst. U.S. Atty., Criminal Receiving & Appellate Div., G. Roger Markley, Special Asst. U.S. Atty., Chicago, Ill., for U.S.

Before BAUER, Chief Judge, CUDAHY, Circuit Judge, and GRANT, Senior District Judge.*

CUDAHY, Circuit Judge.

Defendant-appellant Wesley Bucey was convicted of multiple related offenses arising out of an elaborate money laundering scheme designed to ostensibly "legitimize" the source of illegally obtained cash and to evade taxes. Bucey's conviction was based on a twelve-count indictment charging him with conspiracy, 18 U.S.C. section 371; mail and wire fraud, 18 U.S.C. sections 1341, 1343; failure to file currency transac-

* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

tion reports with the Internal Revenue Service ("IRS"), 31 U.S.C. sections 5313, 5322(b); causing false information to be provided to the IRS, 18 U.S.C. sections 2(b), 1001; and attempting to obstruct the administration of a grand jury, 18 U.S.C. section 1503. Bucey appeals his conviction on all counts. We affirm in part and reverse in part.

I.

This is a tale of an illicit money laundering enterprise engineered by defendant Bucey and Boston Witt, a former Attorney General of New Mexico.[1] We shall chronicle the facts, keeping in mind that all evidence and permissible inferences must be taken in the light most favorable to the government. *See United States v. Gimbel*, 830 F.2d 621, 622 (7th Cir.1987).

Bucey and Witt orchestrated a scheme with dual objectives: money laundering and tax evasion. The money laundering aspect of the operation was designed to provide a method for converting cash from unlawful activities, such as narcotics trafficking, into ostensibly legitimate business income. To carry out this scheme, Bucey set up a tax-exempt organization called the "Huguenot National Church," which was the conduit through which money was laundered.[2] Bucey and Witt charged a commission for these services rendered through the "church."

Bucey and Witt devised two methods for achieving the secondary objective of their scheme, tax evasion. First, they planned to use the Huguenot Church as a facade for directing their clients' illegally obtained cash overseas to the bank accounts of shell corporations. The clients could then spend this money in connection with the "business" of the foreign corporations, thereby avoiding taxation by the United States government. Bucey and Witt also arranged a second tax evasion strategem for persons seeking an illegal tax deduction to purchase art work through Bucey at an established price but to report the purchase at an inflated price through false documentation. Bucey would then accept the property as a sham donation to the Huguenot Church, enabling the purchaser to take an inflated charitable tax deduction.

Bucey and Witt's machinations were unveiled by an extensive undercover investigation. Undercover police officers, John and Don Smith, posed as drug dealers interested in laundering narcotics proceeds. In October 1985, Witt met the Smiths and advised them of a money laundering device by which they could transfer their cash overseas to a shell corporation and avoid paying taxes. Witt also discussed another mode of laundering the Smiths' cash through channels that would generate income purportedly earned by the Smiths for services provided to the Huguenot Church. All transactions would be supported by bogus documentation.

Following the October 1985 meeting, Witt contacted Bucey in Chicago and the two discussed the feasibility of exchanging the Smiths' cash for cashier's checks using the Huguenot Church account. Witt informed Bucey that the Smiths' cash was from a dubious source. Tr. at 221. On November 4, 1985, Witt met the Smiths in Las Vegas and discussed in more detail the money laundering operation. Witt explained Bucey's role in handling the cash and controlling the church's account. Witt proposed that the Smiths launder an initial deposit through a transaction conducted within the United States. Witt and Bucey viewed this as a step preparatory to generating cash for subsequent overseas transactions. *See* Tr. at 228. Witt instructed the Smiths to take their money to Chicago where Bucey would exchange it (minus a commission) for cashier's checks. Fraudulent documentation would identify the cash-

1. Boston Witt pleaded guilty and was a cooperating witness for the government in this case.

2. The church was an entity operated out of Bucey's home and had no edifice of its own. Upon searching Bucey's home, government agents discovered a "Huguenot National Church" file. Among other items, the file contained several newspaper articles about money laundering, including one entitled "Getting Dirty Money Squeaky Clean." *See* Government's Brief at 5 n. 4; Government's Exhibits 10A and 23–48; Tr. 1165–66.

ier's checks as income from business activities carried out by the Smiths on behalf of the church.[3] An agreement was made to conduct an initial transaction involving $50,000 at Freedom Federal Savings and Loan ("Freedom Federal") in Chicago on January 6, 1986.

Witt and Bucey met the Smiths in Chicago on January 6 to carry out the laundering transaction at Freedom Federal. Prior to the transaction, Bucey and Witt received $8,000 as part of their 20% commission. Bucey and Don Smith then approached the teller, Smith counted the money, $42,000, and Bucey deposited it into the Huguenot Church account, informing the teller that the money was for medicine and supplies for Mexico earthquake victims. Bucey then drew a check on the church's account for $40,000 to pay for two cashier's checks that were given to the Smiths; $2,000 remained in the church account.[4] Bucey completed a Currency Transaction Report ("CTR") describing the cash deposit. On the CTR form, Bucey listed himself as the "individual conducting the transaction with the bank," and listed the Huguenot National Church as the "organization for whom this transaction was completed." *See* Appellant's App. at 58. Nowhere did he identify the Smiths as the source of the money.

As a result of the January 6 transaction, Bucey had converted $50,000 of the Smiths' purported drug proceeds into $40,000 in cashier's checks supported by false documentation legitimizing its source. While Bucey and Witt understood that the Smiths would be required to pay taxes on the $40,000, the remaining $10,000 of the Smiths' narcotics income would be unreported.

On January 23, 1986, Bucey and Witt arranged a similar transaction involving Dembitz, a third government agent posing as a drug-trafficking associate of the Smiths. The transaction was carried out at Freedom Federal on February 20, 1986. Bucey deposited $84,000 in the church account and completed a CTR again listing himself as the "individual conducting the transaction" and the Huguenot Church as the "organization for whom this transaction was completed." *See* Appellant's App. at 60. Bucey then drew three checks totaling $80,000 on the Huguenot Church account in exchange for three cashier's checks in the same amount, which were given to Dembitz. Afterwards, the transaction was similarly documented by false invoices.

This second transaction resulted in Bucey's converting $100,000 of purported drug income into $80,000 supported by documentation legitimizing its source. The remaining $20,000 of Dembitz' drug income was to go unreported.

On April 24, 1986, Dembitz introduced Bucey to a fourth undercover government agent, Ahern, who posed as an investor seeking to avoid taxes through illegal deductions. Bucey advised Ahern of an art donation scam in which Ahern would purchase art with a check for an inflated price and receive 80% back as a kickback in cash. He described how Ahern could then donate the art to Bucey's church and report a charitable deduction for the inflated amount of his cancelled check.[5] When Dembitz expressed concern about excluding Witt from the deal, Bucey responded reassuringly that he and Witt "are a team as far as that goes." Government's Brief

3. Witt and Bucey discussed the details of how the Smiths' money would be deposited in the church's bank account and portrayed as contributions to the church on behalf of earthquake disaster victims. Bucey was then to funnel the money back to the Smiths as a fee for services never rendered and provide the corresponding false documentation.

4. Later, Bucey described to the Smiths how the church insulated them from IRS detection. He explained that had the Smiths themselves simply brought in $40,000 and purchased cashier's checks for cash, the bank would be required to report that the Smiths purchased the checks. By writing a check on the church's account to pay for the cashier's checks, however, Bucey explained that there would be no report identifying the Smiths. Government's Brief at 11; Government's Exhibit 4A, at 20–21.

5. Ahern would retain possession of the art work, which would display a plaque stating that it was "on loan from the Huguenot National Church." *See* Government's Brief at 20; Government's Exhibit 13A, at 90.

at 20; Government's Exhibit 8A, at 18. Bucey later discussed the art deal with Witt, who wanted to ensure that the transaction ran smoothly. Tr. at 764–65.

Witt was eventually arrested on charges involving cocaine trafficking. Thereafter, agent Dembitz notified Bucey by telephone that he had been served with a grand jury subpoena ordering him to produce documents relating to Bucey and the Huguenot Church. Bucey requested that Dembitz send him the subpoena. Bucey then advised Dembitz to rehearse his grand jury testimony with an attorney. Bucey instructed Dembitz that, "You will discuss with the attorney how you raised funds in dribs and drabs for the Huguenot Church and then went over—went over into Mexico and bought—bought goods for those earthquake victims with funds—you know, funds in Mexico, and that you got reimbursed—you brought in the money that you raised and got reimbursed for your out-of-pocket expenses by check from the Huguenot Church." Government's Brief at 22; Government's Exhibit 18A, at 4. In a later discussion, Bucey reiterated that Dembitz should adhere to the story that he had performed services on behalf of the church. *Id.* at 23; Tr. at 842.

Bucey's escapades led to a grand jury indictment on twelve counts: count 1—conspiracy; counts 2–5—mail fraud; counts 6–7—wire fraud; counts 8–9—failure to file CTRs in violation of 31 U.S.C. sections 5313 and 5322(b); counts 10–11—causing false information to be provided to the government in violation of 18 U.S.C. sections 2(b) and 1001; and count 12—attempting to influence, obstruct or impede the administration of a grand jury.

A jury convicted Bucey on all twelve counts. He was sentenced to five years' imprisonment on each of counts 1–9, to run concurrently, and two years' imprisonment on each of counts 10 and 11, to run concurrently with each other, but consecutively to the sentences on counts 1–9. On count 12, he was placed on probation for five years and fined $600.00. Bucey has appealed on all counts.

II.

A. *Failure to File CTRs*

Counts 8 and 9 charge, respectively, that on January 6, 1986, and February 20, 1986, Bucey and Witt, while acting in their capacity as a "financial institution," received currency in excess of $10,000 and knowingly and intentionally failed to file the required CTRs with the IRS in violation of 31 U.S.C. sections 5313 and 5322(b).[6] It is undisputed that on both occasions Bucey completed CTRs upon depositing the currency at Freedom Federal, which the bank then properly filed with the IRS. But, irrespective of those bank filings, the government contends that Bucey himself had an independent legal duty to file CTRs when he received the currency from the third-party government agents. These charges are predicated on the theory that Bucey is a "financial institution." Whether an individual acting in Bucey's capacity can be charged as a "financial institution" under the currency reporting laws is a question of first impression in this circuit.[7] The

6. With respect to the violation of 31 U.S.C. section 5322(b), a penalty enhancement provision, the indictment alleges that the failure to file CTRs offense was part of a pattern of illegal activity involving currency transactions exceeding $100,000, and was committed while violating another law of the United States, 18 U.S.C. section 1001.

Section 5322(b) states in pertinent part:

A person willfully violating this subchapter or a regulation prescribed under this subchapter ... while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than five years, or both.

7. As a preliminary matter, we reject the government's argument that, because Bucey's tendered jury instructions defining "financial institution" were given to the jury without objection, Bucey has failed to preserve this issue for appeal. In a pretrial motion to dismiss the indictment, Bucey initially raised the issue whether, as a matter of law, he could be considered a "financial institution" under the currency reporting laws or regulations promulgated under them. Because the court rejected this challenge to the government's definition of "financial institution," it would have been futile for Bucey to object to the jury instruction. "If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views

sufficiency of the indictment under the currency reporting laws and regulations, of course, raises questions of law for our de novo review. *See United States v. Gimbel*, 830 F.2d 621 (7th Cir.1987); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986).

To be valid, an indictment must allege acts which, if proven, would constitute an offense under the law that the defendant is charged with violating. If the indictment does not charge such a cognizable offense, of course, we must reverse any subsequent conviction based on that indictment. *Gimbel*, 830 F.2d at 624 (citing *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987)). Accordingly, we must determine whether the acts alleged in counts 8 and 9 establish a violation of the currency reporting laws by a "financial institution."

We begin by examining the plain meaning of the statutes and regulations. "[I]n determining the scope of a statute, one is to look first at its language. If the language is unambiguous, ... it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), *reh'g denied*, 461 U.S. 911, 103 S.Ct. 1887, 76 L.Ed.2d 815 (1983).

The Currency Transactions Reporting Act, 31 U.S.C. section 5313, and its implementing regulations provide specific rules designating who is responsible for filing CTRs. *See California Bankers Ass'n v. Schultz*, 416 U.S. 21, 26, 94 S.Ct. 1494, 1500, 39 L.Ed.2d 812 (1974). Section 5313 authorizes the Secretary of the Treasury to require domestic financial institutions, and *any other participants that the Secretary may prescribe*, engaged in transactions for the payment, receipt or transfer of United States currency, to report this currency to the Secretary.[8] Pursuant to this authority there are Treasury regulations directing financial institutions to "file a report of each deposit [or] withdrawal ... which involves a transaction of more than $10,000." 31 C.F.R. § 103.22(a) (1986).[9] In 1986, when the acts charged in the indictment occurred, a financial institution subject to the reporting requirements was defined in 31 C.F.R. section 103.11(e) as follows:

> *Financial institution.* Each *agency, branch,* or *office* within the United States of any person doing business in one or more of the capacities listed below:
>
> (1) A bank ...;
>
> (2) A broker or dealer in securities;
>
> (3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;
>
> (4) A person who engages as a business in the issuing, selling, or redeeming of travelers' checks, money orders or similar instruments ...;

Title 31 U.S.C. section 5312(a)(2) defines "financial institution" to include banks, thrifts, brokers, currency exchangers, travel agents, and other such establishments.

are, to require an objection would exalt form over substance." *United States v. Pirovolos*, 844 F.2d 415, 424 n. 8 (7th Cir.1988).

8. Title 31 U.S.C. section 5313(a) states in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency ... in an amount ... prescribe[d] by regulation, the institution *and any other participant in the transaction the Secretary may prescribe* shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made. [emphasis supplied].

9. 31 C.F.R. section 103.22, as in effect during the relevant time period, provided in part:

> (a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

(5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others;

(6) A [licensed] casino....[10]

Id. (emphasis supplied).

The indictment alleges that Bucey and Witt were persons acting as a "financial institution" by engaging as a business in dealing in currency and in transmitting funds abroad for others. Indictment ¶ 1(c) at 1–2. Bucey claims that the indictment is legally deficient and, alternatively, that the evidence established at trial on this count was insufficient to support his conviction.

[1] There is little case authority directly establishing whether an individual acting in Bucey's capacity could be criminally prosecuted as a "financial institution" under the currency laws in effect at the time of the offense alleged here. Most cases involving money laundering operations have involved the separate issue whether an individual engaged in money laundering can be derivatively liable under 18 U.S.C. section 2(b)[11] for *causing* what is indubitably a "financial institution" to fail to file an accurate CTR as required by the currency reporting laws. Yet these cases are replete with intimations that an individual such as Bucey could not be prosecuted as a "financial institution." For example, in *United States v. Gimbel*, 830 F.2d 621 (7th Cir.1987), this court noted the government's concession that Gimbel, a lawyer who allegedly structured currency transactions for his clients in order to launder proceeds from narcotics trafficking and to conceal income from the IRS, had no independent duty to file a CTR reflecting the structured nature of the transactions. *See id.* at 624 n. 2. Instead, the government sought, albeit unsuccessfully, to convict Gimbel under 18 U.S.C. sections 2(b) and 1001[12] for causing a bank to conceal information, namely, CTRs, from the IRS.[13]

Likewise, in *United States v. Mastronardo*, 849 F.2d 799 (3d Cir.1988), defendants who had engaged in a multimillion dollar bookmaking and money laundering operation were charged with structuring currency transactions to avoid having financial institutions file CTRs. The defendants themselves were not charged as a "financial institution"; rather, the government charged them on a derivative theory for violating 18 U.S.C. sections 2(b) and 1001. The Third Circuit stated:

> conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

10. In 1987, the regulations defining a financial institution were amended to provide in pertinent part:

> *Financial institution.* Each agent, agency, branch, or office within the U.S. of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below:
>
> . . . . . .
>
> (3) A currency dealer or exchanger, including a person engaged in the business of a check casher; ...
>
> . . . . . .
>
> (5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds;....

See 52 Fed.Reg. No. 67, at 11436 (April 8, 1987). Of course, because this amendment was not in effect at the time Bucey committed the alleged violations, it is not controlling.

11. Title 18 U.S.C. section 2(b) establishes that a person who causes another to commit an offense against the United States is chargeable as a principal.

12. Title 18 U.S.C. section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies,

13. In *Gimbel*, the defendant received funds from his clients in excess of $10,000 but then structured separate withdrawal and deposit transactions with the bank so that each transaction involved less than $10,000. Gimbel structured the transactions in this manner so that the bank would not be required to file CTRs under the currency reporting laws. The events in *Gimbel* arose before the Treasury Department promulgated new regulations requiring financial institutions to aggregate structured transactions of this sort. Because the bank had no duty, prior to these new regulations, to aggregate multiple deposits and withdrawals which exceeded $10,000 and to file the corresponding CTRs, this court concluded that Gimbel could not be liable for *causing* a financial institution to fail to disclose material facts on CTRs to the IRS. *See also United States v. Risk*, 843 F.2d 1059 (7th Cir.1988).

> Although the statute authorizes the Secretary to draft regulations requiring "participants" in transactions to file CTRs, the Secretary did not do so. Rather, the Secretary enacted regulations which, by their explicit language place a duty to file CTRs only on financial institutions. The regulations do not even intimate that a bank customer might somehow be violating the law if he structures his transactions so as to avoid making a transaction in currency greater than $10,000.... "[T]he present ambiguity regarding coverage of the Reporting Act and its regulations has indeed been created by the government itself."

Id. at 804–05 (quoting *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir.1986)). *See also United States v. Nersesian*, 824 F.2d 1294, 1311–12 (2d Cir.) (bank customer involved in money laundering scheme had no legal duty to file a CTR himself) (dicta), *cert. denied*, — U.S. —, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Heyman*, 794 F.2d 788, 790–91 (2d Cir. 1986) (government conceded, and court stated in dicta, that defendant, a Merrill Lynch account executive who devised scheme to structure customers' transactions in amounts less than $10,000 in circumvention of the currency reporting laws, had no legal duty to file CTRs), *cert. denied*, 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed. 2d 587 (1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir.1986) (defendants engaged in money laundering had no duty to report currency transactions to or through the bank); *United States v. Denemark*, 779 F.2d 1559, 1561 (11th Cir.1986) (dicta); *United States v. Shearson Lehman Bros., Inc.*, 650 F.Supp. 490, 495, 500 (E.D.Pa.1986) (dicta), *aff'd in part and rev'd in part sub nom. United States v. Mastronardo*, 849 F.2d 799 (3d Cir.1988); *United States v. Richter*, 610 F.Supp. 480, 487 n. 4 (N.D. Ill.1985) (dicta), *aff'd without op. sub nom. United States v. Mangovski*, 785 F.2d 312 (7th Cir.), and *aff'd without op. sub nom. United States v. Konstantinov*, 793 F.2d 1296 (7th Cir.), *cert. denied*, 479 U.S. 855, 107 S.Ct. 191[illegible] L.Ed.2d 124 (1986).

The only case in this circuit directly re[illegible] solving this question is *United States v. Riky*, 669 F.Supp. 196 (N.D. Ill.1987). There, the defendant had engaged in a money laundering scheme in which he received commissions for assisting others in concealing the source of income from narcotics trafficking. Focusing on the opening language of 31 C.F.R. section 103.11(e),[14] the court held that, because the defendant was not an "agency, branch, or office" of any person doing business in one of the subsequently listed capacities, she was not a "financial institution." A later amendment to the regulation, adding the term "agent" to the definition of "financial institution," indicated that the government had not previously believed that the CTR filing obligation applied to individuals. *Id.* at 200. Accordingly, the court dismissed the indictment. *Id. See also United States v. Gimbel*, 632 F.Supp. 713, 721 n. 10 (E.D. Wis.1984), *rev'd on other grounds*, 830 F.2d 621 (7th Cir.1987) (the "plain meaning of the term 'financial institution,' as it is defined by statute and regulation, would be strained to cover a person such as Gimbel," who had engaged in a money laundering scheme) (dicta).

The First Circuit took a similar tack in *United States v. Anzalone*, 766 F.2d 676 (1st Cir.1985). There, the defendant "structured" transactions with the bank so that each involved less than $10,000; hence, the bank did not file CTRs. The First Circuit reversed his conviction and dismissed the indictment, which charged him personally with failing to file CTRs in violation of 31 U.S.C. section 5313, with causing the bank to fail to file CTRs in violation of 18 U.S.C. section 2(b) and with causing the bank to conceal material facts from the IRS in violation of 18 U.S.C. sections 2(b) and 1001. *See id.* at 679–8[illegible] The court concluded that, since the currency regulations limited application of the reporting requirements to financial institutions *only*, the defendant had no indepen[illegible]

14. *See supra* at 1302.

dent duty to file CTRs. *Id.* at 681, 683.[15] *Cf. United States v. Robinson*, 832 F.2d 1165 (9th Cir.1987) (bank teller, who was acting as a private individual and was not charged with operating a currency exchange business, was not a financial institution within currency laws and, thus, had no duty to file CTRs).

However, several other circuits have disagreed. For example, in *United States v. Goldberg*, 756 F.2d 949 (2d Cir.), *cert. denied*, 472 U.S. 1009, 105 S.Ct. 2706, 86 L.Ed.2d 721 (1985), the Second Circuit held that three defendants engaged in money laundering, including two bank officers, constituted a "financial institution," namely, a partnership or joint venture engaged as a business in dealing in currency.[16] The court adverted to the legislative history of the Bank Secrecy Act, 31 U.S.C. section 5311 *et seq.*, which indicated a design to provide a sweeping law enforcement tool for locating large currency transfers of proceeds from unlawful transactions. *See id.* at 954–55 (citing H.R.Rep. No. 975, 91st Cong., 2d Sess. 11–12, *reprinted in* 1970 U.S.Code Cong. & Ad.News 4394, 4396–97). The court divined an intent to reach a vast range of criminal conduct and to grant the Secretary broad authority to impose reporting requirements. *Id.* at 954–55 (citing 116 Cong.Rec. 16957 (1970) (statement of Rep. Burton)). Relying on this legislative history, the court held that the defendants qualified as a "financial institution."

The Eighth, Ninth and Eleventh Circuits have also on occasion broadly construed the term "financial institution" in the money laundering context. In *United States v. Hernando Ospina*, 798 F.2d 1570 (11th Cir. 1986), the defendant, who provided a money laundering service in which he exchanged approximately $1.3 million for Colombian pesos for a total commission of $52,000, was deemed a "financial institution," namely, a "person who engages as a business in dealing in or exchanging currency." Likewise, in *United States v. Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied*, 479 U.S. 985, 107 S.Ct. 574, 93 L.Ed. 2d 577 (1986), the Ninth Circuit held that a defendant who participated in an extensive money laundering and cocaine conspiracy qualified as a "financial institution" by virtue of her role in transferring currency across the country and overseas in an ostensibly legitimate business venture. The *Mouzin* court focused on the language in 31 C.F.R. section 103.11, which relates the definition of a "financial institution" to a "person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks" and a "person engaged in the business of transmitting funds abroad." *Id.* at 689. *See also United States v. Cuevas*, 847 F.2d 1417 (9th Cir.1988) (extensive money laundering operation with several international offices constitutes a "financial institution"), *cert. denied*, — U.S. —, 109 S.Ct. 1122, 103 L.Ed.2d 185 (1989); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir.1986) (defendant, a kingpin of an intricate money laundering operation who delivered cash in excess of $10,000 to his couriers, qualified as a "financial institution" possessing a duty to file CTRs). *But cf. United States v. Rob-*

15. In addition, the court held that the regulations did not impose a duty on the defendant to inform the bank of the structured nature of his transactions. The court explained:

> Although this court, like all other institutions of the United States, is supportive of the law enforcement goals of the government and society, we cannot engage in unprincipled interpretation of the law, lest we foment lawlessness instead of compliance. *Kolender v. Lawson*, 461 U.S. 352, 361, 103 S.Ct. 1855, 1860, 75 L.Ed.2d 903 (1983). This is particularly so when the confusion and uncertainty in this law has been caused by the government itself, and when the solution to that situation, namely eliminating any perceived loop holes, lies completely within the government's control.

Anzalone, 766 F.2d at 682.

16. The court noted in dicta that even assuming that the indictment charged each defendant individually as a "financial institution," the defendants would be encompassed by the language of the regulations which specifically applied to "a person." Nevertheless, the court held that it need not decide that issue because, at the very least, the three defendants acted as a partnership and joint venture, an entity from which Congress sought to require CTRs. *See Goldberg*, 756 F.2d at 955.

inson, 832 F.2d 1165 (9th Cir.1987); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986). The Eighth Circuit has reflected a similar perspective. *See United States v. Hawley*, 855 F.2d 595, 602 (8th Cir.1988) (husband and wife team engaged in "warehouse banking" services constitute "financial institution"; "currency dealers or exchangers who act as middlemen between individuals and commercial banks can appropriately be defined as 'financial institutions' under section 103.11(e)(3), and convicted for failing to [file CTRs]"), *cert. denied*, — U.S. —, 109 S.Ct. 1141, 103 L.Ed.2d 202 (1989).

Some of these cases may be factually distinguishable; but, more importantly, none attempts to make sense of the directly operative "agency, branch, or office" language, which controls the definition contained in section 103.11(e). This language (which has subsequently been expanded) requires that, in order to qualify as a "financial institution," the defendant must be an "agency, branch, or office" of a person acting in one of the listed capacities. This language, which was relied upon in *Riky*, 669 F.Supp. 196 (N.D. Ill.1987), is clearly inapplicable to an individual. Moreover, our opinion in *Gimbel* is presumably premised on the assumption that an individual cannot be charged as a "financial institution." *See* 830 F.2d at 624 n. 2.

We are, of course, cognizant of the purpose underlying the Currency Transactions Reporting Act: "Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 38, 94 S.Ct. 1494, 1506, 39 L.Ed.2d 812 (1974). Nonetheless, it is not the role of the judiciary to "strengthen" the basis for requiring CTRs beyond that expressly provided by statute and regulation.

> If the government wishes to impose a duty on customers, or "other participants in the transaction," to report [currency] transactions, let it require so in plain language. It should not attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction past the breaking point to accommodate the government's interpretation.

United States v. Anzalone, 766 F.2d at 682.

It is clear from the language of 31 C.F.R. section 103.22 that only financial institutions as defined are required to file CTRs. Therefore, it would be improper for us to resort to the legislative history as a basis for applying the regulation to entities other than those specified in it. *Varbel*, 780 F.2d at 762.[17] Accordingly, we conclude that the terms of the statute and regulations in

17. In response to the apparent inefficacy of the Bank Secrecy Act as a basis for imposing criminal liability on individuals engaged in money laundering, Congress enacted the Money Laundering Control Act of 1986. *See* 18 U.S.C. §§ 1956, 1957; 31 U.S.C. § 5324. Among other things, the Money Laundering Act prohibits individual bank customers from structuring transactions to circumvent CTR filing requirements. *See* 31 U.S.C. § 5324. *See generally* Comment, *The Money Laundering Control Act of 1986: Tainted Money and the Criminal Defense Lawyer*, 19 Pac. L.J. 171 (1987).

It is also worth noting that, in the Internal Revenue Code, Congress has explicitly imposed an independent reporting burden on *individual persons* who receive in excess of $10,000. *See* 26 U.S.C. § 6050I (West Supp.1989). This section provides in pertinent part:

> (a) Cash receipts of more than $10,000.00
> —Any person—
> (1) who is engaged in a trade or business, and
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

This statute specifically excludes financial institutions subject to the reporting requirements of title 31. *See* 26 U.S.C. § 6050I(c)(1). Of course this provision is inapplicable to the present case involving a conviction under 31 U.S.C. section 5313, a provision which does not by its express terms address the conduct of persons other than financial institutions. *See United States v. Denemark*, 779 F.2d 1559, 1563–64 (11th Cir.1986); *United States v. Perlmutter*, 656 F.Supp. 782, 788 (S.D.N.Y.1987), *aff'd without op.*, 835 F.2d 1430 (2d Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988).

existence at the relevant time did not impose a duty on Bucey to file CTRs.[18] To countenance the government's theory of prosecution imposing such a duty would deprive Bucey of his due process right to fair notice of the criminality of a failure to file. *See Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).[19] Hence, we conclude that the allegations contained in counts 8 and 9 of the indictment, charging Bucey as a "financial institution" with a duty to file CTRs, are legally insufficient to establish violations of 31 U.S.C. sections 5313 and 5322(b). Bucey's conviction on these counts must therefore be reversed and the indictment insofar as it relates to these counts dismissed.

B. *Concealing and Falsifying Material Facts on CTRs*

Counts 10 and 11 of the indictment charge Bucey with causing the concealment and falsification of material facts within the jurisdiction of the IRS in violation of 18 U.S.C. sections 2(b) and 1001.[20] Under section 1001, concealment violations "relate to the nondisclosure of statements required by statute, government regulation or form." *United States v. Tobon-Builes*, 706 F.2d 1092, 1096 (11th Cir.1983) (citations omitted). During each deposit transaction at Freedom Federal on January 6, 1986, and February 20, 1986, Bucey completed the required CTR on Form 4789, which was prescribed by the Secretary of the Treasury. *See* 31 C.F.R. § 103.25(a). Part I of Form 4789 requests the identity of the "individual conducting the transaction with the financial institution," while Part II requests the identity of the "individual or organization for whom this transaction was completed." *See* Appellant's App. at 58, 60.[21] Bucey listed himself as the individual conducting the transaction and Huguenot National Church as the individual or organization for whom the transaction was completed. *See id.* The indictment charges that, by completing the form in this manner, Bucey intentionally concealed the true identity of the individual who conducted the transaction and the individual for whom the transaction was completed. *See* Indictment ¶¶ 3, 4 at 25, ¶¶ 3, 4 at 26. In response to Bucey's motion to dismiss these counts of the indictment for failure to state an offense, the district court cursorily determined that the allegations of active concealment of material facts that were required to be disclosed sufficiently stated a criminal offense.

[2] The government submits that, based upon the evidence established at trial, a jury could have rationally concluded that the individual who conducted the transaction in each instance was the undercover agent, not Bucey, and that, therefore, Bucey had lied in completing Form 4789. The government relies primarily on the evidence that the agent physically carried the money into the bank, assisted in counting it, and received cashier's checks as a result of the transaction. We do not think these facts are probative. While the agent may have carried the money into the bank, it was Bucey who was responsible for carrying out the money laundering operation, who received a commission for his services, who controlled the Huguenot Church account and who was solely autho-

18. At the very least, we think that the language contained in the statute, regulations and legislative history is "ambiguous, leaving us unable to define the ambit of the criminal statute[; therefore,] the Rule of Lenity requires that we strictly construe the statute in favor of the defendant." *United States v. Lowe*, 860 F.2d 1370, 1376 (7th Cir.1988) (citing *United States v. Turkette*, 452 U.S. 576, 587 n. 10, 101 S.Ct. 2524, 2531 n. 10, 69 L.Ed.2d 246 (1981)), *cert. denied*, — U.S. —, 109 S.Ct. 1639, 104 L.Ed.2d 155 (1989).

19. Conceptually, the government's theory is somewhat anomalous. Essentially, the argument is that Bucey was a walking "financial institution" so that when he received the cash from the agents at Freedom Federal, a duty attached requiring him to file a CTR in addition to the one he would complete immediately upon depositing the money. We do not think the regulations contemplate such a scenario.

20. *See supra* notes 11–12.

21. This language resembles the language contained in 31 U.S.C. section 5313(a), which provides: "A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made."

rized to make the necessary deposits. Therefore, we do not think a rational juror could have found beyond a reasonable doubt that Bucey willfully concealed or falsified a material fact when he listed himself as the individual conducting the transaction with the bank.

[3] A closer question is whether Part II of Form 4789 required Bucey to disclose that the agents were the "individual[s] or organization for whom this transaction was completed." In essence, the issue is whether Bucey had a duty to reveal the source of the funds involved in the transaction.

In *United States v. Gimbel*, 632 F.Supp. 713, 721 n. 10 (E.D. Wis.1984), *rev'd on other grounds*, 830 F.2d 621 (7th Cir.1987), the district court held that the law did not require the defendant, an attorney engaged in money laundering, to disclose on CTRs the real parties in interest in connection with currency transactions. In dismissing this count of the indictment, the court concluded:

> Under the plain meaning of the regulations implementing the Bank Secrecy Act, Gimbel and others similarly situated would not have notice that they must reveal the identities of the real parties in interest to domestic currency transactions made through their trust accounts.

Id. at 723.

Similarly, in *United States v. Murphy*, 809 F.2d 1427 (9th Cir.1987), the Ninth Circuit held that the law did not clearly impose a duty on the defendant to disclose the source of the funds on CTR Form 4789. In *Murphy*, the defendant was charged with conspiring to conceal and falsify material facts within the jurisdiction of the IRS by "falsely identifying the source of the deposited funds as ATC, although he knew the money came from undercover IRS agents." *Id.* at 1429. The court noted that ATC had an account at the bank where the money was deposited, and that an ambiguity in the instructions on the CTR could reasonably lead a depositor to fill out the form as the defendant did in the challenged transaction.[22] The court concluded that the directions on Form 4789 "could easily lead noncriminal participants in CTR transactions to believe that they were required only to name the holder of the account." *Id.* at 1431. As the *Murphy* court reasoned:

> Due process requires that penal statutes define criminal offenses with sufficient clarity that an ordinary person can understand what conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357 [103 S.Ct. 1855, 1858, 75 L.Ed.2d 903] (1983). Section 5313 and its regulations do not clearly require depositors to identify the source of their funds. Therefore, the imposition of criminal sanctions on these facts would violate due process. *Cf. Varbel*, 780 F.2d at 762.

Murphy, 809 F.2d at 1431.

We agree with the reasoning and result of the Ninth Circuit in *Murphy* and the district court in *Gimbel*. Bucey deposited cash into the Huguenot Church account and, accordingly, listed the church as the "organization for whom this transaction was completed." We do not think the language of the statute, regulations or Form

> [B]efore effecting any transaction with respect to which a report is required the financial institution shall verify and record the name and address of the individual *presenting* a transaction, as well as record the identity, account number, and the social security or taxpayer identification number, if any, of any person or entity *for whose or which account* such transaction is to be effected. [emphasis supplied].

We think that the language contained in Part II was sufficiently ambiguous to preclude notice to a reasonable depositor of the duty to disclose the source of the funds.

22. The ambiguity arose out of language contained in the explanatory instructions to Part II, which referred to "the identity ... of the individual or organization *for whose account* the transaction is being made." *Murphy*, 809 F.2d at 1430. The court reasoned that the emphasized phrase could mean "for whose bank account," in which case the defendant truthfully responded "ATC," the nominal account holder. *Id.* These instructions were not introduced into evidence in the case at bar. *See* Tr. at 524. Nevertheless, the regulation in effect at the time of Bucey's actions contained the same language as that included on the form in *Murphy*. In a section labeled "Identification required," title 31 C.F.R. section 103.27 provided in pertinent part:

4789 was sufficiently clear for an ordinary person to understand that listing the undercover agents was required. Thus, because neither Bucey nor the bank had a duty to report the source of the money in Part II of Form 4789, there was no concealment or falsification of material facts in violation of 18 U.S.C. sections 2(b) and 1001. Accordingly, Bucey's conviction for this offense must be reversed and counts 10 and 11 dismissed.

C. *Mail and Wire Fraud Counts*

Bucey raises two principal objections in connection with the mail and wire fraud counts.[23] First, he contends that the indictment is legally insufficient to allege a violation of the mail and wire fraud statutes because it does not adequately charge loss of property by the government. Alternatively, he argues that, even if the indictment sufficiently alleges violations of the mail and wire fraud statutes, the government failed to prove at trial that the government in fact did or would have lost income tax revenue as a consequence of Bucey's actions.

In *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court held that the mail fraud statute is limited to schemes "aimed at causing deprivations of money or property." *Id.*, 107 S.Ct. at 2881. Hence, the *McNally* Court determined that the citizen's intangible right to honest government is not a protectible property right for purposes of mail fraud. The Court has since made clear, however, that "property" may comprise both tangible and intangible property rights. *See Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) (holding that confidential business information constitutes "property" protected by the mail and wire fraud statutes). Thus, the fact that the government's interest in unpaid taxes is intangible is no definitive obstacle to a mail or wire fraud conviction. *See United States v. Porcelli*, 865 F.2d 1352, 1360 (2d Cir.1989). The determinative inquiry is whether Bucey's money laundering scheme defrauded the federal government of a property right, thereby injuring the government in its role as a "property-holder." *See McNally*, 107 S.Ct. at 2882 n. 9.

With respect to the mail fraud counts, the indictment alleges that Bucey "devised and intended to devise a scheme and artifice to defraud the United States of money and property, that is, income taxes." Indictment ¶ 2 at 8. Bucey argues that this allegation does not satisfy the *McNally* standard because the federal government does not possess a cognizable "property interest" in income taxes due and owing.

In *United States v. Gimbel*, 830 F.2d 621, 627 n. 3 (7th Cir.1987), this court specifically left open the question whether a scheme to deprive the federal government of tax dollars is cognizable under *McNally*. The indictment in *Gimbel* did not charge that the defendant's scheme deprived the Treasury Department of money or property. Instead, the indictment alleged that the scheme consisted of depriving the Treasury Department of CTRs and other "accurate and truthful information and data." The government had argued that because Gimbel's scheme concealed information from the Treasury Department which, if disclosed, might have resulted in the Department's assessing tax deficiencies, Gimbel in effect deprived the Treasury of tax revenues. *Gimbel*, 830 F.2d at 626. This court rejected the government's theory, relying on the principle of *McNally* that the

23. The mail fraud statute, 18 U.S.C. section 1341, states in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used,] shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Our analysis of Bucey's conviction under the mail fraud statute, counts 2 through 5, also applies to his conviction on counts 6 and 7 under the corollary wire fraud statute, 18 U.S.C. section 1343. *See United States v. Gimbel*, 830 F.2d 621, 627 (7th Cir.1987) (citing *United States v. Feldman*, 711 F.2d 758, 763 n. 1 (7th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 317 (1983)).

mail fraud statute does not proscribe schemes to defraud entities of intangible rights. Because the jury was not required to find that the scheme resulted in the government's being deprived of money or property, the court reversed Gimbel's mail fraud conviction. *Id.* Likewise, in *United States v. Eckhardt*, 843 F.2d 989, 996 (7th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 106, 102 L.Ed.2d 81 (1988), this court concluded that an allegation that the defendant's scheme was devised "[t]o defraud the United States by impeding ... the functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of the revenue, to wit, income taxes" would not, in itself, satisfy *McNally*. However, the indictment in *Eckhardt* had alleged multiple objectives, one of which was "[t]o obtain money and property [from investors] by false and fraudulent representations and pretenses...." *Id.* Thus, this court concluded, "The failure of the indictment to allege an underlying scheme to defraud the *government* of money or property is not fatal because it does allege a scheme to defraud the *investors* of money or property." *Id.* at 997. Arguably, this language reflects the *Eckhardt* court's view that, had the indictment specifically alleged that the government was defrauded of money or property, it would have comported with the *McNally* standard.

In response to Bucey's motion to dismiss the mail and wire fraud counts of the indictment, the district court determined that the allegations sufficiently charged a cognizable loss of money or property. The district court relied on the general principle that the government has a property right in tax revenues on the date that they accrue. *See Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566, 70 S.Ct. 386, 389, 94 L.Ed. 346 (1950) ("Congress intended the United States to have the use of money lawfully due when it became due."). Similarly, in *United States v. Doe*, 867 F.2d 986 (7th Cir.1989), we held that a scheme to deprive Cook County of its tax revenues satisfied the *McNally* money or property interest test. *See id.* at 989 ("Under Illinois law, Cook County has a property interest in its collected and uncollected tax revenues.").

Although no other circuit court has conclusively resolved this issue, the Fifth Circuit has stated in dicta that "[c]ertainly a scheme to defraud the United States of taxes would meet the 'money or property' requirement of *McNally*...." *United States v. Herron*, 825 F.2d 50, 56 (5th Cir.1987). Moreover, the district court in *United States v. Regan*, 699 F.Supp. 36, 40 (S.D.N.Y.1988), expressly held that the government did indeed have a *McNally* property interest in income taxes due and owing. The *Regan* court reasoned:

> The alleged purpose of the [defendant's] transactions was to defraud the [U.S.] government of tax revenue. The defendants argue that this cannot be characterized as a scheme to defraud the government of property, because the government's property interest in tax revenue does not vest until a tax deficiency is declared. Whether the government had a vested property interest during the life of the scheme is irrelevant. If the alleged scheme had been brought to fruition, it would have fraudulently deprived the government of tax receipts. That was the alleged purpose of the scheme. Surely that putative monetary detriment satisfies the *McNally* requirement.

699 F.Supp. at 40.

[4] The reasoning of *Regan* and *Doe* is sound and we affirm the determination of the district court that the allegation in the indictment charging Bucey with devising a scheme "to defraud the United States of money and property, that is, income taxes" satisfies the *McNally* "money or property" requirement.[24]

24. In *Gimbel*, we left open the issue whether a scheme to deprive the federal government of tax dollars is cognizable in light of footnote 4 of *McNally*, which states, "The Government concedes that it was error for the District Court to include the instruction on tax fraud in the substantive mail fraud instruction ... but the effect of that error is not now at issue." 107 S.Ct. at 2878 n. 4. We conclude that footnote 4 of *McNally* does not foreclose a mail fraud convic

[5] Bucey's second objection to his conviction for mail and wire fraud is that there was insufficient proof at trial that the United States actually did lose or would have lost tax revenues. Obviously, since Bucey's tax-evading "clients" in this case were undercover government agents, the government was not *in fact* deprived of tax revenues. Nevertheless, since the mail fraud statute punishes the *scheme* to defraud, this court has reiterated on numerous occasions that the ultimate success of the fraud and the actual defrauding of a victim are not necessary prerequisites to a successful mail fraud prosecution. *See Moore v. United States*, 865 F.2d 149, 153 n. 1 (7th Cir.1989); *Ward v. United States*, 845 F.2d 1459, 1462 (7th Cir.1988); *United States v. Keane*, 522 F.2d 534, 545 (7th Cir.1975), *cert. denied*, 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976). Consequently, the fact that the government was not actually deprived of tax revenues does not warrant reversal of Bucey's conviction.

tion based on a scheme to defraud the federal government of income taxes. In *McNally*, the district court had erroneously instructed the jury that, in order to convict for mail fraud, the jury had to find that the defendant impeded the IRS' collection of income taxes. This instruction was legally incorrect because the district court had previously dismissed those mail fraud counts alleging tax fraud objectives due to the government's failure to charge that the tax returns involved were fraudulent. Thus, footnote 4 is irrelevant to the issue at bar. *See McNally*, 107 S.Ct. at 2878 n. 2; *United States v. Gray*, 790 F.2d 1290, 1297–98 (6th Cir.1986), *rev'd sub nom. McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); Brief of United States at 9–10 n. 9, *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); Brief of Gray at 7 n. 7, *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); *Cf. Doe*, 867 F.2d at 989.

25. In connection with the "money or property" element, the jury received the following instruction:

> As to Counts 2 through 7 only, the money and property in question is the income taxes that would be due and owing from an amount of income of $24,000, an amount of income earned by Don and John Smith and James Dembitz in their undercover roles.

Tr. at 1331. Apparently, the $24,000 figure was the difference between the amount purportedly earned by the agents in their drug-trafficking affairs and the amount they could declare as income to the IRS evidenced by bogus documentation prepared by Bucey and Witt. Tr. at 1136.

Bucey indicated on several occasions that the scheme was designed to "stick it back in Uncle Sam's ear" and to "screw the IRS." Moreover, the jury was specifically instructed that, in order to convict, it was required to find a scheme to defraud the government of money or property.[25] We think the evidence was sufficient in this case for the jury to find that Bucey and his partner, Witt, intended to defraud the government of money or property.

D. *Conspiracy*

Title 18 U.S.C. section 371, includes two prongs: it is a crime (1) to "conspire ... to commit any offense against the United States, or [2] to defraud the United States, or any agency thereof in any manner or for any purpose." *Id.* Count 1 of the indictment charges Bucey both with conspiracy to defraud the United States and with conspiracy to commit substantive offenses against the United States.[26] On appeal,

26. Specifically, count 1 of the indictment charges Bucey with conspiracy

> (A) to defraud the United States:
>
> (i) by impairing, obstructing and defeating the lawful functions of the Department of Treasury:
>
> (a) in the collection of accurate data and reports relating to currency transactions at financial institutions in excess of $10,000, for use in criminal, tax, and regulatory investigations and proceedings, and of the enforcement of those laws and regulations found in Title 31, U.S.C. section 5311 *et seq.*, and Title 31, C.F.R. section 103.11 *et seq.*...;
>
> (b) in the obtaining of accurate information and data for determining the sources and amounts of income; and
>
> (c) in the determination, assessment and collection of revenue, that is, income taxes; and
>
> (ii) by concealing the source of funds subject to forfeiture under the federal laws relating to narcotics;
>
> (B) to willfully counsel and advise the preparation and presentation of federal income tax returns, which returns were to be false and fraudulent as to the material matters of the source and amount of income, in violation of U.S.C. section 7206(2); and
>
> (C) to travel and cause travel in interstate commerce ... and [use the mails] with the intent to distribute the proceeds of an unlawful activity, and ... to perform acts of distri-

Bucey asserts that the conspiracy conviction must be set aside because none of the acts comprising the conspiracy constitutes a criminal offense. He marshals his arguments challenging each alleged unlawful objective and then concludes that the only conspiracy proven was a conspiracy to conceal the source of currency, which, he submits, is not criminal.

The indictment charges a multi-faceted conspiracy aimed at attaining six separate but related objectives:

to defraud the United States by-

(1) impairing the Treasury Department's collection of accurate CTRs and enforcement of the currency laws;

(2) impairing the Treasury's collection of information to determine the correct sources and amounts of income;

(3) impairing the Treasury's assessment and collection of income taxes; and

(4) concealing the source of funds subject to forfeiture under the federal narcotics laws; and to commit the substantive offenses of—

(5) willfully advising the preparation of false income tax returns; and

(6) facilitating and distributing the proceeds of a narcotics distribution.

[6] It is a general tenet of conspiracy law that when an indictment alleges a conspiracy with multifarious objectives, a conviction will be sustained so long as the evidence is sufficient to show that the defendants agreed to accomplish at least one of the alleged objectives.[27] *See United States v. Soteras*, 770 F.2d 641, 646 (7th Cir.1985) (citing *United States v. Alvarez*, 735 F.2d 461, 465–66 (11th Cir.1984); *United States v. Mackey*, 571 F.2d 376, 387 n. 14 (7th Cir.1978); *United States v. James*, 528 F.2d 999, 1014 (5th Cir.), *cert. denied*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976)).

[7] Notwithstanding the absence of substantive currency law violations, Bucey's acts, when viewed as part of the overall illicit money laundering scheme, support a conviction for conspiracy to defraud the United States by impeding the lawful function of the Treasury Department as described in objectives (1) through (3).[28] In order to convict under the conspiracy to defraud clause of section 371, the government need not charge or prove that Bucey agreed to commit, or actually did commit a substantive offense. He merely "must have 'agreed to interfere with or obstruct one of [the government's] lawful functions by deceit, craft or trickery, or at least by means that are dishonest.'" *United States v. Richter*, 610 F.Supp. 480, 486 (N.D. Ill.1985) (Aspen, J.) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924)). "[A]cts which are in themselves legal lose their legal character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962).

bution of said proceeds and facilitation of carrying on said unlawful activity, in violation of 18 U.S.C. section 1952(a)(1) and (3). Indictment ¶ 2 at 3–4.

27. In this connection, the court properly instructed the jury that, in order to convict Bucey of conspiracy, the jury had to find that Bucey conspired to commit at least one of the six alleged objectives. *See* Tr. at 1318. Because none of the objectives upon which the jury may have relied involves a legally invalid or unconstitutional basis for conviction, the general verdict form does not require reversal of Bucey's conspiracy conviction. *Contra Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957) (where a general verdict is supportable on one ground, but an alternative ground is invalid due to a statute of limitations bar, and it is impossible to tell which ground the jury selected, the verdict must be set aside), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Feela v. Israel*, 727 F.2d 151, 154 (7th Cir.1984) ("Where a verdict is general, and conviction under one of several alternate theories would be unconstitutional, the conviction must be set aside lest the verdict rest on an unconstitutional basis."); *Cramer v. Fahner*, 683 F.2d 1376, 1380 (7th Cir.), *cert. denied*, 459 U.S. 1016, 103 S.Ct. 376, 74 L.Ed.2d 509 (1982); *United States v. Baranski*, 484 F.2d 556, 560–61 (7th Cir.1973). *Cf. United States v. Holguin*, 868 F.2d 201, 202–03 (7th Cir.1989).

28. Thus, under *Soteras*, we need not determine whether the conspiracy conviction may also be sustained on the basis of objectives (4) through (6).

Although Bucey's failure to file CTRs and failure to disclose the source of currency on Form 4789 are not unlawful acts, these acts "lost their lawful character when considered as part of a scheme to intentionally deprive the government of material information it would otherwise receive." *Richter*, 610 F.Supp. at 487. Quite apart from the underlying substantive offenses, Bucey is liable for agreeing with Witt to obstruct by deceit, craft or trickery the lawful function of the Treasury in collecting accurate CTRs (objective 1). *See Richter*, 610 F.Supp. at 486; *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir. 1987).[29] In addition, the evidence sufficiently establishes that the Bucey–Witt confederacy aspired to impede the function of the Treasury in obtaining information concerning the sources and amounts of income (objective 2), and in assessing and collecting income taxes (objective 3). Bucey informed the agents that by using the Huguenot Church account as a conduit for the cash-for-cashier's-checks transactions, the identity of the agents would not be disclosed on CTRs filed by the bank with the IRS and, thus, their identity and drug income would be insulated from government detection. Government's Brief at 11; Government's Exhibit 4A, at 20–21. Bucey and Witt also agreed to provide bogus documentation to prevent the IRS from tracing the illicit source and amount of the agent's income. Moreover, Bucey expressed on several occasions their plot to "stick it back in Uncle Sam's ear" and "screw the IRS." *See* Government's Brief at 19; Tr. at 623. Considering the evidence in the light most favorable to the government, we think this overall scheme to circumvent the currency reporting laws and to prevent the IRS from collecting accurate data, reports and income taxes supports a conspiracy conviction regardless of the absence of substantive currency law violations. *Cf. United States v. Montalvo*, 820 F.2d 686, 690 (5th Cir.1987).[30]

E. *Obstructing the Grand Jury*

Count 12 of the indictment charges Bucey with violating 18 U.S.C. section 1503[31] on the grounds that Bucey "well knowing of the existence of said federal grand jury investigation did corruptly endeavor to influence, obstruct and impede the due administration of justice by advising, counseling and encouraging a person known to him as 'James O'Brien' to give false and misleading testimony when appearing before said grand jury." Indictment ¶ 3 at 27. Bucey's challenge is two-fold: (1) the government failed to prove that he had the requisite corrupt intent to impede a grand jury investigation; and (2) his actions were incapable of interfering with the adminis-

29. *Contra United States v. Murphy*, 809 F.2d 1427, 1432 (9th Cir.1987) (once court finds no violation of the currency laws, conspiracy to defraud IRS charge must also fail if it rests solely on the alleged violations of the currency laws); *United States v. Mastronardo*, 849 F.2d 799, 803–05 (3d Cir.1988).

30. Although at the time the acts arose in this case money laundering in itself was not a substantive criminal offense, courts have held that agreements to engage in such money laundering schemes may constitute criminal conspiracy under section 371. *See United States v. Jerkins*, 871 F.2d 598, 603–04, (6th Cir.1989); *United States v. Browning*, 723 F.2d 1544 (11th Cir. 1984) (laundering scheme aimed in part at thwarting IRS' identification of revenue and collection of taxes subject to criminal conspiracy conviction); *United States v. Enstam*, 622 F.2d 857 (5th Cir.1980) (defendants with intent to use the laundering scheme to obstruct the IRS' tax collecting function can be prosecuted for criminal conspiracy), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 *cert. denied*, 451 U.S. 907, 101 S.Ct. 1974, 68 L.Ed.2d 294 (1981); *United States v. Richter*, 610 F.Supp. 480, 485–87 (N.D. Ill.1985).

After the conduct in this case arose, Congress enacted legislation making money laundering a substantive crime in the "Money Laundering Control Act of 1986," which is part of the Anti–Drug Abuse Act of 1986. *See* Pub.L. 99–570, 100 Stat. 3207 (Oct. 27, 1986) (codified at 18 U.S.C. §§ 1956, 1957; 31 U.S.C. § 5324).

31. Title 18 U.S.C. section 1503 provides in relevant part:

> Whoever corruptly or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any grand or petit juror ... or corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

tration of justice since the putative grand jury "witness" was a fictional character.

[8] To establish a violation of section 1503, the government must demonstrate that the "defendant knew of the pending judicial proceeding and specifically intended to impede its administration." *United States v. Guzzino*, 810 F.2d 687, 696 (7th Cir.) (citation omitted), *cert. denied*, 481 U.S. 1030, 107 S.Ct. 1957, 95 L.Ed.2d 529 (1987). Section 1503 is violated when a defendant interferes with the due administration of justice by tampering with a witness. *See United States v. Rovetuso*, 768 F.2d 809, 824 (7th Cir.1985), *cert. denied*, 474 U.S. 1076, 106 S.Ct. 838, 88 L.Ed.2d 809 (1986), *cert. denied*, 476 U.S. 1106, 106 S.Ct. 1951, 90 L.Ed.2d 360 (1986). We do not think the fact that O'Brien (agent Dembitz' pseudonym) was a "fictional" grand jury witness precludes an obstruction of justice conviction. The statute proscribes the *endeavor* to influence or obstruct the administration of justice; thus, "the impossibility of accomplishing the goal of an obstruction of justice does not prevent a prosecution for the endeavor to accomplish the goal." *United States v. Brimberry*, 744 F.2d 580, 583 (7th Cir.1984) (citing *Osborn v. United States*, 385 U.S. 323, 333, 87 S.Ct. 429, 435, 17 L.Ed.2d 394 (1966) (where defendant Osborn allegedly employed informer to contact prospective juror, fact that informer never intended to carry out scheme did not preclude defendant's conviction for endeavoring to bribe juror)). *See also United States v. Rosner*, 485 F.2d 1213, 1228 (2d Cir.1973), *cert. denied*, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed. 2d 672 (1974). Thus, Dembitz' fictitious identity as a grand jury witness does not exonerate Bucey from his "endeavor" to influence the proper administration of the grand jury.

[9] In addition, viewing the evidence in the light most favorable to the government, we think it was sufficient for the jury to conclude that Bucey possessed the requisite corrupt intent to influence the administration of justice. This court elucidated the requisite intent element for obstruction of justice offenses in *United States v. Machi*, 811 F.2d 991 (7th Cir. 1987), and aligned itself with the Fourth Circuit:

> In our view, the defendant need only have had knowledge or notice that success in his fraud would have likely have [sic] resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts.

Id. at 998 (quoting *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir.1979)).

Bucey, who had been apprised of the ongoing grand jury investigation and of the subpoena purportedly issued to Dembitz, counseled Dembitz on how to role-play his grand jury testimony with his attorney and instructed Dembitz to provide false and misleading testimony to the grand jury. We think a jury could readily infer that Bucey had knowledge or notice that the success of his fraudulent endeavor would likely influence the just administration of the grand jury proceedings. *See United States v. Shannon*, 836 F.2d 1125 (8th Cir.) (sustaining obstruction of justice conviction based upon defendant's advice to former bank teller, who was prospective grand jury witness, that it would be "in her best interest" to forget about any large currency transactions which she had processed), *cert. denied*, — U.S. —, 108 S.Ct. 2830, 100 L.Ed.2d 930 (1988).

F. *Prejudicial Reference to Drugs*

[10] The final issue in Bucey's barrage of challenges on appeal is whether the references to narcotics trafficking during the course of the trial were prejudicial to the defendant. In a pretrial motion, Bucey moved that the district court strike as surplusage all references to drug dealing in the indictment and bar all evidence pertaining to drug dealing at trial. Bucey contends that the district court's denial of that motion was in error and that, because there was no evidence that he had direct knowledge that the undercover agents were posing as drug dealers, admission of these references was unduly prejudicial. Because we agree fully with the district court's disposition of this issue, we do not

think the court abused its discretion in denying Bucey's motion.

This court has stated that "evidence of other crimes may be presented when they are so blended or connected with the one on trial that proof of one incidently involves the other or explains the circumstances thereof or tends logically to prove any element of the crime charged." *United States v. Dorn*, 561 F.2d 1252, 1258 (7th Cir.1977). *See also United States v. Moreno–Nunez*, 595 F.2d 1186, 1188 (9th Cir. 1979); *United States v. Wilson*, 578 F.2d 67, 72 (5th Cir.1978). As the court below acknowledged, evidence of other acts may be admissible if it would assist the jury in understanding the factors surrounding the crime at issue and if the absence of evidence concerning the other acts would leave a "chronological and conceptual void" in the story. *See United States v. Hattaway*, 740 F.2d 1419, 1425 (7th Cir.), *cert. denied*, 469 U.S. 1089, 105 S.Ct. 599, 83 L.Ed.2d 708 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 448, 83 L.Ed.2d 373 (1984). In the instant case, the references to narcotics trafficking in both the indictment and at trial served to explain the purpose of and circumstances surrounding the money laundering scheme. We do not think the risk of unfair prejudice arising from this evidence substantially outweighed its probative value.

III.

Accordingly, we reverse Bucey's conviction on counts 8–11 for violations of the currency reporting laws and dismiss the indictment on these counts. In addition, we affirm Bucey's conviction for conspiracy, mail and wire fraud and obstruction of justice, and, in accordance with our usual practice, we direct that he be resentenced. *See United States v. Holzer*, 840 F.2d 1343, 1352 (7th Cir.1988) (citing *United States v. Manzella*, 791 F.2d 1263, 1270 (7th Cir. 1986)).

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

James F. SMITH, Plaintiff–Appellant,

v.

GENERAL SCANNING, INC., Defendant–Appellee.

No. 88–1917.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 6, 1989.

Decided June 8, 1989.

Terminated employee brought action under the Age Discrimination in Employment Act against his former employer. The United States District Court for the Eastern District of Wisconsin, Terence T. Evans, J., granted summary judgment for employer, and employee appealed. The Court of Appeals, Manion, Circuit Judge, held that: (1) the fact that employee falsified his resume when applying for employment did not preclude him from establishing a prima facie case, and (2) lack of seniority and poor performance evaluations were legitimate, nondiscriminatory business reasons for discharging employee.

Affirmed.

1. Civil Rights ⇐44(6)

In reduction in force case under Age Discrimination in Employment Act, plaintiff can establish prima facie case by showing that he was within protected age group, that he was performing according to his employer's legitimate expectations, that he was terminated, and that others not in protected class were treated more favorably; if plaintiff makes this showing, rebuttable presumption of discrimination arises and burden of production shifts to defendant employer to articulate legitimate and nondiscriminatory reasons for discharge. Age Discrimination in Employment Act of 1967, §§ 2–17, 14(b), as amended, 29 U.S.C.A. §§ 621–634, 633(b).

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(CITE AS: 994 F.2D 417)

UNITED STATES of America, Plaintiff-Appellee,
v.
Fred EDWARDS, Jr., Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Michael JONES, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Herman McGEE, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Judy MASON, Defendant-Appellant.

Nos. 91-2611, 91-2612, 91-2677 and 91-2929.
United States Court of Appeals,
Eighth Circuit.
Submitted: Sept. 17, 1992.
Decided March 30, 1993.
Rehearing and Suggestion for
Rehearing En Banc Denied

Tapes of a conversation between Barnes and McGee on April 3, 1990 ("the McGee Tape"), and a conversation between Barnes and Jones on April 11, 1990 ("the Jones Tape"), were played at trial. The conversations described the roles of various conspirators and discussed who might have been responsible for the March 7 arrests. [FN2] McGee argues that he is entitled to a new trial because the Jones Tape was inadmissible hearsay, because the tapes were inaudible, and because the district court erred by allowing the prosecution to play only selected portions of the tapes.

FN2. Neither the tapes nor their transcripts are part of the record on appeal. The substance of the conversations has been gleaned from Barnes's testimony.

[4][5] A. The Conspirator Hearsay Issue. Statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. Fed.R.Evid. 801(d)(2)(E). Using the procedure approved in United States v. Bell, 573 F.2d 1040, 1044 (8th Cir.1978), the district court conditionally admitted the tapes and then found at the close of the government's evidence that the government had proved the existence of the conspiracy at the time of the taped conversations by a preponderance of the evidence. We review this finding for clear error. See United States v.

Meeks, 857 F.2d 1201, 1203 (8th Cir.1988). As our prior review of the evidence makes clear, the trial court's Bell ruling was not clearly erroneous.

McGee argues that the conversation recorded in the Jones Tape was not made "during the course of" the conspiracy because the conspiracy had ended by April 11, 1990. A CONSPIRACY "is presumed to exist until there has been an AFFIRMATIVE showing that it has terminated, and its members continue to be conspirators until there has been an AFFIRMATIVE showing that they have WITHDRAWN." United States v. Lewis, 759 F.2d 1316, 1343 (8th Cir.), cert. denied, 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 357 (1985). To withdraw from a conspiracy, a conspirator *422 must "either [make] a clean breast to the authorities or [communicate] his withdrawal in a manner reasonably calculated to reach co-conspirators." Askew, 958 F.2d at 812-13. Here, there was overwhelming evidence that the conspiracy continued beyond April 11, 1990, and no evidence that McGee had affirmatively withdrawn.

[6] McGee also argues that the conversation was not "in furtherance of" the conspiracy. This term is interpreted broadly. See United States v. Johnson, 925 F.2d 1115, 1117 (8th Cir.1991). Statements are admissible under 801(d)(2)(E) if the overall effect of the conversation is to facilitate the conspiracy. See United States v. Leisure, 844 F.2d 1347, 1361-62 (8th Cir.), cert. denied, 488 U.S. 932, 960, 109 S.Ct. 324, 403, 102 L.Ed.2d 342 (1988). The Jones Tape conversation covered many subjects, including the

identity of the informant responsible for the March 7 arrests, McGee's arrangements with Jones and Barnes, and McGee's relationship with Mason. The evidence establishes that much of this conversation was in furtherance of the cocaine conspiracy. See United States v. Krevsky, 741 F.2d 1090, 1095 (8th Cir.1984) (discussion of conspirators' duties and particulars of their operations); Meeks, 857 F.2d at 1203 (statements identifying a source of cocaine). Thus, the Jones Tape was properly admitted.

B. Issues of Audibility and Selective Playing. Prior to trial, the district court denied McGee's motion for a pretrial hearing to determine the audibility of some 32 tapes that the government might offer. At trial, the government first offered to play portions of the McGee Tape after it was identified by Barnes. The district court permitted the government to play selected portions of the tape but sustained defense objections to the use of government-prepared transcripts of the tape, explaining that, "I'm interested in what they [the jurors] hear." As the tapes were played, there was considerable sidebar colloquy about whether the listener was able to identify who was speaking and about the poor audibility of portions of the tapes. However, no defense counsel objected during trial that the tapes were so inaudible that they should not be played at all, or requested that portions in addition to those selected by the government also be played. During its deliberations, the jury asked to replay one of the tapes; the district court sustained defense objections to

Tax cases.

Citation
838 F.2d 426
61 A.F.T.R.2d 88-647, 88-1 USTC P 9154, 24 Fed. R. Evid. Serv. 720
(CITE AS: 838 F.2D 426)

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UNITED STATES of America, Plaintiff-Appellee,
v.
Arloha Mae PINTO, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Marcel Samuel LAMBERT, Defendant-Appellant.
Nos. 87-1023, 87-1045.
United States Court of Appeals,
Tenth Circuit.
Jan. 29, 1988.

Defendants were convicted in the United States District Court for the District of Kansas, Dale E. Saffels, J., of conspiring to defraud the United States and falsifying tax returns, and one defendant was additionally convicted of five counts of tax evasion, and defendants appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) evidence was sufficient to support convictions; (2) there was sufficient evidence of existence of conspiracy to render coconspirator hearsay admissible; (3) there was no fatal variance between indictment and proof; (4) severance was not required; and (5) statute of limitations had not run on conspiracy count.

Affirmed.

[1] CONSPIRACY k47(6)
91k47(6)
There was sufficient evidence that defendant had substantial income from sale and distribution of marijuana to support taxpayer's convictions of conspiring to defraud the United States and of falsifying tax return, though IRS agents who testified were unable to state amount of taxpayer's income from drug trafficking. 18 U.S.C.A. ss 2, 371; 26 U.S.C.A. s 7206(1).

[1] INTERNAL REVENUE k5303
220k5303
There was sufficient evidence that defendant had substantial income from sale and distribution of marijuana to support taxpayer's convictions of conspiring to defraud the United States and of falsifying tax return, though IRS agents who testified were unable to state amount of taxpayer's income from drug trafficking. 18 U.S.C.A. ss 2, 371; 26 U.S.C.A. s 7206(1).

[2] CONSPIRACY k24(1)
91k24(1)
Formerly 91k24
Evidence in conspiracy prosecution must support finding that conspirators had unity of purpose or common design and understanding.

[3] CONSPIRACY k47(6)
91k47(6)
There was sufficient evidence that defendant knew of conspiracy to evade taxes on marijuana profits and knowingly participated in conspiracy to support her conviction for conspiring to defraud the United States, though majority of

evidence regarding marijuana trafficking directly implicated only defendant's husband. 18 U.S.C.A. ss 2, 371.

[4] INTERNAL REVENUE k5303
220k5303
There was sufficient evidence that defendant did not have legitimate home mortgage and did not pay mortgage interest as stated on income tax return to support her conviction of falsifying tax return. 26 U.S.C.A. s 7206(1).

[5] INTERNAL REVENUE k5306
220k5306
There was sufficient evidence of opening net worth of taxpayer and probable source of income to support defendant's tax evasion convictions, using cash expenditure method of proof; opening worth of defendant, including cash on hand, did not have to be established by formal net worth statement, and accurate cash on hand figure did not have to be offered for beginning of each taxable year in indictment. 26 U.S.C.A. s 7201.

[6] CRIMINAL LAW k427(3)
110k427(3)
Challenged testimony concerning statements of codefendant, even assuming they were coconspirator hearsay, could have been conditionally admitted subject to being connected up, where statements were admitted before trial court found there was substantial evidence that conspiracy existed. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[7] CRIMINAL LAW k427(2)
110k427(2)
Coconspirator hearsay is properly admitted if trial court makes factual determination that Government has established, by preponderance of evidence, that conspiracy existed, declarant and defendant were members of conspiracy, and hearsay statements were made in course and in furtherance of conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[7] CRIMINAL LAW k427(5)
110k427(5)
Coconspirator hearsay is properly admitted if trial court makes factual determination that Government has established, by preponderance of evidence, that conspiracy existed, declarant and defendant were members of conspiracy, and hearsay statements were made in course and in furtherance of conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[8] CRIMINAL LAW k427(5)
110k427(5)
There was sufficient evidence of existence of conspiracy to warrant admitting against defendant, as coconspirator hearsay, testimony of statement by codefendant; nonhearsay testimony linked defendant to drug trafficking, which was integral part of alleged conspiracy to evade taxes on income generated by sale and distribution of marijuana. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[9] INDICTMENT AND INFORMATION k171
210k171
Variance occurs when evidence presented at trial establishes facts different from those alleged in indictment.

[10] INDICTMENT AND INFORMATION k171
210k171
Pivotal inquiry, in assessing claim of fatal variance between indictment and proof, is whether there has been variance in proof which affects substantial rights of accused.

[11] CONSPIRACY k43(12)
91k43(12)
There was no fatal variance between conspiracy charged in indictment, to hide substantial income from sale and distribution of marijuana and to evade payment of taxes on that and other income, and proof at trial of conspiracy to possess, sell, and distribute marijuana; although defendant was not charged with conspiring to sell drugs, she could anticipate from indictment that evidence of her involvement in overt acts of possessing, selling, and distributing marijuana would be presented at trial. 18 U.S.C.A. ss 2, 371.

[12] CRIMINAL LAW k422(1)
110k422(1)
Presentation of evidence concerning codefendant's drug activities unrelated to joint charge of conspiring to defraud the United States did not result in transference of guilt affecting defendant's substantial rights; as to joint charge, evidence indicated that defendants acted in concert, to effectuate common illicit goal of evading taxes by concealing income derived from sale and distribution of marijuana. 18 U.S.C.A. ss 2, 371.

[13] CRIMINAL LAW k622.2(11)
110k622.2(11)
Quantitative disparity in evidence, without more, provides no justification for severance in conspiracy case.

[14] CRIMINAL LAW k622.2(1)
110k622.2(1)
Defendant was not entitled to severance of her and codefendant's conspiracy prosecutions, given Government's order of proof, trial court's continuous admonitions, and interests of judicial economy, notwithstanding disparity in weight of evidence and marital relationship between defendant and codefendant. 18 U.S.C.A. ss 2, 371.

[14] CRIMINAL LAW k622.2(11)
110k622.2(11)
Defendant was not entitled to severance of her and codefendant's conspiracy prosecutions, given Government's order of proof, trial court's continuous admonitions, and interests of judicial economy, notwithstanding disparity in weight of evidence and marital relationship between defendant and codefendant. 18 U.S.C.A. ss 2, 371.

[15] CRIMINAL LAW k150
110k150
Object of defendants' conspiracy, concealment of income from sale and distribution of marijuana, did not end with filing of their income tax returns for specific year and, thus, statute of limitations for conspiracy did not begin to run upon such filing; filing of returns was but first step in process of evading taxes on income, with additional overt acts subsequently undertaken to conceal marijuana income in attempt to make evasion succeed. 18 U.S.C.A. ss 2, 371; 26 U.S.C.A. s 6531.

[16] CRIMINAL LAW k772(6)
110k772(6)
Defendant is entitled to instruction regarding his theory of defense, but trial court need not follow exact language in instruction tendered by defendant.

[16] CRIMINAL LAW k834(3)
110k834(3)
Defendant is entitled to instruction regarding his theory of defense, but trial court need not follow exact language in instruction tendered by defendant.

[17] CRIMINAL LAW k829(1)
110k829(1)
Substance of instruction tendered by defendants, which stated that jury had to find defendants not guilty if evidence failed to establish beyond reasonable doubt that defendants had taxable income from sales of marijuana, was contained in charge given to jury and, therefore, trial court was not required to give tendered instruction.

[18] CRIMINAL LAW k810
110k810
Trial court's instruction on cash expenditure method of proving tax evasion was neither confusing nor inconsistent, but rather properly directed jury to determine whether expenditures in excess of reported income could be accounted for by assets available at outset of prosecution period. 26 U.S.C.A. s 7201.

[18] INTERNAL REVENUE k5317
220k5317
Trial court's instruction on cash expenditure method of proving tax evasion was neither confusing nor inconsistent, but rather properly directed jury to determine whether expenditures in excess of reported income could be accounted for by assets available at outset of prosecution period. 26 U.S.C.A. s 7201.

*428 Linda L. Sybrant, Sp. Asst. U.S. Atty., Kansas City, Mo. (Benjamin L. Burgess, Jr., U.S. Atty., Kansas City, Kan., with her on the brief), for plaintiff-appellee.

James L. Eisenbrandt, Morris, Larson, King and Stamper, Overland Park, Kan., for defendant-appellant Arloha Mae Pinto.

Bruce C. Houdek, James, Millert, Houdek, Tyrl & Sommers, Kansas City, Mo., for

defendant-appellant Marcel Samuel Lambert.

Before MOORE, McWILLIAMS and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

On April 1, 1986, defendant-appellant Marcel Samuel Lambert (Lambert) and his wife, defendant-appellant Arloha Mae Pinto (Pinto), were named in a seven-count indictment. They were jointly charged with one count of conspiring to defraud the United States, in violation of 18 U.S.C. s 371, and one count of falsifying a tax return, in violation of 26 U.S.C. s 7206(1) and 18 U.S.C. s 2. Defendant Lambert also was charged with five counts of tax evasion, in violation of 26 U.S.C. s 7201.

A jury found defendants guilty on all counts. The court sentenced defendant Lambert to seven consecutive two-year terms of imprisonment and defendant Pinto to concurrent three-year terms of imprisonment. Both defendants appeal, contending that: 1) the evidence was insufficient to support the convictions; 2) the trial court erroneously admitted co-conspirator hearsay; 3) there was a fatal variance, as to the conspiracy count, between the indictment and the evidence presented at trial; 4) the trial court erred in denying severance; 5) the conspiracy count should have been dismissed because the statute of limitations had expired; and 6) the trial court failed to give defendants' instruction regarding their theory of defense and improperly instructed the jury regarding the cash expenditure method of proving tax evasion. We affirm.

The rather complex factual background of these cases will be briefly summarized, with additional facts discussed as they pertain to the issues raised by defendants. At trial, the government presented its case in two parts, initially introducing evidence pertaining to the joint charges of conspiring to conceal taxable income derived from the sale and distribution of marijuana in 1977 and of claiming a false home mortgage interest expense on Pinto's 1980 tax return. The essence of the government's theory was that defendants concealed $150,000 in marijuana income by using cash to purchase the first in a series of three homes and later obtaining sham mortgages to create the appearance that the purchase money came from loans.

Marty Ritschel and Michael Bono testified that they purchased substantial quantities of marijuana from Lambert over an approximately two-year period commencing in 1976. Sally Robinson Wells testified that in September of 1977, Lambert "fronted" 300 pounds of marijuana to her former husband, Bruce Robinson, and another man. Robinson testified that the bales were weighed in defendants' basement and transported in Lambert's car to a "stash" house. The marijuana was then stolen. Soon after the theft was discovered, the parties to the transaction held a meeting, at which time Pinto demanded payment for the stolen marijuana and identified the lost $100,000 as hers.

Regarding the series of real estate transactions, it was revealed that during the final two months of 1977, Pinto took $149,000 in cash and purchased eighteen cashier's checks from sixteen different banks in the Kansas City area. With the cashier's checks, $1,154.66 in cash and a mortgage in favor of the builder, Pinto bought a $190,500 home in Leawood, Kansas. Neither Pinto nor Lambert reported the $150,000 on their respective 1977 income tax returns. In November of the following year, defendants sold the house. With the proceeds from that sale, plus an additional $31,960.19 in cash, Pinto purchased

outright a *429 second home in Leawood for $220,050. On December 5, 1978, Pinto presented her realty company with a $150,000 note and mortgage, which had been executed in favor of a Cayman Islands corporation formed by Lambert, and requested that a lien be filed against the residence she had purchased outright the previous month.

In early 1980, defendants bought yet another residence, again in Leawood. The mortgage on the second home was rolled over into a new note in favor of the offshore corporation. On March 25, 1981, Pinto filed her 1980 income tax return and reported a deductible home mortgage interest expense of $20,424.00, an amount arrived at by computing interest on the $150,000 note. Defendants sold the third residence in November of 1985. On November 8, 1985, they gave the title insurance company a Deed of Release, dated November 20, 1984, which stated that the second mortgage was released "in consideration of the full payment" of the debt.

Following a summary of the evidence admitted on the joint charges, the government, employing the cash expenditure method of proof, endeavored to prove the tax evasion charges filed against Lambert. An analysis of defendants' financial activities for the years 1974 through 1978 established that they spent $115,913.96 more cash than they had available, signifying that Lambert did not have an appreciable amount of cash on hand in 1979, the beginning of the indictment period. The government then analyzed the tax years 1979 through 1983 and established that Lambert's cash expenditures far exceeded his reported income.

Additional evidence was presented to show that Lambert took steps to conceal income and thereby evade the payment of taxes. The government established that Lambert dealt almost exclusively in cash, and that among his sizeable cash expenditures were the purchases a number of automobiles, none of which were registered in his name or titled in the state of Kansas. In 1980, Lambert directed his brother, who was preparing their parents' estate tax returns, to report a non-interest bearing loan of $50,000, which Lambert represented their father had made to him in 1976, and also to report $60,000 cash on hand, an amount which Lambert represented had been given to him by their parents.

I.

Both defendants strenuously argue that the evidence was insufficient to support their convictions. Our standard for evaluating the sufficiency of the evidence is well established. We view all the evidence, both direct and circumstantial, together with the reasonable inferences to be drawn therefrom, in the light most favorable to the government. United States v. Hooks, 780 F.2d 1526, 1529 (10th Cir.), cert. denied, 475 U.S. 1128, 106 S.Ct. 1657, 90 L.Ed.2d 199 (1986). We then must determine whether a reasonable jury could find the defendants guilty beyond a reasonable doubt. Id. at 1531.

A.

Defendant Lambert claims that the evidence was insufficient to show that he had substantial income from the sale and distribution of marijuana. In a related argument, defendant Pinto asserts that the evidence was insufficient to show that she intended to join a conspiracy to evade taxes on that income.

[1] It is true, as defendants point out, that the Internal Revenue Service (IRS) agents who testified were unable to state the amount of defendants' income from drug trafficking. Nevertheless, there was substantial evidence to support the jury's conclusion that defendants derived a significant amount of

income from the sale and distribution of marijuana. At one time, Lambert described himself as the "main man" for supplying marijuana in Kansas City. Ritschel testified that he had paid Lambert more than $200,000 for the marijuana that he had purchased between 1976 and 1978. Bono testified that he had purchased marijuana from Lambert on six occasions, each time buying quantities of twenty-five to fifty pounds at a price of $285 per pound. That testimony, along *430 with other evidence indicating that defendants dealt almost exclusively in cash and failed to report the $150,000 used to purchase the first residence, supports a reasonable inference that the funds used by Pinto to purchase the residence were derived from the sale of marijuana.

In arguing that the government failed to show that she had the requisite intent to join the conspiracy, defendant Pinto similarly alleges that there was no evidence of marijuana income, and in addition asserts that there was no evidence to show that she had knowledge of marijuana profits realized by Lambert or of the illegitimate nature of the two mortgages. We cannot agree. Contrary to Pinto's assertion, she does not stand convicted without proof of her knowledge of the conspiracy's objective or solely because of her relationship with Lambert. See, e.g., United States v. Jones, 808 F.2d 754, 756 (10th Cir.1987); United States v. McMahon, 562 F.2d 1192, 1196-97 (10th Cir.1977).

[2] "The essence of the crime of conspiracy is an agreement to violate the law." United States v. Troutman, 814 F.2d 1428, 1446 (10th Cir.1987). In a conspiracy prosecution, the evidence must support a finding that the conspirators had a unity of purpose or a common design and understanding. United States v. Kendall, 766 F.2d 1426, 1431 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986). The existence of an agreement to accomplish an unlawful objective "may be inferred from a 'development and a collocation of circumstances.' " United States v. Pack, 773 F.2d 261, 265-66 (10th Cir.1985) (quoting Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942)).

[3] The government was required to show that Pinto knew of the conspiracy to evade taxes on marijuana profits and knowingly participated in the conspiracy. United States v. Kendall, 766 F.2d at 1431-32. Despite the fact that the majority of the evidence regarding the marijuana trafficking directly implicated only her husband, there was evidence which linked Pinto to the trafficking and thus supported a reasonable inference that she knew of the existence of profits derived from the sale of marijuana. For instance, it was shown that large quantities of marijuana were stored in the basement of the house where she lived with Lambert. When the $100,000 drug deal went awry, Pinto claimed ownership of the stolen marijuana and demanded payment of the money lost as a result of the theft. Her knowledge of both the existence of marijuana profits and the use of the sham mortagages to conceal those profits was demonstrated by the fact that her purchase of the first residence was, in effect, a cash transaction, the bulk of the purchase price having been comprised of cashier's checks which she had acquired earlier with $149,000 in cash. Moreover, as discussed below, there was other evidence which indicated that Pinto had knowledge of the illegitimate nature of the mortgages.

B.

[4] Both defendants assert that the government failed to prove either that Pinto did not have a legitimate home mortgage or that she did not pay mortgage

interest as stated on her 1980 income tax return.

The nature of the purported mortgages and Pinto's failure to pay any mortgage interest can be inferred from the evidence presented. In the latter half of 1978, Lambert set up a corporation in the Bahamas, Luxaco Limited (Luxaco), and another corporation in the Cayman Islands, Yarrabee International Limited (Yarrabee). At that time, the secrecy laws of the Bahamas and the Cayman Islands prevented the United States government from investigating corporations established in those countries. Pursuant to a 1984 agreement between the United States and the Cayman Islands, the government obtained public records pertaining to Yarrabee as well as records kept by the law firm and the management company which represented the corporation. Those records revealed that Yarrabee was a subsidiary of Luxaco and that the corporation had issued only three shares of stock at a price of one dollar per share. No mortgages or schedules of payments were *431 found. A letter dated March 17, 1980, provided that there would be no further use for the corporation after the release of the mortgage had been finalized. The transcript also reflects the testimony of the designated agent for Yarrabee, a Kansas City attorney, who testified that Pinto made no interest payments to his law firm.

C.

[5] Defendant Lambert makes a three-pronged attack on the sufficiency of the evidence presented to show that he had taxable income in excess of that reported on his returns for the years 1979 through 1983. [FN1] He contends that the government failed to 1) show that he did not have cash on hand in 1979, 2) offer an accurate cash on hand figure for the beginning of each taxable year in the indictment period and 3) establish a likely source of income.

> FN1. During the indictment period, Lambert's cash expenditures far exceeded his reported income: in 1979, his income was $36,000, while cash expenditures totalled $132,098.31; in 1980, his income was $6,000, while cash expenditures totalled $134,265.44; in 1981, his income was $6,000, while cash expenditures totalled $100,820.79; in 1982, his income was $7,000, while cash expenditures totalled $34,160.21; and in 1983, his income was $30,000, while cash expenditures totalled $158,901.39.

The government employed the cash expenditure method of proof, which permits circumstantial proof of a defendant's taxable income in cases where the prosecution is unable to show directly specific items of such income. United States v. Bianco, 534 F.2d 501, 503 (2d Cir.), cert. denied, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976).

Under the 'cash expenditures' method, after taking into account the amount of resources the taxpayer had on hand at the beginning of a period, the income received by the taxpayer for the same period is compared with his expenditures that are not attributable to his resources on hand or non-taxable receipts during the period. A substantial excess of expenditures over the combination of reported income, non-taxable receipts, and cash on hand may establish the existence of unreported income.

United States v. Citron, 783 F.2d 307, 310 (2d Cir.1986). The relevant issue is whether expenditures in excess of reported income can be accounted for by assets available at the outset of the prosecution period or non-taxable

receipts during the period. Taglianetti v. United States, 398 F.2d 558, 565-66 (1st Cir.1968), aff'd, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969); see also United States v. Pack, 773 F.2d at 264-65 (establishing unreported income by cash expenditure method of proof).

While the opening net worth of the taxpayer, including cash on hand, must be demonstrated "to a reasonable certainty," it need not be established by a formal net worth statement. United States v. Citron, 783 F.2d at 315. Here, the government compared defendants' cash expenditures during the years 1974 to 1978 with the amount of income reported on their tax returns, plus other funds they had available, resulting in a showing that cash expenditures exceeded reported income and other funds by $115,913.96. See United States v. Terrell, 754 F.2d 1139, 1146-47 (5th Cir.), cert. denied, 472 U.S. 1029, 105 S.Ct. 3505, 87 L.Ed.2d 635 (1985). That comparison tended to show that defendant could not have had a significant amount of cash on hand and thus supports the jury's conclusion that Lambert had insufficient assets at the beginning of the prosecution period to have supported his expenditures in any of those years. [FN2] United States v. Bianco, 534 F.2d at 505.

> FN2. In Bianco, the defendant's contention that the government failed to negate the possibility of a cash hoard was rejected because there was no evidence to indicate that the defendant had such a cache. United States v. Bianco, 534 F.2d at 505. As the court explained,
> [o]f course, as in any criminal prosecution, the defendant is under no obligation to prove any particular set of facts, including the existence of a non-taxable source, such as a 'cash hoard' from which his expenditures were made. But once the government has introduced sufficient evidence from which the jury could conclude with reasonable certainty that no such assets existed, the defendant remains silent at his own peril.
> Id. at 505-06 (citations omitted).

Nor was the government required to offer an accurate cash on hand figure, as *432 part of opening net worth, for the beginning of each taxable year in the indictment period. See United States v. Mastropieri, 685 F.2d 776, 784 (2d Cir.), cert. denied, 459 U.S. 945, 103 S.Ct. 260, 74 L.Ed.2d 203 (1982). In a cash expenditure case, reasonable certainty may be established without presenting opening net worth positions for each of the taxable years so long as the proof "makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures." Taglianetti v. United States, 398 F.2d at 565. Thus, there need not be any formal opening net worth statement, which would include cash on hand, so long as sources of available funds are identified and quantified. Id. at 565 n. 7. The purpose of including an accurate identification of any diminution of resources is to enable the jury to determine if expenditures were financed by a liquidation of assets, depletion of a cash hoard or unreported income. United States v. Citron, 783 F.2d at 315. For example, if an asset is sold, an accounting must be made of that fact because the proceeds could be used to finance expenditures during the year in question. See Taglianetti v. United States, 398 F.2d at 564. The government accounted for the sale or disposal of assets during the indictment period, and none of the assets acquired by Lambert during that time were income-producing. The evidence

presented was sufficient to enable the jury to determine whether the expenditures in excess of reported income could be accounted for by assets available at the opening of the prosecution period or by non-taxable receipts during the period. Id. at 565-66.

Defendant's final contention, that the government did not establish a probable source of income, is also unavailing. By presenting evidence pertaining to Lambert's involvement in marijuana and cocaine trafficking, the government met its burden of showing "at least one 'likely source' of taxable income." United States v. Bianco, 534 F.2d at 506; see United States v. Mastropieri, 685 F.2d at 784-86. Such evidence was sufficient to support the inference that the cash expenditures proved were attributable to currently taxable income. See United States v. Bianco, 534 F.2d at 506-07.

Upon a careful review of the record, we conclude that defendants' sundry claims are without merit and hold that the evidence was sufficient to support the jury's verdict.

II.

Defendant Pinto next asserts that the trial court erred in admitting certain hearsay statements. She argues that the court failed to follow the preferred order of proof for the admission of co-conspirator hearsay and erroneously found that the government had shown the existence of a conspiracy.

At the outset of the trial, Ritschel and Bono testified about their marijuana dealings with Lambert. During the testimony of Sally Wells, defense counsel objected to the admission of any statements made by Lambert to Wells concerning Lambert's involvement in marijuana trafficking and his identification of boxes in defendants' basement as containing marijuana. In allowing the testimony, the court apparently agreed with the government's argument that the statements were admissible as admissions made by Lambert and therefore were not hearsay. Rec. vol. III at 81-88; see Fed.R.Evid. 801(d)(2). Wells then testified that during the meeting about the stolen marijuana, Pinto identified the lost $100,000 as hers. Upon the succeeding direct examination of Wells' ex-husband, Bruce Robinson, a question was asked about Robinson's discussions with Lambert concerning marijuana distribution. Counsel for Pinto again objected on grounds of hearsay. The court found that there was substantial evidence, independent of the statements at issue, that a conspiracy existed, that both defendants were members of the conspiracy and that the statements were made during the course and in furtherance of the conspiracy. Rec. vol. III at 101. The court subsequently restated its finding that the government had shown the existence of a conspiracy. Rec. vol. VII at 789.

*433 [6] Defendant apparently is arguing that the court failed to follow the "preferred order of proof" [FN3] by admitting co-conspirator hearsay before finding the existence of a conspiracy. That argument fails, primarily because the hearsay statements offered in the course of direct examination of Wells were admitted as admissions by Lambert. Even assuming the statements were admitted as co-conspirator hearsay, they would have been conditionally admissible subject to being connected up. See United States v. Hernandez, 829 F.2d 988, 994 (10th Cir.1987). The other statements which defendant now contends were improperly admitted were allowed after the trial court had found the existence of a conspiracy.

FN3. This court recently clarified the meaning of the term "preferred

order of proof" as it pertains to the admission of co-conspirator hearsay. In United States v. Hernandez, 829 F.2d 988 (10th Cir.1987), we stated that the "preferred order of proof" simply refers to the requirement that the trial court make the requisite factual determination of the existence of a conspiracy prior to allowing co-conspirator hearsay statements to be heard by the jury. Id. at 994 n. 6. We further stated that "this order of proof does not involve a right to a pretrial hearing on admissibility, and in no way precludes the trial judge from exercising his considerable discretion and conditionally admitting the statements subject to later being connected up." Id.

[7][8] Defendant further claims that the government had not shown the existence of the conspiracy as charged. Co-conspirator hearsay is properly admitted if the trial court makes a factual determination that the government has established, by a preponderance of the evidence, that: 1) a conspiracy existed; 2) the declarant and the defendant were members of the conspiracy; and 3) the hearsay statements were made in the course and in furtherance of the conspiracy. United States v. Esch, 832 F.2d 531, 537 (10th Cir.1987). There was substantial evidence of the existence of a conspiracy. Ritschel and Bono testified that they had purchased large quantities of marijuana from Lambert and each testified about obtaining marijuana which had been stored in defendants' basement. Wells then testified that Pinto claimed ownership of the stolen marijuana. Wells' testimony, which was not hearsay as to Pinto, linked Pinto to the drug trafficking, which was an integral part of the alleged conspiracy to evade taxes on income generated by the sale and distribution of marijuana. The trial court did not err in admitting the contested testimony.

III.

Defendant Pinto next claims that there was a fatal variance between the conspiracy as charged and the evidence adduced at trial, which she maintains indicated the existence of a second, uncharged conspiracy to possess, sell and distribute marijuana. Consequently, defendant argues, her convictions were based on a theory not charged in the indictment.

[9][10] A variance occurs when the evidence presented at trial establishes facts different from those alleged in the indictment. Dunn v. United States, 442 U.S. 100, 105, 99 S.Ct. 2190, 2193, 60 L.Ed.2d 743 (1979); United States v. Dickey, 736 F.2d 571, 581 (10th Cir.1984), cert. denied, 469 U.S. 1188, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985). In assessing a claim of a fatal variance, the pivotal inquiry is whether there has been a variance in proof which affects the substantial rights of the accused. United States v. Morris, 623 F.2d 145, 149 (10th Cir.), cert. denied, 449 U.S. 1065, 101 S.Ct. 793, 66 L.Ed.2d 609 (1980). This court has previously stated that such a variance occurs when the accused could not have anticipated from the indictment what evidence would be presented at trial. Id. "Another source of prejudice is the transference of guilt to an accused from incriminating evidence presented in connection with the prosecution of another in the same trial for a crime in which the accused did not participate." Id.

[11] The indictment charged that "[t]he object of the defendants' conspiracy was to knowingly and willfully hide substantial income from the sale and distribution of marijuana and to evade the payment of taxes on that and other income," which was accomplished by creating the appearance that funds used to

purchase the series of residences *434 came from loans when, as defendants knew, the funds came from the sale and distribution of marijuana. Rec. vol. I, doc. 1, at 2. In setting out the overt acts committed in furtherance of the conspiracy, the indictment alleged that during 1977, defendants possessed, sold and distributed, and aided and abetted in the possession, sale and distribution, of marijuana. Id. at 3. Although Pinto was not charged with conspiring to sell drugs, she could anticipate from the indictment what evidence would be presented at trial, in particular her involvement in the alleged overt act of possessing, selling and distributing marijuana. United States v. Morris, 623 F.2d at 149.

[12] Also meritless is Pinto's argument that she was prejudiced by an improper transference of guilt resulting from the evidence submitted on the tax evasion charges which indicated Lambert's post-1977 drug activities. As to the joint conspiracy charge, the evidence indicated that defendants acted in concert to effectuate the common illicit goal of evading taxes by concealing income derived from the sale and distribution of marijuana. See United States v. Dickey, 736 F.2d at 582. Pinto's allegation of prejudice arising from the evidence showing Lambert's likely source of income during the tax evasion indictment period is more pertinent to the issue of severance, and, in any event, the evidence of Lambert's post-1977 drug activities did not result in a transference of guilt affecting her substantial rights.

IV.

[13][14] Defendant Pinto next contends that the trial court committed reversible error in denying her motion for severance. She argues that she was prejudiced by the great disparity in the weight of the evidence admitted solely against Lambert, the disparity being exacerbated by the fact of their marital relationship.

The general rule in this circuit is that individuals jointly indicted should be jointly tried. United States v. Rinke, 778 F.2d 581, 590 (10th Cir.1985). The trial court's decision whether to sever is made within its sound discretion, and will not be reversed absent a strong showing of prejudice. United States v. Esch, 832 F.2d at 537. In ruling on a motion to sever, the trial court must weigh any potential prejudice caused by the joinder against considerations of economy and expedition in judicial administration. Id.; United States v. Rinke, 778 F.2d at 590.

The government presented the testimony and exhibits relating to the joint charges during the first portion of the trial, concluding with the summary testimony of IRS Special Agent Kenneth Wissel. The evidence that followed pertained to the tax evasion counts filed against Lambert. The government's order of proof facilitated the separation of the evidence and served to mitigate any potentially adverse effect of the evidence submitted solely against Lambert. Throughout the trial, the court admonished the jury to consider certain evidence only as to Lambert. As a result, the jury was able to compartmentalize the evidence as to each of the defendants and to properly apply it as the court instructed. United States v. Pack, 773 F.2d at 267.

Further, we cannot agree with Pinto's claim that her right to a fair trial was undermined by the disparity in the evidence against Lambert as compared to the alleged dearth of evidence implicating her. In a conspiracy case, a quantitative disparity in the evidence, without more, provides no justification for severance. United States v. Hack, 782 F.2d 862, 871 (10th Cir.), cert.

denied, 476 U.S. 1184, 106 S.Ct. 2921, 91 L.Ed.2d 549 (1986). Given the government's order of proof, the trial court's continuous admonitions and the fact that the interests of judicial economy were served by the avoidance of duplicitous separate trials, the trial court did not abuse its discretion in denying the motion for severance.

V.

[15] Both defendants next argue that the trial court erred in not dismissing the conspiracy count because the statute of limitations had expired before the charges *435 were filed on April 1, 1986. Their theory is that the offense of evading tax due on income derived from the sale and distribution of marijuana in 1977 was completed no later than April 15, 1978, the due date for the filing of their tax returns.

Under the Internal Revenue Code, the statute of limitations for a conspiracy to defraud the United States is six years. 26 U.S.C. s 6531; [FN4] United States v. Brunetti, 615 F.2d 899, 901-02 (10th Cir.1980). It therefore was incumbent upon the government to prove that the conspiracy was still in existence on April 1, 1980, and that at least one overt act in furtherance of the conspiracy was performed after that date. Grunewald v. United States, 353 U.S. 391, 396, 77 S.Ct. 963, 969, 1 L.Ed.2d 931 (1957); United States v. Brunetti, 615 F.2d at 901.

FN4. 26 U.S.C. s 6531 provides in pertinent part:
No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years--
(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

* * *

(8) for offenses arising under section 317 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

Defendants' theory, that the central purpose of the conspiracy was accomplished with the filing of the tax returns, ignores both the object of their conspiracy as charged in the indictment and the evidence presented at trial to establish the conspiracy. They were charged with conspiring to defraud the United States, in violation of 18 U.S.C. s 371, [FN5] "by impeding, impairing, obstructing, and defeating the lawful governmental functions" of the IRS "in the ascertainment, computation, assessment, and collection of income taxes...." Rec. vol. I, doc. 1, at 1. The indictment was based on one continuing conspiracy, the central object of which was not merely to evade taxes on marijuana income in 1978, but rather to immunize defendants from prosecution for tax evasion. Forman v. United States, 361 U.S. 416, 422-23, 80 S.Ct. 481, 485-86, 4 L.Ed.2d 412 (1960); see Grunewald v. United States, 353 U.S. at 405, 77 S.Ct. at 974 (distinguishing between acts of concealment done in furtherance of the main criminal objectives of the conspiracy and acts of concealment done solely for the purpose of covering up

the crime).

FN5. 18 U.S.C. s 371 provides in pertinent part:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The object of defendants' conspiracy, the concealment of income derived from the sale and distribution of marijuana in 1977, did not end with the filing of their income tax returns in 1978. The filing of the returns was but the first step in the process of evading taxes on that income, with additional overt acts subsequently undertaken to conceal the marijuana income in an attempt to make the evasion succeed. Forman v. United States, 361 U.S. at 423-24, 80 S.Ct. at 485-86. Because at least one overt act was committed within six years prior to the filing of the indictment, the trial court properly denied defendants' motion to dismiss the conspiracy count. United States v. Brunetti, 615 F.2d at 901.

VI.

Defendants' final contention is that the trial court erred by failing to give their tendered instruction setting out their theory of defense. Defendant Lambert also contends that the court erred in giving instruction 38, which addressed the cash expenditure method of proving tax evasion.

[16] Jury instructions must be evaluated as a whole. United States v. Grissom, 814 F.2d 577, 580 (10th Cir.1987). The trial court is given substantial discretion in tailoring and formulating its instructions, so long as they correctly state the law and fairly and adequately cover the issues *436 presented. United States v. Pack, 773 F.2d at 267. Although a defendant is entitled to an instruction regarding his theory of defense, the trial court need not follow the exact language in an instruction tendered by the defendant. United States v. Hoffner, 777 F.2d 1423, 1426 (10th Cir.1985).

[17] The defendants tendered the following instruction:

If the evidence fails to establish beyond a reasonable doubt that defendants had taxable income from sales of marijuana in 1977 then you must find the defendants not guilty as to Count I.

In instructions 9 through 15, the court advised the jury of the law pertaining to the conspiracy charge. Rec. vol. II, doc. 78, at 23-31. Instruction 10 provided that the government had the burden of proving beyond a reasonable doubt every essential element of the crime charged, including the existence of the conspiracy charged in the indictment. Id. at 24. Instruction 2 contained the substance of the indictment, in which defendants were charged with conspiring to conceal income received in 1977 from the sale and distribution of marijuana. Id. at 4. While defendants reiterate their previously rejected claim that there was no evidence to show such income, the fact remains that the jury was properly instructed that it had to find beyond a reasonable doubt that defendants had income in 1977 from the sale and distribution of marijuana. The trial court did not err in refusing to give the tendered instruction when the substance of the instruction was contained in the

charge given to the jury.

[18] Regarding instruction 38, defendant Lambert contends that the instruction was erroneous because it failed to require the government to prove his net worth at both the beginning and end of the indictment period and in addition was confusing and internally inconsistent. Due to the government's employment of the cash expenditure method of proof, it was not required to present formal net worth statements. United States v. Citron, 783 F.2d at 315; Taglianetti v. United States, 398 F.2d at 564-66. As to Lambert's corollary contention, we note that he did not submit a tendered instruction on the cash expenditure method of proof, and conclude that the trial court's instruction was neither confusing nor inconsistent, but rather properly directed the jury to determine whether expenditures in excess of reported income could be accounted for by assets available at the outset of the prosecution period. See Taglianetti v. United States, 398 F.2d at 565-66.

AFFIRMED.

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Citation 871 F.2d 1298 (CITE AS: 871 F.2D 1298)
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UNITED STATES of America, Plaintiff-Appellee (88-5195), Plaintiff-Appellant (88-5484),
v.
Billy York WALKER, Defendant-Appellant (88-5195), Defendant-Appellee (88-5484).

Nos. 88-5195, 88-5484.
United States Court of Appeals,
Sixth Circuit.
Argued Nov. 14, 1988.
Decided April 3, 1989.

Defendant was convicted after jury trial in the United States District Court for the Western District of Tennessee, Odell Horton, Chief Judge, of various federal banking laws. Defendant appealed. The Court of Appeals, Enslen, District Judge, sitting by designation, held that: (1) evidence of coconspirator's guilty plea was admissible as evidence of coconspirator's credibility, and (2) evidence of named borrowers' credit worthiness and their understanding of obligation to repay loans was irrelevant and inadmissible on charges of bank fraud.

Affirmed.

[1] CRIMINAL LAW k338(6)
110k338(6)
Evidence of coconspirator's guilty plea and plea agreement was admissible as evidence of coconspirator's credibility.

[2] WITNESSES k318
410k318
Introduction of entire plea agreement of codefendant is permitted, even where agreement contains promise to testify truthfully, since these details allow jury to consider fully possible conflicting motivations underlying codefendant's testimony, and thus codefendant's credibility.

[3] CONSPIRACY k24(6)
91k24(6)
Formerly 91k23
So called rule of consistency that requires where all possible coconspirators are tried together, and all but one are acquitted, remaining coconspirator's conviction must be reversed for lack of sufficient evidence, does not apply where coconspirators are tried separately or could have conspired with unindicted individuals.

[4] BANKS AND BANKING k509.10
52k509.10
Where bank officer arranges loans for named borrower, intending proceeds will benefit himself, and without disclosing his interest in loan transaction, he has acted in deceitful and dishonest manner in violation of bank fraud statute. 18 U.S.C.A. ss 371, 1344.

[5] BANKS AND BANKING k509.25
52k509.25
Evidence of named borrowers' credit worthiness and their understanding of obligation to repay bank loans was irrelevant, and thus, inadmissible in prosecution of defendant, a bank officer, for bank fraud; officer had arranged loans for his own benefit, concealing his interest in them from other bank officials. 18 U.S.C.A. ss 371, 1344.

[6] CRIMINAL LAW k150
110k150
Conspiracy to defraud bank account based upon misapplication of bank funds and false entries in bank records was not barred by statute of limitations, even though prosecution was not commenced until several years after loans of issue were made, where defendant continuously attempted to conceal his interest in loans by keeping payments on loans currently and, later, by giving coconspirators funds to make payments on defendant's behalf, thus establishing repayment of loans and concealment were objectives of conspiracy. 18 U.S.C.A. ss 371, 3282.

[7] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank official, made false entries in federal deposit insurance corporation questionaire when he failed to disclose loans made to third parties on his behalf was question for jury in prosecution alleging defendant made false entries. 18 U.S.C.A. s 1005.

[8] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank officer, was guilty of making false entries in bank records based upon recordation of interest payment on loans, which records failed to reveal that payments were not made with named borrower's funds or that loans were not made for named borrowers' benefit, was question for jury in prosecution alleging false entry in bank records.

*1299 W. Hickman Ewing, Jr., U.S. Atty., Frederick H. Godwin, Asst. U.S. Atty. (argued), Memphis, Tenn., for U.S.

James Wilson (argued), Hal Gerber, Memphis, Tenn., for Billy York Walker.

Before NELSON and BOGGS, Circuit Judges, and ENSLEN, District Judge. [FN*]

FN* Honorable Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

ENSLEN, District Judge.

Billy York Walker appeals his conviction following a jury trial on each count of a 28-count indictment alleging violations of various federal banking laws. [FN1] Prior to 1985, Mr. Walker was the president and majority shareholder of Farmers Bank located in Dyersburg, Tennessee. Most of the bank's business was agricultural in nature. Mr. Walker was also the owner, president and operator of Walker Grain Company ("Walker Grain"), a grain storage firm, located in the same town.

FN1. The indictment alleged violations of the following statutes: Count 1, conspiracy to commit bank fraud, 18 U.S.C. s 371, Counts 3-21, 24-26, false entries in bank records, 18 U.S.C. s 1005; Counts 22 and 28, false statement on loan application, 18 U.S.C. s 1014; and Counts 23 and 27, bank fraud, 18 U.S.C. s 1344.

Count 1 alleges that Walker and his life-long friend, Walter Hastings, conspired to defraud Farmers Bank, to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. s 371. Walker convinced Hastings to sign two promissory notes, one for $150,000 secured by stock owned by Hastings, and one for $118,000 which was unsecured. The proceeds of both loans were immediately deposited to Walker Grain's account at Farmers Bank. The loan applications did not disclose Walker Grain's interest in the loans. Walker personally approved both loans.

Originally, Hastings called Walker each time an interest payment was due and Walker made the payment using a Walker Grain check. In 1985, Walker started giving checks to Hastings and Hastings made the payments using his own checks. The overt acts in the conspiracy each involve separate interest payments on the two loans. The bank's records on each loan indicate that the loans were for Hastings' benefit and that Hastings made the interest payments. Counts 3-21 allege false entries in bank records based upon the failure of the records to indicate that the loans were not for Hastings' benefit and that he did not make the interest payments from his own funds.

In 1985, the bank's vice president in charge of loans, Larry James, noticed that the Hastings loans were becoming past due. He knew that Walker and Hastings were friends and offered to take the collection of these loans over for Walker, thinking Walker might be uncomfortable handling the accounts himself. Walker assured James that Hastings would repay the loans as soon as Hastings solved some other financial problems. An investigation conducted by the bank, at the suggestion of federal examiners, subsequently revealed Walker's interest in the Hastings loans. When confronted with the matter by bank officials, Walker shook his head and replied, "What can I say?" Thereafter, Walker took an indefinite leave of absence and never returned to the bank.

*1300 Walker's defense to counts 1 and 3-21 was that he lacked any intent to defraud the bank. He contends that he approved each loan in the ordinary course of business, based upon Hastings' credit worthiness, character, and reputation, as well as the bank's potential to profit from each loan. He claims that he lacked any intent to deceive the bank, although he admits that he did not tell the bank's board of directors of Walker Grain's interest in the loans. Walker contended that he did not think it necessary to tell the bank's board of directors about Walker Grain Company's interest in the Hastings loans, since the bank was only interested in profitability and since Hastings had the ability to repay the loans. [FN2] Walker testified that Hastings understood his obligation to repay the loans, but understood that the money would come from Walker. Hastings testified that he had no intention of repaying the loans and thought Walker would do so.

FN2. Hastings' financial statement filed with the bank indicated Hastings'

tax evasion case — nature of crime requires concealment

Citation
571 F.2d 376.
78-1 USTC P 9321, 2 Fed. R. Evid. Serv. 1284
(CITE AS: 571 F.2D 376)

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UNITED STATES of America, Plaintiff-Appellee,
v.
Fred T. MACKEY, Defendant-Appellant.
Nos. 77-1074 and 77-1978.
United States Court of Appeals,
Seventh Circuit.
Argued Dec. 7, 1977.
Decided Feb. 22, 1978.

Defendant was convicted before the United States District Court for the Northern District of Indiana, South Bend Division, Allen Sharp, J., of attempted income tax evasion and of conspiracy to evade payment of income taxes, and he appealed. The Court of Appeals, Sprecher, Circuit Judge, held that (1) a witness' hearsay testimony that defendant's alleged coconspirator told him that comments he made to IRS agents would "probably send him (the coconspirator) to jail" was admissible, since the statement was "in furtherance of" the concealment portion of the conspiracy, and since the coconspirator's statement was made "during the course" of the conspiracy, (2) although a misstatement of law by the prosecutor in closing argument can be ground for reversal, and although defendant claimed that the prosecutor's closing comments suggested that the jury, in order to acquit, would have to believe that the prosecution suborned two witnesses to perjure themselves, an examination of the record disclosed that the prosecutor made no statement of law in his closing argument and merely stated that he "resent(ed)" defense counsel's argument that the aforesaid two prosecution witnesses had been induced to testify as they did out of fear of further prosecution, (3) while defendant argued that his conviction on the indictment's second count, attempted income tax evasion, must be reversed because two of the affirmative acts of tax evasion alleged were not proved, defendant did not contest that there was sufficient evidence to prove the other three affirmative acts alleged in that count and therefore the conviction had to be affirmed and (4) prosecution's failure to provide defendant with a copy of a transcript of an interview by an internal revenue agent with one prosecution witness was not a Brady violation, since defendant's request for Brady materials was general, and since nondisclosure of the aforesaid interview, which was merely additional material for impeaching an already thoroughly impeached witness, did not deprive defendant of a fair trial.

Affirmed.

[1] CRIMINAL LAW k423(1)
110k423(1)
In prosecution for conspiracy to evade payment of income taxes and attempted tax evasion, a witness' hearsay testimony that defendant's alleged coconspirator told him that comments he made to IRS agents would "probably send him [the coconspirator] to jail" was admissible, since the statement was "in furtherance of" the concealment portion of the conspiracy, and since the coconspirator's statement was made "during the course" of the conspiracy; moreover, even if the testimony were inadmissible, its admission was harmless error since it was merely a single comment in an eight-day trial that was only

directly inculpatory as to the coconspirator, not defendant. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371; Federal Rules of Evidence, rule 801(d)(2)(E), 28 U.S.C.A.

[1] CRIMINAL LAW k1169.7
110k1169.7
In prosecution for conspiracy to evade payment of income taxes and attempted tax evasion, a witness' hearsay testimony that defendant's alleged coconspirator told him that comments he made to IRS agents would "probably send him [the coconspirator] to jail" was admissible, since the statement was "in furtherance of" the concealment portion of the conspiracy, and since the coconspirator's statement was made "during the course" of the conspiracy; moreover, even if the testimony were inadmissible, its admission was harmless error since it was merely a single comment in an eight-day trial that was only directly inculpatory as to the coconspirator, not defendant. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371; Federal Rules of Evidence, rule 801(d)(2)(E), 28 U.S.C.A.

[2] WITNESSES k286(2)
410k286(2)
Scope of redirect examination is a matter firmly committed to the sound discretion of the trial court.

[3] WITNESSES k287(2)
410k287(2)
Where the district court decided that the subject matter of defense counsel's cross-examination of a witness dealt with meetings between the witness and defendant's alleged coconspirator without any apparent time limitation, the court did not abuse its discretion in then allowing the prosecution, on redirect examination, to ask the witness about one meeting between him and the coconspirator not specifically raised in cross-examination.

[4] CRIMINAL LAW k662.11
110k662.11
Formerly 110k662(1)
Defendant's Fifth Amendment right to confront and cross-examine his alleged coconspirator was not violated by the admission of a witness' hearsay testimony to the effect that the coconspirator told him that his comments to IRS agents would "probably send him [the coconspirator] to jail, since defendant had the opportunity to cross-examine the witness as to whether the statement was actually made and the statement, itself, was basically reliable, being a statement against penal interest and not dependent on the coconspirator's recollection.

[5] CONSPIRACY k24.15
91k24.15
Formerly 91k23
The last overt act charged and proved in an indictment may, but does not always, mark the duration of the conspiracy. 18 U.S.C.A. s 371.

[6] CRIMINAL LAW k1119(4)
110k1119(4)
Although a misstatement of law by the prosecutor in closing argument can be ground for reversal, and although defendant claimed that the prosecutor's closing comments suggested that the jury, in order to acquit, would have to believe that the prosecution suborned two witnesses to perjure themselves, an examination of the record disclosed that the prosecutor made no statement of law in his closing argument and merely stated that he "resent[ed]" defense counsel's argument that the aforesaid two prosecution witnesses had been induced to testify as they did out of fear of further prosecution.

[7] CRIMINAL LAW k726
110k726
Although statements to a jury suggesting some relationship between a defendant's fraudulent activities and the jurors' insurance premiums or taxes is improper, and although the prosecutor, in the instant attempted tax evasion trial, did say at one point "we recognize our responsibility to the Government to pay our taxes," such comment was in response to defense counsel's argument that $2,000,000 is a lot of money and that some of the expenditures that were being used as evidence were for the benefit of defendant's son; the prosecutor's comment was intended to dispel any sympathy for defendant on this point, not to appeal to the jury's pecuniary interests. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371.

[8] CRIMINAL LAW k726
110k726
In light of defense counsel's closing argument, the prosecutor rightly concluded that defendant was attempting to shift the blame to his alleged coconspirator, and there was thus no error in the prosecutor presenting his response to that issue in a colorful fashion, i. e., referring to the Biblical story of the slaying of Abel by Cain and quoting Cain's statement to God "I'm not my brother's keeper.".

[9] CRIMINAL LAW k706(3)
110k706(3)
To the extent there is ever a duty to complete an impeachment, it will only arise once the witness categorically denies having made the prior inconsistent statement, not when he merely fails to remember whether or not he made it.

[10] CRIMINAL LAW k1171.8(1)
110k1171.8(1)
Even if the prosecution, in regard to the impeachment of one of its witnesses who gave an unexpected answer and then denied making a prior inconsistent statement before a magistrate, had a duty to complete the impeachment by offering into evidence a transcript of the proceedings before the magistrate, it was difficult to fathom what harm to defendant's case attended that error.

[11] CRIMINAL LAW k700(1)
110k700(1)

Formerly 110k700
In prosecution for attempted income tax evasion and conspiracy to evade payment of income taxes, defendant was not denied a fair trial by reason of the prosecution's possible misstatement in a letter that the fictitious bank account alleged in the attempted tax evasion count was maintained at the Citizen's Trust Bank in Atlanta, Georgia, and then subsequently proving that the account in fact was kept at the Gary National Bank. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371.

[12] INTERNAL REVENUE k5291.1
220k5291.1
Formerly 220k5291, 220k2447
In a prosecution for attempted tax evasion, the prosecution must prove some affirmative act constituting attempt to evade or defeat payment of taxes, but it need not prove each affirmative act alleged. 26 U.S.C.A. (I.R.C.1954) s 7201.

[13] INTERNAL REVENUE k5299
220k5299
Formerly 220k2451.2
While defendant argued that his conviction on the indictment's second count, to wit, attempted income tax evasion, must be reversed because two of the affirmative acts of tax evasion alleged were not proved, defendant did not contest that there was sufficient evidence to prove the other three affirmative acts alleged in that count and therefore the conviction had to be affirmed; furthermore, there was in fact sufficient evidence to support a finding that defendant committed all the affirmative acts alleged. 26 U.S.C.A. (I.R.C.1954) s 7201.

[14] INDICTMENT AND INFORMATION k10.2(8)
210k10.2(8)
While defendant claimed that there was no evidence before the grand jury to support a charge of subornation of perjury, which was the indictment's third count, and that the inclusion of such charge both as a separate count and as part of each of the other two counts, on which defendant was convicted, required reversal of his conviction, nothing in defendant's one-sided summary of the grand jury proceedings showed that the lower court erred in assessing the grand jury record and in then overruling defendant's claim; furthermore, defendant failed to certify the grand jury transcript as part of the record for appeal.

[15] CRIMINAL LAW k627.8(1)
110k627.8(1)
While defendant claimed that the district court erred in requiring him to produce documents without a fuller presentation by the prosecution to support its motion, defendant failed to contest the district court's finding that production of the documents would "expedite the trial in this case," and more importantly, defendant failed to allege any prejudice caused by the court's order. Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

[16] CRIMINAL LAW k627.8(3)
110k627.8(3)
Prosecution's failure to provide defendant with a copy of a transcript of an interview by an internal revenue agent with one prosecution witness was not a Brady violation, since defendant's request for Brady materials was general, and since nondisclosure of the aforesaid interview, which was merely additional material for impeaching an already thoroughly impeached witness, did not deprive defendant of a fair trial.

[17] CRIMINAL LAW k627.7(4)
110k627.7(4)
Failure of the prosecution, in tax evasion case, to provide defendant with the memorandum of an interview of a prosecution witness relating to his narcotics activities was not a violation of the Jencks Act, since the information contained in the interview did not "relate to" the witness' testimony. 18 U.S.C.A. ss 3500, 3500(e)(1).

*379 Harvey M. Silets, Chicago, Ill., for defendant-appellant.

Charles E. Brookhart, Myron C. Baum, Abraham M. Poretz, Tax Div., U. S. Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Before CUMMINGS and SPRECHER, Circuit Judges, and CAMPBELL, Senior District Judge.[FN*]

FN* Senior District Judge William J. Campbell, of the Northern District of Illinois, is sitting by designation.

SPRECHER, Circuit Judge.

The case involves a large number of alleged errors by the district court in a criminal trial where the defendant was convicted both of attempted tax evasion in violation of 26 U.S.C. s 7201 and conspiracy to evade the payment of taxes in violation of 18 U.S.C. s 371. Defendant's chief arguments deal with the admissibility of the hearsay declarations of a co-conspirator not on trial, the propriety of some of the prosecutor's closing remarks and the failure of the prosecution to provide materials that might have been used by the defendant to impeach one of the prosecution's main witnesses.

I

This case involves two consolidated appeals arising out of the same district court case. Initially, defendant appeals his convictions for tax evasion and conspiracy on the basis of numerous assigned errors at trial. Defendant also appeals the district court's denial of his motion for a new trial based on "newly discovered" evidence that defendant claims was subject to disclosure by the government under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and/or the Jencks Act, 18 U.S.C. s 3500. The facts underlying the convictions will be discussed first and those relevant to the motion for a new trial will be described subsequently.

A

The defendant, Fred T. Mackey, and his alleged co-conspirator, F. Lawrence Anderson, were charged in a five count indictment. Count I charged the defendant with conspiracy to evade payment of income tax and to defraud the United States by impeding the Internal Revenue Service in the collection of

revenue in violation of 18 *380 U.S.C. s 371.[FN1] Count II charged the defendant with attempted tax evasion in violation of 26 U.S.C. s 7201.[FN2] Count III charged the defendant with subornation of perjury in violation of 18U.S.C. s 1622.[FN3] Counts IV and V of the indictment related only to F. Lawrence Anderson.[FN4]

FN1. That section provides:
If two or or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
18 U.S.C. s 371.

FN2. That section provides:
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
26 U.S.C. s 7201.

FN3. That section provides:
Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.
18 U.S.C. s 1622.
The district court directed a verdict in favor of the defendant on this count of the indictment. Nonetheless, its inclusion at the trial is claimed as a basis for reversal. See part VII of this opinion infra.

FN4. F. Lawrence Anderson was severed from defendant's trial due to ill health. He was subsequently tried and acquitted of all charges against him in the indictment.

The claims in the indictment stem from a series of events subsequent to a $2,488,712 stipulated settlement of June 5, 1972, between the defendant and the Internal Revenue Service in a civil case before the Tax Court for back taxes and penalties for the period from 1954 through 1961 and 1963 through 1965. It was this large sum of money due and owing the federal government that the prosecution claims the defendant conspired and attempted to avoid paying.
The defendant's trial lasted for over a week, during which the prosecution presented 34 witnesses and over 100 documents. In turn, the defendant presented three witness on his behalf. Since we cannot describe all of the evidence presented at trial without unduly prolonging this opinion, we will focus on the important points in the government's and defendant's cases.
The prosecution presented evidence as to six affirmative acts of attempted tax evasion committed by the defendant. First, the prosecution showed that the defendant had substantial control over three companies, Gibraltar Mutual Insurance Company, Gibraltar Industrial Insurance Company and M.W.E. & S.

Investment Company (M.W.E. & S.), and that he manipulated them so that most of the assets of the three were kept in M.W.E. & S. which left them potentially at the defendant's disposal. Second, the prosecution presented evidence that several checks of M.W.E. & S. were used to purchase personal goods and services for the defendant, and therefore, a bank account at the Gary National Bank placed in the company's name may have been "fictitious." Third, the defendant was shown to have made substantial purchases in cash, the source of which was generally unknown. Fourth, the prosecution presented evidence that defendant used money from M.W.E. & S. and the insurance companies to pay for various personal items, including, among other things, a security system and swimming pool for the defendant's home. Fifth, the prosecution showed that defendant had kept mortgages on his property, notwithstanding that there was no money due and owing to anyone. Finally, it was shown that defendant had placed his assets with another person and company by giving $25,000 in cash to a Carl Smith to invest in a company named A & D Realty, Inc. (A & D).

The prosecution's conspiracy charge is somewhat more complex. It revolves around the formation by F. Lawrence Anderson, defendant's co-conspirator, and Robert F. Deal, defendant's nephew by marriage, of A & D, which purchased the defendant's *381 home from the IRS.[FN5] It was the prosecution's theory that A & D was created for the defendant's benefit so that his resources could be placed secretly in A & D and thereby be protected from collection by the Internal Revenue Service. The defendant claimed that A & D was a legitimate realty company with bona fide investors. The prosecution presented three key witnesses on the conspiracy count who were purportedly shareholders in A & D, but who testified that they, in fact, had not invested their own money in the enterprise. Carl Smith, a pharmacist in a building owned by defendant, testified that he was initially contacted by Mr. Anderson about an "investment" in A & D Realty. He testified further that he was called by defendant to come to his office, whereupon he was given by the defendant $25,000 in cash in a paper bag and was told to purchase a cashier's check payable to A & D Realty and to take the check to Mr. Anderson. Smith testified that he did this, and that at some indeterminate time later he signed an A & D stock certificate for a $25,000 investment.

> FN5. The house was sold at auction in partial satisfaction of the two million dollars due and owing the IRS. It was initially purchased by an unrelated party at the first auction, but that party was unable to acquire sufficient funds to make the down payment. A & D Realty subsequently purchased the property for $136,000. The defendant continued to reside at his house throughout the entire period prior to trial.

A second witness, Warren E. Dotson, an automobile tire dealer, testified that defendant Mackey had asked him about investing in A & D Realty. In response to Dotson's comment that he lacked the money to invest, defendant said that Dotson "didn't need any" (Tr. at 672-75). Subsequently, Dotson was contacted by co-conspirator Anderson who gave Dotson $12,000 in cash and told him to take it to a bank and to get a cashier's check payable to A & D Realty. Dotson returned the check to Anderson's secretary. Later, just before he was to testify before the grand jury, Dotson was invited to an A & D Realty shareholders' meeting at Anderson's house, at which time he signed the

company's stockholders book and a certificate for 60 shares of its stock.[FN6]

FN6. Warren Dotson's testimony was impeached by defense counsel on cross-examination. He had testified before the grand jury that the $12,000 was his own. He subsequently was indicted and pleaded guilty to perjury. As a part of his plea bargain for probation, Dotson promised to testify against the defendant. In addition, there was some reason to believe that Dotson had received $12,000 in a loan from the Small Business Administration, and that he testified that the money had come from Anderson to conceal his misuse of that loan which is a criminal offense.

The third witness, Dr. Edwin G. Moore, testified that he had been contacted by F. Lawrence Anderson about loaning Anderson money for some real estate investments. Dr. Moore agreed to do so, wrote a check payable to A & D Realty for the sum of $10,000 and took it to Anderson. In return, Dr. Moore immediately was given $10,000 in cash by one of Anderson's employees.

In addition to the evidence of a conspiracy between the defendant and F. Lawrence Anderson to have A & D Realty established and to place defendant's assets in the firm for the purpose of purchasing defendant's home, the prosecution sought to demonstrate the existence of a conspiracy to cover-up the true nature of A & D Realty. The primary evidence used was F. Lawrence Anderson's false grand jury testimony in April 1975, that Messrs. Smith and Dotson and Dr. Moore were actual investors in A & D Realty (Exhibit 33a). The concealment phase of the conspiracy was alleged to have continued until the date of the indictment.

Based primarily on the evidence described above, the jury found the defendant guilty on both the conspiracy and tax evasion counts in the indictment. The defendant appeals both convictions relying on several claimed errors by the district court during the trial.

B

As suggested above, Carl Smith's testimony that he received cash from the defendant and was told to invest it in A & D *382 Realty was an important part of the prosecution's conspiracy case. Subsequent to the entry of judgment in this case, defense counsel discovered evidence indicating that Smith might have been involved in the trafficking of narcotics before and after he supposedly received $25,000 in cash from defendant. While investigating this possibility, defense counsel discovered that agents of the Internal Revenue Service, including one who was investigating the defendant, had interrogated Smith about his narcotics activity. The IRS had elicited from Smith, in return for possible consideration in other matters, a statement which he refused to sign without his attorney present and which, in fact, he never did sign.

Defense counsel, believing that the evidence of Smith's narcotics trafficking was significant because it was a possible source for the $25,000 Smith claimed the defendant had given him, and also because it was a source that Smith would have a strong motive to conceal, moved for a new trial under Fed.R.Crim.P. 33 based on evidence that allegedly was withheld by the prosecution.

A hearing on the motion was held. During that hearing it was shown that defense counsel had evidence of Smith's possible narcotics trafficking available to him prior to trial. Smith had been questioned before the Grand Jury by the prosecution about a previous interview he had had with the

government about narcotic transactions.[FN7] Smith's grand jury testimony was provided to defense counsel during pre-trial discovery.

FN7. During the grand jury testimony of Carl Smith on May 8, 1975, Smith was questioned by the prosecutor as follows:
Q. All right. Now, Mr. Smith, sometime ago, were you interviewed by a representative of Narcotics Bureau in connection with some transactions?
A. Yes, sir.
Q. All right. During that period of time did you tell this Narcotics Agent that you had no other source of income other than the salary that you received from your employment?
A. Yes, sir.

After the hearing, the court denied defendant's motion for two reasons. First, the court held that this evidence was not "newly discovered" because defense counsel could have located it had he exercised due diligence. Second, the court determined that the evidence was cumulative since it could only be used to impeach Smith's testimony which already had been impeached severely by defense counsel.[FN8] The defendant appeals from the district court's denial of his motion for a new trial.

FN8. Smith had testified previously before the grand jury investigating the defendant that he had invested his own money in A & D Realty. In fact, he had told the same story to his wife, parents and the Internal Revenue Service. Smith was subsequently indicted and convicted for perjury based on this testimony before the grand jury. In addition, Smith was granted immunity after his perjury conviction so that he would testify again before the grand jury and at the trial.

II

[1] Defendant's first argument is that the district court erred in admitting, through Dr. Moore's testimony, the statement by F. Lawrence Anderson made in August 1975, that Dr. Moore's comments to the IRS would "probably send" Anderson to jail. During cross-examination, defense counsel asked Dr. Moore about various conversations he had had with Mr. Anderson. From Dr. Moore's answers, defense counsel elicited the fact that the defendant had never been present during any of their meetings.

On redirect examination, the prosecution asked about a conversation between Dr. Moore and Anderson that occurred subsequent to the former's appearance before the grand jury. Defense counsel objected on the ground that the question was beyond the temporal scope of the cross-examination. The court overruled the objection on the basis that it fell within the subject matter of the cross-examination.

[2][3][4] In response to the question, Dr. Moore testified that Anderson told him that the comments to the Internal Revenue Service *383 agents would "probably send him (Anderson) to jail . . .." (Tr. at 771). Defendant argues primarily [FN9] that since the statement was made neither "in the course of" nor "in furtherance of" the conspiracy, as required by Fed.R.Evid. 801(d)(2)(E), it was inadmissible hearsay and that its admission against the defendant was prejudicial error.

FN9. Defendant also appears to argue that the question on redirect examination that elicited the hearsay statement was beyond the scope of cross-examination. The general rule is that the scope of redirect examination is a matter firmly committed to the sound discretion of the trial court. United States v. Hodges, 480 F.2d 229, 233 (10th Cir. 1973); Chapman v. United States, 346 F.2d 383, 388 (9th Cir.), cert. denied, 382 U.S. 909, 86 S.Ct. 249, 15 L.Ed.2d 161 (1965). See also Schutter Candy Co. v. Stein Bros. Paper Box Co., 371 F.2d 340, 342 (7th Cir. 1966). Here the district court decided that the subject matter of the cross-examination dealt with meetings between Anderson and Moore without any apparent time limitation. On redirect examination, the prosecution asked about one meeting between Anderson and Moore not specifically raised in cross-examination. The judge certainly did not abuse his discretion by deciding that that line of questioning was appropriate. That the questioning elicited a response that was damaging to defendant does not affect the propriety of the court's decision as to the appropriate scope of redirect examination.
Defendant also asserts that the admission of Anderson's statement to Dr. Moore at the trial violated the defendant's constitutional right under the Fifth Amendment to confront and cross-examine Anderson. The assertion lacks merit. Defendant had the opportunity to cross-examine Dr. Moore as to whether the statement was actually made and the statement, itself, was basically reliable, being a statement against penal interest and not dependent on Anderson's recollection. See United States v. Cogwell, 486 F.2d 823, 833-35 (7th Cir. 1973), cert. denied, 416 U.S. 959, 94 S.Ct. 1975, 40 L.Ed.2d 310 (1974).

It seems to us quite clear that if the conspiracy can be said to have continued up to the time of Anderson's statement to Dr. Moore then that statement was "in furtherance of" the concealment portion of the conspiracy. The standard to be applied is whether some reasonable basis exists for concluding that the statement furthered the conspiracy. See United States v. Moore, 522 F.2d 1068, 1077 (9th Cir. 1975), cert. denied, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637 (1976); United States v. Knippenberg, 502 F.2d 1056, 1061 (7th Cir. 1974). While the statement is susceptible of alternative interpretations, it is quite reasonable to view it as an attempt to persuade Dr. Moore either to alter his statements to the IRS or to stop talking to the agency altogether.

Somewhat less clear is whether Anderson's statement was made "during the course" of the conspiracy. This court has recognized that "(t)he duration of a conspiracy . . . depends upon the scope of the agreement entered into by its members" and is, therefore, dependent on the facts in each case. United States v. Hickey, 360 F.2d 127, 141 (7th Cir.), cert. denied, 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966); United States v. Nowak, 448 F.2d 134, 139 (7th Cir. 1971). In addition, in determining whether there has been an agreement to conceal, the Supreme Court has stated that there must be more than "circumstantial evidence showing merely that . . . the conspirators took care to cover up their crime in order to escape punishment." Grunewald v. United States, 353 U.S. 391, 402, 77 S.Ct. 963, 972, 1 L.Ed.2d 931 (1957).

See also Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953); Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

On the record before us, we find that sufficient evidence existed from which a jury could infer that an agreement to conceal existed at the outset of the conspiracy. First, the indictment alleged and the prosecution proved a broad effort to evade taxes which by its nature required a substantial effort at concealment. Nowak, supra, 448 F.2d at 139. Thus, unlike in Lutwak and Krulewitch, where the object of the conspiracy was a discrete criminal act, here we deal with a crime that had no specific terminating event.[FN10] Therefore, *384 the nature of the attempted crime by itself provides a substantial inference of agreement to conceal or cover-up.

FN10. This case is distinguishable from both United States v. Flecha, 539 F.2d 874 (2d Cir. 1976) and United States v. Floyd, 555 F.2d 45 (2d Cir. 1977), on the basis that in both decisions the court found an event which terminated the conspiracy. In Flecha, the court concluded quite reasonably that the arrest of the conspirators ended the conspiracy. In Floyd, the court found that the conspiracy had as its sole object the robbing of a bank. Once that object was concluded, the conspiracy terminated. In this case, there is no such single event, and, therefore, we must examine all of the evidence to determine what the jury could reasonably decide the duration of the conspiracy had been.

In addition, there was the evidence of the meeting of the A & D stockholders and the false testimony of Anderson before the grand jury. The successful commission of the crime, rather than its mere concealment from investigation, required that the "investors" true status not be uncovered. Both acts, therefore, could be viewed by a jury as relating back to the decision to evade taxes. Viewing the case in the light most favorable to the government, we conclude that there was sufficient evidence from which a jury could determine that a cover-up of the crime was one of the central objects of the conspiracy as originally conceived. Therefore, the conspiracy continued until the date of the filing of the indictment, and Anderson's statement to Dr. Moore was made "during the course" of the conspiracy.

[5] We should note finally in dealing with this issue that, even if we were disposed to conclude that this evidence was inadmissible, we would still hold that its admission was harmless error under Fed.R.Crim.P. 52(a). It was merely a single comment in an eight-day trial that was only directly inculpatory as to Anderson, and not the defendant. Also, there is substantial independent evidence of the defendant's guilt. See United States v. Rizzo, 418 F.2d 71, 79 (7th Cir. 1969), cert. denied sub nom., Tornabene v. United States, 397 U.S. 967, 90 S.Ct. 1006, 25 L.Ed.2d 260 (1970); United States v. Fellabaum, 408 F.2d 220, 226 (7th Cir.), cert. denied, 396 U.S. 858, 90 S.Ct. 125, 24 L.Ed.2d 109 (1969). We, therefore, conclude that the admission of Anderson's statement to Dr. Moore is not a sufficient basis for reversal.[FN11]

FN11. Although defendant's brief is not clear on the point, it appears to argue in a footnote that the duration of the conspiracy cannot exceed the date of the last overt act charged and proved in the indictment. Since the

last overt act in this case was Anderson's statements to the grand jury and his statement to Dr. Moore occurred subsequent to the grand jury appearance, the defendant argues that the statement was inadmissible. Defendant's reliance on Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196 (1946), to support his position is misplaced. In that case the Court held that the last overt act was also the object of the conspiracy, and therefore marked its termination. Id. at 216-17, 67 S.Ct. 224. The Court did not purport to establish a rule that the last overt act, of necessity, marks the duration of the conspiracy. In fact, the Court, itself, only stated that the overt acts "may" mark the duration of the conspiracy, and not that they must. Id. at 216, 67 S.Ct. 224. We should also note that defendant later in his brief argued that it was error for the prosecutor in his closing argument to make reference to Anderson's remark to Dr. Moore. Given our holding that the statement was admissible, it is obvious that defendant's argument has become frivolous.

III

[6] Defendant's next set of arguments deals with the propriety of the prosecutor's closing argument at the trial. The basis for the defendant's first assignment of error is the prosecutor's comments suggesting, in the defendant's view, that the jury would have to believe that the prosecution suborned witnesses Smith and Dotson to perjure themselves in order to acquit the defendant. Based on this characterization, the defendant argues that no such finding was necessary to acquit, and therefore, concludes that the prosecutor's statement represented a misstatement of the law within the meaning of United States v. Bohle, 445 F.2d 54 (7th Cir. 1971), and United States v. Phillips, 527 F.2d 1021 (7th Cir. 1975).

Defendant properly cites Bohle and Phillips for the proposition that a misstatement of law by the prosecutor in a closing argument can be a ground for reversal.[FN12] However, *385 the defendant here seriously exaggerates the nature of the prosecutor's remarks. The prosecutor made no statements of law in his closing argument. All that he did was respond to defense counsel's argument that Smith and Dotson had been induced to testify as they did out of fear of further prosecution. The prosecutor raised the point merely to state that he "resent(ed) it" (Tr. at 1063). There was no statement here, like that repeated several times in Phillips, that the jury had to find the prosecutor guilty of wrongdoing before it could acquit the defendant. We find no error in the prosecutor's comments on this point.[FN13]

FN12. This case is readily distinguishable from Bohle and Phillips. In Bohle, the prosecutor told the jury that in its evaluation of the defendant's insanity defense it could properly consider the presumption of sanity. However, as a matter of law, the jury was not permitted to consider that presumption. The court held that such a serious misstatement of the law on the central issue to the defendant's case was error. 445 F.2d at 71. There is no comparable misstatement of law in this case. In Phillips, the prosecutor on three separate occasions, and with the approval of the court in the presence of the jury, argued "you're going to have to find, I suppose, that I conspired with the agent to commit this crime by bringing it to you." 527 F.2d at 1022. The court correctly

decided on those facts that the jury might reasonably have concluded that it had to find the prosecutor guilty of misconduct before it could acquit the defendant. The argument to the jury in this case was significantly less likely to mislead the jury.

FN13. Defendant also argues that the prosecutor's remarks about Dotson and Smith amounted to "placing his personal integrity behind the truthfulness of the witness(es)." United States v. Phillips, 527 F.2d 1021, 1023 (7th Cir. 1975). We cannot agree. Nothing in the prosecutor's comments even approaches the defendant's characterization that the argument "amounts to placing the prosecutor in the same conspiratorial nest with the witnesses." Id. at 1025.

[7] Next, defendant complains that the prosecutor in his closing argument improperly appealed to the pecuniary interests of the jury. This court has held that statements to a jury suggesting some relationship between a defendant's fraudulent activities and the jurors' insurance premiums or taxes is improper and potentially reversible error. See United States v. Trutenko, 490 F.2d 678, 679 (7th Cir. 1973); Epperson v. United States, 490 F.2d 98, 100 (7th Cir. 1973). However, this is not such a case.

At one point the prosecutor did say, "we recognize our responsibility to the Government to pay our taxes" (Tr. at 1080). However, the comment was in response to defense counsel's argument that two million dollars is a lot of money and that some of the expenditures that were being used as evidence were for the benefit of defendant's son. The prosecutor's argument was intended to dispel any sympathy for the defendant on this point, and not to appeal to the jury's pecuniary interests.

[8] Defendant's final assignment of error based on the closing argument is that the prosecutor made an uncalled for reference to the Biblical story of the slaying of Abel by Cain that was included merely for its highly prejudicial effect. During his argument, the prosecutor characterized the defendant's defense as an effort to shift the defendant's responsibility to F. Lawrence Anderson. In so doing, he quoted Cain's statement to God, "I'm not my brother's keeper" (Tr. at 1085). Defendant claims that he never attempted to shift the blame to Anderson in his argument. However, in his closing argument, defense counsel twice suggested that the arrangements for fraudulent shareholders might have been in Anderson's interest rather than the defendant's. He argued:

If Mr. Anderson was working some kind of a plan with . . . Dr. Moore, for example, . . . that is their problem. There's no proof whatsoever that Mr. Mackey had anything to do with that.

If you choose to believe that Mr. Dotson got the twelve thousand dollars, that he . . . invested in A & D from Mr. Anderson, that may be something between them, but you can't hold that against Mr. Mackey.

(Tr. at 1039). In light of these arguments, the prosecutor rightly concluded that defendant was attempting to shift the blame to Anderson. There is no error in presenting his response to this issue in a colorful fashion.

Based on our evaluation of the closing arguments of both the defense counsel and *386 the prosecutor, we conclude that the district court rightly decided that the prosecutor "in response to defense arguments made struck hard blows,

but he did not strike foul ones" (Tr. at 1090). See Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). We, therefore, find no error based on the prosecution's closing argument.

IV

One of the prosecution's witnesses, Artie Jenkins, was asked about the source of $5000 in cash that he had used to attempt to post bail for the defendant before a magistrate in Hammond, Indiana. The prosecution sought to elicit from the witness the fact that he had acquired the money from Gibraltar Insurance Company. Jenkins, however, stated that the money had come from his mother (Tr. at 145). In an effort to impeach this statement, the prosecutor asked if Jenkins had told the magistrate in charge of defendant's bail that the money had come from Gibraltar Insurance Company. Jenkins responded that he could not recall. The prosecutor then asked about other statements that Jenkins made before the magistrate, but he again responded that he did not recall. The prosecution did not attempt to offer into evidence a transcript of the proceedings before the magistrate in order to complete the impeachment.

Defendant claims that the prosecution, having emphasized the witness's comments to the magistrate, had a duty to complete the impeachment and failure to do so was prejudicial error. We disagree with defendant's analysis on both points.

[9][10] First, to the extent there is ever a duty to complete an impeachment, it will only arise once the witness categorically denies ever having made the prior inconsistent statement, United States v. Bohle, 445 F.2d 54, 73 (7th Cir. 1971), and not when he merely fails to remember whether or not he has made it. Second, even if a duty to impeach had arisen, it is difficult to fathom what harm to the defendant's case attended that error. The witness's testimony was generally favorable to defendant, the effort at impeachment was modest and the witness's significance to the prosecution's case was de minimis. Under these circumstances, we find no error in the prosecution's conduct.

V

Defendant argues that the prosecution deceived him by first stating in a bill of particulars that the fictitious bank account alleged in Count II of the indictment was maintained at the Citizens Trust Bank in Atlanta, Georgia and then subsequently proving that the account in fact was kept at the Gary National Bank. We find no basis in defendant's argument for reversal.

Initially, we note that the letter sent to defendant was not a bill of particulars. The district court denied the defendant's motion for a bill of particulars on September 24, 1976, because of the extensive discovery permitted. Therefore, cases cited by defendant dealing with misstatements in a bill of particulars are inapposite.

[11] There remains the possibility that defendant was sufficiently misled by the representations of the prosecution so that he was deprived of a fair trial. Defendant, in this respect, fails to identify how he was prejudiced by the prosecution's statement. In fact, after the trial below, counsel for the defendant stated, "I did not recall specifically that the letter related to the fictitious bank accounts until I had an opportunity to review it last night in the motel" (Tr. at 1100). This statement seems to belie any reliance by the defendant on the prosecution's letter. We agree with the district court's assessment that "(i)t would appear to me that defense counsel should have known

about the M.W.E. & S. account and the Government's contentions in regard to it a long time ago" (Tr. at 1100). The prosecution's possible misstatement did not deny defendant a fair trial.

VI

Defendant's next two arguments are that the conviction under Count II must be reversed *387 because two of the affirmative acts of tax evasion alleged in the indictment were not proved. Defendant asserts that no evidence was presented as to fictitious bank accounts or fictitious mortgages. Defendant is incorrect in his assessment both of the law and the facts surrounding these issues.

[12][13] Under 26 U.S.C. s 7201, the prosecution must prove some affirmative act constituting an attempt to evade or defeat the payment of taxes. Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 87 L.Ed. 418 (1943); United States v. Ming, 466 F.2d 1000, 1004 (7th Cir.), cert. denied, 409 U.S. 915, 93 S.Ct. 235, 34 L.Ed.2d 176 (1972). However, the prosecution need not prove each affirmative act alleged. This case seems directly controlled by this court's previous decision in United States v. Reicin, 497 F.2d 563 (7th Cir.), cert. denied, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974), a mail fraud case involving, as here, several instances of illegal activity guided by a unitary scheme. Id. at 569-70. There, the court distinguished a Second Circuit decision, relied on heavily by defendant in this case, United States v. Groves, 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670, 62 S.Ct. 135, 86 L.Ed. 536 (1941), and held "it is necessary to prove at least one but not necessarily each of the specific acts to sustain each count." 497 F.2d 568. We believe that the court's analysis in Reicin applies with equal force here. Since defendant does not contest that there is at least sufficient evidence to prove the other three affirmative acts alleged in Count II of the indictment, we must affirm the conviction on this Count.

We note as an alternative basis for affirming the conviction on this Count that there was sufficient evidence to support a finding that the defendant committed all the affirmative acts alleged. First, defendant asserts that the only fictitious bank account at issue was the one in Atlanta, Georgia. In light of our discussion in part V, supra, however, this view is patently incorrect. The M.W.E. & S. account in Gary, Indiana was the basis for the allegation and there was a great deal of evidence as to whether it was a corporate account or merely a personal account of the defendant.

Second, the prosecution demonstrated that mortgages remained on defendant's property long after the debts that created them had been satisfied (Tr. at 479-80, 509, 546). While defendant presents persuasive arguments as to what inferences to draw from this fact, those arguments were for the jury and do not affect the correctness of the district court's decision to let the general allegation be considered by the jury. We, therefore, find no error on these points.[FN14]

FN14. Defendant argues similarly, again relying on United States v. Groves, 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670, 62 S.Ct. 135, 86 L.Ed. 536 (1941), that his conspiracy conviction must be reversed because the prosecution failed to prove one of the alleged objects of the conspiracy charged in Count I of the indictment, viz., that defendant and

F. Lawrence Anderson caused witnesses to testify falsely before the grand jury and at the perjury trial of Carl Smith. First, there was some evidence supporting both general allegations. Second, the prosecution need only prove one object of the conspiracy, absent undue prejudice created by the evidence presented as to the object not proved. See United States v. Papadakis, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975); United States v. Grizaffi, 471 F.2d 69, 73 (7th Cir. 1972), cert. denied, 411 U.S. 964, 93 S.Ct. 2141, 36 L.Ed.2d 684 (1973). Defendant neither contests that the prosecution in fact proved several objects of this conspiracy nor contends that the evidence used to prove the objects at issue here was prejudicial. Therefore, we find defendant's argument without merit.

VII

[14] Defendant next argues that there was no evidence before the grand jury to support a charge of subornation of perjury (Count III of the indictment), and that the inclusion of such a charge both as a separate count and as a part of each of the other counts in the indictment requires reversal of defendant's conviction. Defendant contends that courts must exercise some supervisory control over grand jury indictments if there is an allegation that there was "no evidence" presented to the *388 grand jury to support a given charge. United States v. Costello, 221 F.2d 668, 677 (2d Cir. 1955), aff'd on other grounds, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956); Brady v. United States, 24 F.2d 405, 407-08 (8th Cir. 1928). Assuming, without deciding, that defendant correctly states the law, we nonetheless find no basis in this argument for reversal. Defendant raised this issue before the district court and it stated initially that it has inspected in camera several grand jury transcripts and concluded "with all due respect, Counsel, I don't think you are even close" (Tr. at 781). Then, the court overruled defendant's motion for a mistrial based on this argument (Tr. at 782). Nothing in defendant's one-sided summary of the proceedings before the grand jury convinces us that the court below erred in its assessment of the grand jury record. In light of this fact, and defendant's failure to certify the grand jury transcript as part of the record for appeal, we hold there was no error in the district court's decision.

VIII

[15] Defendant's last argument in his initial appeal is that the district court erred in requiring the defendant, pursuant to Fed.R.Crim.P. 17(c), to produce documents without a fuller presentation by the prosecution to support its motion. The court concluded in response to the defendant's motion to reconsider that production of the documents would "expedite the trial in this case." Defendant does not contest that finding. More importantly, defendant fails to allege any prejudice caused by the court's order. We, therefore, find no error.

IX

[16] On his appeal to the district court's denial of his motion for a new trial, defendant raises two arguments. First, defendant argues that the prosecution's failure to provide him with a copy of a transcript of an interview by an Internal Revenue Agent with Carl E. Smith was a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.

In Brady, the Supreme Court held that:

(T)he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87, 83 S.Ct. 1196 (emphasis added). As suggested by the quotation from Brady, the narrow issue for us is, given the nature of the defendant's request for exculpatory materials, did the prosecutor have a duty to provide defendant with a transcript of this particular interview? That issue is controlled by the Supreme Court's recent decision in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The Court in Agurs reasoned that two factors define the duty of the prosecutor to provide Brady materials: whether the request for those materials was specific or general and their materiality. With regard to a general request, the Court concluded:

Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor.

427 U.S. at 106-07, 96 S.Ct. at 2399. If the request for Brady material is general in nature, the Court held as to the materiality of that evidence that, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." Id. at 108, 96 S.Ct. at 2399.

Applying those standards to the record before us, we conclude that the prosecutor did not violate his constitutional duty to disclose. Here the defendant's request was for "(i)nformation relating to material inconsistencies between statements given by any person, whether or not he is a prospective Government witness, and information relating to material inconsistencies between two or more persons, whether or not they are prospective government witnesses." *389 Contrary to defendant's contention, we conclude that this request was "general" within the meaning of Agurs. At a minimum, we would require that defendant focus his request on a particular witness before we would hold the request to be "specific." Plainly, defendant's request did not give "the prosecutor notice of exactly what the defense desired." Id. at 106, 96 S.Ct. at 2398.

Having determined that the request was general, it remains to be determined whether its non-disclosure deprived defendant of a fair trial. That determination is best made by the district court judge, with our review limited to whether his "first-hand appraisal of the record" was "thorough" and "reasonable." Id. at 114, 96 S.Ct. at 2402. The court below, after a careful consideration of the requested material and the record at trial, concluded:

The material presented would have been of a collateral nature. At the very most a small part of the material presented might have been used for impeachment of Carl Smith. However, such would only have been cumulative.

(Order of Sept. 23, 1977, at 12). Given that the omitted evidence was merely additional material for impeaching an already thoroughly impeached witness, we conclude that the district court's assessment was reasonable.[FN15]

FN15. There is a substantial dispute between the defendant and the

prosecution as to whether defense counsel exercised "due diligence" in discovering the relevance of Smith's narcotics interview. It is not exactly clear what role this issue plays in defendant's appeal of the denial of his motion for a new trial. Defendant in his initial brief before this court did not argue that the interview was "newly discovered" evidence. Instead, his arguments were limited to possible violations of Brady and the Jencks Act. The prosecution in its brief raised the "due diligence" defense. That analysis, as argued, seems absolutely unrelated to any point raised in defendant's brief. Nonetheless, the defendant responded to the issue in his reply brief; however, he did so within the context of the Brady issue. Initially, we conclude that we are not being asked to reverse solely because the interview is "newly discovered" evidence. Second, in light of our view that, regardless of whether defense counsel exercised "due diligence," there is no violation of Brady and Agurs on this record, we decline to consider the possible effect of that factor either for or against the defendant. Compare United States v. Hedgeman, 564 F.2d 763 (7th Cir. 1977) with Marshall v. United States, 141 U.S.App.D.C. 1, 436 F.2d 155 (1970).

[17] Second, defendant in this appeal argues that the failure of the prosecution to provide the memorandum of the interview of Carl Smith relating to his narcotics activities was a violation of the Jencks Act, 18 U.S.C. s 3500.[FN16] Since neither party argued the point, we assume, without deciding, that this was a "statement" within the meaning of 18 U.S.C. s 3500(e)(1). Thus, the key issue is whether the information contained in the interview " relates generally to the events and activities testified to" by Carl Smith. United States v. O'Brien, 444 F.2d 1082, 1086 (7th Cir. 1971).

FN16. That section provides in relevant part:
(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.
18 U.S.C. s 3500.

The district court concluded both that the statement did not "relate to" Smith's testimony within the meaning of United States v. Cleveland, 507 F.2d 731 (7th Cir. 1974), and that, even if it had, failure to produce that information did not require reversal of the case. See United States v. Esposito, 523 F.2d 242, 248 (7th Cir. 1975), cert. denied, 425 U.S. 916, 96 S.Ct. 1517, 47 L.Ed.2d 768 (1976). We find no basis for reversing those determinations. The subject matter of Smith's statement to the IRS agent occurred well before the creation of A & D Realty and it only indirectly reflected on the witness's statement on direct examination that he received money from defendant. In addition, the fact that the witness was promised consideration in return for his cooperation in a completely unrelated narcotics investigation cannot be said to "relate to" his trial testimony in any way. *390 We, therefore, find no violation of the Jencks Act requiring reversal of defendant's conviction.

For these reasons, the judgment of conviction entered by the district court on January 14, 1977, and the judgment denying the defendant's motion for a new trial entered September 23, 1977, are affirmed.

AFFIRMED.

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conspir to defraud gov't → crime of concealment

istrative decisions in the Department of Justice must flow. Nevertheless, the government has already received special dispensation in this regard through the federal rules. Fed.R.App.P. 4(a)(1) gives the government twice as long as the private litigant to file notice of appeal. If the government cannot make its strategic decisions within this time and a protective notice must be filed and later dismissed, there is no reason that the private litigant should be forced to pay attorneys' fees for a meaningless appeal. We conclude, therefore, that the government's appeal was not substantially justified.

The judgment of the district court is affirmed.

A true copy.

dx Grunewald

UNITED STATES of America, Appellee,

v.

Lorraine D. GLEASON, Appellant.

No. 84-1913.

United States Court of Appeals, Eighth Circuit.

Submitted March 14, 1985.

Decided July 3, 1985.

Defendant was convicted in the United States District Court for the Western District of Missouri, Joseph E. Stevens, Jr., J., of conspiracy to defraud United States by obstructing Treasury and collection of income taxes, and two counts of aiding in preparation of fraudulent income tax returns, and she appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that: (1) evidence, in form of coconspirator's statements, of "cover-up" or concealment of fraud was admissible, and did not create variance between conspiracy charged in indictment and evidence produced at trial; (2) trial judge, in questioning witnesses, did not overstep bounds of propriety; (3) defendant's rights under Speedy Trial Act were not violated; (4) district court did not abuse its discretion in refusing to limit potential cross-examination of defendant; and (5) conviction on one count of aiding in preparation of fraudulent returns was supported by sufficient evidence.

Affirmed.

1. Conspiracy ⇐43(12)

Evidence, in form of coconspirator's statements, of "cover-up" or concealment of fraud was admissible, and did not create variance between conspiracy charged in indictment and evidence produced at trial. 18 U.S.C.A. § 371.

2. Conspiracy ⇐28(1)

When successful accomplishment of crime necessitates concealment, acts of concealment are properly considered to be within scope of original conspiracy. 18 U.S.C.A. § 371.

3. Criminal Law ⇐656(2)

Trial judge, in questioning witnesses, did not overstep bounds of propriety, and questioning did not become so one-sided as to deprive defendant of fair trial.

4. Criminal Law ⇐1035(8)

In absence of objection to trial judge's comment, and because record reflected that comment was made out of jury's hearing, there was no plain error warranting reversal.

5. Criminal Law ⇐577.14

Where first trial ended in declaration of mistrial, and second indictment was filed before first indictment was dismissed, section of Speedy Trial Act [18 U.S.C.A. § 3161(e)] providing 70 days for retrial of case controlled, and, where retrial on superseding indictment commenced before that period expired, defendant's rights under such Act were not violated.

6. Witnesses ⇐393(1)

Prosecutor could not properly have confronted defendant with her prior statements made in course of proceeding regarding guilty plea which was later withdrawn. Fed.Rules Cr.Proc.Rule 11(e)(6)(C), 18 U.S.C.A.

7. Witnesses ⇐277(2)

District court did not abuse its discretion in refusing to limit potential cross-examination of defendant about allegedly fraudulent tax return, after prosecutor stated that he would be compelled to seek perjury indictment against defendant if she testified, contrary to her prior sworn statement, that she did not know receipts attached to tax return were fraudulent, where prosecutor had right to use statement made by defendant in proceeding involving guilty plea, which was later withdrawn, in subsequent criminal proceeding for perjury, and even if defendant had testified without mentioning return on direct examination, if she had represented that she did not know that any receipts that she had attached to returns were fraudulent, return would relate to this testimony and could properly be addressed on cross-examination.

8. Criminal Law ⇐1144.13(3, 5)

In reviewing district court's denial of motion for judgment of acquittal, Court of Appeals must consider evidence in light most favorable to government and must give government benefit of all reasonable inferences that may be logically drawn from evidence.

9. Internal Revenue ⇐5303

Conviction of aiding in preparation of fraudulent income tax returns was supported by sufficient evidence, from which jury could reasonably conclude that defendant prepared return knowing that claimed charitable contribution had not been made, and that receipt she attached to return fraudulently represented that such contribution had been made. 26 U.S.C.A. 7206(2).

James R. Wyrsch, Kansas City, Mo., for appellant.

John R. Osgood, Asst. U.S. Atty., Kansas City, Mo., for appellee.

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Defendant Lorraine D. Gleason appeals from the district court's [1] judgment entered on a jury verdict convicting her on one count of conspiracy to defraud the United States by obstructing the Department of Treasury in collection of income taxes in violation of 18 U.S.C. § 371, and two counts of aiding in the preparation of fraudulent income tax returns in violation of 26 U.S.C. § 7206(2) [2]. On July 6, 1984, the district court sentenced Gleason to two years imprisonment on the conspiracy count, with all but six months suspended, and three years probation to begin upon her release from custody, plus a $1,000 fine. On the remaining two counts, the court sentenced Gleason to three years probation on each count, to be served concurrently with each other and with the probation sentence imposed on the conspiracy count. Gleason appeals to this court, arguing that a variance existed at trial between the conspiracy charged in the indictment and the evidence shown at trial; that the trial court impermissibly acted as an advocate at trial; that her rights to a speedy trial were violated; that the trial court erred in refusing to limit potential cross-examination of her; and that the evidence as to Count Three of

1. The Honorable Joseph E. Stevens, United States District Judge for the Western District of Missouri.

2. Count Two charged Gleason with aiding and abetting in the preparation of the 1980 fraudulent tax return of Orville and Diane Hart. Count Three made a similar charge as to the 1980 tax return of Nora and Charles Blankenship.

the indictment was insufficient to sustain a guilty verdict. We affirm.

I. Facts

In 1981, Lorraine Gleason worked with her husband Michael J. Gleason at Gleason's Tax and Accounting Service, a sole proprietorship owned by Michael Gleason in Independence, Missouri. Both Michael and Lorraine Gleason were members of the Universal Life Church, as was George Leigh, who occupied a separate office in the same building as the tax service. The Universal Life Church is a non-profit, religious corporation headquartered in Modesto, California. The Universal Life Church operates through "mail order ministries," through which anyone can be ordained as a minister and have conferred upon him ministerial credentials and powers. The ministers have no required duties, nor does the church have any established creed or doctrines. The Universal Life Church also issues "mail order church charters," through which as few as three people can be designated as a congregation. The members of the congregation may be members of the same family. Once ordained, a minister may donate to the church the earnings from his regular occupation, by placing the money into his congregation's bank account. In so doing, the minister receives a charitable contributions deduction of up to 50 percent of his gross income, with a corresponding reduction in income tax liability. The minister may then withdraw money from the account, tax-free, for the upkeep of the "church" (his home), and his living expenses, including food and lodging. The "Mother Church" in Modesto requires only that the congregation file a regular report.

The evidence at trial showed that both Michael and Lorraine Gleason prepared fraudulent income tax returns for various clients for the 1980 tax year. Typically, either Michael or Lorraine Gleason, or both, would conduct a preliminary interview with taxpayers, during which the taxpayers would produce necessary information to prepare their tax returns. Then either Michael or Lorraine Gleason would inform the taxpayers that more deductions would either decrease their tax liability or increase their tax refund. The Gleasons would refer the taxpayers to George Leigh, who would sell them receipts falsely stating that the taxpayers had made contributions to the Universal Life Church during 1980. Leigh sold the receipts for a small percentage of the stated contributions.[3] Either Michael or Lorraine Gleason would prepare returns for the taxpayers reflecting these bogus contributions, and the receipts were attached to the returns. If any taxpayer expressed concern about the possibility of audits, he or she would be assured by either Michael or Lorraine Gleason or George Leigh that the Universal Life Church would corroborate the claimed contributions.

Lorraine Gleason sought to establish as a defense at trial that she played no part in the conspiracy, and that her position at the tax service was merely that of a receptionist. Gleason insisted that she had not prepared any of the fraudulent returns but merely copied over returns sloppily prepared by her husband, or signed her name as preparer when he was too busy to sign his own name. The testimony at trial, however, showed that Lorraine Gleason had informed Orville and Diane Hart how they could receive a bigger refund by purchasing phony receipts from George Leigh. Gleason also filled out the Harts' receipts, signed their return as the preparer, and told the Harts not to worry about the validity of the deductions because the receipts substantiated the claimed contributions. Further, Lorraine Gleason was present when her husband informed Nora and Charles Blankenship about the availability of the false receipts and told them to con-

3. For example, the evidence at trial showed that Dale Bedsaul received from George Leigh receipts reflecting a total 1980 contribution of $9,000 to the Universal Life Church. Bedsaul paid Leigh $100 for the receipts. Ralph Keeling obtained receipts from Leigh representing a total 1980 contribution of $12,000; Keeling paid $60 or $65 for the receipts. James Massey paid Leigh $60 for receipts reflecting a $22,000 contribution to the Universal Life Church in 1980.

tact George Leigh. She later attached the receipts that the Blankenships obtained from George Leigh to a completed tax return, which she had signed as preparer.

Lorraine Gleason pled guilty on July 27, 1983 to a one-count information charging her with aiding and assisting in the preparation of the false and fraudulent income tax return of taxpayer Ralph Keeling, in violation of 26 U.S.C. § 7206(2).[4] Gleason withdrew her guilty plea on November 23, 1983, and was indicted along with an alleged co-conspirator, J.C. Baxter, on December 9, 1983. A jury trial began on February 27, 1984, before the Honorable Scott O. Wright of the United States District Court for the Western District of Missouri. The court declared a mistrial on March 5, 1984, because the jury was unable to reach a verdict. Gleason was subsequently reindicted, and retried before Judge Stevens on May 7, 1984, resulting in the convictions from which she now appeals.

A. Variance

Gleason first contends on appeal that the district court erred in denying her motion for a new trial, for arrest of judgment, and for judgment of acquittal based on her allegation that a variance existed between the conspiracy charged in the indictment and the evidence produced at trial. She asserts that the district court erred in admitting evidence, in the form of a co-conspirator's statements, of the "cover-up" or concealment of the fraud, because the cover-up was not within the scope of the conspiracy charged in the indictment.[5] Thus, Gleason's argument goes, the Government introduced evidence at trial as to multiple conspiracies—the initial conspiracy to defraud the United States and a second conspiracy to conceal the fraud. Gleason cites *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), in support of her claim that the admission of the cover-up evidence caused an impermissible variance from the indictment. Because of the variance between the lone conspiracy count in the indictment and the evidence produced as to multiple conspiracies, Gleason contends her conviction should be reversed.

[1, 2] We hold that the cover-up evidence was properly admitted and that no variance existed here. In citing *Grunewald*, Gleason overlooks the Court's direction in that case to distinguish "between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." 353 U.S. at 405, 77 S.Ct. at 974 (emphasis in original). When "[t]he successful accomplishment of the crime necessitates concealment," acts of concealment are properly considered to be within the scope of the original conspiracy. *Id.* We agree with other courts that have held that a conspiracy covered by 18 U.S.C. § 371, such as the one charged here, necessarily contemplates acts of concealment to accomplish its objectives. *See United States v. Mackey*, 571 F.2d 376, 383–84 (7th Cir. 1978); *United States v. Diez*, 515 F.2d 892, 897–98 (5th Cir.1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976). *See also Forman v. United States*, 361 U.S. 416, 423–24, 80 S.Ct. 481, 485–86, 4 L.Ed.2d 412 (1960), *overruled on other grounds, Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). As the Fifth Circuit stated in *Diez*,

> [I]n the present case the central aim of the conspiracy was to deceive officials of the Internal Revenue Service, thereby inducing them to accept fraudulent tax returns as truthful and accurate. In light

4. Michael Gleason entered a plea of guilty on the same day to a charge pursuant to 26 U.S.C. § 7206(2) with respect to the 1980 income tax return of Patrick Goldsworthy.

5. The first indictment against Gleason did not specifically mention the concealment efforts. In the trial on this indictment, which ended in a mistrial, Judge Wright did not admit the concealment evidence. When Gleason was reindicted, the superseding indictment, on which she ultimately was convicted, did refer to the concealment.

of the substantial possibility that the returns would be audited and investigated, the filing of the returns did not fully accomplish the purpose of the main conspiracy, which by its very nature, called for concealment.

515 F.2d at 897–898. Because the co-conspirators' concealment attempts were part of the original conspiracy, no variance existed and the concealment evidence was properly admitted.

II. Alleged Misconduct of Trial Judge

Gleason next asserts that the trial court erred in denying her motions for a new trial and for a mistrial based on her allegations that the trial judge's misconduct deprived her of a fair trial. Specifically, Gleason contends that the trial judge impermissibly interjected himself into her trial by questioning witnesses, particularly Bishop Imbeau of the Universal Life Church headquarters in Modesto; calling for Bishop Imbeau to produce certain evidence; and commenting on the evidence, all to her prejudice. In support of her argument Gleason cites us to many places in the transcript that she deems examples of the judge's misconduct.

[3, 4] We have reviewed the transcript carefully and conclude that the trial judge did not overstep the bounds of propriety. First, we note that at least a few of the transcript pages to which Gleason refers us contain no comments by the trial judge at all, while others contain comments made by the judge out of the presence of the jury, thus averting any chance of prejudice. Other passages cited by Gleason consist of comments made by the judge to the prosecutor or defense counsel, including rulings on objections. Still other comments by the judge appear in the record as having been made in the presence, but out of the hearing, of the jury. Gleason's counsel contends that one such comment in particular, when the judge stated that a witness had been "dead wrong" in his testimony concerning the tax free benefits of ministers, was audible at the counsel table and therefore probably to the jury as well. Counsel, however, did not make a contemporaneous objection to the comment. Had an objection been made at the time of the perceived error, the trial court would have had the opportunity to determine whether members of the jury had in fact overheard the comment. In the absence of such an objection, however, and because the record reflects that the comment was made out of the jury's hearing, we find that no plain error warranting reversal exists. *See United States v. Ellis,* 747 F.2d 1205, 1208 (8th Cir.1984).

A trial judge is more than a "mere moderator" of a trial. *United States v. Woods,* 696 F.2d 566, 570–71 (8th Cir.1982) (quoting *Dranow v. United States,* 307 F.2d 545, 572 (8th Cir.1962)).

> [The trial judge] has the prerogative, and at times the duty, of eliciting facts he deems necessary to the clear presentation of the issues. To this end he may examine witnesses who testify, so long as he preserves an attitude of impartiality and guards against giving the jury an impression that the court believes the defendant is guilty.

Llach v. United States, 739 F.2d 1322, 1329–30 (8th Cir.1984) (quoting *Dranow,* 307 F.2d at 572). Those questions that the trial judge did ask of witnesses were properly intended to clarify testimony and elicit necessary facts; the judge's questioning did not become so one-sided as to deprive Gleason of a fair trial. *See United States v. Bland,* 697 F.2d 262, 265 (8th Cir.1983) (when trial judge has made allegedly prejudicial comments, appeals court must use balancing process to determine whether such comments have "pervaded over-all fairness" of proceedings). In sum, the trial court did not err in denying Gleason's motions for a new trial and for a mistrial based on alleged misconduct.

III. Alleged Violation of Speedy Trial Act

Gleason also contends that her right to a speedy trial pursuant to the Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (1982), was violated in this case. For consideration of this issue we review the relevant dates

involved. Gleason originally waived indictment and pled guilty to a one-count information on July 27, 1983. The district court subsequently allowed her to withdraw her guilty plea November 23, 1983. The grand jury then handed down a nine-count indictment against Gleason and J.C. Baxter, in which Gleason was named in seven of the nine counts. Upon defense counsel's motion, the magistrate on January 9, 1984 ordered that the trial be continued from its scheduled January 23, 1984 starting date until February 27, 1984. After the case was tried, beginning on February 27, and submitted to the jury, the district court ordered a mistrial on March 5, 1984, because the jury was unable to reach a verdict. Baxter subsequently entered a guilty plea.

On March 13, 1984, the grand jury returned a new indictment against Gleason. This superseding indictment contained three counts. Count One charged a conspiracy based upon the same acts that served as the basis for the conspiracy charged in Count One of the previous indictment, but added a paragraph specifically including as part of the conspiracy actions taken to cover up the fraud. Counts Two and Three of the superseding indictment were identical to Counts Seven and Eight of the first indictment. The remaining charges in the previous indictment were dropped from the superseding indictment.

Gleason was arraigned on the new indictment on March 21, 1984, and the district court set the matter for trial on May 7, 1984. Gleason filed a motion to dismiss the case on April 25, based on alleged violations of the Speedy Trial Act, asserting that Speedy Trial computation should be governed by 18 U.S.C. § 3161(h)(6).[6] The district court denied the motion in an order filed April 26, 1984, citing 18 U.S.C. § 3161(e), which provides 70 days for the retrial of a case that ended in a mistrial.[7] Trial on the superseding indictment began on May 7, 1984, with the jury returning its guilty verdict on May 15. The Government subsequently moved to dismiss the first indictment against Gleason.

On appeal to this court Gleason argues that the district court erred in denying her motion to dismiss based on the Speedy Trial Act. She repeats her contention that section 3161(h)(6), rather than section 3161(e), applies. Gleason claims that the superseding indictment differs greatly from the initial indictment, and that the Government benefited from the alterations because it had fewer charges to prove and more evidence (from the broadening of the conspiracy count) with which to prove them. Because under section 3161(h)(6) the 70-day time period within which she could be tried expired before May 7, 1984, the indictment should have been dismissed with prejudice under 18 U.S.C. § 3162(a)(2).

[5] We agree with the district court that section 3161(e) applies to Gleason's case. Section 3161(e) plainly addresses the circumstance that warranted retrial in this case: the declaration of a mistrial. By its terms, section 3161(e) requires that a defendant be retried within seventy days of the declaration of a mistrial. Gleason's trial on May 7, 1984, was within seventy days of the March 5th declaration of mistrial. Gleason would have us read into section 3161(e) a condition that does not exist—namely, that a defendant must be tried on the identical indictment following a

6. 18 U.S.C. § 3161(h)(6) states:

> If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge [shall be excluded in computing the time within which the trial of any such offense must commence].

7. 18 U.S.C. § 3161(e) states in relevant part: "If the defendant is to be tried again following a declaration of the trial judge of a mistrial * * *, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final."

mistrial—and asks us to apply section 3161(h)(6).

We do not think section 3161(h)(6) can be applied without some distortion. That section expressly covers the circumstance when the Government moves to dismiss an indictment and *thereafter* a charge is filed for the same offense. Here, however, the second indictment was filed *before* the first indictment was dismissed. Thus by its terms section 3161(h)(6) does not apply to Gleason's situation. *See United States v. McCown*, 711 F.2d 1441, 1446 (9th Cir. 1983); *United States v. Horton*, 676 F.2d 1165, 1170 (7th Cir.1982), *cert. denied*, 459 U.S. 1201, 103 S.Ct. 1184, 75 L.Ed.2d 431 (1983). *C.f. United States v. Harris*, 724 F.2d 1452, 1454 (9th Cir.1984) (construing similar language in 18 U.S.C. § 3161(d)(1)). Gleason argues that the return of the second indictment in effect dismissed the first indictment against her, so that no excludable delay exists under section 3161(h)(6). She cites us to no cases, however, which hold that a superseding indictment automatically dismisses an original indictment, nor have we found any such authority. Based on a plain reading of the statute, then, we agree with the district court that section 3161(e)(6) specifically controls this situation and that Gleason's rights under the Speedy Trial Act were not violated.

IV. District Court's Refusal to Limit Potential Cross-Examination of Gleason.

[6] Gleason next assigns as error the district court's refusal to limit in advance the Government's cross-examination of her should she take the stand. When Gleason pled guilty on July 27, 1983 to the one-count information, she stated under oath that she knew the receipts attached to the tax return of Ralph Keeling were fraudulent. The district court later allowed Gleason to withdraw her guilty plea. Before this case went to trial, the prosecutor indicated that if Gleason elected to take the stand, he would question her about the Keeling return. If Gleason then testified that she did not know the receipts were fraudulent when she attached them to the Keeling return, the prosecutor stated that he would be compelled to seek a perjury indictment against her for contradicting her prior sworn statement.[8] Gleason thus asked the district court to rule before trial that the Government would not be able to cross-examine her about the Keeling return. The court refused to so limit the questioning, and Gleason did not testify.

Gleason argues that the failure to restrict the potential cross-examination of her prevented her from testifying. Basically, she asserts that the court should have restricted the cross-examination for two reasons. First, the Government was able to use the threat of perjury either to prevent Gleason from testifying or to force her to waive her rights under Fed.R.Crim.P. 11(e)(6)(C). Second, if Gleason did testify but did not mention the Keeling return on direct examination, any questions about that return on cross-examination would have been outside the scope of direct and therefore inadmissible under Rule 610 of the Federal Rules of Evidence.

[7] We think both of Gleason's arguments are without merit. Rule 11(e)(6)(D)(ii) of the Federal Rules of Criminal Procedure specifically contemplates the use of a statement made by a defendant in a proceeding involving a guilty plea, which is later withdrawn, in a subsequent criminal proceeding for perjury. The prosecutor's "threat" of perjury, therefore, was nothing more than a statement of intent to

8. The prosecutor would not have been able to confront Gleason with her prior statements because Rule 11(e)(6)(C) of the Federal Rules of Criminal Procedure provides that statements made by a defendant in the course of a proceeding regarding a guilty plea, which is later withdrawn, are not admissible against the defendant in any civil or criminal proceeding. Rule 11(e)(6)(D)(ii), however, allows as an exception to the general rule that such a statement is admissible "in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel." *See also* Rule 410 of the Federal Rules of Evidence.

do that which he had an express right to do.

Further, even if Gleason had testified without mentioning the Keeling return on direct examination, if she had represented that she did not know that any of the receipts that she had attached to returns were fraudulent, the Keeling return would relate to this testimony and could properly be addressed on cross-examination. The scope of questioning permissible on cross-examination is within the broad discretion of the district court. *United States v. Schepp*, 746 F.2d 406, 410 (8th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1190, 84 L.Ed.2d 336 (1985); *Villanueva v. Leininger*, 707 F.2d 1007, 1010 (8th Cir.1983) (per curiam). "Cross-examination may embrace any matter germane to direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict or rebut testimony given by the witness." *Roberts v. Hollocher*, 664 F.2d 200, 203 (8th Cir.1981). The district court did not abuse its discretion in refusing to limit the potential cross-examination of Gleason, especially when it could have expressly contradicted her testimony on direct.

V. Sufficiency of Evidence

Gleason's final contention before us is that the district court erred in denying her motions for a new trial, for arrest of judgment, and for judgment of acquittal based on her contention that the evidence as to Count Three of the Indictment was insufficient to sustain a guilty verdict. Count Three alleges that Gleason willfully and knowingly aided and assisted in preparing a fraudulent income tax return for Charles and Nora Blankenship for the 1980 tax year. Although Gleason concedes that the Blankenships' tax return did contain fraudulent deductions, she contests the jury's finding that she acted willfully, with full knowledge of the fraudulent nature of the return. She asserts that her duties at the tax service were merely clerical, that she had no tax expertise, and that the Blankenships relied on Michael Gleason's advice in claiming the fraudulent deductions. In support of her contentions, Gleason points to the Blankenships' testimony that they had no direct conversations with her about the Universal Life Church, and to Charles Blankenship's failure to identify her in court at trial.

[8, 9] In reviewing the district court's denial of a motion for judgment of acquittal, this court must consider the evidence "in the light most favorable to the government and must give the government the benefit of all reasonable inferences that may logically be drawn from the evidence." *United States v. DeLuna*, 763 F.2d 897, 924 (8th Cir.1985); *see also United States v. Anziano*, 606 F.2d 242, 244 (8th Cir.1979) (per curiam). In reviewing the evidence in the light most favorable to the Government, we conclude that the evidence as to Count Three was sufficient to sustain the jury verdict. Upon the Blankenships' initial visit to the tax service in March 1981, Lorraine Gleason conducted a preliminary interview to get information necessary to prepare their return. The Blankenships made no mention of any charitable contributions at that time. Lorraine Gleason was also present when her husband told the Blankenships that they needed a $9,000 deduction and discussed with them how they could get a receipt for a contribution from George Leigh. When Nora Blankenship later brought in a receipt obtained from Leigh representing that a $9,000 contribution had been made, Lorraine Gleason attached the receipt to a return that she had signed as the preparer, which already reflected that a $9,000 contribution had been made. That Charles Blankenship could not identify Gleason at trial is not significant in light of the fact that he met her only once in 1981, and the trial took place three years later. No question exists as to whether Lorraine Gleason was actually the woman who assisted the Blankenships on their visit to Gleason's Tax and Accounting Service. From the evidence the jury could reasonably conclude that Gleason prepared the Blankenships' return knowing that a $9,000 contribution to the Universal Life Church had not been made in 1980, and that the receipt she attached to

the return fraudulently represented that such a contribution had been made.

VII. Conclusion

Because we find Gleason's allegations of error to be without merit, and the evidence of her guilt overwhelming, we affirm her convictions.

Roesevelt HAYES, Appellant,

v.

A.L. LOCKHART, Director, Arkansas Department of Corrections, Appellee.

No. 84-2092.

United States Court of Appeals, Eighth Circuit.

Submitted April 10, 1985.

Decided July 9, 1985.

Rehearing Denied Aug. 13, 1985.

Petitioner sought habeas corpus relief from state court conviction. The United States District Court for the Eastern District of Arkansas, Henry Woods, J., denied relief, and petitioner appealed. The Court of Appeals, Collinson, J., sitting by designation, held that: (1) trial judge had no affirmative duty to inquire on conflict of interest in joint representation of codefendants; (2) petitioner failed to show actual conflict of interest; and (3) issue whether petitioner was denied due process by giving of state's requested instruction was barred from collateral review by habeas court for failure to comply with state procedural rules.

Affirmed.

1. Criminal Law ⇐641.5(2)

Joint representation of codefendants is not per se violative of constitutional guarantees of effective assistance of counsel. U.S.C.A. Const.Amends. 6, 14.

2. Criminal Law ⇐641.5(5)

Trial judge did not have an affirmative duty to inquire whether joint representation of co-defendants would create a conflict of interest where neither defendant nor his trial attorney objected to proceeding to trial without separate counsel, and trial counsel did not indicate to the court that he foresaw even the possibility of a conflict.

3. Habeas Corpus ⇐25.1(6)

Without an objection or other signal to trial judge that a potential conflict of interest exists, a habeas petitioner must demonstrate that his attorney's performance was adversely affected by an actual conflict of interest.

4. Criminal Law ⇐641.5(3)

Defendant failed to demonstrate actual conflict of interest in trial counsel's joint representation of codefendants in first degree murder prosecution, notwithstanding that defendant, who shot victim after codefendant had initially shot her, and who alleged that his participation involved a "mercy killing," did not receive a reduced sentence, as given young age of codefendant and defendant's relationship to victim and codefendant, namely, sharing an apartment with them, it was not unreasonable for jury to have imposed a greater sentence on defendant.

5. Criminal Law ⇐641.13(1)

An appropriate inquiry in a Sixth Amendment case alleging ineffectiveness of counsel focuses upon the adversarial process, not on accused's relationship with his lawyer as such. U.S.C.A. Const. Amend. 6.

6. Criminal Law ⇐641.13(1)

If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. U.S.C.A. Const.Amend. 6.

Citation
731 F.2d 1521
84-1 USTC P 9484, 15 Fed. R. Evid. Serv. 1010
(CITE AS: 731 F.2D 1521)

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UNITED STATES of America, Plaintiff-Appellee,
v.
Fred W. SANS, Frank A. Weaner, Raymond O. McDonald, Jr., Defendants-Appellants.

No. 82-3106.
United States Court of Appeals,
Eleventh Circuit.
May 11, 1984.

Defendants were convicted in the United States District Court for the Middle District of Florida, Ben Krentzman, J., of conspiring to defraud government and failure to file currency transaction reports, and defendants appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) delegation of authority to Secretary of Treasury in statute authorizing Secretary to require reports of transactions involving payment, receipt or transfer of United States currency was valid; (2) evidence was sufficient to support conviction of bank officials for wilfully failing to file currency transaction reports; (3) whether bank officials knew that other bankers disobeyed law was not relevant to whether they acted knowingly in failing to file forms or whether they acted with specific intent to ignore law; (4) jury was entitled to fine nonbank officer defendant guilty of conspiring even though it decided to acquit bank officers; (5) evidence of coconspirator's checkered past was relevant to establish bank officials' state of mind in entering into currency transaction; and (6) conspiring to fail to file currency transaction reports in order to impair Internal Revenue Service's ability to collect data constituted conspiracy to defraud United States.

Affirmed.

[1] UNITED STATES k34
393k34
Treasury regulation requiring financial institution to file report of exchange of currency involving transaction of currency of more than $10,000 came within meaning of statute requiring that transactions involving any domestic financial institution shall be reported to Secretary of Treasury if transactions involve payment, receipt or transfer of United States currency. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[2] CONSTITUTIONAL LAW k60
92k60
Congress may not transfer to others essential legislative functions with which it is vested; however, Congress may authorize other bodies to determine specific facts and may also establish general standards and delegate to others responsibility of effectuating legislative policy. U.S.C.A. Const. Art. 1, s 1.

[3] CONSTITUTIONAL LAW k62(5.1)
92k62(5.1)
Formerly 92k62(5)
Where statute enabled Secretary of Treasury to require only "reports" of transactions involving monetary instruments to which domestic financial

institution was party, defined both monetary instruments and domestic financial institutions, and Secretary's choice whether to require reports at all, or what specific transaction, was limited by purposes of statute, statute providing that transactions involving domestic financial institutions shall be reported to Secretary at such time, manner and in such detail as Secretary may require was valid delegation of authority. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[3] UNITED STATES k34
393k34
Where statute enabled Secretary of Treasury to require only "reports" of transactions involving monetary instruments to which domestic financial institution was party, defined both monetary instruments and domestic financial institutions, and Secretary's choice whether to require reports at all, or what specific transaction, was limited by purposes of statute, statute providing that transactions involving domestic financial institutions shall be reported to Secretary at such time, manner and in such detail as Secretary may require was valid delegation of authority. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[4] UNITED STATES k34
393k34
Evidence in prosecution of bank officers for failure to file currency transaction reports, including testimony of teller and secretary of one officer, was sufficient to support findings that transactions occurred, that officers' failure to file reports was wilful, and that customer's actions in exchanging currency did not reasonably fit within known customer exemption to filing requirement. Currency and Foreign Transactions Reporting Act, s 221 31 U.S.C. (1976 Ed.) s 1081.

[5] CRIMINAL LAW k878(4)
110k878(4)
Where jury could have found evidence sufficient to show bankers purposely violated currency transaction reporting laws, but perhaps did so just to boost their business, not as coconspirators in action to defraud United States, bank officers' acquittal of conspiracy count did not bar their conviction on substantive counts of violating reporting laws. Currency and Foreign Transactions Reporting Act, ss 209, 221, 31 U.S.C. (1976 Ed.) ss 1058, 1081.

[6] CRIMINAL LAW k1173.1
110k1173.1
Trial court's refusal to deliver requested instruction is reversible error only if requested instruction was correct, was not substantially covered by others delivered, and concerned point in trial so important that failure to give requested instructions seriously impaired defendant's ability to defend himself.

[7] CRIMINAL LAW k829(3)
110k829(3)

In prosecution for failure to file currency transaction reports, there was no error in denial of defendants' requested instruction on wilfulness element of the offense, since the first sentence of the requested instruction, referring to the "special nature" of this element, was not a clear statement of the law and since the remainder of the requested instruction was substantially covered by the instructions given by the court. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[7] CRIMINAL LAW k830
110k830
In prosecution for failure to file currency transaction reports, there was no error in denial of defendants' requested instruction on wilfulness element of the offense, since the first sentence of the requested instruction, referring to the "special nature" of this element, was not a clear statement of the law and since the remainder of the requested instruction was substantially covered by the instructions given by the court. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[8] CRIMINAL LAW k469.2
110k469.2
Formerly 110k469
Trial judge has broad discretion in admitting or excluding expert testimony, and his action is to be upheld unless manifestly erroneous.

[8] CRIMINAL LAW k1153(1)
110k1153(1)
Trial judge has broad discretion in admitting or excluding expert testimony, and his action is to be upheld unless manifestly erroneous.

[9] UNITED STATES k34
393k34
Wilfulness required for conviction of bank officials for failure to file currency transaction reports required knowing failure to obey law, with specific intent to disobey law; thus, testimony that banks universally ignored currency reporting requirements at time of transactions in question was not relevant to officials' wilfulness in failing to file form or to whether they acted with specific intent to ignore law. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[10] CONSPIRACY k40.2
91k40.2
Where second object of conspiracy, violation of law requiring filing of currency transaction reports, was read as incorporating statute which provides that one who wilfully causes act to be done which if directly performed by him or another would be offense against United States is punishable as principal, conviction of defendant for conspiracy to defraud government was not invalid on ground that only parties capable of committing illegal act of failing to file reports were acquitted of conspiracy. 18 U.S.C.A. s 2(b); Currency and Foreign Transactions Reporting Act, ss 209, 221, 31 U.S.C. (1976 Ed.) ss 1058, 1081.

[11] CRIMINAL LAW k338(1)
110k338(1)
Determinations of admissibility of evidence rests largely within discretion of trial judge and will not be disturbed on appeal absent clear showing of abuse of discretion.

[11] CRIMINAL LAW k1153(1)
110k1153(1)
Determinations of admissibility of evidence rests largely within discretion of trial judge and will not be disturbed on appeal absent clear showing of abuse of discretion.

[12] CRIMINAL LAW k338(7)
110k338(7)
Newspaper items, which detailed codefendant's criminal activity, introduced to show bank's officers knew, or at least had reason to believe, that codefendant was using bank to launder his ill-gotten gains, were relevant to officers' state of mind in entering into currency transactions with codefendant; thus, where defendant asked for no limiting instruction, admission of evidence of codefendant's checkered past was not erroneous on ground it was irrelevant and overly prejudicial and denied defendant, who was tried with bank officers, fair trial in prosecution for conspiracy to defraud government. 18 U.S.C.A. s 371.

[12] CRIMINAL LAW k419(12)
110k419(12)
Newspaper items, which detailed codefendant's criminal activity, introduced to show bank's officers knew, or at least had reason to believe, that codefendant was using bank to launder his ill-gotten gains, were relevant to officers' state of mind in entering into currency transactions with codefendant; thus, where defendant asked for no limiting instruction, admission of evidence of codefendant's checkered past was not erroneous on ground it was irrelevant and overly prejudicial and denied defendant, who was tried with bank officers, fair trial in prosecution for conspiracy to defraud government. 18 U.S.C.A. s 371.

[13] CRIMINAL LAW k1030(1)
110k1030(1)
Objection not made at trial is viewed for plain error, which is error, when examined in context of entire case, that is so obvious that failure to notice it would seriously affect fairness and integrity of judicial proceeding. Fed.Rules Cr.Proc.Rules 51, 52(b), 18 U.S.C.A.

[14] CRIMINAL LAW k1036.3
110k1036.3
Trial judge's admission of evidence concerning checkered past of codefendant was not plain error in prosecution of defendant tried jointly with bank officials for conspiracy to defraud United States, where evidence of

codefendant's dealings was necessary to show where codefendant obtained large sums of money that he endeavored to launder through bank, most of evidence of criminal activity was contained in newspaper articles with which prosecution showed bankers to have come in contact, and prosecution argued to jury that it should use articles only in considering bankers' state of mind in exchanging currency for codefendant.

[15] CRIMINAL LAW k622.1(2)
110k622.1(2)
Formerly 110k622(1)
Decision to sever is discretionary; appellant must show abuse of discretion in denying motion to sever and can do so only by demonstrating compelling prejudice.

[15] CRIMINAL LAW k1148
110k1148
Decision to sever is discretionary; appellant must show abuse of discretion in denying motion to sever and can do so only by demonstrating compelling prejudice.

[16] CRIMINAL LAW k622.2(4)
110k622.2(4)
Formerly 110k622(1)
Coconspirators should be tried jointly in interest of judicial economy, and severance is not warranted even if defendant participated in only single aspect of conspiracy.

[17] CRIMINAL LAW k622.2(3)
110k622.2(3)
Formerly 110k622(2)
Even if defendant charged with conspiracy to defraud government, and failure to file currency transaction reports, joined in codefendants' motion for severance, motion was properly denied as to defendant, where defendant showed no "compelling prejudice," and jury was able to distinguish what was necessary for his conviction of conspiracy from that which was not.

[18] CONSPIRACY k33(7)
91k33(7)
Conspiring to fail to file currency transaction report in order to impair Internal Revenue Service's ability to collect data that would have been in reports involves dishonest impeding of lawful governmental function, and therefore, constitutes conspiracy to defraud United States. 18 U.S.C.A. s 371.

[19] CONSPIRACY k51
91k51
Whether defendant was guilty of conspiring to defraud United States by obstructing Internal Revenue Service in its efforts to collect information and reports of currency transactions larger than $1,000, or wilfully failing to file and cause failure to file of currency transaction reports in connection

with currency exchanges totalling in excess of $100,000, defendant was subject to being sentenced to five years in prison, or $1,000 fine, and therefore, sentence within those bounds was not excessive. 18 U.S.C.A. s 371.

[19] UNITED STATES k34
393k34
Whether defendant was guilty of conspiring to defraud United States by obstructing Internal Revenue Service in its efforts to collect information and reports of currency transactions larger than $1,000, or wilfully failing to file and cause failure to file of currency transaction reports in connection with currency exchanges totalling in excess of $100,000, defendant was subject to being sentenced to five years in prison, or $1,000 fine, and therefore, sentence within those bounds was not excessive. 18 U.S.C.A. s 371.

*1523 Michael C. Addison, Tampa, Fla., for Sans.

Anthony S. Battaglia, Stephen J. Wein, St. Petersburg, Fla., for Weaner & McDonald.

Lynn Hamilton Cole, Asst. U.S. Atty., Tampa, Fla., Sidney M. Glazer, Atty., Appellate Sect., Criminal Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

1524 Before TJOFLAT and FAY, Circuit Judges, and WISDOM [FN], Senior Circuit Judge.

FN* Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

TJOFLAT, Circuit Judge:

This case involves the attempts of Leon Cohen and his associates to "launder" illegally obtained money through the Palm State Bank, Palm Harbor, Florida, and to avoid federal income tax liability. Leon Cohen, his bookkeeper Fred Sans, the Palm State Bank, and two of the bank's officers, Frank Weaner and Ray McDonald, were charged in four counts with conspiracy to defraud the government, failure to file currency transaction reports (CTR's) (two counts), and falsifying facts in a matter under the jurisdiction of the Internal Revenue Service (IRS). [FN1] Leon Cohen's case was severed because he was ill, and the remaining indictees went to trial before a jury. At the close of the government's case, the court acquitted all four defendants of the fourth count. The jury found Sans guilty of the conspiracy count only; it found Weaner, McDonald, and the Palm State Bank guilty only of the two counts of failure to file the CTR's. Sans, Weaner and McDonald appeal, presenting several claims of error. We affirm.

FN1. See infra text at 1525 for the complete indictment.

I.

The conduct for which appellants were indicted took place in 1976 and 1977. At that time, Leon Cohen, an Atlanta, Georgia, resident, owed the IRS over $600,000, and it had filed substantial tax liens against him. Appellant Sans

was Cohen's bookkeeper and accountant. Between late 1976 and mid-1977, Cohen obtained over $900,000, much of it in small bills ($5's, $10's and $20's), through various schemes to defraud Leslie Atkinson, a convicted drug dealer then serving a federal sentence in the Atlanta penitentiary. [FN2]

FN2. Atkinson's conviction is reported in United States v. Atkinson, 565 F.2d 1283 (11th Cir.1977), cert. denied, 436 U.S. 944, 98 S.Ct. 2845, 56 L.Ed.2d 785 (1978).

In November 1976, Cohen, through his attorney Stanley Galkin and associate John Tipton, offered to sell Atkinson six kilograms of heroin for $300,000. [FN3] Atkinson's representatives and Cohen's representatives were to exchange the drugs and money; however, Cohen arranged a simulated arrest at the exchange point, inducing Atkinson's associates to flee without the drugs or the money. Tipton and Sans counted the money over a period of two days at Cohen's house. Tipton and Jerome Kaplan, a business associate of Cohen's, exchanged some of the money at Atlanta banks; Cohen had instructed them not to exchange more than $5,000 at any one bank, and not to attract attention.

FN3. Atkinson apparently still managed a drug operation though he was incarcerated.

In January 1977, Sans and Cohen showed Charles Michael, another of Cohen's associates, what Cohen boasted was "a million dollars" in low denomination bills, and Cohen gave him $25,000 of that money to exchange for $100 bills at several North Carolina banks. Sans and Tipton were present when Michael returned the clean money. Also in January, Cohen showed Milton Chalmers, a commercial loan officer in a St. Petersburg, Florida, bank, a briefcase full of money and sought to exchange it for one hundred dollar bills. Chalmers, declining to make the exchange, explained the federal reporting requirements; [FN4] Cohen commented that he could circumvent *1525 the requirements by exchanging the money at the Palm State Bank because his associates controlled the bank.

FN4. 31 U.S.C. s 1081 (1976) authorized the Secretary of the Treasury to require the reporting of domestic currency transactions. Pursuant to this authority, the Secretary promulgated 31 C.F.R. 103.22(a) (1983) providing that "[e]ach financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000."

On January 20, 1977, one day after the Palm State Bank received a large shipment of $100 and $50 bills from the Federal Reserve, Cohen came to the bank. Appellant McDonald, as the vice president with whom Cohen was dealing, brought Cohen to then head teller Rosemary Gardner and instructed her that Cohen had a large number of small bills that should be exchanged for large ones. $20,000 to $25,000 was exchanged on that occasion. McDonald told Gardner that no CTR was necessary, implying to her that such reports did not apply to exchanges of bills for other bills.

In early February 1977, appellant Weaner, in the presence of McDonald and Cohen, instructed his secretary Loraine Ingham to take a large stack of cash to Rosemary Gardner to be exchanged, and to open a safety deposit box for Cohen, but without his name appearing on the bank's records. They set up the account in Tipton's name.

On March 10, 1977, Galkin and Cohen, accompanied by Chalmers, [FN5] exchanged about $50,000 at the Palm State Bank. Teller Gary Watson, who exchanged the money, asked Rosemary Gardner if a CTR needed to be filed. Gardner took a CTR form to Weaner's office and returned with it five minutes later. [FN6] No form was filed.

FN5. Cohen had asked Chalmers to accompany him on this trip, apparently to impress Chalmers with his authority at the Palm State Bank. Later that day, Cohen asked Chalmers if he could set up a similar exchange at the St. Petersburg bank. Chalmers, avoiding a direct refusal, told Cohen the risk involved would warrant a 10% charge on such an exchange.

FN6. The record does not reflect whether the form was filled out when Rosemary Gardner returned.

In March and April 1977, Cohen weaseled more money out of Atkinson. Galkin, at Cohen's direction, convinced Atkinson that he had high official connections who, for a $1 million fee, could arrange Atkinson's release from prison. After receiving a $100,000 prepayment from one of Atkinson's associates, Cohen, impersonating then Associate Attorney General Michael Egan, visited Atkinson at the prison. When Cohen returned, Sans and Tipton counted the $100,000. In April, Cohen forged a note to Atkinson's brother and used it to get $300,000 of Atkinson's money. Also in April, Cohen sent Sans to the Grand Cayman Islands where, by trick, Sans and Cohen arranged a wire transfer of $260,000 from an account Atkinson had there through a Canadian bank to a checking account in Sans' name at the Palm State Bank. Weaner's initials were on the card establishing the account.

On May 10, 1977, Palm State Bank received another Federal Reserve shipment of $50,000 in large bills. Cohen then exchanged about $40,000 in $5's, $10's and $20's for large bills. McDonald waited with Cohen at the teller window while then head teller Gary Watson made the exchange. Watson retained the small bills in his teller drawer. Watson again asked Rosemary Gardner about filing a CTR; no report was filed, however.

Cohen, Sans, Weaner, McDonald and Palm State Bank were indicted for: (count one) conspiracy to (a) defraud the United States by obstructing the IRS in its efforts to collect information and reports of currency transactions larger than $10,000, (b) falsify and conceal material facts within IRS jurisdiction in violation of 18 U.S.C. 1001, (c) willfully fail to file and cause the failure to file CTR's in connection with currency exchanges totaling in excess of $100,000 at Palm State Bank, and (d) defraud the United States by impeding collection of Cohen's income taxes; (count two) willful failure to file a CTR in connection with the March 10, 1977, money exchange; (count three) willful failure to file a CTR in connection with the May 10, 1977, money exchange; and (count four) concealing facts within IRS jurisdiction in violation of 18 U.S.C. 1001.

*1526 At trial, the government presented Galkin, Tipton, Chalmers, Watson, Rosemary Gardner and teller Shirley Scoggins, among others, as witnesses. They testified to the above transactions. The defendants denied any wrongdoing on their part. Sans' denial, presented through his attorney's argument to the jury, was that he did not know Cohen was violating the law and did not know about the money exchanges. Weaner testified that no exchange had taken place to his knowledge, and even if one had he would not have thought a CTR was required because he thought Cohen fell into a "known customer" exemption to the reporting requirements. The exemption, at 31 CFR s 103.22(b)(3) (1972), provided that a bank would not need to "report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business ... of the customer concerned." McDonald testified that he recalled one cash exchange; Cohen had told him a real estate seller he was dealing with needed cash in large bills for certain property Cohen was trying to purchase, and McDonald had allowed him to exchange some small bills for large bills. No other exchanges had taken place, and, for the purpose of that one exchange, he had considered Cohen a "known customer" and so had not filed the CTR.

The defendants sought to buttress their denials of wrong-doing with the testimony of the president of the Palm State Bank, Phyllis Jones, and a banking expert, Gerald Stogniew; their testimony raised an inference that the currency exchange of May 10, 1977, handled by Gary Watson, could not have taken place. Jones said the bank's guidelines on the amount of cash the head teller could have in his drawer at any one time was $25,000 to $30,000, substantially less than the amount Cohen gave Watson on May 10; under the guidelines, Watson would have been required to deposit the excess in the bank's vault. Stogniew opined that the records of the bank's vault showed no deposit on May 10 of the number of small denomination bills Watson said he received from Cohen on that date, the inference being, as the defendants argued to the jury, that Watson had not conducted the exchange. As we have indicated, the jury found the bank officers and the bank guilty of having willfully failed to file the CTR's; it found Sans guilty of conspiracy.

On appeal, Weaner, McDonald and Sans raise three kinds of error. The first would require us to enter one or more judgments of acquittal; the second would require us to grant one or more of the appellants a new trial, and the third would require us to grant a resentencing. In the first category are two claims by Weaner and McDonald: (1) that the rules requiring CTR's to be filed were unconstitutional as they resulted from an overbroad congressional delegation, and (2) that the evidence was insufficient to establish that the March 10 and May 10 transactions occurred and that any failure to file was willful.

Two claims by Weaner and McDonald would require a new trial: (1) that the trial court erred in refusing one of two jury instructions Weaner requested on willfulness, and (2) that the trial court erred in refusing expert testimony proffered by Weaner regarding the banking trade custom of ignoring currency regulations. Sans brings two claims requiring us to grant him a new trial. First, he claims that his conspiracy conviction is flawed because it may have been based on a conspiracy objective which, due to the acquittals of Weaner and McDonald on the conspiracy count, could not have been part of the conspiracy. Second, he claims that irrelevant and prejudicial evidence regarding Leon Cohen

fatally flawed his conviction. He brings one claim of the third type, asking us to require that he be resentenced because the conspiracy charge contained both misdemeanor and felony objectives, such that Sans might be guilty of a misdemeanor conspiracy rather than a felony *1527 conspiracy. If so, his sentence, as it stands, would be excessive. We first address Weaner's and McDonald's arguments.

I.

A. Constitutionality of the Regulations.

[1] Weaner and McDonald were convicted of substantive violations of 31 U.S.C. ss 1081 and 1058 (1976). [FN7] These statutory provisions were part of Chapter 21 of Title 31 of the United States Code, entitled Reports of Currency and Foreign Transactions. Section 1081 in its entirety provided that:

FN7. Since the indictment and trial, these sections have been revised and renumbered. Reports of Currency and Foreign Transactions now appear at 31 U.S.C.A. ss 5311-5322 (1983) as Records and Reports on Monetary Instruments Transactions. Also, the regulations promulgated pursuant to the statutes have been amended since the dates of the alleged offense. Here, reference is made to the statutes and regulations as existing at the time of the alleged offenses.

Transactions involving any domestic financial institution shall be reported to the Secretary [of the Treasury] at such time, in such manner, and in such detail, as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall be regulation prescribe. (emphasis supplied.)

Section 1058 in its entirety provided that:

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both. (emphasis supplied.)

31 C.F.R. s 103.22 (1972), enacted by the Secretary of the Treasury pursuant to the aforementioned statutes, provided in pertinent part that:

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction of currency of more than $10,000.

Weaner and McDonald argue that the legislative delegation in section 1081 was too broad because Congress granted the Secretary the option to create criminal statutes in his sole discretion, unlimited by any guidelines. [FN8]

FN8. They also argue that even if the statute is a constitutional delegation, the Secretary has exceeded the scope of that delegation in creating 31 C.F.R. s 103.22 (1983). They base this argument on section 1081's reference to reportable transactions as "payment, receipt, or transfer" of currency, and the regulation's coverage of "deposit, withdrawal, exchange of currency or other payment or transfer." An "exchange," they assert, was not contemplated by section 1081. This argument is not credible; an "exchange" is certainly nothing more than

two "payments" and thus is covered by the language of section 1081.

[2] The U.S. Constitution, Art. 1, s 1, provides that "all legislative powers herein granted shall be vested in a Congress of the United States." Congress may not transfer to others the essential legislative functions with which it is vested. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 55 S.Ct. 837, 843, 79 L.Ed. 1570 (1935). However, Congress may "authorize other bodies to determine specific facts and may also establish general standards and delegate to others the responsibility of effectuating the legislative policy." United States v. Gordon, 580 F.2d 827, 839 (5th Cir.) cert. denied 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978), citing Schechter.

United States v. Womack, 654 F.2d 1034, 1037 (5th Cir. Unit B 1981) cert. denied 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 314 (1982), describes the standard we apply in judging a delegation challenge:

Congressional legislation which prescribes essential standards and basic legislative policy and delegates to an administrator authority for promulgation of rules and regulations is constitutionally *1528 permissible, provided the standards are "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator ... has conformed to those standards." The standards of the statute are not to be tested in isolation but must derive meaningful content from the purpose of the statute and its factual background and the statutory context in which the standards appear. (citations omitted)

[3] The statute in question here met these standards. The statute delegated a limited power to the Secretary: it enabled him to require only "reports" of transactions involving "monetary instruments" to which a "domestic financial institution" was a party. The statute defined both "monetary instruments" and "domestic financial institutions." While it is true that the Secretary might have chosen not to regulate at all under this section, if he chose to act he could require only that reports of transactions involving payment, receipt, or transfer of U.S. currency be made. Moreover, his choice whether to require the reports at all, or of what specific transactions, was limited by the purposes of the act, to require certain reports or records where such reports or records have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." H.R. No. 975, 91st Cong., 2d Sess., reprinted in 1970 U.S.Code Cong. & Admin.News, 4394, 4395. The legislative history of the Act indicates that "the domestic reporting requirements were enacted because law enforcement agencies found that the growth of financial institutions had been paralleled by an increase in criminal activity associated with them." Id.

The limited nature of the delegation is even clearer when we consider, as we must, the factual background in which the statute appears. When the statute was enacted, the Secretary of the Treasury had been requiring reports of customers' large currency transactions for twenty-five years. Reports had been required for "currency transactions that, in the judgment of the institution, exceeded those 'commensurate with the customary conduct of the business, industry or profession of the person or organization concerned.' " California Bankers Association v. Shultz, 416 U.S. 21, 37, 94 S.Ct. 1494, 1506, 39 L.Ed.2d 812 (1974). This pattern of regulation was merely continued

by the reporting requirements in this case.
Given the single action the Secretary could undertake (requiring reports), the pattern of prior regulation, and the extent to which Congress defined in the statute and legislative history the targets of the reporting requirements, the transactions covered, and the purpose of the reporting legislation, we find no delegation problem here. That the Secretary under section 1081 could have imposed standards enforceable by criminal penalties did not make the delegation less valid, for "[i]t is well established that a delegatee may formulate rules for violation of which the statute itself provides penalties imposable by judicial process...." Gordon, 580 F.2d at 840 (citations omitted).

B. Sufficiency of the Evidence

[4] Weaner and McDonald argue that there was insufficient evidence to show that the counts two and three currency transactions occurred and that their failure to file CTR's was willful. We disagree. There was sufficient testimony from the teller Gary Watson and Weaner's secretary Loraine Ingham for the jury to find that the transactions took place. Watson's testimony was not, as appellants argue, rendered valueless by the testimony of the bank's president and the banking expert we have recited concerning the currency exchange of May 10, 1977. Watson flatly refuted the president's statement that the bank's guidelines limited the amount of cash he could have in his teller's drawer; he said the limit was $80,000. He also said that he kept the money he got from Cohen in the drawer overnight. Consequently, he *1529 rendered meaningless the bank expert's testimony as to the state of the vault records on May 10.

The evidence was also sufficient for the jury to conclude that Cohen's actions did not reasonably fit within the known customer exemption. The evidence, albeit circumstantial, was also plainly adequate to support a conclusion that the bankers failed to file CTR's with specific intent to violate the reporting laws.

[5] Weaner and McDonald next argue that their acquittal of the conspiracy count bars conviction of the substantive counts because the jury, in determining that they had not joined the Cohen-Sans conspiracy, implicitly determined that they had not failed to file CTR's following the March 10 and May 10 currency exchanges. This argument is clearly without merit. The jury could have found beyond a reasonable doubt that Sans and Cohen engaged in a conspiracy with each other to defraud the United States by obstructing the calculation and collection of Cohen's taxes, and also that the bankers had purposely violated currency laws by failing to file the CTR's. The jury could certainly have found the evidence sufficient to show that the bankers purposely violated the reporting laws, but perhaps did so just to boost their business, and not as coconspirators of Cohen or Sans. Contrary to Weaner's and McDonald's arguments, the jury's conclusion that the bankers should be acquitted of conspiracy is consistent with its determination that the currency exchanges took place. That conclusion could merely indicate that the jury did not find the bankers to have had the requisite state of mind to be conspirators when those exchanges occurred.

C. The Willfulness Instruction

Weaner and McDonald asked the trial judge to instruct the jury on willfulness as follows:

The willfulness element under this law is of a special nature. The mere

failure to comply with the terms of the law is not a violation, it must be shown beyond a reasonable doubt that the Defendant had specific knowledge of the reporting requirements alleged to have been violated. An acknowledgement by the Defendant of awareness of currency laws is not sufficient to prove willfulness under these statutes.

Declining to give this requested charge to the jury, the district court instructed the jury as follows:

Each of the following essential elements must be proved in order to establish the violation charged in Counts 2 and 3 of the indictment [the substantive counts charging failure to file the CTR's]:

* * *

[T]hird, that the defendant's act or acts, if any, in failing to file and causing the failure to file such a report were done willfully.

An act is willful if done knowingly and with specific intent to act with a bad purpose, either to disobey or to disregard the law. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that a defendant knowingly did an act which the law forbids or knowingly failed to do an act which the law requires, purposely intending to violate the law.

An act or a failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reasons. (emphasis added.)

[6] A trial court's refusal to deliver a requested instruction is reversible error only if the requested instruction (1) was correct, (2) was not substantially covered by others delivered, and (3) concerned a point in the trial so important that the failure to give the requested instruction seriously impaired the defendant's ability *1530 to defend himself. United States v. Stone, 702 F.2d 1333, 1339 (11th Cir.1983); Pine v. United States, 135 F.2d 353, 355 (5th Cir.), [FN9] cert. denied, 320 U.S. 740, 64 S.Ct. 40, 88 L.Ed. 439 (1943); see United States v. Hitsman, 604 F.2d 443, 446 (5th Cir.1979). Here, to the extent the requested instruction was correct, it was substantially covered by the instruction the trial court gave.

FN9. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[7] The first sentence of the requested instruction was not a clear statement of the law. Any willfulness requirement may or may not be "special"; this elucidated nothing helpful for the jury. The second sentence was substantially covered by the willfulness instruction and the court's other instructions; those instructions placed the burden on the government to prove every element of the offense beyond a reasonable doubt, including that the defendants purposefully intended to violate the reporting law. The third sentence was also adequately covered; nothing in the judge's instructions would have led the jury to believe that knowing the law was enough in itself to show willfulness. [FN10] Accordingly we find no error in the trial judge's rejection of the requested instructions.

FN10. Even taken as the defendants probably meant it, the third sentence

was largely an incorrect statement of the law in this case. It comes from a case, United States v. Schnaiderman, 568 F.2d 1208 (5th Cir.1978), in which a Venezuelan tourist was carrying a large sum of money into the country. A customs officer asked the tourist if he understood U.S. currency laws. The tourist replied that he was aware of such laws but that he was going to spend the money gambling in Aruba two days later. The customs officer never asked about what, if any, specific currency laws the tourist was aware of. This court found the statement that he was aware of "U.S. currency laws" to be too vague and unspecific to constitute "knowledge" or provide a basis for a showing of willfulness within the meaning of the currency offenses charged. In this case, all defendants indicated a higher level of awareness than mere awareness of "U.S. currency laws" generally. The third sentence of the defendant's requested instruction is thus, at its best, a correct, but misleading and irrelevant, statement of the law.

D. The Expert Witness

Weaner and McDonald called a banking expert, Gerald Stogniew, to testify. Stogniew had been in banking for twenty-two years, had worked extensively as a bank auditor, and had conducted "director's audits." [FN11] Appellants asked the trial court to find Stogniew qualified as an expert on bank management for the purpose of testifying that banks universally ignored currency reporting requirements at the time of the Cohen transactions. They argued that this testimony, if received, would permit an inference that their failure to file the CTR's was not willful. The government objected that the testimony was not relevant to Weaner or McDonald's willfulness. The trial judge sustained the objection.

FN11. These covered an examination of responsibilities a director would have in his position with the bank and would include operational accounting reviews of the bank's operation and a determination if the bank was in compliance with various laws and regulations.

[8][9] The trial judge has broad discretion in admitting or excluding expert testimony, and his action is to be upheld unless manifestly erroneous. United States v. Costa, 691 F.2d 1358, 1361 (11th Cir.1982). We find no error here. The evidence was not relevant on the willfulness issue. As we have discussed, willfulness required the knowing failure to obey the law, with the specific intent to disobey the law. Whether the appellants knew that other bankers disobeyed the law was not relevant to whether they acted knowingly in failing to file the forms or whether they acted with specific intent to ignore the law.

II.

A. The Conspiracy Acquittals

Sans' first claim is based on a theory that one cannot be guilty of a conspiracy to *1531 commit an illegal act if the only party capable of committing the illegal act is acquitted of the conspiracy. Applying this theory, Sans observes initially that Weaner and McDonald were the only actors in this case with the legal duty to file CTR's and therefore the only ones capable of disregarding that duty. Because they were acquitted of conspiring

to disregard that duty, he argues, he could not be guilty of conspiring with Cohen or anyone else to do so. We are not persuaded by Sans' theory. [FN12]

FN12. To willfully fail to file, or cause the failure to file, CTR's with the second object of the conspiracy charged. If Sans' theory were correct, a conviction based on this object would be defective. The evidence was clearly sufficient to support a conviction based on either of the other two objections of the conspiracy, however. Thus, if we were to agree with Sans, we would remand the case for a new trial on the conspiracy count, with the second object deleted.

We first note that "failing to file" the CTR and causing the "failure to file" the CTR are really just two ways in which one offense can be consummated. Sans was capable of "failing to file" a CTR under 18 U.S.C. s 2(b) (1982), which provides that one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal" (emphasis added). United States v. Tobon-Builes, 706 F.2d 1092, 1099 (11th Cir.1983), shows clearly that a person with no duty to disclose financial information or file currency transaction reports can be found guilty under section 2(b). This is so even if the one who actually performs the criminal act or omission has no criminal intent and is thus innocent of the substantive crime. Tobon-Builes, 706 F.2d at 1099. See also United States v. Puerto, 730 F.2d 627 at 631 (11th Cir., 1984).
Tobon-Builes, id., cites with approval United States v. Lester, 363 F.2d 68 (6th Cir.1966) cert. denied, 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967), which presented the precise issue Sans now raises. It involved application of section 2(b) in the context of a conspiracy where all of those who could have actually performed the illegal act charged as the object of the conspiracy were acquitted. In that case, two private citizens were tried along with three police officers for conspiring willfully to deprive another private citizen of his fourteenth amendment rights under color of state law. The police officers were also charged with committing the substantive offense and the two private citizens with aiding and abetting them in committing that offense. 18 U.S.C. s 2 (1982) was not explicitly alleged in the conspiracy count of the indictment. The jury acquitted the police officers of the conspiracy and the substantive offense; it acquitted the two other men of aiding and abetting, but convicted them of the conspiracy. On appeal, the two men argued that because they could not have acted "under color of law," and thus could not have committed the substantive offense, they could not have conspired to commit that offense in violation of 18 U.S.C. s 371 (1982).
The Lester court, reading 18 U.S.C. s 2 (1976) into the conspiracy count, upheld the conspiracy convictions. It pointed out first that, "[i]n keeping with the provisions of s 2, it has long been held that [a count of] an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either." Id. at 72. The court then applied this principle to the conspiracy count as follows:
So long as anyone who "willfully causes an act to be done" which, "if directly performed by him or another would be an offense against the United States", is punishable as a principal, it follows a fortiori that when two or

more persons conspire willfully to "cause" an act forbidden by s 2(b), they ex necessitate conspire to "commit [an] offense against the United States" within the meaning of 18 U.S. s 371. Id. at 73.

The court cautioned:

Of no consequence here is the fact that one reading the record before us might *1532 find it difficult, perhaps even impossible, to comprehend how the jury could have acquitted all the police officers of the conspiracy offense. It is not the province of the Court to inquire by what course of reasoning the jury may have reached seemingly inconsistent verdicts. Inconsistency of verdicts as to various defendants in a particular case has always been an exclusive prerogative of the jury. Id. at 74.

[10] We agree with the Lester analysis. The second object of the conspiracy--the violation of the law requiring the filing of CTR's--must be read as having incorporated section 2(b). [FN13] Therefore, Sans could have been convicted of conspiring with Cohen to cause the failure to file the CTR's. Accordingly, the jury was entitled to find Sans guilty of the conspiracy even though it decided to acquit the bank officers.

FN13. Here, as in Lester the substantive offenses charged violations of 18 U.S.C. s 2 (1982), but the conspiracy charge failed to mention that section.

B. Prejudicial Evidence

Sans argues that the trial judge's admission of evidence of Leon Cohen's checkered past was erroneous because it was both irrelevant and overly prejudicial and denied him a fair trial. From time to time during the trial, the government introduced testimony and items of evidence that portrayed Cohen as a criminal. These items included newspaper articles, which detailed some of Cohen's criminal activity, taken from the records of the Palm State Bank. The articles were introduced to show that the bank and officers McDonald and Weaner knew, or at least had reason to believe, that Cohen was using the bank to launder his ill-gotten gains. The testimony of Cohen's criminal activity dealt mainly with his acquisition from Leslie Atkinson of the money he laundered at Palm State Bank. The testimony also suggested that Cohen had approached Wilton Chalmers about a possible loan from Chalmers' bank to set up a marijuana operation in Central America, and that Cohen had been convicted of impersonating a federal officer.

[11][12] Sans objected to some of the newspaper articles and the testimony about Cohen's criminal activities on the ground that this evidence was irrelevant to any issue in the case. His objections were overruled. Determinations of the admissibility of evidence rest largely within the discretion of the trial judge and will not be disturbed on appeal absent a clear showing of abuse of discretion. See United States v. Russell, 703 F.2d 1243 (11th Cir.1983). We find no abuse of discretion in the trial judge's admission of the evidence to which Sans objected on relevancy grounds. The newspaper articles were relevant to the bankers' state of mind in entering into the Cohen currency transactions. Evidence of Cohen's trial for impersonating a federal officer in the Atkinson schemes corroborated Galkin's testimony about the scheme. Cohen's comment to Chalmers about the marijuana loan was relevant to the issue of Cohen's criminal intent regarding the conspiracy. Since Cohen

was an alleged coconspirator, his state of mind was relevant. Sans did not ask for any limiting instructions on any of this testimony.

[13] Sans also presents a new argument on appeal, that the evidence showing Cohen to be a criminal was inadmissible because its probative value was substantially outweighed by its prejudicial effect. We review an objection not made at trial by a plain error standard. See Fed.R.Crim.P. 51, 52(b). Plain error is error which, when examined in the context of the entire case, is so obvious that [our] failure to notice it would seriously affect the fairness and integrity of judicial proceedings. Russell, 703 F.2d at 1248.

[14] We find the trial judge's admission of the evidence not to be plain error. Evidence of Cohen's dealings with Leslie Atkinson was necessary to show where Cohen obtained the large sums of money that he endeavored to launder through the Palm *1533 State Bank, and the amount he needed to dispose of. Most of the evidence of Cohen's criminal activity was contained in the newspaper articles with which the prosecution showed the bankers to have come in contact. These articles were clearly admissible; as we have noted, they were important for the jury to consider in determining the bankers' state of mind in dealing with Cohen and processing the illicit transactions for him. The prosecution argued to the jury only that it should use the articles in considering Weaner's and McDonald's states of mind. All the "prejudicial" information had substantial probative value. It showed Cohen's acquisition of a large sum of money that required laundering, his trouble with Atlanta banks due to his past criminal conduct, his according need to go out-of-state to launder money, and Weaner and McDonald's state of mind in conducting the transactions. Any improper prejudicial effect of this evidence was minimized by the prosecutor's closing argument to the jury in that he drew only the proper inferences from the evidence.

Sans also argues that he moved for a severance because of the likelihood that evidence against Leon Cohen would be overly prejudicial, and the district court erroneously denied the motion. It is unclear whether Sans actually had a motion for severance before the court; his attorney merely filed a statement that he joined in other defendants' motions. At the time, Weaner and McDonald had pending a motion for a severance on the ground that information at trial regarding Cohen and Sans would be overly prejudicial. The trial court, ruling on the motion, stated that only Weaner and McDonald sought the severance; we find no evidence in the record that Sans took issue with that determination or requested a ruling on "his" motion for a severance. If he was a party to the severance motion, its denial was appropriate as to him in any event.

[15][16][17] The decision to sever is discretionary; an appellant must show an abuse of discretion in denying the motion to sever and can do so only by demonstrating "compelling prejudice." See United States v. Capo, 693 F.2d 1330 (11th Cir.1982) cert. denied --- U.S. ----, 103 S.Ct. 1793, 76 L.Ed.2d 359. "Compelling prejudice" means that the jury will not be able to "collate and appraise the independent evidence against each defendant.... [T]hough the task be difficult [unless the jury is unable to perform it] severance should not be granted." Tillman v. United States, 406 F.2d 930, 935 (5th Cir.), vacated in part on other grounds 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). Coconspirators should be tried jointly in the interests of judicial economy, and severance is not warranted even if a defendant participated in only a single aspect of the conspiracy. See

United States v. Marszalkowski, 669 F.2d 655, 659-60 (11th Cir.1982) cert. denied sub. nom Brock v. United States, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 167. Applying these principles to Sans' case, even if he was included in the Weaver-McDonald motion for a severance, that motion was properly denied as to him. He shows no "compelling prejudice"; the jury was certainly able to distinguish what was necessary for his conviction of conspiracy from what was not.

C. The Conspiracy--Felony or Misdemeanor

The conspiracy statute, 18 U.S.C. s 371 (1982), subjects to criminal liability two kinds of conspiracies: (1) conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose"; and (2) conspiracies "to commit any offense against the United States." If such an offense is a misdemeanor, the punishment for such conspiracy cannot exceed the maximum punishment provided for such misdemeanor. *1534 [FN14] Sans argues that the first object of the conspiracy count described a misdemeanor offense rather than a felony. Since the jury could have convicted him on that object, he asserts, the maximum sentence he could have received was that for a misdemeanor conspiracy rather than that for a felony conspiracy. [FN15] Since we disagree with his premise, we uphold the sentence imposed. [FN16]

FN14. Section 371 provides:
Conspiracy to commit offense or to defraud United States
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

FN15. He received an indeterminate three-year prison sentence under 18 U.S.C. s 4205(b)(2) (1982).

FN16. There is some question as to whether Sans properly preserved this point for appeal. At the charge conference prior to closing arguments, the parties discussed using a special verdict form showing separate verdicts for each object of the conspiracy. During the discussion, Sans' attorney stated that he thought the first conspiracy objective was the commission of a misdemeanor, and asked what the others thought. The court and the government stated that it was a felony. The attorney did not mention the point again. After the jury retired, the court asked counsel about their record objections to the court's jury instructions, and Sans' counsel stated that he adopted the objections "and comments" he had made at the charge conference. The misdemeanor/special verdict forms issue might arguably be such a "comment."

The conspirators' first objective was "[t]o unlawfully, knowingly, and intentionally defraud the United States ..." by impairing the IRS' ability to collect the data that would have been in the CTR's that should have been filed

following the currency exchanges in question. Sans argues that a conspiracy to fail to file CTR's cannot rise to the level of a conspiracy to defraud the United States. Rather, he argues, the indictment alleged only a conspiracy to commit the misdemeanor offense of failing to file CTR's. We do not find this argument convincing. A conspiracy to fail to file CTR's can amount to a conspiracy to defraud the United States.

United States v. Burgin, 621 F.2d 1352 (5th Cir.), cert. denied 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980), discusses the broad sweep of allowable conspiracies "to defraud the United States" under section 371. The court, citing Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), noted that the conspiracy-to-defraud language reaches "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." 621 F.2d at 1356. The Burgin court also quoted Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924) as follows:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. (emphasis added).

[18][19] The first conspiracy object alleged certainly met the criteria expressed in Burgin. It involved the dishonest impeding of a lawful governmental function. As the government points out, by submitting the fraud charge to the jury instead of charging simple conspiracy to commit a misdemeanor, it increased its own burden of proof. The jury was required to find the *1535 fraud element rather than just an agreement to fail to file CTR's. Accordingly, we find no error in the government's proceeding under the conspiracy-to-defraud theory, or to Sans' sentence. Whether guilty of joining in the conspiracy to defraud or either of the two other objects of the conspiracy in this case, Sans was subject to being sentenced under section 371 to five years in prison, or a $10,000 fine, or both. His sentence was within these bounds.

AFFIRMED.

END OF DOCUMENT

suggests that false FDIC certif. re: 3d party interests in loans/self dealing was part of conspir.

Citation 871 F.2d 1298 (CITE AS: 871 F.2D 1298)
FOUND DOCUMENT
Database CTA
Mode Page

UNITED STATES of America, Plaintiff-Appellee (88-5195), Plaintiff-Appellant (88-5484),
v.
Billy York WALKER, Defendant-Appellant (88-5195), Defendant-Appellee (88-5484).

Nos. 88-5195, 88-5484.
United States Court of Appeals,
Sixth Circuit.
Argued Nov. 14, 1988.
Decided April 3, 1989.

Defendant was convicted after jury trial in the United States District Court for the Western District of Tennessee, Odell Horton, Chief Judge, of various federal banking laws. Defendant appealed. The Court of Appeals, Enslen, District Judge, sitting by designation, held that: (1) evidence of coconspirator's guilty plea was admissible as evidence of coconspirator's credibility, and (2) evidence of named borrowers' credit worthiness and their understanding of obligation to repay loans was irrelevant and inadmissible on charges of bank fraud.

Affirmed.

[1] CRIMINAL LAW k338(6)
110k338(6)
Evidence of coconspirator's guilty plea and plea agreement was admissible as evidence of coconspirator's credibility.

[2] WITNESSES k318
410k318
Introduction of entire plea agreement of codefendant is permitted, even where agreement contains promise to testify truthfully, since these details allow jury to consider fully possible conflicting motivations underlying codefendant's testimony, and thus codefendant's credibility.

[3] CONSPIRACY k24(6)
91k24(6)
Formerly 91k23
So called rule of consistency that requires where all possible coconspirators are tried together, and all but one are acquitted, remaining coconspirator's conviction must be reversed for lack of sufficient evidence, does not apply where coconspirators are tried separately or could have conspired with unindicted individuals.

[4] BANKS AND BANKING k509.10
52k509.10
Where bank officer arranges loans for named borrower, intending proceeds will benefit himself, and without disclosing his interest in loan transaction, he has acted in deceitful and dishonest manner in violation of bank fraud statute. 18 U.S.C.A. ss 371, 1344.

[5] BANKS AND BANKING k509.25
52k509.25
Evidence of named borrowers' credit worthiness and their understanding of obligation to repay bank loans was irrelevant, and thus, inadmissible in prosecution of defendant, a bank officer, for bank fraud; officer had arranged loans for his own benefit, concealing his interest in them from other bank officials. 18 U.S.C.A. ss 371, 1344.

[6] CRIMINAL LAW k150
110k150
Conspiracy to defraud bank account based upon misapplication of bank funds and false entries in bank records was not barred by statute of limitations, even though prosecution was not commenced until several years after loans of issue were made, where defendant continuously attempted to conceal his interest in loans by keeping payments on loans currently and, later, by giving coconspirators funds to make payments on defendant's behalf, thus establishing repayment of loans and concealment were objectives of conspiracy. 18 U.S.C.A. ss 371, 3282.

[7] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank official, made false entries in federal deposit insurance corporation questionaire when he failed to disclose loans made to third parties on his behalf was question for jury in prosecution alleging defendant made false entries. 18 U.S.C.A. s 1005.

[8] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank officer, was guilty of making false entries in bank records based upon recordation of interest payment on loans, which records failed to reveal that payments were not made with named borrower's funds or that loans were not made for named borrowers' benefit, was question for jury in prosecution alleging false entry in bank records.

*1299 W. Hickman Ewing, Jr., U.S. Atty., Frederick H. Godwin, Asst. U.S. Atty. (argued), Memphis, Tenn., for U.S.

James Wilson (argued), Hal Gerber, Memphis, Tenn., for Billy York Walker.

Before NELSON and BOGGS, Circuit Judges, and ENSLEN, District Judge. [FN*]

FN* Honorable Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

ENSLEN, District Judge.

Billy York Walker appeals his conviction following a jury trial on each count of a 28-count indictment alleging violations of various federal banking laws. [FN1] Prior to 1985, Mr. Walker was the president and majority shareholder of Farmers Bank located in Dyersburg, Tennessee. Most of the bank's business was agricultural in nature. Mr. Walker was also the owner, president and operator of Walker Grain Company ("Walker Grain"), a grain storage firm, located in the same town.

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U.S. v. Walker

[7]
52 BANKS AND BANKING
52XI Federal Deposit Insurance Corporation
52k509 Offenses and Penalties
52k509.25 k. Prosecutions.
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Billy York Walker appeals his conviction following a jury trial on each count of a 28-count indictment alleging violations of various federal banking laws. [FN1] Prior to 1985, Mr. Walker was the president and majority shareholder of Farmers Bank located in Dyersburg, Tennessee. Most of the bank's business was agricultural in nature. Mr. Walker was also the owner, president and operator of Walker Grain Company ("Walker Grain"), a grain storage firm, located in the same town.

FN1. The indictment alleged violations of the following statutes: Count 1, conspiracy to commit bank fraud, 18 U.S.C. s 371, Counts 3-21, 24-26, false entries in bank records, 18 U.S.C. s 1005; Counts 22 and 28, false statement on loan application, 18 U.S.C. s 1014; and Counts 23

and 27, bank fraud, 18 U.S.C. s 1344.

Count 1 alleges that Walker and his life-long friend, Walter Hastings, conspired to defraud Farmers Bank, to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. s 371. Walker convinced Hastings to sign two promissory notes, one for $150,000 secured by stock owned by Hastings, and one for $118,000 which was unsecured. The proceeds of both loans were immediately deposited to Walker Grain's account at Farmers Bank. The loan applications did not disclose Walker Grain's interest in the loans. Walker personally approved both loans.

Originally, Hastings called Walker each time an interest payment was due and Walker made the payment using a Walker Grain check. In 1985, Walker started giving checks to Hastings and Hastings made the payments using his own checks. The overt acts in the conspiracy each involve separate interest payments on the two loans. The bank's records on each loan indicate that the loans were for Hastings' benefit and that Hastings made the interest payments. Counts 3-21 allege false entries in bank records based upon the failure of the records to indicate that the loans were not for Hastings' benefit and that he did not make the interest payments from his own funds.

In 1985, the bank's vice president in charge of loans, Larry James, noticed that the Hastings loans were becoming past due. He knew that Walker and Hastings were friends and offered to take the collection of these loans over for Walker, thinking Walker might be uncomfortable handling the accounts himself. Walker assured James that Hastings would repay the loans as soon as Hastings solved some other financial problems. An investigation conducted by the bank, at the suggestion of federal examiners, subsequently revealed Walker's interest in the Hastings loans. When confronted with the matter by bank officials, Walker shook his head and replied, "What can I say?" Thereafter, Walker took an indefinite leave of absence and never returned to the bank.

*1300 Walker's defense to counts 1 and 3-21 was that he lacked any intent to defraud the bank. He contends that he approved each loan in the ordinary course of business, based upon Hastings' credit worthiness, character, and reputation, as well as the bank's potential to profit from each loan. He claims that he lacked any intent to deceive the bank, although he admits that he did not tell the bank's board of directors of Walker Grain's interest in the loans. Walker contended that he did not think it necessary to tell the bank's board of directors about Walker Grain Company's interest in the Hastings loans, since the bank was only interested in profitability and since Hastings had the ability to repay the loans. [FN2] Walker testified that Hastings understood his obligation to repay the loans, but understood that the money would come from Walker. Hastings testified that he had no intention of repaying the loans and thought Walker would do so.

FN2. Hastings' financial statement filed with the bank indicated Hastings' net worth was between $6 and $8 million dollars at the time of these loans.

Count 2 alleges that Walker, in his capacity as president of Farmers Bank, made a false statement on a Federal Deposit Insurance Corporation ("FDIC") questionnaire. The questionnaire at issue, dated May 25, 1982, asked

net worth was between $6 and $8 million dollars at the time of these loans.

Count 2 alleges that Walker, in his capacity as president of Farmers Bank, made a false statement on a Federal Deposit Insurance Corporation ("FDIC") questionnaire. The questionnaire at issue, dated May 25, 1982, asked Walker to: "List all extensions of credit made since last examination for the accommodation of others than those whose names appear on bank's records or on credit instruments in connection with such extension." Walker answered that no such loans had been made. The government charged that this statement was false because it failed to disclose the loans to Hastings which were used for the benefit of Walker Grain.

Count 22 involves a loan made to Mr. Hastings by the Bank of Friendship, located in Friendship, Tennessee, in the amount of $150,000. The president of the Bank of Friendship is John York, Mr. Walker's cousin. Mr. York testified that Walker called him and asked him to make a loan to Walter Hastings. York never spoke to Hastings about the loan. The note showed that the purpose of the loan was for "operating capital." It was repaid by a check drawn on Farmers Bank showing Hastings as the remitter. Hastings testified that he had never been to the Bank of Friendship and had never spoken to York regarding a loan. The government contended that the loan to Hastings was not used as operating capital, but was instead used to make a principal and interest payment on Hastings' $150,000 note at Farmer's Bank. The balance of one of the Hastings notes was increased to repay the Bank of Friendship loan. The government argued that Walker obtained this loan for Hastings under false pretenses, by failing to disclose Walker Grain's interest in the transaction. [FN3]

FN3. At trial, Walker characterized this transaction as a "participation loan," arguing that the Bank of Friendship extended credit to Hastings at the request of Farmers Bank, to provide the latter bank with some ready cash. Walker argued that such transactions were commonplace, and that in the general course of business, Farmers Bank would repay the participating bank when it had available cash. Since the participating bank would look to Farmers Bank, rather than to debtor for repayment, Walker contended that it was unnecessary to inform the Bank of Friendship of the loan's real beneficiary.

Counts 23 and 24 relate to a gentleman named Dan Holloway. Mr. Holloway's 1982 financial statement showed a net worth of $100 million dollars and he had deposits in the Farmers Bank totaling up to $1,250,000. Walker owned an option on an 80-acre farm in Dyersburg, Tennessee. He and Holloway decided to develop the farm as a gravel pit. They jointly applied for, and received, a loan for $120,000 from First Tennessee Bank to buy the farm/gravel pit. This note was secured by a deed of trust on the land. Walker and Holloway never earned any profits on the gravel pit. They each paid half of the interest on the loan and of one payment to reduce principal.

When First Tennessee Bank requested a second principal reduction, Walker could not come up with the funds. Holloway agreed to take over the loan in exchange for Walker's interest in the property. At Holloway's request, Walker arranged for *1301 Farmers Bank to lend Holloway $122,055.90. Part of the proceeds

from the loan went to pay off the First Tennessee loan and part went to cover an overdraft in a checking account held jointly by Walker and Holloway. Walker transferred his interest in the property to Holloway after these transactions were completed.

Count 23 alleges that Walker engaged in a scheme to defraud Farmers Bank by means of false statements to the bank's finance committee. Members of the finance committee testified that, on January 7, 1985, Walker told the committee that the loan to Holloway was well collateralized and/or secured by real estate. The minutes of the meeting contain the following entry:

Dan Holloway, application for loan of $122,000 at FBP for one year, accompanied by financial statements, to payoff farm note at First Tennessee Bank, secured by deed of trust on farm. Approved.

Walker did not disclose his interest in the loan to the finance committee and none of the loan documents disclosed that Walker benefited from the loan. Walker also denied that he benefited from the loan, even though it eliminated his obligation to First Tennessee Bank and an overdraft on a checking account at Farmers Bank.

Count 24 alleges that Walker caused a false entry to be made in bank records--specifically the minutes of the January 7, 1985 finance committee meeting--since those minutes imply that the note to Holloway was secured by a deed of trust on the farm when, in fact, the loan from Farmers Bank was unsecured. Walker argued that the minute entry is not false, since the reference to a deed of trust refers to the First Tennessee Bank loan, not to the loan from Farmers Bank. In addition, the note itself and the loan documents all indicated on their face that the Farmers Bank loan was unsecured. Walker argued that he did not receive a benefit from the loan to Holloway, since he had already relinquished his interest in the gravel pit.

Count 25 alleges a false entry in the form of a false endorsement Walker caused another bank employee, Mabel Paschal, to make on a cashier's check. Walker drew a check for $54,747.51 on Walker Grain's checking account, made payable to Henry Simon. Walker gave Paschal the Walker Grain/Henry Simon check and directed her to make out a cashier's check to Holloway in the amount of $47,770.02, which she did. Walker then told her to give him the difference in cash. Paschal complied, and then noticed that the Simon check was not endorsed. She testified that Walker told her to sign it. When she refused, he instructed her to stamp the back of the check with a stamp reading "Credit to the account of the within named payee. Absence of endorsement guaranteed, Farmers Bank, Dyersburg, TN."

Walker denied telling Paschal to endorse the check or to stamp it. He argued that, since the check was drawn on the Walker Grain account, it did not need an endorsement and this was not unusual. Walker admitted that Henry Simon did not exist, and explained his use of a false name by saying that he did not want Holloway to become embroiled in his difficulties with the FDIC. The government contends that the cash was given to Holloway to make one half of an interest payment due on the $122,055.90 loan to Holloway. Holloway made this interest payment, with a check drawn on his business account, on the same day as the cashier's check transactions occurred.

Count 26 alleges that Walker incorrectly answered the question involved in Count 2 on a July, 1985 FDIC questionnaire. As he had in 1982, Walker answered that no accommodation loans had been made. An FDIC examiner took the July,

1985 questionnaire to Walker and stated that he had found two loans which should have been reflected in the questionnaire. Walker had his secretary delete the previous answer and type the two loans in its place. The government contends that Walker should have, but did not, include the loan to Holloway and a January 23, 1985 loan to Carl Jones. Walker contends that his original answer was correct, according to his understanding of the questionnaire.

*1302 Jones was a former business partner in Walker Grain. He left the firm in 1983 or 1984, owing it approximately $200,000. He also owned some beans and milo which were stored at the grain company. Walker approved a loan from Farmers Bank to Jones for approximately $130,000 which was secured by Jones' beans. Walker did not need board approval to make this loan. The money was deposited to Jones' account and was used to pay his debt to Walker Grain, leaving a balance due of approximately $70,000. Walker contends that this was not an "accommodation loan" within the meaning of the FDIC questionnaire.

The government characterized this transaction somewhat differently. It argued that Jones was the manager of Walker Grain in January 1985 and that he also had a farming partnership with Walker. The farming operation was financed by advances from Walker Grain. In January, 1985, Walker told Jones that the farm owed Walker Grain for the advances and that they needed to be paid because the Walker Grain account was overdrawn. Walker wanted Jones to come to the bank to get a loan to cover the overdraft. On January 24, Jones borrowed about $130,000 from the bank in his own name. Walker approved the loan. The money went to Jones' personal account and was paid to Walker Grain by Jones' personal check on the same day. Although the note said it was secured by beans, Jones testified that these beans did not exist. The note did not indicate that Jones' farm or Walker Grain would benefit from the loan.

Count 27 alleges that Walker engaged in a scheme to defraud Farmers Bank when, in January, 1985 he applied to the bank for a loan on behalf of Walker Grain. Walker needed the loan to cover a $300,000 overdraft in the grain company's checking account. After applying for the loan, Walker then deposited a check for $300,000, drawn on Walker Grain's account at First Citizens National Bank, into the company's Farmers Bank account. The First Citizens account had been closed in 1982 and did not have sufficient funds to cover the check. Walker told a vice president of Farmers Bank that the grain company had a loan for $300,000 and other deposits coming in which would cover the overdraft. He failed to disclose the loans made to Hastings and Jones on behalf of the grain company. Walker Grain eventually obtained a $190,000 loan from Farmers Bank.

Count 28 alleges that Walker made a false statement to the bank, for the purpose of influencing its action on the Walker Grain loan. The statement at issue is Walker's statement that the grain company had funds to cover the check drawn on First Citizens Bank and therefore the overdraft in the grain company's Farmers Bank account. The government charged that this statement was false since Walker knew that the First Citizens account was closed and did not have funds to pay the check.

Walker testified that he was aware of the overdraft and called an employee of First Citizens Bank to arrange a loan. The employee, Mr. Lipford, told Walker that the loan would have to be approved by his discount committee. Walker told Lipford that, in the meantime, he was going to write a check on the company's First Citizens account and deposit it at Farmers Bank. Lipford approved and this was done. Walker alleges that he informed Farmers Bank about the First

Citizens loan and about the fact that the check was written before the loan was actually approved. The First Citizens loan was never approved. Walker Grain's overdraft at Farmers Bank was cured by the Farmers Bank loan and by the check from Jones.

Mr. Walker raises five issues on appeal. He argues first that the trial court erred in admitting into evidence Walter Hastings' guilty plea to a conspiracy identical to that alleged in count 1 of the indictment. His second argument is that the trial court erred in denying him a new trial when Hastings withdrew his guilty plea. Third, Walker argues that the trial court erred in excluding evidence relevant to his intent to defraud or injure Farmers Bank. Fourth, he contends that prosecution of the conspiracy alleged in count 1 is barred by the applicable statute of limitations. Finally, Walker argues that the trial court erred in *1303 denying his motion for judgments of acquittal on counts 2, 3-21, 24, 26 and 28. Because we find no error, we will affirm Walker's conviction on all counts. The government has appealed from the district court's order granting Walker bond pending appeal. Because we resolve Walker's appeal in favor of the government, we need not reach the issues raised in its appeal.

Admission of Hastings' Guilty Plea and Plea Agreement. Prior to Walker's trial, Mr. Hastings pled guilty to a conspiracy charge virtually identical to Count 1 of the indictment against Walker. [FN4] Mr. Hastings testified at Walker's trial, and was allowed to testify to both his guilty plea and the contents of his plea agreement with the government. Walker argues that admission of this evidence made his conviction on Count 1 inevitable, since the jury knew that Hastings was guilty of a conspiracy and that Walker was the only individual Hastings could have conspired with. He concludes that admission of Hastings' guilty plea and plea agreement allowed the government to establish his guilt by association with Hastings.

FN4. Hastings is identified as a co-conspirator in the Walker indictment, but is not named as a co-defendant in that indictment.

[1] We hold that it was not error for the trial court to admit evidence of Hastings' guilty plea and plea agreement. While the government may not use a witness' guilty plea as evidence of another defendant's guilt, the plea "may properly be considered as evidence of a witness' credibility," United States v. Christian, 786 F.2d 203, 214 (6th Cir.1986), and may also be used to show the witness' first-hand knowledge of and participation in the offense. United States v. Little Boy, 578 F.2d 211, 212 (8th Cir.1978). "Admissibility of the plea turns on the purpose for which it is offered. When that purpose is to further the jury's difficult task of evaluating credibility, it is relevant and admissible without regard to the identity of the offering party." United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir.1981).

[2] We have held that much of the prejudice associated with the use of a plea agreement is negated where the pleading individual testifies at trial. "In such a case, it is reasonable to believe that the jury uses the testimony regarding the facts to convict the [ ]defendants and the testimony regarding the guilty plea to assess the witness' credibility." Christian, 786 F.2d at 214. Introduction of the entire plea agreement is permitted, even where the agreement contains a promise to testify truthfully, since these details allow

the jury to "consider fully the possible conflicting motivations underlying the witness' testimony, and, thus, the witness' credibility." United States v. Townsend, 796 F.2d 158, 163 (6th Cir.1986).

In this case, these is no argument that the government improperly emphasized Hastings' guilty plea, United States v. Halbert, 640 F.2d 1000, 1005 (9th Cir.1981); United States v. Pickett, 746 F.2d 1129, 1135-36 (6th Cir.1984), cert. denied, 469 U.S. 1226, 105 S.Ct. 1222, 84 L.Ed.2d 362 (1985), nor could such a claim be sustained. Hastings testified only briefly regarding the matter, and the government did not refer to his plea in its closing argument. The agreement was relevant to Hastings' credibility and was admissible for that purpose. Further, the trial court gave the jury an appropriate limiting instruction, cautioning them that the plea agreement had "been offered so that you may properly assess the credibility of the witness. It is not offered for any other purpose and you should not consider it for any other purpose." While it is a better practice to instruct the jury on both the plea agreement and the guilty plea itself, the trial court's failure to do so in this instance did not deprive Walker of a fair trial. As the government argues, the plea agreement at issue discussed Hastings' guilty plea. An instruction regarding the plea agreement was sufficient to confine the jury's consideration of both the plea and the agreement to its assessment of Hastings' credibility.

Walker's remaining argument, that the similarity between the charge against Hastings *1304 and Count 1 of the indictment against Walker virtually assured his conviction on that count, is without merit. It is often the case that a defendant will plead guilty to a conspiracy charge, and then testify against his co-conspirators who stand trial for a similar or identical crime. If it was always unfairly prejudicial to admit the guilty plea of such a co-defendant, then the rule recognized in Christian, Townsend and Halbert would be meaningless. The jury was instructed that Hastings' guilty plea could not be used as evidence of Walker's guilt, and that it could consider that plea only in evaluating Hastings' credibility. There is no reason to assume that the jury disregarded this instruction.

[3] Denial of Motion for New Trial. Approximately five months after Walker's conviction, Hastings appeared for sentencing pursuant to his guilty plea and was allowed to withdraw that plea. At the sentencing hearing, Hastings expressly denied that he intended to defraud the bank through his transactions with Walker. Upon learning of Hastings' withdrawn plea, Walker moved for a new trial on the ground of newly discovered evidence. The trial court denied this motion without a hearing. Walker argues that it was an abuse of the trial court's discretion to deny this motion. We find that this issue need not be decided because, after Walker's motion was denied, Mr. Hastings changed his plea a second time and pled guilty to the same conspiracy. The "newly discovered evidence" proffered by Walker in support of a new trial, therefore, no longer exists. [FN5]

FN5. Even if Walker's "newly discovered evidence" had not evaporated, we would affirm the trial court's decision. The so-called rule of consistency requires that, where all possible co-conspirators are tried together, and all but one are acquitted, the remaining conspirator's conviction must be reversed for lack of sufficient evidence. United States v. Patterson,

678 F.2d 774 (9th Cir.), cert. denied, 459 U.S. 911, 103 S.Ct. 219, 74 L.Ed.2d 174 (1982); United States v. Phillips, 630 F.2d 1138 (6th Cir.1980). The rule does not apply where co-conspirators are tried separately or could have conspired with unindicted individuals. United States v. Sachs, 801 F.2d 839 (6th Cir.1986); United States v. Irvin, 787 F.2d 1506, 1512-13 (11th Cir.1986); United States v. Espinos-Cerpa, 630 F.2d 328 (5th Cir.1980). Thus, even if Hastings had been acquitted of the conspiracy, his acquittal would not mandate reversal of Walker's conviction. Further, at the time Walker's motion was denied, Hastings' guilt had not been determined. The jury was free to discredit Hastings' claim that he lacked intent to defraud the bank, just as it discredited Walker's similar claim. While Hastings' withdrawn plea may incrementally increase Walker's chances of acquittal, it is insufficient to demonstrate that Walker would likely be acquitted if his case were retried. United States v. O'Dell, 805 F.2d 637 (6th Cir.1986), cert. denied, --- U.S. ----, 108 S.Ct. 170, 98 L.Ed.2d 124 (1987); United States v. Terry, 729 F.2d 1063, 1067 (6th Cir.1984); United States v. Barlow, 693 F.2d 954 (6th Cir.1982), cert. denied, 461 U.S. 945, 103 S.Ct. 2124, 77 L.Ed.2d 1304 (1983).

Intent to Defraud. At trial, Mr. Walker attempted to prove that he lacked an intent to defraud or injure the bank by proving that Holloway and Hastings were good credit risks and understood their obligation to repay the loans at issue. Walker argues that, under United States v. Gens, 493 F.2d 216 (1st Cir.1974), this evidence is relevant to show a lack of intent to defraud the bank. The government argues that this evidence was properly excluded. Relying on United States v. Foster, 566 F.2d 1045 (6th Cir.1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1473, 55 L.Ed.2d 509 (1978), the government argues that whether the loans were "good" or "bad" is irrelevant to the defendant's intent to defraud the bank. The trial court apparently agreed with the government's position, ruling the evidence irrelevant. Despite this ruling, however, the jury heard testimony from a number of witnesses indicating that both Hastings and Holloway were good credit risks and their financial statements indicated that they had the ability to repay the loans. In addition, Mr. Walker testified that he considered the borrower's financial strength, character, and reputation as well as the bank's potential to profit from the loans before approving the loans. Mr. Walker further testified that Holloway and Hastings understood their obligation to repay the loans in the event that Walker was unable to do so. Although we believe that the government and the trial court construed Foster too broadly, we find no error in the attempted exclusion of this evidence.

*1305 In United States v. Gens, 493 F.2d 216 (1st Cir.1974), the court reversed a bank director's conviction for misapplication of bank funds, 18 U.S.C. s 656, finding insufficient evidence that the director had intended to defraud the bank. In that case, two bank officers approved loans to third parties, knowing that the funds would be given to Gens, a bank director who could not borrow the money himself because he had already exceeded the bank's lending limit. The First Circuit held that misapplication of bank funds had not been established:

[W]here the named debtor is both financially capable and fully understands

that it is his responsibility to repay, a loan to him cannot--absent other circumstances--properly be characterized as a sham or dummy, even if bank officials know he will turn over the proceeds to a third party. Instead, what we really have in such a situation are two loans: one from the bank to the named debtor and the other from the named debtor to the third party. The bank looks to the named debtor for repayment of its loan, while the named debtor looks to the third party for repayment of his loan. If for some reason the third party fails to make repayment to the named debtor, the latter nonetheless recognizes that this failure does not end his own obligation to repay the bank. In this situation, the bank official has simply granted a loan to a financially capable party, which is precisely what a bank official should do. There is no natural tendency to injure or defraud the bank, and the official cannot be said to have willfully misapplied bank funds in violation of s 656.

Id. at 222 (footnote omitted). See also United States v. Fusaro, 708 F.2d 17, 21 (1st Cir.), cert. denied, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983); United States v. Blackwood, 735 F.2d 142, 145-46 (4th Cir.1984).

A number of other circuits have accepted the Gens court's reasoning, but have refused to apply it in cases where the beneficiary of the loan is a bank officer who conceals his interest in the loan from the bank. See United States v. Shively, 715 F.2d 260, 265 (7th Cir.1983) ("it has been held to be misapplication per se for a bank officer or employee to funnel funds to himself by making a loan to a third party ..."), cert. denied, 465 U.S. 1007, 104 S.Ct. 1001, 79 L.Ed.2d 233 (1984); United States v. Krepps, 605 F.2d 101, 106 (3rd Cir.1979); United States v. Twiford, 600 F.2d 1339, 1341 (10th Cir.1979) ("misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made for his own benefit, concealing his interest from the bank"); United States v. Steffen, 641 F.2d 591, 597 (8th Cir.) (financial condition of borrower irrelevant where bank officer benefits from loan and conceals interest from the bank), cert. denied, 452 U.S. 943, 101 S.Ct. 3091, 69 L.Ed.2d 959 (1981). At least one circuit has rejected the Gens analysis in all circumstances. United States v. Kennedy, 564 F.2d 1329, 1339 (9th Cir.1977) ("misapplication ... occurs when funds are distributed under a record which misrepresents the true state of the record with the intent that bank officials ... will be deceived"), cert. denied, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978). [FN6]

FN6. Each of these cases involve misapplication of bank funds in violation of 18 U.S.C. s 656. The crime at issue here is bank fraud, in violation of 18 U.S.C. ss 371, 1344. Both crimes require proof that the defendant intended to defraud or injure a bank. The crimes differ in that misapplication requires proof of a conversion of bank funds, while bank fraud requires only a fraudulent statement designed to influence a bank's action. Compare United States v. Goldblatt, 813 F.2d 619, 625-26 (3rd Cir.1987), with United States v. Duncan, 598 F.2d 839, 860 (4th Cir.1979).

Although we have been faced with the issue on at least two occasions, United States v. Cooper, 577 F.2d 1079 (6th Cir.), cert. denied, 439 U.S. 868, 99 S.Ct. 196, 58 L.Ed.2d 179 (1978); United States v. Foster, 566 F.2d

1045 (6th Cir.1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1473, 55 L.Ed.2d 509 (1978), we have never expressly adopted or rejected the Gens analysis. In Cooper, we found that the named borrowers lacked the ability to repay the loans and did not understand their obligation to do so. *1306 Thus, even if Gens had been adopted, it would not have exonerated the bank official's conduct in that case. In Foster, we distinguished Gens on the grounds that, unlike the defendants in Foster, "the defendants in Gens were not recipients of kickbacks from loans which they had approved." 566 F.2d at 1050. Since the bank officials in Foster received kickbacks in exchange for approving the loans at issue, they knew that the loans had to be made in an amount larger than would otherwise have been necessary. Thus, even if the borrowers had fit the Gens criteria, a portion of the loan proceeds had been misapplied--that portion attributable to the kickbacks. Foster did not hold that evidence of a named borrower's credit worthiness was irrelevant under all circumstances.

In this case, there is no evidence that Mr. Walker received a kickback from the loans at issue, and it appears that the named borrowers, Hastings and Holloway, had the ability to repay the loans and understood their obligation to do so. Mr. Walker is, however, a bank officer, and he approved the loans at issue for his own benefit concealing that fact from the bank's board of directors. This case, therefore, requires us to determine whether we will adopt the First Circuit's Gens rule, the modified form of that rule adopted by other circuits, or the Ninth Circuit's complete rejection of Gens. We believe that the Third Circuit's reasoning in United States v. Krepps, 605 F.2d 101 (3rd Cir.1979), most accurately states the law on this issue.

[4] In Krepps, a bank officer loaned money to two borrowers, who then loaned the money to him. He concealed his interest in these loans from other bank officials. The Third Circuit found sufficient evidence of an intent to defraud the bank, and affirmed his conviction for misapplication of bank funds:

> [I]f the named debtor is credit worthy and understands that he is responsible to repay the loan, "the bank official has simply granted a loan to a financially capable party, which is precisely what a bank official should do." How this party chooses to dispose of the fund so obtained should, in the absence of misrepresentation on his part, be of no interest to the bank, and certainly not to the criminal law.
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> It is quite a different matter, however, when a bank officer procures the assistance of another person in obtaining the desired funds for his own use. In these circumstances, it cannot be said that the bank officer is doing "precisely what a bank official should do." To the contrary, a jury would be warranted in concluding that the loan transaction was undertaken with intent to defraud the bank or to deceive its officers or examiners, notwithstanding the fact that the intermediary may have been financially capable of repaying the loan and undertook to do so. A jury might plausibly deduce that the bank officer, by channeling the funds through another party, sought to conceal from the bank his own interest in the transaction and thereby circumvent the barrier--imposed by the statute [limiting direct loans to bank officers] and the bank's own regulations--to the bank's making the particular loan directly to him.
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Essentially, then, it is our view that a willful misapplication ... is established when a bank officer secures a loan for himself by having the bank lend to a named debtor who then transfers the funds to him, even when the named debtor is financially capable and [fully] understands that it is his legal responsibility to repay the loan. In these circumstances, the very existence of a mediated transaction demonstrates that the bank officer had the measure of criminal intent needed to establish a willful misapplication of bank funds.

Id. at 106, 108.

The Krepps rule is compatible with our decisions in Cooper, Foster and United States v. Franklin, 608 F.2d 241 (6th Cir.1979). In each of these cases, we held that, "at the very least, the term misapplication '[means a] deceitful and dishonest mishandling of bank funds.' " Franklin, 608 *1307 F.2d at 244 (quotingCooper, 577 F.2d at 1085). Where a bank officer arranges loans for a named borrower, intending that the proceeds will benefit himself, and without disclosing his interest in the loan transaction, he has acted in a deceitful and dishonest manner. As the Third Circuit noted in Krepps, he has acted to circumvent federal statutes limiting a bank's extension of credit to its own officers and he has concealed material facts about the transaction from other bank officials. Such conduct is sufficient to establish the necessary intent to injure or defraud the bank.

[5] In this case, evidence of Hastings' and Holloway's credit worthiness and their understanding of the obligation to repay was irrelevant, as the trial court held. Mr. Walker arranged these loans for his own benefit, concealing his interest in them from other bank officials. With these facts, the government adequately established Walker's intent to defraud the bank. The fact that the loans were otherwise "good" loans, and that the named borrowers understood their obligation to repay the loans if Walker defaulted on them, is irrelevant because Walker personally benefited from the transactions at issue. Thus, even if the trial court misread our holding in Foster, his ruling was correct. Walker was not prejudiced by the trial court's attempted exclusion of this evidence, and his convictions on counts 1, 23 and 27 are affirmed.

[6] Walker's remaining arguments are without merit. Count 1 of the indictment is not barred by the applicable statute of limitations. 18 U.S.C. s 3282. Although the loans at issue in that count were made in 1981, Walker continuously attempted to conceal his interest in them by keeping payments on the loans current and, later, by giving Hastings the funds to make payments on Walker's behalf. The government thus established that repayment of the loans and concealment of Walker's interest in them were objectives of the conspiracy. The conspiracy therefore continued until its discovery in 1985. "In conspiracies where a main objective has not been attained or abandoned and concealment is essential to success of that objective, attempts to conceal the conspiracy are made in furtherance of the conspiracy." United States v. Howard, 770 F.2d 57, 61 (6th Cir.1985). See also United States v. Portner, 462 F.2d 678 (2d Cir.), cert. denied, 409 U.S. 983, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); United States v. Hickey, 360 F.2d 127 (7th Cir.1966).

[7] Walker attacks his convictions on counts 2 and 26 of the indictment, which allege that he made false entries in two Federal Deposit Insurance Corporation ("FDIC") questionnaires, in violation of 18 U.S.C. s 1005. The entries at issue required Walker to disclose all accommodation loans, or loans made to named parties on behalf of an unnamed person, which had

been made, "since last examination." Walker answered this question in the negative in 1982, after the loans to Hastings, and again in 1985, after the Holloway and Jones loans. He testified at trial that he believed the question referred to the last bank examination by any entity, including state bank examiners. Because the record does not disclose whether Walker revealed these loans during examinations by state officials which preceded the FDIC examinations, Walker argues that his answers to the questions were correct and that the jury must have speculated as to his guilt on these counts.

Walker was not entitled to a directed verdict of acquittal on either count. Taking the evidence in the light most favorable to the government, a reasonable jury could have concluded that the FDIC's question referred to the last examination conducted by that agency. See United States v. O'Boyle, 680 F.2d 34 (6th Cir.1982); United States v. Gibson, 675 F.2d 825 (6th Cir.), cert. denied, 459 U.S. 972, 103 S.Ct. 305, 74 L.Ed.2d 285 (1982). Under that theory, Walker's answers were false. Further, there is no evidence to indicate that Walker disclosed the transactions at issue to state officials, or even that state officials require such a disclosure. Finally, the testimony showed that, after an FDIC official explained the question to Walker in 1985, he changed his answer to this question to reveal *1308 two previously omitted loans, but failed to disclose the Holloway and Jones loans. The government was required to show that Walker knowingly and willfully made a false entry in the questionnaire regarding a material fact, with the intent to deceive the FDIC. United States v. McGuire, 744 F.2d 1197, 1200 (6th Cir.1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985). The evidence adduced at trial, taken in the light most favorable to the government, would allow a reasonable jury to draw that conclusion.

[8] Nor was Walker entitled to a directed verdict on counts 3 through 21 of the indictment. These counts allege false entries in bank records based upon the recordation of interest payments on the Hastings loans. These records recorded the fact that interest payments had been made, but did not reveal that the payments were not made with Hastings' funds or that the loans were not made for Hastings' benefit. Walker contends that the entries are not false because they recorded actual transactions exactly as they occurred.

A statement may be false when it contains a half truth or when it conceals a material fact. McGuire, 744 F.2d at 1200, n. 2; United States v. Krepps, 605 F.2d 101, 108 (3rd Cir.1979) ("an entry may be false by virtue of an omission of material information as much as by an actual misstatement"). Here, the records failed to disclose Walker Grain's interest in the loans and the fact that Walker Grain made the interest payments on Hastings' behalf. Both facts may be regarded as material. The jury was entitled to conclude that these entries were false.

Walker argues that the entries are not false because they recorded actual transactions exactly as they occurred. In United States v. Hardin, 841 F.2d 694, 697 (6th Cir.1988), we noted, "It is undisputed that an entry that shows a transaction as it actually occurred is not a false entry under section 1005." That rule remains undisputed, but does not require that Walker's conviction be reversed. In Hardin, a bank official made a questionable loan of $250,000 to a business in which his wife had an interest. The loan was sold to another bank. Two years later, the bank official renewed the loan, using the proceeds to extinguish his bank's obligation to the

purchasing bank. The bank records disclosed a $250,000 loan to the business. The indictment charged that this entry was false because the loan was not made to the business, but to another bank. At trial, the government failed to prove that the loan was never made; instead it argued that the loan was a sham or a mere formality. Since the government failed to prove that the loan was never made, the defendant's conviction for making false statements was reversed.

This case is distinguishable from Hardin on its facts. Here the government alleged and proved that the entries at issue were false because they failed to disclose that the loans were not made for the benefit of the named borrower and that the named borrower had not made the interest payments with his own funds. Hardin expressly distinguished cases involving loans made for the benefit of unnamed third parties. Id. at 698. Further, the charge in this case was that the entries failed to disclose material information, not that they recorded interest payments or loans which had never been made. The entries at issue are false not because they fail to disclose the manner in which a transaction occurred, but because they fail to disclose the true beneficiary of the loans at issue.

Walker argues that the trial court erred in refusing to grant a judgment of acquittal on Count 24 of the indictment. This count alleges a false entry in the minutes of the finance committee meeting which approved the Holloway loan. That entry stated, "Dan Holloway, application for loan of $122,000 at FBP for one year ... to pay off farm note at First Tennessee Bank, secured by deed of trust on farm. Approved." The government argued at trial that this entry was false because it misled the finance committee into believing that the bank's loan to Holloway would be secured by a deed of trust on a farm, when the loan was in fact unsecured. Walker points out that the loan documents indicate *1309 that the loan was unsecured. No member of the finance committee testified that Walker told them the loan would be secured. Walker concludes that, because the minute entry can be read two ways, he was entitled to a verdict of acquittal on this count.

We disagree. The minute entry may, indeed, be read in two ways, one favorable to Walker and one unfavorable. In considering Walker's motion for a judgment of acquittal, the district court was required to view the evidence in the light most favorable to the government. There was sufficient evidence to allow the jury to conclude that this entry was false, and Walker's argument to the contrary is without merit. See, United States v. Johnson, 741 F.2d 854, 856 (6th Cir.), cert. denied, 469 U.S. 1075, 105 S.Ct. 572, 83 L.Ed.2d 512 (1984); United States v. Green, 548 F.2d 1261, 1262 (6th Cir.1977).

Walker's challenge to his conviction on Count 28 of the indictment is equally without merit. On January 18, 1985, Walker applied for a loan of $200,000 from the bank for Walker Grain Company. On that date, Walker Grain Company's checking account at the bank was overdrawn by $293,072.06. In applying for the loan, Walker assured Gary Carlton that he had a check for $300,000 coming in which would cover the overdraft. The check was written on a Walker Grain Company checking account at First Citizens Bank. This account had been closed in June, 1982 and there were no funds in the account to cover the $300,000 check. Walker testified at trial that the check was written because he had applied for a loan in that amount from First Citizens Bank, although the loan had not yet been approved. He testified that he informed Mr. Carlton of these facts. The loan from First Citizens Bank was never approved, although

there was no evidence that Walker Grain Company's $300,000 check was dishonored by that bank. On January 24, 1985, Farmers Bank loaned $190,000 to Walker Grain Company and the proceeds were deposited into the Walker Grain Company account. These proceeds, together with the proceeds of the Jones loan, allowed Farmers Bank to cover the $300,000 check written on the First Citizens account, curing the overdraft in the Walker Grain Company account.

Walker argues that he made no false statements to Carlton in order to receive the $190,000 loan, because he explained to Carlton that the $300,000 check would be covered by a loan from First Citizens. As the government argues, however, the jury was entitled to view Walker's statements as false because he failed to tell Carlton that Walker Grain Company's checking account at First Citizens had been closed for nearly four years. Further, in the course of applying for the loan from Farmers Bank, Walker failed to inform Carlton that the grain company already had hundreds of thousands of the bank's dollars in its coffers from the Hastings and Jones loans. Certainly these are omissions of material fact which the jury was entitled to consider in determining Walker's guilt. That they chose not to accept Walker's version of the events is no ground for reversing his conviction.

We conclude, therefore, that the jury's verdict on each count of the indictment must be affirmed. The district court did not err in admitting evidence of Hastings' guilty plea and plea agreement, or in excluding evidence of the named borrowers' ability to repay the loans at issue in counts 1, 23 and 27 of the indictment. While evidence of the named borrowers' ability to repay and understanding of their obligation to do so may be relevant in certain cases, it is not where, as here, the individual who actually benefited from the loan was a bank officer. The prosecution is not barred by the applicable statute of limitations, and the district court did not err in denying Walker's motion for judgment of acquittal on the remaining counts of the indictment. Accordingly, we AFFIRM Walker's conviction on all counts. Given our disposition of Walker's appeal, we see no need to address the issues raised in the government's appeal.

END OF DOCUMENT

"substantial possibility" of govt investigation/audit → efforts to conceal probably part of orig. conspiracy

Citation
515 F.2d 892
75-2 USTC P 9656
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UNITED STATES of America, Plaintiff-Appellee,
v.
Joe Raymond DIEZ and Peter A. Palori, Defendants-Appellants.
No. 74-2641.
United States Court of Appeals,
Fifth Circuit.
July 14, 1975.

The United States District Court for the Middle District of Florida, at Tampa, Ben Krentzman, J., found one of the defendants guilty of income tax evasion and found both defendants guilty of conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, and they appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that (1) the hearsay statements made by a coconspirator in 1972 were part of the central conspiracy itself, which involved a series of real estate transactions between 1965 and 1968 but which had not terminated when the statements were made, and they were thus admissible under the coconspirator exception to the hearsay rule, (2) the work papers of defendant's accountant, an alleged coconspirator, were admissible, (3) the refusal of the defendant's motion for a trial separate from his accountant was not an abuse of discretion, where, inter alia, defendant's proffer in support of his motion was bereft of exculpatory content and where the motion was made late in the trial, and (4) the illustrative charts used by the government, while undeniably making assumptions concerning the proper attribution of income from the real estate transactions, had ample evidentiary support.

Affirmed.

[1] CRIMINAL LAW k423(1)
110k423(1)
Acts and declarations of coconspirators are binding upon each member of the conspiracy if made during the life of the conspiracy and in furtherance of any of its objects.

[2] CRIMINAL LAW k419(2.20)
110k419(2.20)
Formerly 110k419(1)
Where IRS agent's statement, reported to second agent by coconspirator, of his intention to classify defendant as a dealer in real estate was received not to prove that defendant was or had been classified as a dealer, but rather to prove that the first agent intended to regard him as one, the statement of the first agent was a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)" and fell under the well-established exception to the hearsay rule for such statements. Federal Rules of Evidence, rules 803(3), 805, 28 U.S.C.A.

[3] CRIMINAL LAW k410
110k410
Since, when IRS agent first interviewed defendant, defendant specifically

referred the agent to an accountant for answers to any questions concerning taxes, the statement thereafter made by the accountant constituted an "admission by an authorized agent" and was admissible against defendant irrespective of whether the coconspirator exception applied.

[4] CRIMINAL LAW k422(1)
110k422(1)
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, involving a series of real estate transactions between 1965 and 1968, the hearsay statements made by coconspirator in 1972 were part of the central conspiracy itself, which had not terminated when those statements were made, and were thus admissible under the coconspirator exception to the hearsay rule.

[5] CRIMINAL LAW k423(1)
110k423(1)
A statement need not be false in every detail in order to have been made in furtherance of a conspiracy to conceal and defraud.

[6] CRIMINAL LAW k423(1)
110k423(1)
Although isolated parts of coconspirators' hearsay statements may have been true, the record showed that, taken as a whole, the statements were deceptive in design and were therefore in furtherance of the conspiracy, rendering them admissible under the coconspirator exception to the hearsay rule.

[7] CRIMINAL LAW k423(3)
110k423(3)
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, the work papers of defendant's accountant, an alleged coconspirator, were admissible under the coconspirator exception to the hearsay rule, since the papers were prepared during the course of the conspiracy and were also in furtherance of the purpose thereof, namely, the filing of false income tax returns. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201.

[8] CRIMINAL LAW k423(3)
110k423(3)
Accountant for unindicted coconspirator could have testified to what his client told him concerning the ownership of subject land, since his client's statements to him were those of a coconspirator during the course and in furtherance of a conspiracy to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201.

[9] CRIMINAL LAW k436(2)
110k436(2)
Formerly 110k436
Availability of the declarant does not bar introduction of a document under the Business Records Act. 28 U.S.C.A. s 1732.

[10] CRIMINAL LAW k419(12)
110k419(12)
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, involving a series of real estate transactions, a letter from an attorney for the seller of a parcel purchased and later resold by defendant, which letter stated that defendant was the actual mortgagor of the property even though the property was held in the name of defendant's mother, was admissible over a hearsay objection, even though the attorney testified that an unindicted coconspirator had told him that defendant was the mortgagor, since the coconspirator's statement was made long before the conspiracy ended and was in furtherance of the conspiracy. 18 U.S.C.A. s 371.

[11] CONSPIRACY k48.1(2.1)
91k48.1(2.1)
Formerly 91k48.1(2)
In prosecution brought against uncle and nephew for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, the role of the uncle in the various real estate transactions in question was amply established by the government's evidence, and his motion for acquittal was thus properly denied. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201.

[12] CONSPIRACY k40
91k40
Mere association with members of a conspiracy is insufficient to establish a person's participation in the conspiracy.

[13] CRIMINAL LAW k1159.2(5)
110k1159.2(5)
Guilty verdict must be sustained if there is substantial evidence, taking view most favorable to the government, to support it, and that standard is not changed by fact that government's case rested in substantial part on circumstantial evidence.

[13] CRIMINAL LAW k1159.6
110k1159.6
Guilty verdict must be sustained if there is substantial evidence, taking view most favorable to the government, to support it, and that standard is not changed by fact that government's case rested in substantial part on circumstantial evidence.

[14] CRIMINAL LAW k622.2(4)
110k622.2(4)
Formerly 110k622(2)
In prosecution for income tax evasion and for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, the refusal of defendant's motion for a trial separate from his accountant was not an abuse of discretion, where, inter alia, defendant's

proffer in support of his motion was bereft of exculpatory content and where said motion was made very late in the trial. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

[15] CRIMINAL LAW k622.3
110k622.3
Formerly 110k622(3)
For court to grant a severance motion based on the unavailability of a codefendant whose testimony is allegedly needed, the movant must show a bona fide desire to use the codefendant's testimony, that the testimony will be exculpatory, that the codefendant will likely testify if the severance is granted, and that the motion is timely and will not impair the economy of judicial resources.

[16] CRIMINAL LAW k622.2(1)
110k622.2(1)
Formerly 110k622(1)
Complexity of the trial, by itself, is insufficient ground for overturning trial court's denial of a severance motion; in fact, in complex trials the pressures against severance are especially great because of the drain on judicial resources that would be created by separate trials.

[17] CONSPIRACY k45
91k45
In joint trial of uncle and nephew on charge of conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, nephew's preconspiracy financial statement which purported to list nephew's outstanding obligations, yet made no mention of a loan from uncle, was admissible as evidence casting doubt on whether nephew had made a $3,200 interest payment to uncle for a loan, thus supporting government's charge of a conspiracy to conceal nephew's income.

[18] CRIMINAL LAW k1169.5(2)
110k1169.5(2)
In joint trial of uncle and nephew on charge of conspiring to defraud the United States by impeding the Internal Revenue Service in collecting income taxes, uncle could not have been prejudiced by the introduction of nephew's preconspiracy financial statement, which purported to list nephew's outstanding obligations yet made no mention of a loan from uncle, since the jury was repeatedly instructed that statements of any conspirator made before the existence of the conspiracy may only be considered as evidence against the person making it.

[19] CRIMINAL LAW k437
110k437
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in collecting income taxes, the illustrative charts used by the government, while undeniably making assumptions concerning the proper attribution of income from the real estate transactions involved, had ample evidentiary support. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s

7201.

[20] CRIMINAL LAW k777
110k777
Where summaries are used in a prosecution for income tax evasion, the trial court should instruct the jury that the summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documents and detail evidence already submitted. 26 U.S.C.A. (I.R.C.1954) s 7201.

[21] CRIMINAL LAW k437
110k437
In a criminal prosecution, it is within the trial court's discretion to decide whether the Government may use illustrative charts.

*894 Raymond E. LaPorte, Tampa, Fla., for Diez.

E. David Rosen, Miami, Fla., for Palori.

John L. Briggs, U. S. Atty., Bernard Dempsey, Asst. U. S. Atty., Jacksonville, Fla., Claude Tison, Jr., Asst. U. S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

895 Before GIBSON,[FN] THORNBERRY and AINSWORTH, Circuit Judges.

FN* Of the Eighth Circuit, sitting by designation.

AINSWORTH, Circuit Judge:

Peter A. Palori and Joe Raymond Diez appeal from convictions of conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income tax in violation of 18 U.S.C. s 371. Palori also appeals from his conviction on four counts of income tax evasion. 26 U.S.C. s 7201. Both defendants assign numerous errors in the trial court's rulings concerning the admissibility and weight of hearsay evidence, the propriety of a joint trial of the defendants, and the possibility of prejudice from the Government's use of illustrative charts.

I. Factual Background

The Government's case against Palori and Diez involved a series of real estate transactions in Tampa, Florida, between 1965 and 1968. The Government's theory was that Palori was the real owner of shares of the various parcels sold in these transactions, but that he had arranged for several of his relatives to act as nominal owners or brokers in the transactions and to report part of the profits from the sales on their own tax returns. Palori's mother, Minnie Lopez, reported profits from a number of the transactions on her returns and was indicted as a member of the conspiracy but acquitted. Diez, who is Palori's uncle, reported part of the profit from one of the transactions, as well as two brokerage commissions allegedly received in connection with other transactions, and interest on a loan he allegedly made to Palori. B. J. DeGuzman, Palori's accountant during the tax years in question, reported part of the profit from one of the real estate transactions, and was indicted and convicted both for his role in the conspiracy and for preparing false returns specifically those of Palori and his relatives.[FN1] The Government contended

that all of this income was properly attributable to Palori. James Garrett and Clarence Prevatt, two unindicted coconspirators, also participated in some of the transactions.

FN1. DeGuzman did not appeal his conviction.

II. Evidence Allegedly Admitted in Violation of the Hearsay Rule

A. Statements of Coconspirators

[1] Palori and Diez contend that it was error to permit the introduction of several statements by Garrett and DeGuzman, two of their coconspirators, which, they argue, were inadmissible under the hearsay rule. The general principles governing the introduction of out-of-court declarations by one conspirator against another, for the truth of the matter stated, are clear:

It is established law, at least since Krulewitch v. United States, 1949, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790, and under so many cases prior to and following Krulewitch that it would be an affectation to cite them, that acts and declarations of co-conspirators are binding upon each member of the conspiracy, if made during the life of the conspiracy and in furtherance of any of its objects.

United States v. Harrell, 5 Cir., 1970, 436 F.2d 606, 613. See United States v. Register, 5 Cir., 1974, 496 F.2d 1072, 1078.

[2][3] The statements complained of were part of the testimony of Agents Brock and Hill of the Internal Revenue Service. Brock testified that DeGuzman told him, in an interview in November 1970, that during a prior audit another agent, named Hunting, had proposed to classify Palori as a dealer in real estate,[FN2]and *896 thus as ineligible for the special tax treatment usually given long-term capital gains.[FN3] DeGuzman also stated in interviews during July 1969 and July 1970, according to the testimony of Agents Brock and Hill, that he and Minnie Lopez had paid fees and brokerage commissions to Diez in connection with several of the real estate transactions in the case.[FN4]

FN2. The fact that DeGuzman's statement, like numerous others introduced at trial, relied on a statement by another person does not render the testimony inadmissible. Agent Hunting's statement, reported to Agent Brock by DeGuzman, was a statement of his intention to classify Palori as a dealer in real estate. The statement was received not to prove that Palori was or had been classified as a dealer, but rather to prove that Agent Hunting intended to regard him as one. The statement was thus a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)" and falls under the well-established exception to the hearsay rule for such statements. Fed.R.Evid. Rule 803(3). DeGuzman was therefore a competent witness to Hunting's statement, just as Agent Brock was a competent witness to DeGuzman's statement under the coconspirator rule. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed.R.Evid. Rule 805.

The Federal Rules of Evidence were approved by Congress on January 2, 1975, and take effect on the one hundred and eightieth day thereafter. The Rules

are to be applied even in advance of their effective date "except to the extent that application of the rules would not be feasible, or would work (an) injustice." United States v. Rivera, 2 Cir., 1975, 513 F.2d 519. See United States v. Arias-Diaz, 5 Cir., 1974, 497 F.2d 165, 170.

FN3. Palori made no objection to the introduction of this statement, either on the basis of the hearsay rule or on the basis of irrelevance, and admission of the testimony was not plain error. Wright, Federal Practice and Procedure: Criminal s 856 (1969). Therefore, it seems doubtful that we can consider this assignment of error as to Palori. Moreover, Agent Hunting was available and testified at trial. Neither Palori nor Diez has explained why they did not attempt to cross-examine him or call him as a witness on this issue.

FN4. Because DeGuzman's statement is consistent with Palori and Diez's version of the facts, it is unclear how admission of this testimony prejudiced defendants. Moreover, when Agent Brock first interviewed Diez he specifically referred the agent to DeGuzman for answers to any questions concerning his taxes. DeGuzman's statement, therefore, would appear to be an "admission by an authorized agent," Hayes v. United States, 5 Cir., 1969, 407 F.2d 189, 192, and therefore would be admissible irrespective of whether the coconspirator exception applies. In Hayes the accountant acted pursuant to a written power of attorney, but we know of no precedent requiring authorization by a written instrument.

According to Agent Brock's testimony, in an interview during January 1972 Garrett stated that Diez "didn't participate as a partner in any of Mr. Palori's real estate transactions, nor did he perform any services which would entitle him to a commission." This statement, in contrast to that of DeGuzman concerning payment of fees and commissions, supported the Government's contention that income properly belonging to Palori was being attributed to Diez as part of the conspiracy. Agent Brock, testifying as an expert witness, also stated that in computing Palori's income for 1965 he disregarded a check from Palori to Garrett, allegedly for the latter's interest in a parcel sold in one of the transactions, because Garrett had told him (in the January 1972 interview) that he did not own an interest in the parcel in question.[FN5]

FN5. This testimony is largely repetitive of earlier testimony by Agent Brock. On cross-examination his testimony strongly suggested that Garrett had told him he held no interest in the property in question. No objection was made by defendants. His testimony on redirect examination, to which Palori objected, was largely repetitive of his answers on cross-examination.
Garrett's statement to the agents disavowing any ownership of a share in one of the parcels sold in 1965 was also introduced in the form of his tax return for that year, which contained no reference to gain from that sale. Palori contends that the tax return was inadmissible, relying on Greenbaum v. United States, 9 Cir., 1935, 80 F.2d 113, 125, which we cited approvingly in dicta in United States v. Ragano, 5 Cir., 1973, 476 F.2d 410, 417-418. Like the testimony on redirect concerning Garrett's oral

statement to the agents, however, the information supplied by the tax return was merely repetitive of what Agent Brock had stated on cross-examination without objection. Under these circumstances, the admission of the tax return and Agent's Brock's statements on redirect examination was not erroneous or prejudicial.

Palori and Diez contend that these hearsay statements were, at most, attempts to conceal the completed crime, and thus could not be introduced under the coconspirator exception to the hearsay rule. A review of the prior Supreme *897 Court cases convinces us that this argument must fail.

In Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), the Supreme Court held inadmissible the hearsay statement of a coconspirator made after she had been apprehended. The Government argued that there was an implicit conspiracy to conceal the crime. The Court noted, however, that no such conspiracy to conceal had been charged in the indictment, and stated:

It is beyond doubt that the central aim of the alleged conspiracy transportation of the complaining witness to Florida for prostitution had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her.

336 U.S. at 442, 69 S.Ct. at 718.

In Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953), a conspiracy to conceal the crime was charged in the indictment, but the Court interpreted Krulewitch to require more than an unsubstantiated allegation:

This Court in (Krulewitch) rejected the Government's contention that in every conspiracy there is implicit an agreement as a part thereof for the conspirators to collaborate to conceal the conspiracy.

344 U.S. at 616, 73 S.Ct. at 489. The Court held in Lutwak that the Government had failed to prove a conspiracy to conceal the crime, and went on to discuss what kind of proof would be sufficient. See GRUNEWALD v. United States, 353 U.S. 391, 403-405, 77 S.Ct. 963, 973-974, 1 L.Ed.2d 931 (1957).

[4] It is unnecessary to apply the reasoning developed in these prior cases concerning proof of a conspiracy to conceal a completed crime, because the statements in question here were part of the central conspiracy itself, which had not terminated when those statements were made. In this case the Government charged a conspiracy to defraud the United States by impeding the Internal Revenue Service in the collection of income tax. This conspiracy is different from the conspiracies discussed in the cases relied on by defendants.

In Krulewitch the conspiracy was to transport a woman across state lines for prostitution in violation of 18 U.S.C. s 2421. That conspiracy clearly had ended when the arrested coconspirator made her statement. In Lutwak, supra, the conspiracy was

" 'to defraud the United States of and concerning its governmental function and right of administering' the immigration laws and the Immigration and Naturalization Service, by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans."

344 U.S. at 605, 73 S.Ct. at 483 (emphasis added). The conspiracy to defraud was complete when the conspirators deceived the immigration officials into permitting them to enter the country.[FN6] The Court held that

coconspirators' statements made later would not be admissible under the coconspirator exception to the hearsay rule. In GRUNEWALD, supra, the conspiracy was to defraud the United States by preventing criminal tax prosecutions. The prosecutions were prevented through the procurement, by bribery, of "no prosecution" rulings from the Internal Revenue Service, and ended when the rulings were issued.

FN6. The dissolution of the fraudulent marital relations, after the aliens had entered the United States but long before the indictments were handed down, left little doubt that the conspiracy to defraud the Government had ended.

On the other hand, in the present case the central aim of the conspiracy was to deceive officials of the Internal Revenue Service, thereby inducing them to accept fraudulent tax returns as truthful and accurate. In light of the substantial possibility that the returns would be audited and investigated, the filing of the returns did not fully accomplish the purpose *898 of the main conspiracy, which, by its very nature, called for concealment.[FN7]

FN7. The conspiracy alleged in this case is similar to the Supreme Court's examples, in GRUNEWALD, supra, of crimes that inherently involve concealment.
Kidnapers in hiding, waiting for ransom, commit acts of CONCEALMENT in furtherance of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the SUCCESSFUL ACCOMPLISHMENT of the crime NECESSITATES CONCEALMENT.
353 U.S. at 405, 77 S.Ct. at 974 (emphasis added).

The Supreme Court described a very similar conspiracy in Forman v. United States, 361 U.S. 416, 423-424, 80 S.Ct. 481, 486, 4 L.Ed.2d 412 (1960):
(T)he conspiracy was a continuing one extending from 1942 to 1953 and its principal object was to evade (taxes) for 1942-1945, inclusive, by concealing (the conspirators') "holdout" income. This object was not attained when the tax returns for 1945 concealing the "holdout" income were filed. As was said in GRUNEWALD, this was but the first step in the process of evasion. The concealment of the "holdout" income must continue if the evasion is to succeed.
In some circumstances it may be difficult to determine precisely when the deception has been accomplished in a conspiracy like this one.[FN8] A lapse of several years between the filing of the last fraudulent return and the initiation of investigative efforts by the Government might suggest that the conspiracy had succeeded in its purpose. Statements made during the course of such an investigation might be considered outside the scope of the coconspirator exception. That difficult determination is unnecessary in the present case, however, because an IRS audit of Palori's returns for 1965 and 1966 was undertaken in April 1968 even before the last fraudulent return involved here was filed. Thus the conspirators were clearly on notice that their activities had aroused suspicion and that further deception might be necessary to fulfill their purpose. At the time of the statements by DeGuzman and Garrett, it could not be said that the conspiracy "had long since ended in success or failure," as was true in Krulewitch. No charges had been brought,

so the conspiracy could not be considered a failure, and the investigation had not been abandoned, so the conspiracy could not be considered a success.

FN8. In Forman the Supreme Court suggested that so long as acts of concealment continue beyond the filing of the returns, such conspiracies cannot be said to have "ended in success or failure" until either the conspirators are caught or the statute of limitations has run on any action to recover the evaded taxes. 361 U.S. at 424, 80 S.Ct. at 486.

"(T)he termination of a conspiracy generally is an issue to be determined on the facts of the individual case . . . ." United States v. Sarno, 1 Cir., 1972, 456 F.2d 875, 878. We find no reversible error in the District Court's conclusion that, for purposes of admissibility, there was sufficient evidence that the statements in question were made during the course of the conspiracy. See United States v. Nowak, 7 Cir., 1971, 448 F.2d 134, 139; Nassif v. United States, 8 Cir., 1966, 370 F.2d 147, 151-152; United States v. Hickey, 7 Cir., 1966, 360 F.2d 127, 140-141; United States v. Klein, 2 Cir., 1957, 247 F.2d 908.

[5][6] Defendants contend that, even if made during the conspiracy, several of the statements made by DeGuzman and Garrett to the IRS agents cannot be considered in furtherance of the conspiracy.[FN9] Defendants argue that since the statements were consistent with the Government's position at trial, they must be considered as true; and true statements do not further a conspiracy to deceive. A statement need not be false in every detail, however, in order to have been *899 made in furtherance of a conspiracy to conceal and defraud. Deception rarely takes the form of an uninterrupted series of lies. A fair reading of the agents' interviews with DeGuzman and Garrett convinces us that, taken as a whole, the coconspirators' statements were deceptive in design, especially when considered in conjunction with the versions of the facts related to the agents by Palori, Diez and the others during the investigation. The truthfulness of isolated parts of the statements does not affect this conclusion. Cf. Bruton v. United States, 391 U.S. 123, 126, 88 S.Ct. 1620, 1622, 20 L.Ed.2d 476 (1968); United States v. Maddox, 5 Cir., 1974, 492 F.2d 104, 107.

FN9. The fact that Garrett and Prevatt were not made defendants in the case does not render the coconspirator exception inapplicable to them. United States v. Nixon, 418 U.S. 683, 700-701, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974).

B. Evidence Admitted Under the Business Records Act

[7] The trial court received into evidence, over defendants' objections, several documents which the Government contended were admissible under the Business Records Act. 28 U.S.C. s 1732(a).[FN10] Defendants particularly objected to the introduction of work papers, given to the IRS agents by DeGuzman, showing that Palori had a one-third interest in a parcel of land sold in one of the transactions in the case, although Diez reported half of the gain attributable to that one-third share on his own tax return for 1965. Defendants contend that proper foundation for introducing the papers as business records was lacking. We need not resolve that question, however,

because DeGuzman's work papers, like his statements discussed earlier, were admissible under the coconspirator exception to the hearsay rule. The work papers were prepared shortly after the sale of the parcel in 1965, and thus were statements made during the course of the conspiracy. They also were in furtherance of the purpose of the conspiracy: the filing of false income tax returns.[FN11]

FN10. Section 1732(a) provides:
In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
Rule 803(6) of the Federal Rules of Evidence provides:
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FN11. As we noted earlier in connection with DeGuzman and Garrett's oral statements, the fact that DeGuzman's notations on the work papers coincided with the Government's version of the facts at trial does not mean that they were not in furtherance of the conspiracy.

The remainder of the documents in question, objected to by Palori, are writings "made in (the) regular course of any business," 28 U.S.C. s 1732, and were otherwise qualified to be introduced under the Act. Palori does not dispute this, but raises other objections to the admission of these documents, which we deal with separately.
The Government offered in evidence the work papers of Clarence Prevatt's accountant, showing a profit of $24,612.91 on the sale of a parcel of real estate in 1968 and allocating $9,000 of that profit as Palori's share $9,000 that Palori did not report on his 1968 return. *900 The accountant testified that he prepared the work paper in the regular course of business, specifically in the course of preparing Prevatt's 1968 tax return. He also testified that Prevatt, an unindicted coconspirator in the case, had provided the information he used in his computations.
[8] Apparently Palori's only objection to the introduction of this document

is that, since the accountant could not testify to what Prevatt had told him concerning the ownership of the land, the same information could not come in by virtue of being preserved in a business record. We believe, however, that the accountant could have so testified, because Prevatt's statements to him were those of a coconspirator during the course and in furtherance of the conspiracy. The purpose of the conspiracy was to enable Palori to receive income from the various real estate transactions without revealing his participation in them as an owner and thus exposing himself to tax liability. The statements of the conspirators that were intended to facilitate the flow of funds to Palori were as much in furtherance of the conspiracy as were the statements designed to conceal the disposition of the proceeds of the transactions. Without Prevatt's directions to his accountant, which indisputably were given before the conspiracy ended, Palori would not have received his share of the proceeds from the sale, and a major purpose of the conspiracy would have been frustrated.

To establish Palori's intention to conceal his participation in one of the transactions in 1967, the prosecution offered a letter from an official of the title company that closed the sale, stating that Palori "did not want his name to appear because he did not think it was politically expedient that it do so." The title company official testified that he wrote the letter in the regular course of business and that Palori himself was the source of his statement concerning the omission of Palori's name from the transaction.[FN12]

FN12. Palori contends that the title company official could not remember whether Palori specifically directed that his name be kept out of the transaction or whether he simply drew that conclusion himself. A careful reading of the testimony to which Palori refers, however, shows that the official's uncertainty concerned a different part of his letter. In any event, the clear import of the text of the letter is that Palori had requested that his name not be mentioned, and a specific present recollection of that fact on the part of the writer of the letter is unnecessary.

[9] Palori contends that the title company officer's letter should not have been admitted because he was available to provide his own testimonial recollection of the facts in the letter. Availability of the declarant, however, does not bar introduction of a document under the Act. McCormick on Evidence s 311 at 728-729 (1972); Fed.R.Evid. Rule 803(6).

[10] As further evidence of Palori's concealment of his participation in the transactions, the prosecution introduced a letter from an attorney for the seller of a parcel purchased and later resold by Palori. It stated that Palori was the actual mortgagor of the property, even though the parcel was held in the name of Minnie Lopez, Palori's mother. The attorney testified that he prepared the letter in the regular course of his business. He stated that he had written Mrs. Lopez to tell her where to send the mortgage payments, but she had failed to make the first payment. Garrett intervened, informing the attorney that Palori was the actual mortgagor of the property and would be making the payments.

Palori maintains that the attorney was uncertain of the source of his information, but a review of the attorney's testimony reveals this contention

to be without merit. Furthermore, the fact that the attorney relied on Garrett's statement does not render admission of the letter violative of the hearsay rule. The statement was made in 1967, long before the conspiracy ended. It was in furtherance *901 of the conspiracy because the attorney had already brought foreclosure proceedings against Minnie Lopez. If Garrett had not intervened the conspirators could not have resold the property.

III. Sufficiency of the Evidence as to Diez

[11] Diez contends that the trial court erred in denying his motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, because the evidence was insufficient for submission of the case to the jury. His argument is based chiefly on the paucity of references to his role in the conspiracy by the numerous witnesses at trial. Under the Government's theory of the case, however, Diez's role was amply established by the evidence.

The Government sought to prove that Diez had reported income that was not properly attributable to him. That the income was reported by Diez was established by introducing his tax returns for 1965, 1966, 1967 and 1968. The other half of the Government's case against Diez was more difficult, because it required proof that Diez had not earned the income in question and had not owned a share of the property that was the source of the sales proceeds listed on his return.

[12] The prosecutor asked a number of witnesses whether they knew Diez, and many of them answered affirmatively. Diez argues that, because the prosecutor did not pursue the relevance of these witnesses' familiarity with Diez, his conviction was the product of guilt by association. It is true that mere association with members of a conspiracy is insufficient to establish a person's participation in the conspiracy,[FN13] but in this case it was the defendant's nonassociation that proved his guilt. Despite his acquaintance with a number of the witnesses at trial, Diez was not mentioned as a participant in the real estate transactions by anyone but Palori and, in one statement, DeGuzman.

> FN13. United States v. Oliva, 5 Cir., 1974, 497 F.2d 130, 134; United States v. Suarez, 5 Cir., 1973, 487 F.2d 236, 239; United States v. Martinez, 5 Cir., 1973, 486 F.2d 15, 24; United States v. Jackson, 5 Cir., 1970, 426 F.2d 305, 309; Jett v. United States, 5 Cir., 1968, 393 F.2d 139, 140; Causey v. United States, 5 Cir., 1965, 352 F.2d 203, 207; Panci v. United States, 5 Cir., 1958, 256 F.2d 308, 312; United States v. Cantone, 2 Cir., 1970, 426 F.2d 902, 904. Cf. United States v. Menichino, 5 Cir., 1974, 497 F.2d 935, 942-943; United States v. Edwards, 5 Cir., 1974, 488 F.2d 1154, 1158.

Simon Wooten, an associate of Palori who owned a one-third share of one of the parcels sold, indicated no knowledge of any participation in the transaction by Diez, who nevertheless reported the profit from a one-sixth interest in the property on his return. Gaston Fernandez, the real estate broker who handled the transaction, identified only Palori, Garrett, and Simon Wooten as owners of the land. Diez's name did not appear on any documents connected with the sale, and there was no record of any payment of sale expenses by him. Although the other owners received payments from Palori by check for their interests in the property, there was no record of any such check from Palori to Diez.

DeGuzman's worksheet compiled during the preparation of Palori's 1965 tax return, lists one-third interests held by Palori, Garrett, and Simon Wooten.
Diez reported a $5,000 brokerage commission, allegedly paid by Minnie Lopez, from another real estate sale involved in the case. The broker who procured the purchase option by which the owners (Palori and others) acquired this land, however, knew of nothing Diez had done in connection with the property which would warrant receipt of a commission. The closing statements for this transaction show payment of commissions to several real estate brokers, but Diez is not among them. Although in all the other transactions Minnie Lopez paid sale expenses by purchasing cashier's checks with cash withdrawals from her *902 savings account, there was no such check payable to Diez.[FN14]

FN14. At trial Palori offered a different explanation of Diez's receipt of the $5,000. He stated that Diez had made arrangements for sewerage hook-ups for a parcel sold in Minnie Lopez's name, and he had recommended that she pay Diez $5,000 for his services. The Government introduced evidence showing that Palori was aware of the need for sewerage hook-ups long before he allegedly commissioned Diez to look into the matter and had hired an expert engineer to solve the problem. Palori maintains that the engineer was hired in connection with sewerage hook-ups for another parcel sold in the same transaction, but that was a question for the jury.

Diez also reported a $6,000 commission, allegedly paid to him in cash by DeGuzman, in connection with another real estate transaction involved in the case. Like Minnie Lopez, DeGuzman consistently made payments by check in the other transactions. The real estate broker who helped Palori and Garrett obtain an option to purchase on the property, which was later sold, testified that he knew of no efforts by Diez in connection with the property which would warrant receipt of a commission.
Finally, Diez reported as his income $3,200 allegedly paid to him by Palori as interest on a loan. Palori's records contain no indication, however, of such payments. Nor is there any evidence that any such loan was made to Palori by Diez.
The pattern of Diez's reporting of income also reinforced the Government's case. For three of the four years in question (1965-1968), Diez reported substantial losses consistently in excess of his gains from the real estate transactions. In 1966, the only year in which Diez reported no losses, no gains from commissions or the sale of real estate were reported on his return.
Against all this evidence there was only the out-of-court statement of DeGuzman (to which Agent Brock testified) concerning his payment of a commission to Diez, for which he furnished an alleged receipt, and the testimony of Palori, who stated that Diez participated in all of the transactions from which he reported income, but had been paid in cash each time and had participated without the knowledge of anyone but himself, DeGuzman, and Minnie Lopez.
[13] The standard we must apply in reviewing a denial of a motion for acquittal is clear. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). That the Government's case rested in substantial part on

circumstantial evidence does not change that standard. Id.; United States v. Prince, 5 Cir., 1974, 496 F.2d 1289, 1293; McFarland v. United States, 5 Cir., 1960, 273 F.2d 417, 419. "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence." Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954). See United States v. Miller, 5 Cir., 1974, 500 F.2d 751, 763. Our examination of the evidence and application of the appropriate standard of review compels the conclusion that the trial court did not err in denying Diez's motion for acquittal.

IV. Defendants' Motions for Severance

Palori contends that the trial court erred in refusing to grant him a trial separate from DeGuzman's. Diez contends that the trial court erred in refusing to grant him a trial separate from Palori's. Both of these assignments of error are without merit.

A. Palori's Motion

[14] After the Government and the other defendants had rested and he had presented his evidence, Palori moved for a severance, alleging that DeGuzman would testify in his behalf if a separate trial was granted. Palori's proffer in support of his motion was, in its entirety, as follows:

*903 He (DeGuzman) would be prepared to testify for and on behalf of Mr. Palori as to the manner and means by which he computed the taxes and his error or omission on the 1967 tax return. His advice from time to time on tax matters.

[15] In Byrd v. Wainwright, 5 Cir., 1970, 428 F.2d 1017, we discussed the factors a trial court should consider in ruling on a motion for severance based on the unavailability of a codefendant whose testimony is allegedly needed. First, the movant must show a bona fide desire to use the codefendant's testimony. In Byrd the movant's assertions concerning the importance of the codefendant's testimony were made "with full exploration of reasons." 428 F.2d at 1020. Here, in contrast, the defendant offered an unelaborated conclusory statement.

Second, the codefendant's testimony must be specifically shown to be exculpatory. United States v. Wilson, 5 Cir., 1974, 500 F.2d 715, 721. In this case the defendant's proffer not only lacked sufficient detail but also was bereft of exculpatory content. Palori had based prior motions for severance on the allegedly prejudicial effect of admissions made by DeGuzman during the investigation. His proffer contained nothing to erase this suggestion that DeGuzman would be a damaging, rather than exculpating, witness. The testimony briefly described in the proffer was irrelevant. Palori's defense was not that he relied in good faith on advice that proved to be incorrect. He contended that the transactions were exactly as represented on the various tax returns. As to the omission on Palori's 1967 tax return, Palori had already stated that the proceeds from one of the sales was left out of the return inadvertently. See United States v. Burke, 5 Cir., 1974, 495 F.2d 1226, 1234. Cf. United States v. Shuford, 4 Cir., 1971, 454 F.2d 772, 778.

Third, the movant must show a substantial likelihood that the codefendant will testify if the severance is granted. In Byrd the prosecutor and other defense counsel advised the judge, before he ruled on the severance motion, that the codefendant would testify if a separate trial was granted. Here there is nothing to show why DeGuzman would be any more willing to testify in a separate

trial than in a joint trial. See United States v. Cochran, 5 Cir., 1974, 499 F.2d 380, 391-392; United States v. Burke, supra, 495 F.2d 1226, 1234.

Finally, the trial judge should consider the timeliness of the motion and the effect of a severance on economy of judicial resources. Byrd v. Wainwright, supra, 428 F.2d at 1020; United States v. Burke, supra, 495 F.2d at 1234; United States v. Johnson, 5 Cir., 1973, 478 F.2d 1129, 1134. In the present case, Palori has offered no explanation for making his motion very late in the trial.[FN15] Having spent three weeks of trial time hearing the testimony of over sixty witnesses and considering over three hundred documents, the trial judge was not obliged to treat Palori's motion as he would an ordinary severance request made at the outset of a trial.

FN15. Palori's two prior motions for severance were not based on the contention that DeGuzman would testify in his behalf, and he has not contended on appeal that the denial of these earlier motions is error.

The granting of a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure is within the trial court's discretion. E. g., Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed. 101 (1954); United States v. Burke, supra, 495 F.2d at 1233-1234; Byrd v. Wainwright, supra, 428 F.2d at 1018; Smith v. United States, 5 Cir., 1967, 385 F.2d 34, 38. We find nothing to indicate an abuse of discretion on the part of the trial court in denying Palori's motion.[FN16]

FN16. Palori alternatively requested that the court bifurcate the jury deliberations, so that DeGuzman's guilt or innocence could be resolved whereupon he would testify for Palori. This procedure would have been impractical and unwarranted. The jury could not have determined DeGuzman's guilt or innocence on the conspiracy count without coming to a conclusion concerning Palori's guilt or innocence on the substantive count, which would nullify the purpose of having the bifurcated deliberation in the first place.

*904 B. Diez's Motion

Diez contends that trying him with Palori was inherently unfair, because of the sheer complexity of the case and the impossibility of expecting the jury to restrict their consideration of evidence admitted against less than all the defendants. Closely related to this contention is Diez's assertion that the trial court's general instructions to the jury concerning the admissibility of evidence in a conspiracy trial were inadequate.

[16] The complexity of a trial, by itself, is insufficient grounds for overturning a trial court's denial of a severance motion. In complex trials the pressures against severance are especially great, because of the drain on judicial resources that would be created by separate trials. See Byrd v. Wainwright, supra ; United States v. Martinez, supra, 486 F.2d at 23.

The only specific evidence cited by Diez as prejudicing him in the joint trial was a record of zoning proceedings held by the Hillsborough County Commission in late 1966 and early 1967, and a financial statement given by Palori to his bank in September 1964. The minutes of the Commission proceedings were

introduced to refute Palori's contention that he recommended to Minnie Lopez that she pay Diez a $5,000 commission for arranging sewer hook-ups to a parcel of property sold in her name in 1967. This evidence showed that Palori had been aware of the sewerage problem months before he allegedly commissioned Diez to look into the matter, and had hired an engineer to develop plans for sewerage connections. The minutes supported the Government's contention that Diez had not earned the $5,000 he reported on his 1967 tax return. They were admissible against both Palori and Diez as proof of the existence of a conspiracy to conceal Palori's income.[FN17]

FN17. Diez asserts that a cautionary instruction was necessary because this evidence was offered only to impeach Palori's credibility. Although in its brief the Government does use the term "impeachment" in discussing Diez's contention, this evidence is referred to as "impeachment of Palori's testimony." The context in which the Commission records were offered leaves no doubt that they were introduced as evidence of guilt. Palori contends the minutes were introduced to inject an element of political scandal into the trial, because they suggest connivance between him and Prevatt, an unindicted coconspirator and member of the Commission, to arrange for zoning variances and changes. As we explained in our discussion of Diez's motion for severance, however, there were legitimate reasons for the introduction of the minutes. The Government is not required to forego valuable evidence merely because it may lay bare the unsavory details of a defendant's dealings.

[17][18] Diez's objection to the admission of Palori's financial statement is also without merit. Palori furnished the statement to his bank in connection with an application for a loan several months before, under the Government's theory, the conspiracy began. The statement purported to list Palori's outstanding obligations, yet made no mention of a loan from Diez. By casting doubt on whether Palori had made a $3,200 payment of interest to Diez, the evidence supported the Government's charge of a conspiracy to conceal Palori's income. Although the court did not give an instruction to the jury cautioning that Palori's admission was not binding on Diez, or the other alleged coconspirators, such an instruction was given in connection with the introduction of a similar financial statement by Palori later in the trial. More importantly, the jury was repeatedly instructed throughout the trial that "(s)tatements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making it." In light of these instructions we fail to see how Diez was prejudiced by the introduction of Palori's pre-conspiracy financial statement.

*905 To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict.

Opper v. United States, supra, 348 U.S. at 95, 75 S.Ct. at 165.[FN18]

FN18. Diez challenges the correctness of the court's cautionary instruction concerning the kind of evidence admissible to connect a defendant with a conspiracy. The record shows that the trial judge

apparently did skip a line, inadvertently, when he first read to the jury the standard instruction on this point. No one objected. Moreover, the instruction was correctly repeated throughout the trial, thus eliminating any possibility of prejudice.

V. The Government's Use of Charts

[19] Palori and Diez claim prejudice by the Government's use of illustrative charts and summaries in connection with the testimony of its summary witness, Agent Brock. Their argument is that the captions on the charts and the headings on various columns of figures misled the jury by assuming the central fact to be proved at trial to whom various items of income were properly attributable. [FN19] The caption on one chart, for example, reads "Schedule of Sales, Net Taxable Gains to Peter A. Palori And Amounts Not Reported Or Taxable Gain Reported By Others."

FN19. Defendants also object to the parts of one chart listing the total sales price of the properties sold and the listing of the taxable gains, rather than the entire gains, reported by DeGuzman and Minnie Lopez on the various real estate transactions. We find no prejudice from the listing of the sales prices. Furthermore, the taxable gain to Lopez and DeGuzman was only half of the entire gain because they reported these items of income as long-term capital gains. If the entire gain had been shown, the chart would have given a misleading indication of the amount of taxable income Palori had avoided reporting.

The charts undeniably make assumptions concerning the proper attribution of the income from the transactions in this case, and the propriety of Palori and Diez's attributions of this income was the crucial issue at trial. Any such chart of computations, however, must rest on certain assumptions. Contrary to defendants' argument, the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record. United States v. Lawhon, 5 Cir., 1974, 499 F.2d 352, 357; Gordon v. United States, 5 Cir., 1971, 438 F.2d 858, 876; Myers v. United States, 5 Cir., 1966, 356 F.2d 469, 470; Azcona v. United States, 5 Cir., 1958, 257 F.2d 462, 466; Barsky v. United States, 9 Cir., 1964, 339 F.2d 180, 181-182. See Watkins v. United States, 1 Cir., 1961, 287 F.2d 932, 934.[FN20] In this case it is indisputable that the assumptions on which the Government based its charts that is, its version of the facts were amply supported by evidence already presented to the jury.

FN20. Baines v. United States, 5 Cir., 1970, 426 F.2d 833, relied on by defendants, is inapposite. In that case the crucial issue was whether dancing and music occurred simultaneously after 9:30 p. m. in a nightclub, for purposes of a cabaret tax on the sale of liquor. The Government relied on a chart computing the amount of taxes based on the assumption that every sale of liquor after 9:30 p. m. occurred while music and dancing were occurring simultaneously. There was no evidence to support that assumption. In this case, each representation made on the charts is supported by evidence in the record.

[20] The court should instruct the jury that "summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documented and detailed evidence already submitted." [FN21] Gordon v. United States, supra, 438 F.2d at 877. See Myers v. *906 United States, supra, 356 F.2d at 470. In this case such instructions were given both when the Government's summary witness testified and again at the close of the case. [FN22] We believe the court's instructions eliminated any possibility of the charts confusing the jury.

FN21. Contrary to defendants' assertion, relying on Steele v. United States, 5 Cir., 1955, 222 F.2d 628, this Court has never held that the jury cannot take illustrative charts with them to the jury room. In that case we held only that the charts in question, because of their composition and layout, could not properly have been submitted to the jury, and that it was doubly prejudicial to accede to the jury's request for the charts after the deliberations began. See Flemister v. United States, 5 Cir., 1958, 260 F.2d 513, 516; United States v. Warner, 8 Cir., 1970, 428 F.2d 730, 737.

FN22. Defendants contend that the court described these charts in its instruction to the jury as "summaries of facts." Although that phrase appears in the Government's proposed instruction, the record shows that the trial judge did not use this language.

[21] It is within the trial court's discretion to decide whether the Government may use illustrative charts. United States v. Lawhon, supra, 499 F.2d at 357; Gordon v. United States, supra, 438 F.2d at 877; Bobsee Corporation v. United States, 5 Cir., 1969, 411 F.2d 231, 241; Lloyd v. United States, 5 Cir., 1955, 226 F.2d 9, 16; United States v. Dana, 7 Cir., 1972, 457 F.2d 205, 207-208. We perceive no abuse of discretion here.

Having reviewed all of defendants' assignments of error carefully, we find no reversible error.

Affirmed.

END OF DOCUMENT

whether tax evasion is not complete when false forms are filed -- subsequent false statements to the IRS are in furtherance of conspiracy -- was "course of conduct"

Citation 731 F.Supp. 1189
65 A.F.T.R.2d 90-1019, 90-1 USTC P 50,138
(CITE AS: 731 F.SUPP. 1189)
FOUND DOCUMENT
Database DCT
Mode Page

UNITED STATES of America
v.
Jeffrey L. FELDMAN and Paul J. Foont, Defendants.
No. 89 Cr. 765 (CSH).
United States District Court,
S.D. New York.
March 2, 1990.

affd 992 F2d 320

Defendants charged with tax evasion and conspiracy filed motion for various pretrial relief. The District Court, Haight, J., held that: (1) six-year limitations period applicable to tax evasion counts based on defendants' alleged creation of limited partnerships designed to defer income for one tax year commenced to run on last date defendants concealed true nature of transactions engaged in by partnerships; (2) Government was required to supply affidavit on personal knowledge of IRS agent or Justice Department official specifying exact date on which Justice Department referral was made; (3) defendants were not entitled to discover list of Government's witnesses; and (4) defendant was not entitled to severance based on his claim that codefendant would exculpate him at separate trial.

Motions granted in part and denied in part.

[1] CRIMINAL LAW k150
110k150
Six-year limitations period applicable to tax evasion counts based on defendants' alleged creation of limited partnerships designed to defer income for one tax year commenced to run on last date defendants concealed true nature of transactions engaged in by partnerships, rather than when tax returns containing allegedly fraudulent deductions were filed by limited partners. 26 U.S.C.A. ss 6531, 7201.

[2] CRIMINAL LAW k150
110k150
Six-year limitations period applicable to conspiracy charges based on defendants' alleged conspiracy to evade taxes commenced when defendants last made false statements to Internal Revenue Service agents designed to conceal fraudulent deductions, rather than when deductions were actually taken. 18 U.S.C.A. s 371; 26 U.S.C.A. s 6531.

[3] CRIMINAL LAW k627.6(1)
110k627.6(1)
Government was required to supply affidavit on personal knowledge of Internal Revenue Service (IRS) agent or Justice Department official specifying exact date on which Justice Department referral was made in prosecution for tax evasion and conspiracy, where defendants sought to discover whether IRS summonses issued in connection with civil tax investigation were made at time Justice Department referral was in effect, so as to require suppression of statements made in response to those summonses. 26 U.S.C.A. s 7602.

[4] CRIMINAL LAW k629(3.1)

110k629(3.1)
Formerly 110k629(3)
Defendants charged with tax evasion were not entitled to discover list of Government's witnesses; although defendants claimed that potential witness pool was large and witness list would greatly facilitate defense preparation, they failed to present specific evidence showing need for disclosure.

[5] INDICTMENT AND INFORMATION k121.2(3)
210k121.2(3)
Defendants charged with tax evasion and conspiracy were entitled to bill of particulars requiring Government to produce identities of persons whom defendants were alleged to have aided and abetted.

[5] INDICTMENT AND INFORMATION k121.2(6)
210k121.2(6)
Defendants charged with tax evasion and conspiracy were entitled to bill of particulars requiring Government to produce identities of persons whom defendants were alleged to have aided and abetted.

[6] CRIMINAL LAW k629(1)
110k629(1)
Defendants charged with tax evasion and conspiracy were entitled to list of those exhibits Government anticipated might be used at trial within 14 days of trial.

[7] CRIMINAL LAW k629(1)
110k629(1)
Defendants charged with tax evasion and conspiracy were not entitled to production of Government's evidence in advance of trial.

[8] CRIMINAL LAW k374
110k374
Defendants charged with tax evasion and conspiracy were entitled to be informed as to whether Government intended to offer similar act evidence at trial within 14 days of trial.

[9] CRIMINAL LAW k700(5)
110k700(5)
Defendants charged with tax evasion and conspiracy were not entitled to immediate production of Brady impeachment material, where Government had stated its intent to make such production for each government witness.

[10] CRIMINAL LAW k622.2(10)
110k622.2(10)
Defendant charged with tax evasion and conspiracy was not entitled to severance based on his claim that codefendant would exculpate him at separate trial, although codefendant had stated in affidavit that he would waive his Fifth Amendment privilege at separate trial; affidavit also suggested that codefendant would be willing to waive Fifth Amendment privilege at joint trial,

and case was complex one that would take more than one month to try. U.S.C.A. Const.Amend. 5.

*1190 Otto G. Obermaier, U.S. Atty., S.D.N.Y., New York City (Robert J. Cleary, Asst. U.S. Atty., of counsel), for U.S.

Kronish, Lieb, Weiner & Hellman, New York City (Alan Levine, Celia Goldwag Barenholz and Patricia S. Constantikes, [FN*] of counsel), for Paul J. Foont.

FN* Awaiting Admission in New York

Shea & Gould, New York City (Michael S. Feldberg and Lloyd M. Eisenberg, of counsel), for Jeffrey L. Feldman.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Trial in this tax evasion case is scheduled to begin on April 23, 1990. Defendants now move for various pre-trial relief.

Background

The indictment in the captioned case charges the defendants with various offenses arising out of certain financial transactions entered into by the Cralin partnerships. [FN1]

FN1. The Cralin partnerships "were a series of New York limited partnerships that were promoted as dealers or broker-dealers in various securities, commodities, and options." Indictment at P 2(a).
Specifically, the Cralin partnerships refer collectively to the following limited partnerships: Securities Arbitrage Company, Capital Trading Group, Arbitrage Partners, The Money Market Group, Capital Futures Group, Multi-Asset Group, Cralin Securities Company, Cralin Metals Company, and Greystone Investment Group. Id. at PP 2(b)-(j).
Feldman was, at all times relevant to the indictment, a "Special Partner" in Securities Arbitrage Company, Capital Trading Group and Arbitrage Partners. As a special partner, Feldman had a 1% partnership interest in each of those partnerships. Feldman also had a "controlling interest in the managing or general partners" of The Money Market Group, Capital Futures Group, Multi-Asset Group, Cralin Securities Company, Cralin Metals Company, and Greystone Investment Group. Id. at P 2(m).
Foont was, at all times relevant to the indictment, the Chief Trader for the Cralin partnerships. In addition, Foont was the President of the corporate general partner of Multi-Asset Group and the Executive Vice President of the general partners of Cralin Securities Company, Cralin Metals Company and Greystone Investment Group. Id. at P 2(n).

The government alleges that the defendants devised a plan to create approximately *1191 $140,000,000 in false tax deductions for the 1981 tax year, such deductions to be passed on to the limited partners in the Cralin partnerships. The government charges the defendants with the creation and concealment of a fraudulent income deferral device aimed at evading taxes for the 1981 tax year.

Specifically, the defendants are charged with having entered into a secret oral agreement with New York Hanseatic Division ("New York Hanseatic") [FN2] on

behalf of the Cralin partnerships pursuant to which New York Hanseatic was paid a set fee for creating records substantiating certain false transactions by the Cralin partnerships in government securities. These transactions led to fraudulent interest deductions by the limited partners in the amount of $140,000,000 for the tax year 1981. The second stage of the transaction was the reporting of false income in the amount of $132,000,000 for the tax year 1982. That false income was also passed on to the limited partners.

FN2. New York Hanseatic operates "as a broker-dealer in government backed securities and other interest-rate sensitive instruments, to purchase significant tax losses for a fee, and to provide significant tax losses to willing purchasers for a fee." Indictment at P 2(1).

The charges in the indictment, all of which arise out of the basic scenario set forth above, are divided into three groups. Count 1 charges the defendants with conspiracy in violation of 18 U.S.C. s 371. The conspiracy is defined as one extending from "in or about 1981 through in or about the end of 1985", one object of which was the evasion of taxes due and owing in the 1981 tax year. Indictment at P 1.

Counts 2 through 6 charge the defendants with tax evasion arising out of the 1981 tax returns of various limited partners. The return of each of those partners forms the basis for a separate count in the indictment. Although the offenses arise out of the 1981 tax returns, the indictment charges the defendants with tax evasion for the period 1981 through 1985.

Counts 7 through 15 charge the defendants with aiding and assisting in the filing of certain false tax returns for the Cralin partnerships. Each of the false filings referred to in this set of charges relates to the 1983 tax year.

Defendants move for various pre-trial relief. Specifically, defendants move to dismiss counts 1 through 6 as barred by the statute of limitations. Defendants further move for various discovery and a bill of particulars. Defendant Foont moves for a severance. I address these issues in turn.

Discussion

I. Statute of Limitations

It is common ground that the applicable statute of limitations in respect of both the conspiracy charged in count 1 and the tax evasion charges contained in counts 2 through 6 is six years. 26 U.S.C. s 6531. [FN3]

FN3. 26 U.S.C. s 6531 provides in pertinent part:
No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years--
(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof....

The indictment in the captioned case was filed on October 10, 1989. Thus, in

order to be timely filed, the indictment must charge the defendants with crimes committed within six years of October 10, 1989, namely on or after October 10, 1983. Defendants contend that the indictment fails in that regard, while the government argues that both the conspiracy and the counts of evasion were not complete until the end of 1985, well after the October 1983 limitations cutoff date.

A. Tax Evasion

[1] Defendants are charged with five counts of tax evasion in violation of 26 U.S.C. s 7201. [FN4] The elements of tax evasion are familiar:

FN4. 26 U.S.C. s 7201 provides:
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

*1192 (1) an attempt to evade or defeat a tax or the payment thereof;
(2) an additional tax due and owing; and
(3) willfulness.

Sansone v. United States, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965).

That first element of tax evasion, commonly referred to as the "affirmative act" requirement or the affirmative act of evasion, is described by the Supreme Court as "some willful commission in addition to the willful omissions that make up the list of misdemeanors," Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418 (1943), such as failure to pay a tax or failure to file a tax return in any given year.

Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Id. The question presented by the instant motion is when the statute of limitations began to run.

Defendants contend that the crime was complete, if committed at all, with the filing of the 1981 tax returns that contained the allegedly fraudulent deductions. In the alternative, defendants argue that the counts of evasion were complete with the filing of the 1982 tax returns that constituted the second prong of the attempt to evade taxes for the 1981 tax year. In essence, the government alleges that the defendants engaged in a course of conduct aimed at evading taxes for 1981, which continued through 1985 at which time the statute of limitations began to run. In consequence, the government argues, the instant indictment was filed only four years after the limitations period began to run, well within the limitations period.

The indictment alleges the following as affirmative acts of evasion occurring after October 10, 1983.

(d) From in or about 1981 through in or about 1985, FELDMAN and FOONT concealed the bogus, fraudulent and pre-arranged nature of the New York Hanseatic transactions from the outside accountants of the Cralin partnerships

and attempted to mislead those accountants as to the true nature of the transactions.

(f) On or about December 1, 1983, FOONT made false statements and representations to an employee of the IRS, in the presence of FELDMAN and one of the outside accountants for the Cralin partnerships, for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, ..., to wit, FOONT told an IRS agent that there were no oral or written agreements affecting the 1981 transactions between the Cralin partnerships and New York Hanseatic.

(g) In or about 1984, FELDMAN made false statements and representations to an employee of the IRS, in the presence of FOONT and one of the outside accountants for the Cralin partnerships, for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, ..., to wit, FELDMAN told an IRS agent that there were no oral or written agreements affecting the 1981 transactions between the Cralin partnerships and New York Hanseatic.

(h) Between in or about mid-1984 and in or about April 1985, FOONT refused to answer questions posed by an employee of the IRS, in the presence of one of the outside accountants for the Cralin partnerships, for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, *1193 ..., to wit, FOONT refused to answer an IRS agent's question about the financing for the 1981 transactions between the Cralin partnerships and New York Hanseatic.

(i) Between in or about March 1985 and in or about April 1985, FELDMAN made false statements and representations to one of the outside accountants for the Cralin partnerships for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, ..., to wit, FELDMAN lied to the accountant about the financing for the 1981 transactions between the Cralin partnerships and New York Hanseatic.

Indictment at P 7(d), (f)-(i).

Defendants concede, as they must, that false statements to an employee of the IRS constitute affirmative acts of evasion. United States v. Beacon Brass, 344 U.S. 43, 45-46, 73 S.CT. 77, 78-79, 97 L.Ed. 61 (1952) ("[t]he language of [26 U.S.C. s 7201] which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income"). [FN5] Rather, defendants contend that the alleged false statements, along with the other affirmative acts of evasion set forth in the indictment, occurred after the crime of evasion was complete.

FN5. Defendants take issue with two of the so-called affirmative acts of evasion, namely those contained in PP 7(h) and (i). Paragraph 7(h) alleges that sometime in mid-1984 Foont refused to answer certain questions put to him by an employee of the IRS. Defendants argue that Foont had a Fifth Amendment right to refuse to answer whatever questions were asked of him by the IRS and such refusal can thus not constitute an affirmative act of evasion and should be struck from the indictment. Although defendants cite no case law in support of their argument, the government is in essence attempting to hold Foont's

> invocation of the Fifth Amendment privilege against him on the face of the charging instrument, in violation of basic principles of constitutional law.
>
> It does not appear that there existed a duty on the part of defendant Foont to answer the questions asked by the IRS. Indeed, by letter dated December 7, 1989, counsel for defendant Foont served a request for a bill of particulars as follows:
>
> 7. Paragraph 7(h)--Identify any duty on Mr. Foont's part to answer the question allegedly put by the IRS agent.
>
> The government declined to provide a response to defendant Foont's request. Affidavit of Celia Goldwag Barenholtz sworn to on December 19, 1989 at P 7. Absent some showing by the government that Foont had a duty to answer the IRS's questions, or citation to case law demonstrating the propriety of the inclusion of Foont's failure to do so as an affirmative act of evasion or an overt act in furtherance of the conspiracy, I direct that the allegations be stricken from the indictment. The government has ten (10) days to make the requisite showing.
>
> In respect of P 7(i) which alleges that Feldman made false statements in March or April of 1985 to an outside accountant for the Cralin partnerships, defendants argue that even if the allegation is true, it does not amount to an affirmative act of evasion as to taxes due and owing in the 1981 tax year. Defendants make this argument without benefit of citation to case law, which points clearly in the opposite direction. The Supreme Court has held that "any conduct, the likely effect of which would be to mislead or conceal" constitutes an affirmative act of evasion. Spies, 317 U.S. at 499.
>
> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.
>
> Id.

Two separate but related issues are presented by these facts and the arguments of counsel. First, the question arises whether the elements of the alleged crime of evasion were present in 1981 or 1982. The next issue presented for consideration is whether, assuming that the elements *1194 of tax evasion were all present in 1981 or 1982, the limitations period began to run at that point, or after the last affirmative act of evasion, that being in 1985. I address these issues in turn.

In respect of that first issue, whether the elements of evasion were

present in 1981, it is important to note that the tax returns at issue were not filed by the defendants. Rather, the fraudulent tax returns were filed by various limited partners of the Cralin partnerships to whom the tax benefits of certain false transactions were passed along. In these circumstances, it is difficult to view the allegedly false filings as a "watershed event" for purposes of the statute of limitations. [FN6]

FN6. Indeed, the Supreme Court has recognized that affirmative acts of evasion, such as lying to the IRS, can support a prosecution for tax evasion, and consequently start the clock on the limitations period, even where the defendant never files a return. Spies, 317 U.S. 492, 63 S.Ct. 364.

It is defendants' course of conduct preceding and subsequent to the false filings that constitutes the evasion with which they are charged. Specifically, the government charges the defendants with a continuing series of acts ranging in time from the creation of the allegedly fraudulent transactions with New York Hanseatic to the defendants' continued and ongoing concealment of the true nature of those transactions. The question is whether the last act in such a course of conduct is that which properly triggers the statute of limitations.

While not cited in the briefs, United States v. Shorter, 608 F.Supp. 871 (D.C.D.C.1985), aff'd, 809 F.2d 54 (D.C.Cir.), cert. denied, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987) is instructive. In that case the government had charged the defendant in one felony count of "willful attempt to evade the payment of income taxes due for the years 1972 through 1983, in violation of 26 U.S.C. s 7201." 608 F.Supp. at 873. Shorter had filed allegedly fraudulent tax returns for the years in question. The indictment was returned in 1984. The defendant argued that the indictment was time-barred as to the tax years between and including 1972 and 1977 and consequently that allegations as to those tax years should be stricken from the indictment. The defendant further argued that the single felony count was impermissibly duplicitous and should be dismissed, inasmuch as it alleged twelve separate offenses, namely evasion for each tax year 1972 through 1983.

The district court rejected defendant's first claim, namely that certain of the allegations of evasion were time-barred.

[T]he statute of limitations does not ipso facto rule out prosecution with respect to taxes owing prior to 1978, for the offense of tax evasion is not necessarily committed only in the year when the tax was due and payable. That is so because the existence of a tax deficiency is but one of the two essential elements of the crime, the other being an affirmative act of willful evasion. Sansone v. United States, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). An act constituting evasion which occurs during the limitations period brings the prosecution within the statute of limitations even if the taxes being evaded were due and payable prior thereto. United States v. Trownsell, 367 F.2d 815 (7th Cir.1966); United States v. Mousley, 194 F.Supp. 119 (E.D.Pa.1961), aff'd without opinion, 311 F.2d 795 (3d Cir.1963); United States v. Sclafani, 126 F.Supp. 654 (E.D.N.Y.1954), aff'd on other grounds, 265 F.2d 408 (2d Cir.1959); see also, United States v.

Malnik, 348 F.Supp. 1273 (S.D.Fla.1972), aff'd on other grounds, 489 F.2d 682 (5th Cir.1974).

It follows that the indictment in this case is not subject to dismissal even with respect to the evasion of taxes due prior to 1978 if it is supported by proof of one or more affirmative acts of evasion committed by the defendant within the past six years if these acts relate to taxes due in earlier years. Id. at 874 (footnote omitted). The court held that, on its face, the indictment did not *1195 suffer from a statute of limitations problem. That was so because the indictment alleged, and the government contended that it would prove, a continuing series of acts of evasion, or a course of conduct aimed at evading the payment of past taxes. Where defendant's conduct was of a continuing nature, the court viewed the limitations period as properly running from the last of defendant's actions, not the first.

The defendant in Shorter further argued that the single felony count was impermissibly duplicitous and should therefore be dismissed. The district court denied the motion. The court's analysis in that regard is illuminating. In determining whether "it is proper to charge a continuing scheme to evade taxes for several years", the court looked to "(1) the language and legislative history of the statute, and (2) the nature of the proscribed conduct." [FN7] 608 F.Supp. at 877. The district court found little guidance in the language and legislative history of the tax evasion statute and thus turned to the Supreme Court's opinion in Spies. Specifically, the district court turned to the Court's non-exclusive list of conduct amounting to affirmative acts of evasion. Much of the conduct envisioned by the Court as paving the way for a prosecution for tax evasion is that sort of conduct "which typically would be committed on a multi-year, continuing-course-of-conduct basis," id., namely the keeping of a double set of books, concealment of assets or covering up sources of income, and acts of that nature. The type of conduct alleged in the instant indictment, continuing efforts by the defendants to conceal the fraudulent nature of the New York Hanseatic transactions from the outside accountants of the Cralin partnerships, is that same sort of continuing conduct faced by the district court in Shorter.

> FN7. This is the analysis set forth by the Court in Toussie v. United States, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970), which defendants urge upon this Court.

The district court further evaluated the duplicity argument with respect to the statute of limitations question. In what is essentially a fairness inquiry, the court observed that if the first count of the indictment were severed into twelve separate counts, each alleging a violation of the tax evasion statute for a single year 1972 through 1983, all of the acts of evasion occurring within the limitations period relating to those years could be introduced as to each year in which there was a tax deficiency.

Thus, the first count of such a hypothetical indictment presumably would allege evasion of taxes due in 1972. In support of that count, the government would be entitled to introduce evidence of a tax deficiency in 1972 as well as of any and all affirmative acts of evasion after 1978 [the limitations cutoff date] which may have been intended to evade payment of the 1972 taxes. Id. at 878-79. The court further noted that "[a]cts of evasion

occurring between 1972 and 1978 would probably also be admissible, especially where--as in the instance of the establishment of a bank account in the name of another--they had continuing consequences." Id. at 878 n. 21. The court of appeals agreed with the district court's observations on this point. 809 F.2d at 57.

I find the court's reasoning in Shorter persuasive. Here, as in that case, the government alleges an ongoing course of conduct that constitutes the affirmative act of evasion. In essence, that course of conduct consisted of a series of lies and acts of concealment in respect of both the outside accountants of the Cralin partnerships and employees of the IRS. The government is not required by the statute of limitations to parse out that course of conduct in order to find the date of the first misstatement to an accountant. Of course, whether the government will be able to prove that sort of continuing conduct that the indictment suggests is ultimately a question for the jury. [FN8]

FN8. I note that in Shorter Judge Greene instructed the jury that it must find that sort of continuous conduct alleged by the government in order to convict.
Judge Greene took steps to ensure against the problem "of a possible lack of unanimity of the jury under the indictment and the proposed evidence in the event of a guilty verdict." 608 F.Supp. at 881. Specifically, the Judge charged the jury on the requirement that an affirmative act of evasion occurring after 1978 must be proved by the government and that such act must relate to the alleged nonpayment of taxes for any one or more of the specific years 1972 through 1978. The court further employed "special interrogatories" or a special verdict form in order to make certain that each juror, in the case of a conviction, voted for that verdict based on the same affirmative act of evasion.
Moreover, the court instructed the jury that in order "to return a verdict of guilty on the felony count, it must agree unanimously ... that these acts of evasion were part of a course of conduct which had as its purpose the willful evasion of the payment of such taxes." Id. In respect of that last instruction, the district court noted that "[a]lthough the existence of a course of conduct is not an element of the offense as such, it would be unfair to the defendant and inconsistent with the prosecutions' theory to permit it to rely on the existence of such a course to defeat the duplicity claim (as augmented by the statute of limitations defense), but then to have this factor ignored when the jury is called upon to make its decision." Id. at 881-82 n. 27.

*1196 I am not faced with the situation where a defendant files a false tax return and then is called in by the IRS to talk about that return perhaps a decade or more after its filing. Defendants argue that if that individual were to give false testimony to the IRS, under the government's theory at bar he could then be prosecuted for tax evasion as to the return filed more than six years before the return of the indictment, based solely on the single affirmative act of giving false testimony to the IRS, a result with which they disagree.

But that is not the case at bar. In the instant case, defendants did not even

file the returns at issue. Rather, it is their ongoing course of allegedly fraudulent conduct in its entirety that forms the basis for this prosecution. The statute of limitations thus cannot begin to run until the entirety of that conduct is complete, which in this case is the end of 1985. The indictment was timely filed in respect of counts 2 through 6, the tax evasion counts.

B. Conspiracy

[2] Relying on Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), defendants argue that the conspiracy count is barred by the six year statute of limitations.

In Grunewald the defendants were charged with and convicted of conspiracy to defraud the United States with reference to certain tax matters. The indictment charged the defendants with conspiring " 'to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption....' " Id. at 394, 77 S.Ct. at 968. The indictment further charged that "a part of the conspiracy was an agreement to conceal the acts of the conspirators." Id.

The acts of concealment, such as bribery and the giving of false testimony, occurred within the six year limitations period. However, the defendants' improper efforts to get "no prosecution" rulings in two tax fraud cases were complete with the issuance of those rulings more than six years prior to the filing of the indictment. The question presented in Grunewald was whether the indictment, in light of the government's proof at trial, properly charged a single conspiracy, or whether the non-time-barred acts of concealment were merely part of a second conspiracy to cover up the first, namely that to obtain the no prosecution rulings. If there were two conspiracies then the first was time-barred. The Court said the following:

> [A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.

353 U.S. at 401-02, 77 S.Ct. at 972. The Court rejected the government's argument that the defendants' efforts to conceal their earlier wrongdoings should be viewed as part of the original conspiracy to obtain the no prosecution rulings. Defendants at bar *1197 argue that their alleged misstatements to agents of the IRS, which statements constitute three out of the four overt acts executed within the limitations period, [FN9] similarly constitute a second conspiracy to conceal the first.

> FN9. One of the three overt acts dealing with statements made to the IRS alleges Foont's refusal to answer questions of that agency. Indictment at P 5(i). As discussed at n. 5 supra, that allegation is improper absent some showing by the government to the contrary.
> The fourth overt act within the limitations period alleges that between March and April 1985, Feldman lied to one of the Cralin partnerships' outside accountants concerning the financing for the New York Hanseatic transactions.

This case is manifestly different from Grunewald. Here the conspiracy was entered into, in part, to accomplish the offenses of tax evasion charged in counts 2 through 6 of the indictment. [FN10] As discussed above, the misstatements to the IRS are an integral element of the substantive evasion charges underlying the conspiracy alleged in count 1. Grunewald itself suggests the importance of this distinction:

> FN10. The indictment also alleges that the defendants conspired to accomplish the acts of aiding and assisting in those false filings charged in counts 7 through 15.

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

Id. at 405, 77 S.Ct. at 974 (emphasis in original). In this instance, the acts of concealment are central to the government's proof on the underlying evasion charges. In other words, they were in furtherance of one of the main criminal objectives of the conspiracy, tax evasion.

Defendants' motion to dismiss the conspiracy count as barred by the statute of limitations is denied.

II. Discovery

A. Initiation of the Criminal Investigation

[3] Defendants seek discovery of a limited nature in respect of the start and duration of the IRS's civil investigation as well as the start of the criminal investigation. Specifically, defendants seek to determine whether summonses served upon the defendants were improper and thus whether statements given by the defendants in response to those summonses are subject to suppression.

The relevant statutory provision is 26 U.S.C. s 7602, which grants the IRS authority to serve summonses for "the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws", so long as a Justice Department referral is not in effect. [FN11] If a Justice Department referral is in effect at the time summonses are issued, defendants have the basis for a motion to suppress the statements made in consequence of those summonses. See United States v. MacKenzie, 777 F.2d 811, 819 (2d Cir.1985); see also United States v. Piper, 681 F.Supp. 833, 839 (M.D.Ga.1988). [FN12] Defendants at bar are not in a position to know whether a Justice Department referral was in effect at the time the summonses were issued without limited discovery from the government on the point. It is that discovery they now seek.

> FN11. The statute defines a Justice Department referral as being in effect when either (i) the IRS has recommended to the Attorney General "a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws", 26 U.S.C. s 7602(c)(2)(A)(i), or when "any request is made [by the Justice Department of the IRS] under section 6103(h)(3)(B) for

the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person", 26 U.S.C. s 7602(c)(2)(A)(ii).

FN12. I intimate no present view as to outcome of such a motion to suppress were it to be made.

The government argues that "the only showing that the Government need make, at most, is an affidavit from the case agent affirming that there was no Justice Department *1198 referral at the time the summonses were issued." Government's Memorandum at 18-19. The government cites cases to that effect. See Godwin v. United States, 564 F.Supp. 1209, 1211 (D.Del.1983) (amendment of 26 U.S.C. s 7602 "did not alter the showing required by the government to establish a prima facie case for the enforcement of the summons"); Drum v. United States, 570 F.Supp. 938, 941 (M.D.Pa.1983) ("[t]he requisite showing of good faith may be made by the affidavit of the Internal Revenue Service Agent who issued the challenged summons and who is seeking enforcement thereof"), aff'd without opinion, 735 F.2d 1348 (3d Cir.1984).

The government supplies the affidavit of Special Agent Laura Wolf, the IRS special agent currently assigned to the case. Wolf states that a Justice Department referral was not in effect until approximately April 1987, some two years after the last statements alleged in the indictment. Affidavit of Laura Wolf sworn to on January 5, 1990 at P 3. That affidavit is on information and belief. Wolf states that she "was initially assigned to the instant investigation in approximately March, 1987 [and] ... was the first IRS criminal investigator so assigned." Id. at P 2. Apart from this general statement as to Wolf's association with the investigation, the affidavit contains no statement as to the source of her beliefs in respect of the date on which the Justice Department referral was in effect. Having submitted that affidavit, the government declares the ball to be in defendants' court.

By letter dated January 18, 1990, counsel for defendant Foont brings to this Court's attention a grand jury subpoena dated March 19, 1985 which seemingly relates to the captioned action. Specifically, the subpoena is one directed to the "Custodian of Records" at Cralin & Co., Inc. The subpoena directs production as follows:

Arbitrage Trading Partners
Greystone Investment Group
Money Market Group
Securities Arbitrage
Cralin Securities Co.
Cralin Metals Co.
Multi Asset Group
Cralin Governments Group
Cralin & Co., Inc.
Cralin Group, Inc.
Cralin Capital Partners
Cralin Capital Investment Associates
Capital Futures Group
Capital Trading Group

1. From January 1, 1980 to the present for the above-named entities all

documents and material, including but not limited to tape recordings, correspondence, memoranda, notes, wires, telexes, checks, comparisons, confirmations, workpapers, traders' tickets, spread sheets, contracts, blotters relating any financial business or proposed dealings with Arbitrage Management Company.

2. Employment/Personnel and Compensation file for Paul Foont.

NOTE: If any document is not produced under a claim of privilege, provide a list of the documents not produced, their author, date, parties distributed to and a brief description of the subject matter so that the claims may be litigated.

The subpoena states that the information was sought in connection with the investigation of an alleged violation of 18 U.S.C. s 371 (conspiracy to defraud the IRS); 18 U.S.C. s 1341 (mail fraud); and 26 U.S.C. s 7206(2) (aiding and assisting in the filing of false tax returns). On its face, the subpoena appears to be one issued in connection with the grand jury investigation of this case. If that is so, a Justice Department referral was in effect at least as early as March 19, 1985, the date of the subpoena's issuance, rather than the April 1987 date suggested by the affidavit supplied by the government. Defendants' having provided such information, the ball is now back in the government's court.

I therefore direct the government to supply an affidavit(s) on personal knowledge of an IRS agent(s) or other official of that agency, and/or representatives of the Justice Department specifying the exact date on which a Justice Department referral was made in this case. The affidavit(s) should specify whether the grand jury subpoena of March 19, 1985 was issued in *1199 connection with the investigation of this case. The government is to comply with this direction within ten (10) days of the date of this Opinion.

B. Notes of Defendants' Oral Statements

Defendants move for production of any notes memorializing defendants' statements to the IRS. The government represents that no such notes were taken, thereby rendering the request moot.

C. Witness List

[4] Defendants move for production of "a list of the witnesses the government intends to call during its case in chief." Defendants' Memorandum at 24. The government opposes that application.

The lead case in this circuit on the subject of witness list disclosure is United States v. Cannone, 528 F.2d 296 (2d Cir.1975). Both defendants and the government find comfort in Cannone. Defendants argue that certain language in Cannone supports the application for disclosure, while the government argues that the holding of the case clearly prohibits it. The court stated that it is "often desirable" to allow disclosure because

without the benefit of such disclosure, the defense may be substantially hampered in its preparation for trial. At a minimum, pretrial ignorance of the identity of the prosecution's witnesses tends to detract from the effectiveness of the defense's objections and cross-examination.

528 F.2d at 301. However, the Second Circuit held that the district court had abused its discretion in providing the defendants with a witness list where "the defense made only an abstract, conclusory claim that such disclosure was necessary to its proper preparation for trial." Id. at 301-02.

Defendants next point to the factors enumerated in United States v.

Turkish, 458 F.Supp. 874, 881 (S.D.N.Y.1978) in support of their application. Those factors are as follows:

(1) Did the offense alleged in the indictment involve a crime of violence?

(2) Have the defendants been arrested or convicted for crimes involving violence?

(3) Will the evidence in the case largely consist of testimony relating to documents (which by their nature are not easily altered)?

(4) Is there a realistic possibility that supplying the witnesses' names prior to trial will increase the likelihood that the prosecution's witnesses will not appear at trial, or will be unwilling to testify at trial?

(5) Does the indictment allege offenses occurring over an extended period of time, making preparation of the defendants' defense complex and difficult?

(6) Do the defendants have limited funds with which to investigate and prepare their defense?

458 F.Supp. at 881.

While it is true that four out of the six Turkish factors support defendants' argument, [FN13] they have not come forth with "specific evidence of the need for disclosure", 528 F.2d at 302, as is required for the district court to properly direct disclosure. In essence, defendants argue that the government's investigation was a long one and the potential witness pool is a large one and a witness list would thus greatly facilitate defense preparation. That is not the specific showing contemplated by Cannone. Indeed, although the potential witness pool is large in an absolute sense, many of the witnesses are known to the defendants. Specifically, defendants are familiar with the former employees of the Cralin partnerships, the limited partners involved in the case and the outside accountants and lawyers with whom they dealt. Moreover, defendants have access to the record of and therefore knowledge of the witnesses called in United States v. Atkins, 87 Cr. 246 (MEL), a related trial arising out of the same transactions at issue here.

FN13. Specifically, the first two factors as well as factors four and five point in defendants' favor.

*1200 Defendants' motion for the production of a witness list is denied.

D. Bill of Particulars

Defendants outline eight basic areas as to which they seek a bill of particulars. Specifically, defendants seek immediate production of the following:

1. a list of those documents the government intends to introduce at trial;

2. the identities of those persons allegedly aided and abetted by the defendants in respect of the false income tax returns that form the basis for counts 7 through 15;

3. the substance of the alleged "secret oral agreements" entered into by the defendants;

4. identification of the alleged fraudulent sales literature distributed to potential investors in the Cralin partnerships;

5. the means by which the conspirators attempted to mislead the outside accountants of the Cralin partnerships;

6. the allegedly false information contained on the schedule K-1 forms sent by the Cralin partnerships to its partners;

7. whether the government intends to use similar act evidence at trial;
8. Brady impeachment material.

[5] The second of these requests, namely one for the production of the identities of those persons whom the defendants are alleged to have aided and abetted, is on par with the traditional request for an enumeration of one's alleged co-conspirators. The government recognizes its obligation to provide that latter information to the defendants and has presumably now made the requisite production. The government is similarly directed to make production forthwith of the names of those persons whom the defendants are alleged to have aided and abetted.

[6] As to a list of those documents which the government will seek to introduce at trial, I will not ask the government to finalize the minutiae of its case in this way some six weeks in advance of trial. However, in this case where all concede that a significant number of documents have been produced by the government and will presumably be used at trial, it is right to narrow the field before trial in order to allow more effective case preparation by the defense. I therefore direct that the government make available to the defendants a list of those exhibits it anticipates might be used at trial within fourteen (14) days of trial.

[7] The middle four requests are no more than a "demand for the government's evidence in advance of trial," United States v. Gottlieb, 493 F.2d 987, 994 (2d Cir.1974), and the "law does not impose an obligation [on the government] to preview its case or expose its legal theory." United States v. Leonelli, 428 F.Supp. 880, 882 (S.D.N.Y.1977). The requests are denied.

[8] The government declined to respond to defendants' request in respect of whether it intends to offer similar act evidence at trial, but states that "[a]s the trial date approaches, we will address this issue anew." Letter of AUSA Robert J. Cleary dated February 22, 1989 at P 13. The government is directed to make production in that regard within fourteen (14) days of trial.

[9] As to the Brady impeachment material which defendants seek, the government recognizes its well-established obligation to produce that material and states its intent to make such production along with the 3500 material for each government witness. That is sufficient. See, e.g., United States v. Nixon, 418 U.S. 683, 701, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974) ("[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial"); United States ex rel. Lucas v. Regan, 503 F.2d 1, 3 n. 1 (2d Cir.1974) ("[n]either Brady nor any other case we know of requires that disclosures under Brady be made before trial"), cert. denied, 420 U.S. 939, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975); United States v. Biaggi, 675 F.Supp. 790, 812 (S.D.N.Y.1987) (" '[i]nformation bearing on a witness' credibility, such as grants or promises of immunity, *1201 plea bargain arrangements, or other consideration promised by the Government in return for testimony must be turned over at the same time as other 18 U.S.C. s 3500 materials' ") (citations omitted); United States v. Abrams, 539 F.Supp. 378, 390 (S.D.N.Y.1982) ("Brady ... does not require the government to disclose information pertaining to the credibility of witnesses before that witness testifies") (citations omitted). Defendants' motion to compel immediate production of Brady impeachment material is denied.

III. Severance

[10] Defendant Foont moves for severance pursuant to the doctrine of United States v. Finkelstein, 526 F.2d 517 (2d Cir.1975), cert. denied, 425 U.S. 960, 96 S.Ct. 1742, 48 L.Ed.2d 205 (1976). The Finkelstein doctrine is one that governs motions for severance based on attempts by one defendant to obtain the exculpatory testimony of his co-defendant. Foont contends that were he to be tried separately from Feldman, Feldman would exculpate Foont at Foont's trial.

The Second Circuit has enumerated four factors to be considered in evaluating such a claim for severance.

> (1) the sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege, ... (2) the degree to which the exculpatory testimony would be cumulative, ... (3) the counter arguments of judicial economy, ... and (4) the likelihood that the testimony would be subject to substantial, damaging impeachment....

526 F.2d at 523-24 (citations omitted). I address these factors in turn.

As to the first factor, the likelihood that Feldman would waive his Fifth Amendment privilege and testify at a separate trial of Foont, Foont offers the affidavit of his co-defendant in which Feldman states that he would testify at Foont's trial as follows:

> On several occasions, including at least one occasion in 1981, Paul J. Foont and I discussed the fact that Price Waterhouse, the Cralin entities' accountants, and Paul, Weiss, Rifkind, Wharton and Garrison, the Cralin entities' legal counsel, had stated, in substance, that the transactions entered into by the Cralin entities in 1981 were legal. During the time period covered by the transactions alleged in the indictment, Mr. Foont was an employee of the Cralin entities and reported to me and others who were in charge of and had ownership interests in the Cralin entities.

Affidavit of Jeffrey L. Feldman sworn to on December 19, 1989 at P 2. Feldman further states that he is "willing to testify at a separate trial of Mr. Foont, even if that trial came before [his] own, and [he is] prepared to waive [his] fifth amendment privilege against self-incrimination at Mr. Foont's trial." Id. at P 3. While the Feldman affidavit is certainly a strong suggestion that he would indeed testify at Foont's trial, there is no indication that he would not also testify at a joint trial of both defendants. Moreover, Feldman's affidavit suggests that he may indeed be willing to so testify given his representation that he would waive his Fifth Amendment privilege and testify at a trial of Foont even if that trial were scheduled before his own.

The second factor is the degree to which the proffered exculpatory testimony would be cumulative. Foont states that his defense at trial "will be that he lacked the requisite intent for the crimes charged." Defendants' Memorandum of Law at 34. Foont argues that Feldman's testimony goes directly to the central issue of Foont's intent in respect of the transactions at issue. The government argues that the proffered testimony is cumulative insofar as the accountants and lawyers had been misled into believing that the transactions were legal and will so testify. In other words, the accountants and lawyers will themselves testify that they advised the defendants that the transactions were legal, but that such advise was given based on fraudulent information. Assuming that Feldman would testify that the conversations were innocent discussions concerning whether the Cralin partnerships should enter into the

subject transactions and Feldman *1202 informed Foont that the outside accountants and lawyers found no legal impediments to so doing, then such testimony would be probative of Foont's state of mind.

Considerations of judicial economy clearly weigh against severance. This is a complex case that will take more than one month to try and the burdens on limited judicial resources in trying the case twice are obvious. Moreover, witnesses would be twice inconvenienced and our jury system doubly taxed.

As to possible impeachment of Feldman's testimony, it is true that if Feldman were tried first and convicted, his testimony at a later trial of Foont would be subject to damaging impeachment. Of course, that is a problem easily remedied by scheduling Feldman's trial after that of Foont. However, the information contained in the ex parte affidavit of AUSA Cleary suggests certain possible areas of impeachment.

On balance, Foont has not satisfied his burden under Finkelstein.

Conclusion

Defendants' motions are denied except as set forth in this Opinion.

The government is directed to proceed in conformity with this Opinion.

The foregoing is SO ORDERED.

END OF DOCUMENT

completion of scheme--
mail fraud -- acts of concealment meant to "lull" victim into false sense of security/avoid detection.

Citation 106 S.Ct. 725 88 L.Ed.2d 814, 54 USLW 4123 (CITE AS: 474 U.S. 438, 106 S.CT. 725)
FOUND DOCUMENT
Database SCT
Mode Page

UNITED STATES, Petitioner
v.
James C. LANE and Dennis R. Lane.
James C. LANE and Dennis R. Lane, Petitioner
v.
UNITED STATES.
Nos. 84-744, 84-963.
Argued Oct. 9, 1985.
Decided Jan. 27, 1986.
Rehearing Denied March 31, 1986.
See 475 U.S. 1104, 106 S.Ct. 1507.

Defendants were convicted in the United States District Court for the Northern District of Texas on various charges arising from certain arson schemes, and they appealed. The Court of Appeals, 735 F.2d 799, reversed and remanded. Rehearing was denied, 741 F.2d 1381. After granting certiorari, the Supreme Court, Chief Justice Burger, held that: (1) misjoinder under Criminal Procedure Rule pertaining to multiple defendants is subject to harmless-error analysis and is not reversible error per se; (2) misjoinder of one count of mail fraud involving one defendant with other counts of mail fraud involving both defendants was harmless error; and (3) evidence was sufficient to support convictions.

Reversed and remanded.

Justice Brennan filed opinion concurring in part and dissenting in part in which Justice Blackmun joined.

Justice Stevens filed opinion concurring in part and dissenting in part in which Justice Marshall joined.

[1] CONSTITUTIONAL LAW k268(2.5)
92k268(2.5)
Improper joinder of defendants does not, in itself, violate the Constitution; rather, misjoinder arises to level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; U.S.C.A. Const.Amend. 5.

[1] INDICTMENT AND INFORMATION k124(3)
210k124(3)
Improper joinder of defendants does not, in itself, violate the Constitution; rather, misjoinder arises to level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; U.S.C.A. Const.Amend. 5.

[2] CRIMINAL LAW k1167(1)
110k1167(1)
Misjoinder of defendants under Criminal Rule 8(b) is subject to harmless-error analysis and is not reversible error per se; an error involving misjoinder affects substantial rights and requires retrial only if misjoinder results in

actual prejudice because it had substantial and injurious effect or influence in determining jury's verdict. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

[2] INDICTMENT AND INFORMATION k124(1)
210k124(1)
Misjoinder of defendants under Criminal Rule 8(b) is subject to harmless-error analysis and is not reversible error per se; an error involving misjoinder affects substantial rights and requires retrial only if misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining jury's verdict. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

[3] CRIMINAL LAW k1167(1)
110k1167(1)
Misjoinder of first count charging one defendant with mail fraud with other counts charging both defendant and codefendant with mail fraud was harmless error, considering that when evidence of misjoined first count was introduced, district court provided a proper limiting instruction and in final charge repeated instruction and admonished jury to consider each count and defendant separately; moreover, same evidence on first count would likely have been admissible on joint retrial of the other counts to show defendant's intent under Evidence Rule 404(b). Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] INDICTMENT AND INFORMATION k124(5)
210k124(5)
Misjoinder of first count charging one defendant with mail fraud with other counts charging both defendant and codefendant with mail fraud was harmless error, considering that when evidence of misjoined first count was introduced, district court provided a proper limiting instruction and in final charge repeated instruction and admonished jury to consider each count and defendant separately; moreover, same evidence on first count would likely have been admissible on joint retrial of the other counts to show defendant's intent under Evidence Rule 404(b). Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] POSTAL SERVICE k35(8)
306k35(8)
To find a violation of the mail fraud statute [18 U.S.C.A. s 1341], the charged mailings must be for purpose of executing the fraudulent scheme; mailings occurring after receipt of the goods obtained by fraud are within the statute if they were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities and make the apprehension of defendants less likely than if no mailings had taken place.

[5] POSTAL SERVICE k35(8)
306k35(8)
Evidence was sufficient to support convictions on three counts of mail fraud arising from overall scheme to defraud fire insurer notwithstanding defendants' claim that mailings to insurer alleged in indictment occurred after irrevocable

receipt of related payment, and thus after each scheme to defraud came to fruition; mailings charged in the counts took place while overall scheme charged in indictment was still continuing; scheme was not completed until after mailing charged in last count, because that mailing, as were the others, was intended to "lull" insurer into a false sense of security. 18 U.S.C.A. s 1341.

[5] POSTAL SERVICE k49(11)
306k49(11)
Evidence was sufficient to support convictions on three counts of mail fraud arising from overall scheme to defraud fire insurer notwithstanding defendants' claim that mailings to insurer alleged in indictment occurred after irrevocable receipt of related payment, and thus after each scheme to defraud came to fruition; mailings charged in the counts took place while overall scheme charged in indictment was still continuing; scheme was not completed until after mailing charged in last count, because that mailing, as were the others, was intended to "lull" insurer into a false sense of security. 18 U.S.C.A. s 1341.

**726 *438 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

James Lane and his son Dennis, respondents in No. 84-744, were indicted on counts for, inter alia, mail fraud in connection with insurance claims that were made and that insurers paid for fire damage to a restaurant and duplex that James had hired a professional arsonist to burn. The restaurant was operated by James in partnership with others. Count 1 charged James with mail fraud with regard to that fire. The duplex was owned by a different partnership, of which Dennis was one of the partners. Counts 2 through 4 charged both respondents with mail fraud related to the duplex fire. Count 5 charged both respondents with conspiracy to commit mail fraud in connection with a third arson scheme, and Count 6 charged Dennis with perjury before the grand jury. The Federal District Court denied respondents' pretrial motions for severance on the alleged ground that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), which provides that two or more defendants may be charged in the same indictment if they are alleged to have participated "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The trial then proceeded jointly before a jury. When evidence relating to the restaurant fire was admitted, the court instructed the jury not to consider that evidence against Dennis, and repeated this instruction in the final charge and admonished the jury to consider each count and defendant separately. The jury returned convictions on all counts. The Court of Appeals reversed and remanded for new trials, holding that the joinder of Count 1 with the other five counts violated Rule 8(b) and that such misjoinder was prejudicial per se. The court, however, rejected respondents' contention that there was insufficient evidence to support convictions under Counts 2 through 4 because each charged mailing

occurred after each related insurance payment had been received and thus after each scheme to defraud had reached fruition.

Held:

1. Misjoinder under Rule 8(b) is subject to harmless-error analysis and is not reversible error per se. An error involving misjoinder "affects *439 substantial rights" and requires retrial only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). It is only by such a holding that Rule 8(b) and Federal Rule of Criminal Procedure 52(a)--which provides that any error "which does not affect substantial rights shall be disregarded"--can be brought into substantial harmony. Here, in the face of overwhelming evidence of guilt, the claimed error was harmless. The District Court provided proper limiting jury instructions, and, moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of the other counts to show James' intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. Pp. 729-733.

2. There was sufficient evidence to support the convictions on Counts 2 through 4. On the evidence and under proper instructions, the jury could properly find that the mailings charged in Counts 2 and 3 took place while the overall scheme charged in the indictment was still continuing and that the scheme was not completed until after the mailing charged in Count 4, because that mailing, as were the others, was intended to "lull" the insurer into a false sense of security. Pp. 733-734.

735 F.2d 799 (CA5 1984), reversed and remanded.

BURGER, C.J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, post, p. ---. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, post, p. ---.

**727 Bruce Neil Kuhlik, Washington, D.C., for the U.S.

Clifford W. Brown, Lubbock, Tex., for James C. Lane and Dennis R. Lane.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal *440 Rules of Criminal Procedure is subject to the harmless-error rule, [FN1] and to determine whether there is sufficient evidence in this case to support convictions for mail fraud under 18 U.S.C. s 1341.

FN1. Six Circuits have adopted a per se approach holding that misjoinder is always reversible error. See United States v. Turkette, 632 F.2d 896, 906, and n. 35 (CA1 1980), rev'd on other grounds, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); United States v. Graci, 504 F.2d 411, 414 (CA3 1974); United States v. Bova, 493 F.2d 33 (CA5 1974); United States v. Bledsoe, 674 F.2d 647, 654, 657-658 (CA8), cert. denied sub nom. Phillips v. United States, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982); United States v. Eagleston, 417 F.2d 11, 14

(CA10 1969); United States v. Ellis, 709 F.2d 688, 690 (CA11 1983). Six have subjected misjoinder claims to harmless-error analysis. See United States v. Ajlouny, 629 F.2d 830, 843 (CA2 1980), cert. denied, 449 U.S. 1111, 101 S.Ct. 920, 66 L.Ed.2d 840 (1981); United States v. Seidel, 620 F.2d 1006 (CA4 1980); United States v. Hatcher, 680 F.2d 438, 442 (CA6 1982); United States v. Varelli, 407 F.2d 735, 747-748 (CA7 1969); United States v. Martin, 567 F.2d 849, 854 (CA9 1977); Baker v. United States, 131 U.S.App.D.C. 7, 21-23, 401 F.2d 958, 972-974 (1968). Most of these courts had previously taken the view that misjoinder is prejudicial per se.

I

A

James Lane and three partners opened the El Toro Restaurant in Amarillo, Texas, in the summer of 1978. The business never operated at a profit, however, and sales began to decline that fall. In November, Lane purchased fire insurance covering the building's contents and improvements and any related business losses. Simultaneously, he hired Sidney Heard, a professional arsonist, to burn the building in order to escape the lease and partnership. On February 27, 1979, Heard set a fire that caused smoke damage to the building's contents. Lane first settled with the insurer on the contents and improvements. He then submitted an income statement that falsely indicated the restaurant had operated at a profit. After the insurance adjuster mailed the statement to the insurer's headquarters, Lane settled his business interruption claim.

*441 In early 1980, Lane again hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo. Lane obtained a fire insurance policy on the building, listing the owner as L & L Properties, a partnership between his son Dennis Lane and Andrew Lawson. An accomplice of Heard's burned the duplex on May 1, 1980.

Thereafter, on three occasions Dennis Lane signed proof-of-loss claims for repairs and submitted them to an insurance adjuster, who issued drafts in return totaling $12,000. [FN2] Each time, the adjuster later **728 mailed the proof-of-loss to the insurer's headquarters. The adjuster issued a final settlement draft for $12,250 on September 16, 1980. Two days later, he mailed a memorandum to headquarters explaining why repairs had exceeded previous estimates by some $10,000. He enclosed invoices supplied by Dennis Lane listing various materials and furniture purportedly purchased to repair and refurbish the duplex. In fact, these invoices had been fabricated by James Lane, Heard, and Heard's secretary.

FN2. Each proof-of-loss form stated that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant" and that "no attempt to deceive [the] company as to the extent of the loss has been made."

The Lanes and Lawson met with Heard several weeks after the duplex fire to discuss a proposal to establish and burn a flower shop in Lubbock, Texas. Heard and Dennis Lane picked out a suitable building in July 1980, and an accomplice of Heard's, William Lankford, prepared fictitious invoices for

merchandise and delivered some artificial flowers to the building later in August. In November, James Lane insured the contents for $50,000. Heard, however, was later arrested for an unrelated crime, and the planned arson never took place.

In March 1981, an Amarillo newspaper article connected Dennis Lane with a scheme to burn the flower shop with Heard; that same day, James Lane canceled the insurance policy. On May 12, 1981, Dennis Lane appeared before a *442 federal grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford.

B

James Lane and Dennis Lane were indicted in multiple counts for mail fraud in violation of 18 U.S.C. s 1341, conspiracy in violation of 18 U.S.C. s 371, and perjury in violation of 18 U.S.C. s 1623. Count 1 charged James Lane with mail fraud with regard to the El Toro Restaurant fire. Counts 2 through 4 charged both Lanes with mail fraud related to the duplex fire, and Count 5 charged them with conspiracy to commit mail fraud in connection with the flower shop arson plan. In Count 6, Dennis Lane was charged with perjury before the grand jury.

Prior to trial in the District Court for the Northern District of Texas, the Lanes filed motions for severance contending that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), but the motions were denied and the trial proceeded jointly before a jury. When evidence relating to the El Toro Restaurant fire was admitted, the trial court instructed the jury not to consider that evidence against Dennis Lane. App. 21. The trial judge repeated this instruction in the final charge, together with an instruction regarding the separate consideration to be given each defendant and each count. Ibid. The Lanes renewed their severance motions at the end of the Government's evidence and at the close of all evidence, but the motions were again denied. The jury returned convictions on all counts.

On appeal, the Lanes argued that misjoinder under Rule 8(b) had occurred. [FN3] The Court of Appeals for the Fifth Circuit *443 concluded that Counts 2 through 6 were properly joined, but agreed "that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Counts 2 through 6." 735 F.2d 799, 803-804 (1984). The court refused to consider the Government's argument that the error, if any, was harmless, stating only that "Rule 8(b) misjoinder is prejudicial per se in this circuit." Id., at 806 (citing United States v. Levine, 546 F.2d 658 (CA5 1977)). The court reversed **729 the Lanes' convictions and remanded for new trials.

FN3. Rule 8(b) provides:
"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

At the same time, the Court of Appeals rejected the Lanes' contention that there was insufficient evidence to support convictions for mail fraud under

Counts 2 through 4 because each charged mailing occurred after each related payment had been received, and thus after each scheme had reached fruition. [FN4] The Court of Appeals distinguished our holding in United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), and instead relied on United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962), to hold that mailings occurring after receipt of an insurance payment may nevertheless be "in execution of fraud" as required by 18 U.S.C. s 1341 where they are "designed to lull the victims into a false sense of security and postpone investigation." 735 F.2d, at 807-808.

FN4. The Court of Appeals also rejected James Lane's challenge to the sufficiency of the evidence with regard to Count 1. That holding was not challenged in the Lanes' cross-petition.

The court found sufficient evidence for the properly instructed jury to "infer that the mailings were intended to and did have a lulling effect" because they helped persuade the insurer that "the claims were legitimate." Id., at 808. It emphasized that had the proof-of-loss forms not been mailed shortly after issuance of the insurance drafts, the insurer might have been alerted to the possibility of a fraud. Ibid. *444 Similarly, the false invoices submitted by Dennis Lane "gave the impression of a perfectly innocent claim." Ibid.

The Government's petition for rehearing was denied. 741 F.2d 1381 (1984). We granted certiorari, 469 U.S. 1206, 105 S.Ct. 1167, 84 L.Ed.2d 318 (1985). We reverse in part and affirm in part.

II

The Court of Appeals held that misjoinder "is inherently prejudicial." [FN5] 735 F.2d, at 804. The Circuits are divided on the question whether misjoinder requires automatic reversal, or whether the harmless-error rule governs. [FN6] Most Circuits that have adopted the per se approach have relied on McElroy v. United States, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 (1896), where this Court applied the joinder statute then in force and reversed convictions of jointly tried defendants after rejecting the Government's argument that there was no showing of prejudice. Id., at 81, 17 S.Ct., at 33.

FN5. Although the Government continues to believe that Count 1 was properly joined with Counts 2 through 6, it does not challenge that holding here.

FN6. See n. 1, supra.

McElroy, however, was decided long before the adoption of Federal Rules of Criminal Procedure 8 and 52, and prior to the enactment of the harmless-error statute, 28 U.S.C. s 2111, which provides that on appeal we are to ignore "errors or defects which do not affect the substantial rights of the parties." Under Rule 52(a), we are similarly instructed that any error "which does not affect substantial rights shall be disregarded." [FN7]

FN7. Justice STEVENS' partial dissent argues that McElroy conclusively

determined misjoinder is prejudicial per se, and that Rule 8 was intended to represent a restatement of existing law, including the "rule of the McElroy case." Post, at 735. Rule 8, however, is simply a procedural rule with certain technical requirements, and Justice STEVENS' opinion refers to the Advisory Committee on Rules' citation of McElroy, see post, at 738, n. 3, making clear they were referring only to those technical requirements of prior law. Nowhere is there any indication Rule 8 was intended to enshrine any substantive "principle" of McElroy that misjoinder requires reversal, nor is there any citation of McElroy 's specific holding.

*445 The Court's holding in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), made a significant change in the law of harmless error. There, Justice Black, speaking for the Court, emphasized that even "some constitutional errors [may] be deemed harmless, not requiring the automatic reversal of the **730 conviction." Id., at 22, 87 S.Ct., at 827. In rejecting the automatic reversal rule, the Court stated:

"We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful.... We decline to adopt any such rule." Id., at 21-22, 87 S.Ct., at 826-827 (emphasis added).

Justice Black went on to note that all 50 States follow the harmless-error approach, and

"the United States long ago through its Congress established ... the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U.S.C. s 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules." Id., at 22, 87 S.Ct., at 827 (footnote omitted).

Since Chapman, we have "consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." United States v. Hasting, 461 U.S. 499, 509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983). In Hasting, we again emphasized that

"given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial." Id., at 508-509, 103 S.Ct., at 1980.

[1] *446 In this case, the argument for applying harmless-error analysis is even stronger because the specific joinder standards of Rule 8 are not themselves of constitutional magnitude. [FN8] Clearly, Chapman and Hasting dictate that the harmless-error rule governs here. [FN9]

FN8. Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.

FN9. Justice STEVENS' partial dissent suggests Chapman is irrelevant to our analysis because that case involved a constitutional violation, whereas

the error here is of a nonconstitutional nature. Post, at 738. It is difficult to see any logic in the argument that although the harmless-error rule may be applicable to constitutional violations, it should not be applied to violations of mere procedural rules. Justice STEVENS recognizes that the standard for harmless-error analysis adopted in Chapman concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors adopted in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See post, at 731, n. 11. The heightened regard we have for constitutional protections surely warrants a conclusion that nonconstitutional provisions must be treated at least comparably, and in Hasting we emphasized even "most constitutional violations" must be ignored if they are harmless. 461 U.S., at 509, 103 S.Ct., at 1980.

The applicability of harmless error to misjoinder also follows from Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), a case similar to the one at hand. There, some 32 defendants were charged with one conspiracy, when in fact there had been at least eight separate conspiracies. Nineteen defendants were jointly tried, and seven were convicted. The Court applied the harmless-error statute to an error resulting from a variance from the indictment, and held the error was not harmless in that case. Emphasizing the numerous conspiracies involving unrelated defendants, as well as seriously flawed jury instructions, the Kotteakos Court reversed the convictions in light of each of the 32 defendants' "right not to be tried en masse for the conglomeration of distinct and separate offenses" involved. Id., at 775, 66 S.Ct., at 1252.
*447 Although the Court's review in that case was from the perspective of a variance from the indictment, rather than misjoinder, the Court recognized that misjoinder was implicated, and suggested that the harmless-error rule could similarly apply in **731 that context. [FN10] Id., at 774-775, 66 S.Ct., at 1252.

FN10. The Court pointed out that "the problem is not merely one of variance ... but is also essentially one of proper joinder." 328 U.S., at 774, 66 S.Ct., at 1252. Even so, the Court indicated the harmless-error rule must apply, although perhaps with "restraint." Id., at 775, 66 S.Ct., at 1252.

A holding directly involving misjoinder again indicated the harmless-error rule should apply. In Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960), three different groups of defendants were charged with participating in separate criminal acts with one other group of three defendants. The indictment also charged all the defendants with one overall count of conspiracy, making joinder under Rule 8 proper. At the close of the Government's case, however, the District Court concluded there was insufficient evidence of conspiracy and dismissed that count. The court then denied a motion for severance after concluding that defendants failed to show prejudice from the joint trial; the Court of Appeals affirmed. This Court recognized that "the charge which originally justified joinder turn[ed] out to lack the support of sufficient evidence." Id., at 516, 80 S.Ct., at 948.

Essentially, at that point in the trial, there was a clear error of misjoinder under Rule 8 standards. Nevertheless, the Schaffer Court held that once the Rule 8 requirements were met by the allegations in the indictment, severance thereafter is controlled entirely by Federal Rule of Criminal Procedure 14, which requires a showing of prejudice. Id., at 515-516, 80 S.Ct., at 947-948. The Court then affirmed the finding of no prejudice. Although the Court did not reach the harmless-error rule because Rule 8(b) had initially been satisfied, the Court's language surely assumed the rule was applicable.

A plain reading of these cases shows they dictate our holding. Applying the 1919 statute treated in Kotteakos, which *448 governed only "technical errors," 28 U.S.C. s 391 (1946 ed.), the Court emphasized the clear intent of Congress "was simple: To substitute judgment for automatic application of rules." 328 U.S., at 759-760, 66 S.Ct., at 1245. "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." Id., at 762, 66 S.Ct., at 1246. The Court flatly rejected per se rules regarding particular errors because "any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of [the statute] but also to the expressed intent of its legislative sponsors." Id., at 765, 66 S.Ct., at 1248.

Schaffer discussed the current harmless-error statute, which was enacted in 1949 after Kotteakos and deleted the qualifying word "technical" regarding errors governed by the rule. See 28 U.S.C. s 2111. The Court again rejected any per se rule for joinder errors requiring reversal, refusing to "fashion a hard-and-fast formula that ... [the] joinder [wa]s error as a matter of law." 362 U.S., at 516, 80 S.Ct., at 948. Citing Kotteakos, the Court pointed out that there "[t]he dissent agreed that the test of injury resulting from joinder 'depends on the special circumstances of each case.' " 362 U.S., at 517, 80 S.Ct., at 948 (quoting 328 U.S., at 777, 66 S.Ct., at 1254 (Douglas, J., dissenting)). [FN11]

FN11. Contrary to these clear holdings, Justice STEVENS' partial dissent advocates a rule-by-rule review establishing bright-line per se rules whether to conduct harmless-error analysis. Post, at 733-739. But on its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction. That kind of inquiry requires a review of the entire record. See United States v. Hasting, 461 U.S., at 509, 103 S.Ct., at 1980. It is simply too late in the day to argue that Congress intended to incorporate any per se rule of McElroy for misjoinder following Kotteakos, the subsequent enactment of an arguably broader statute, and this Court's prejudice inquiry in Schaffer.

*449 **732 In common with other courts, the Court has long recognized that joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to

trial." Bruton v. United States, 391 U.S. 123, 134, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). Rule 8 accommodates these interests while protecting against prejudicial joinder. But we do not read Rule 8 to mean that prejudice results whenever its requirements have not been satisfied.

Under Rule 52(a), the harmless-error rule focuses on whether the error "affect [ed] substantial rights." In Kotteakos the Court construed a harmless-error statute with similar language, and observed:

"The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S., at 765, 66 S.Ct., at 1248.

[2] Invoking the Kotteakos test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." Id., at 776, 66 S.Ct., at 1253. Only by so holding can we bring Rules 8 and 52(a) "into substantial harmony, not into square conflict." [FN12] Id., at 775, 66 S.Ct., at 1253.

FN12. Respondents argue that application of the harmless-error rule to Rule 8(b) misjoinder will eviscerate Rule 14, which provides the trial court with discretion to grant a severance even if the joinder is proper under Rule 8 when it believes the defendants or the Government may be prejudiced by a joinder. We see no conflict with our holding and the applicability of Rule 14. Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party; review of that decision is for an abuse of discretion. Rule 8(b), however, requires the granting of a motion for severance unless its standards are met, even in the absence of prejudice; review on appeal is for an error of law. Applying the harmless-error rule to Rule 8(b) misjoinder simply goes to the additional question whether the error requires setting aside the convictions. We need not decide whether the degree of prejudice necessary to support a Rule 14 motion for severance is identical to that necessary to require reversal for a Rule 8(b) error. Justice STEVENS' partial dissent fails to recognize that the Rule 14 prejudice component involves a different inquiry from the Rule 8 technical requirements. Indeed, the express language of Rule 14, as well as the Advisory Committee Note, shows that Congress tolerates some Rule 8 joinders even when there is prejudice. The first hurdle in obtaining a severance under Rule 14 is a showing of prejudice, and if shown, it remains in the district court's discretion whether to grant the motion.

*450 Of course, "we are not required to review records to evaluate a harmless-error claim, and do so sparingly, [but] we plainly have the authority to do so." United States v. Hasting, 461 U.S., at 510, 103 S.Ct., at 1981 (footnote omitted).

[3] In the face of overwhelming evidence of guilt shown here, we are satisfied that the claimed error was harmless. When evidence on misjoined Count 1 was introduced, the District Court provided a proper limiting instruction, and in the final charge repeated that instruction and admonished

the jury to consider each count and defendant separately. Moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of Counts 2 through 6 to show James Lane's intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. Kotteakos, supra, 328 U.S., at 765, 66 S.Ct., at 1248. [FN13]

FN13. We can agree with Justice STEVENS' partial dissent "that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." Post, at 740; our reliance on the Kotteakos test makes that clear. See supra, at 731. But that does not in any sense mean that overwhelming evidence of guilt is irrelevant; the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction.
Nor may proper limiting instructions or jury charges never be "an adequate response" to a prejudice inquiry. Post, at 747. Contrary to the suggestion of the dissent, Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947), provides direct support for the Court's approach in this case. There the Court recognized that, in the context of mass trials (as in Kotteakos), limiting instructions on evidence admissible only as to one defendant might in some circumstances be inadequate to prevent prejudice. 332 U.S., at 559-560, 68 S.Ct., at 257-258. But here, as in Blumenthal, we are not faced with any trial en masse of numerous defendants and unrelated crimes.
When there are few defendants and the trial court is aware of the potential for prejudice, "the risk of transference of guilt over the border of admissibility [may be] reduced to the minimum" by carefully crafted limiting instructions with a strict charge to consider the guilt or innocence of each defendant independently. Id., at 560, 68 S.Ct., at 257. We cannot necessarily "assume that the jury misunderstood or disobeyed" such instructions. Id., at 553, 68 S.Ct., at 254. Indeed, this Court's conclusion in Schaffer that defendants failed to show prejudice was based directly on the fact that "the judge was acutely aware of the possibility of prejudice and was strict in his charge--not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each [defendant] separately under the respective substantive counts." 362 U.S., at 516, 80 S.Ct., at 948.
The same caution was exercised by the trial judge here, and no different result should be required. The Government initially observes that because of the similarity of each arson scheme, "only the court of appeals' narrow reading of Rule 8" led to its finding of misjoinder. At trial, Heard and Lankford--two principal actors--testified against both Lanes, who relied essentially on denials or character defenses. Moreover, the evidence as to Count 1 was distinct and easily segregated from evidence relating to Counts 2 through 6. The misjoinder error, if any, in these circumstances was harmless.

*451 **733 III

[4] Respondents challenge the sufficiency of the evidence to sustain their convictions. To find a violation of the mail fraud statute, 18 U.S.C. s

1341, [FN14] the charged "mailings" must be "for the purpose of executing the scheme." Kann v. United States, 323 U.S. 88, 94, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944). Mailings occurring after receipt of the goods obtained by fraud are within the statute if they "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the *452 authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." United States v. Maze, 414 U.S., at 403, 94 S.Ct., at 650. See United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962).

FN14. The statute provides in relevant part:
"Whoever, having devised or intending to devise any scheme or artifice to defraud, ... for the purpose of executing such scheme or artifice ..., places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ... or knowingly causes to be delivered by mail ... any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[5] Only Counts 2 through 4, involving the duplex fire, are at issue. The Lanes argue that each mailing occurred after irrevocable receipt of the related payment, and thus after each scheme to defraud came to fruition. [FN15] This argument misconstrues the nature of the indictment, which charged an overall scheme to defraud based on the events surrounding the duplex fire. Counts 2 through 4 merely relate to separate mailings concerning partial payments that were a part of the whole scheme. The jury could properly find the scheme, at the earliest, was not completed until receipt of the last payment on September 16, 1980, which finally settled their claim. Hence, the mailings charged in Counts 2 and 3 clearly took place while the scheme was still continuing.

FN15. The Government contends that undisputed testimony shows the insurance drafts issued to the Lanes, unlike normal business checks, were not payable on demand but only upon authorization from the insurer's home office when they arrived at the insurer's bank for collection. If the drafts deposited by the Lanes had been dishonored by the insurer's banks, the amounts would have been charged against their account. The Lanes, therefore, may not have irrevocably received the proceeds of the fraud prior to the final mailing. See Brief for United States 30-31. The Court of Appeals, however, did not rely on this argument, and we decline to resolve this factual issue here.

Moreover, the jury could reasonably have found that the scheme was not completed **734 until the final mailing on September 18, 1980, charged in Count 4, because that mailing was intended (as were the two earlier ones) to "lull" the insurer into a false sense of security. [FN16] The jury was properly instructed *453 that each charged mailing must have been made both "for the purpose of executing the scheme to defraud," App. 22, and prior to the scheme's completion, id., at 23, and further that mailings "which facilitate concealment of the scheme" are covered by the statute. [FN17] Id., at 24.

FN16. Our conclusion that the delayed mailings at issue in this action were part of an ongoing scheme to defraud is in accord with our holding in United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962). In that case, defendants purported to help businessmen obtain loans or sell their businesses in exchange for an "advance fee." Id., at 77, 83 S.Ct., at 174. Following the deposit of checks for these fees, the defendants' plan called for the mailing of a form letter assuring the victims of the fraud that they were receiving the services they paid for. Id., at 78, 83 S.Ct., at 174. The Court upheld defendants' convictions for mail fraud because of the "lulling effect" of the delayed mailings.
We see no conflict with our holding in United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974). There, use of a stolen credit card led to the mailing of charge statements to a bank. We held that the fraud was completed upon the defrauder's receipt of the goods, distinguishing Sampson because the mailing of the charge slips, rather than acting to "lull" the bank into acquiescence, instead "increased the probability that [the defrauder] would be detected and apprehended." 414 U.S., at 403, 94 S.Ct., at 650. Had the Lanes failed to submit timely proof-of-loss forms here, the insurer might very well have discovered the fraud.
The Lanes contend that the Fifth Circuit's decision in this case also conflicts with United States v. Ledesma, 632 F.2d 670 (CA7), cert. denied, 449 U.S. 998, 101 S.Ct. 539, 66 L.Ed.2d 296 (1980), which reversed a conviction involving the mailing of a fraudulent proof-of-loss form after receipt of insurance proceeds. In that case, however, the Seventh Circuit never discussed Sampson or the possibility that the delayed mailing had any "lulling" effect.

FN17. The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a general intention on their part to defraud, in order to come within Sampson 's holding. We need not determine whether any such specific intent must be shown, as we agree with the Court of Appeals that there was sufficient evidence for the jury to infer specific intent to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-petition.

The judgment of the Court of Appeals, ordering a new trial based on misjoinder of Count 1 with Counts 2 through 6, is reversed in part and affirmed in part, and the action is remanded for further proceedings consistent with this opinion.
It is so ordered.

Justice BRENNAN, joined by Justice BLACKMUN, concurring in part and dissenting in part.
I agree that the evidence was sufficient to sustain the mail fraud convictions and therefore join Part III of the Court's *454 opinion. I also agree that the Court of Appeals erred in holding that misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is prejudicial per se. I write separately,

however, because my reasons for reaching this conclusion differ from the Court's, and because I agree with Justice STEVENS that the harmless-error inquiry should be made in the first instance by the Court of Appeals.

I

The Act of February 26, 1919 (1919 Act), 40 Stat. 1181, amended s 269 of the Judicial Code. It provided in part:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U.S.C. s 391 (1925-1926 ed.).

In 1949, this provision was reenacted in its current form as 28 U.S.C. s 2111, and now instructs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The 1919 Act was also incorporated **735 in the Federal Rules of Criminal Procedure, and Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also, Fed.Rule Civ.Proc. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). Although s 2111 and Rule 52(a) refer to "errors or defects" without the qualifying word "technical," this change did not alter the substantive legal test. See H.R.Rep. No. 352, 81st Cong., 1st Sess., 18 (1949), U.S.Code Cong.Serv. 1949, 1248 (s 2111 "[i]ncorporates" former harmless-error statute); Advisory Committee's *455 Notes on Fed.Rule Crim.Proc. 52(a), 18 U.S.C.App., p. 657 (Rule is a "restatement of existing law").

The 1919 Act, s 2111, and Rule 52(a) all provide that an error is to be disregarded unless it "affects the substantial rights of the parties." This litigation thus presents a straightforward question of statutory construction: what does the phrase "affects the substantial rights of the parties" mean? Respondents in No. 84-744 contend that the term "substantial rights" refers to a particular class of rights which are essential to a fair trial and argue that errors which "affect" these rights cannot be disregarded on appeal. According to respondents, the 1919 Act, as reenacted in s 2111 and Rule 52(a), incorporated our holding in McElroy v. United States, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 (1896), that joinder is one of these "substantial rights," so that misjoinder is per se reversible.

For the reasons which follow, I conclude that the question whether a particular error "affects the substantial rights of the parties" does not entail a process of classification, whereby some rights are deemed "substantial" and errors affecting these rights are automatically reversible. Rather, an error "affects substantial rights" only if it casts doubt on the outcome of the proceeding. In other words, subject to the exceptions discussed in Part II (most importantly the exception for constitutional errors), I read s 2111 and Rule 52(a) to require harmless-error inquiry for all procedural errors. As none of these exceptions is applicable to misjoinder in violation of Rule 8, I concur in the Court's result on this issue.

Reference to whether error "affected the substantial rights of the parties" was not invented by Congress in 1919. The phrase was commonly used by courts

throughout the 19th century to express the conclusion that particular claims of error did or did not warrant reversal. However, as used by these courts, error which "affected the substantial rights of the parties" was generally understood to refer, not to errors respecting a particular class of rights, but rather to any error which affected the fairness of the trial as a whole by calling *456 into question the reliability of the result. See, e.g., Connors v. United States, 158 U.S. 408, 411, 414, 15 S.Ct. 951, 952, 953, 39 L.Ed. 1033 (1895); Maish v. Arizona, 164 U.S. 599, 602, 17 S.Ct. 193, 195, 41 L.Ed. 567 (1896); Williams v. United States, 168 U.S. 382, 390-398, 18 S.Ct. 92, 95-98, 42 L.Ed. 509 (1897); American Surety Co. v. Pauly, 170 U.S. 133, 159, 18 S.Ct. 552, 562, 42 L.Ed. 977 (1898); McCabe & Steen Constr. Co. v. Wilson, 209 U.S. 275, 279, 28 S.Ct. 558, 560, 52 L.Ed. 788 (1908); Holmgren v. United States, 217 U.S. 509, 523-524, 30 S.Ct. 588, 591-592, 54 L.Ed. 861 (1910). In other words, the statement that an error did not "affect the substantial rights of the parties" was a way of stating the conclusion that the error was not prejudicial.

A careful reading of McElroy demonstrates that it is consistent with this understanding of the phrase "affects the substantial rights of the parties." In McElroy, five defendants were charged in two indictments with separate assaults and in a third indictment with arson. Three of the defendants were also charged in yet a fourth indictment with another assault. After explaining these charges, the Court noted that "it is the settled rule ... to confine the indictment to one distinct offence **736 or restrict the evidence to one transaction" because "[i]n cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges...." 164 U.S., at 80, 17 S.Ct., at 32. The Court then stated: "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." Ibid. In context, this merely restates the common-law understanding that an error is reversible if it prejudices the defendant. The Court did not state that joinder is a "substantial right" and, for this reason, any error respecting joinder is reversible. Rather, the Court held that "[i]t cannot be said in [a case of improper joinder] that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." Id., at 81, 17 S.Ct., at 33. In other words, the *457 Court concluded that misjoinder is the kind of error which must be presumed to have prejudiced the accused and, for that reason, misjoinder affects his "substantial rights." As discussed in Part II, the irrebuttable presumption that misjoinder is prejudicial is inconsistent with the Court's subsequent harmless-error jurisprudence and can be overruled. For the moment, however, it is important only to note that nothing in McElroy suggests that the requirement that error have "affect[ed] the substantial rights of the parties" refers to anything other than that the error have been prejudicial.

Absent some contrary indication, then, it would seem logical to conclude that when Congress used the phrase "affect[s] the substantial rights of the parties" in the 1919 Act, Congress meant to require an inquiry into whether an error cast doubt on the verdict, not to create a class of rights as to which error

was per se reversible. The legislative history of the 1919 Act confirms that this was in fact what Congress intended.
The primary impetus for the enactment of the 1919 Act was the practice in some jurisdictions of reversing convictions on appeal for any procedural error at trial, without regard to whether the error was prejudicial. See Kotteakos v. United States, 328 U.S. 750, 758-759, 66 S.Ct. 1239, 1244-1245, 90 L.Ed. 1557 (1946). There was also concern over the inconsistent application of harmless-error analysis by other courts, this Court in particular. See H.R.Rep. No. 913, 65th Cong., 3d Sess., 2 (1919) (quoting H.R.Rep. No. 611, 62d Cong., 2d Sess., 2 (1912)). The large number of reversals which resulted from failure to scrutinize errors for their prejudicial effect was criticized by leaders of the legal profession, including Taft, Pound, Wigmore, and Hadley. See Kotteakos, supra, at 758-759, 66 S.Ct., at 1244-1245. After prolonged consideration, Congress responded to this criticism by passing the 1919 Act. The House Report accompanying the Act explained:
" 'It is the purpose of the ... bill to enact, in so far as the appellate courts are concerned, that in the consideration *458 in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party.' " H.R.Rep. No. 913, supra, at 2 (quoting H.R.Rep. No. 611, supra, at 2) (emphasis added).
The theme that reversal be limited to prejudicial errors is found throughout the legislative history. For example, the Report accompanying the first version of the bill to pass the House of Representatives explained the meaning of the requirement that error be disregarded unless it "affect[s] the substantial rights of the parties" by quoting from an article by President Taft: " 'No judgment of the court below should be reversed except for an error which the court, after hearing [sic] the entire evidence, can affirmatively say would have led to a different verdict.' " **737 H.R.Rep. No. 1949, 61st Cong., 3d Sess., 1 (1911) (quoting Taft, The Administration of Criminal Law, 15 Yale L.J. 1, 16 (1905)). The Report criticized the practice of reversing judgments for errors which "did not in the least affect the substantial rights of the parties, the real merits of the case having been properly adjudicated upon the first trial." H.R.Rep. No. 1949, supra, at 2 (emphasis added). See also, ibid. (quoting Justice O'Gorman of the New York Supreme Court to the effect that "[o]ne of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits"); H.R.Rep. No. 1218, 63d Cong., 3d Sess. (1914); H.R.Rep. No. 264, 64th Cong., 1st Sess. (1916).
Our decision in Kotteakos v. United States, supra, forecloses any remaining questions as to the interpretation of the phrase "affects substantial rights of the parties." In Kotteakos, we expressly rejected the argument that the 1919 Act required a determination of "what are only technical, *459 what substantial rights; and what really affects the latter hurtfully." 328 U.S., at 761, 66 S.Ct., at 1246. We held instead that the Act's command to disregard errors unless they "affect the substantial rights of the parties" was a command not to overturn a conviction unless, after examining the record as a

whole, the court concludes that an error may have had "substantial influence" on the outcome of the proceeding. Id., at 765, 66 S.Ct., at 1248. Justice Rutledge's explanation, which includes a description of the proper analysis to apply in evaluating the effect of procedural errors, is well worth repeating:

"It comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.' ...

"Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

* * *

"In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance *460 for decision on the case as a whole, are material factors in judgment.

* * *

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Id., at 760-765, 66 S.Ct., **738 at 1245-1248 (citations and footnotes omitted). [FN1]

FN1. It scarcely needs repeating that, since correction may come from the legislature, considerations of stare decisis are at their strongest when this Court confronts its previous constructions of a statute. Cf. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-407, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).

II

This interpretation of s 2111 and Rule 52(a) as requiring examination of the prejudicial effect of all procedural errors is subject to several exceptions. First, and most importantly, constitutional errors are governed by the Due Process Clauses of the Fifth and Fourteenth Amendments rather than by s 2111

and Rule 52(a). See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Thus, the test for harmless constitutional error is stricter than its statutory counterpart. Compare, Chapman, supra, at 24, 87 S.Ct., at 828 (prosecution must establish that the error *461 was "harmless beyond a reasonable doubt"), with Kotteakos, 328 U.S., at 765, 66 S.Ct., at 1248 (error is harmless unless it had "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect). [FN2] In addition, Congress may, of course, expressly provide that a particular right is excluded from the operation of the harmless-error rule. Neither of these exceptions applies to misjoinder in violation of Rule 8, however. Misjoinder does not ordinarily rise to the level of a constitutional violation, [FN3] and nothing in the language or *462 history of either the statutory harmless-error provisions or Rule 8 indicates that Congress chose to except misjoinder from harmless-error scrutiny. [FN4]

FN2. Until Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), harmless-error analysis was considered inapplicable to errors respecting constitutional rights. See id., at 42-44, 87 S.Ct., at 836-837 (Stewart, J., concurring in result) ("[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless' " (citing and discussing examples)); see also, Kotteakos, 328 U.S., at 764-765, and n. 19, 66 S.Ct., at 1247-1248, and n. 19. In Chapman, we altered this practice and held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S., at 22, 87 S.Ct., at 827. Although we have since held that the Chapman harmless-error test applies to "most constitutional violations," United States v. Hasting, 461 U.S., at 509, 103 S.Ct., at 1980, harmless-error analysis remains inapplicable to many constitutional rights. E.g., Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1985) (discrimination in grand jury selection); Connecticut v. Johnson, 460 U.S. 73, 84-88, 103 S.Ct. 969, 976-978, 74 L.Ed.2d 823 (1983) (opinion of BLACKMUN, J.) (Sandstrom violation); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (right to impartial tribunal).
Because the source and nature of the harmless-error test for constitutional errors does not derive from s 2111 or Rule 52(a), our cases concerning constitutional errors do not affect, and are not affected by, our decision today, which applies only to the statutory harmless-error doctrine.

FN3. But cf. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is also possible that a particular case of misjoinder may be so egregious as to constitute a deprivation of due process. If this were the case, the error would be governed by Chapman

rather than by s 2111 or Rule 52(a). See n. 4, infra. Of course, a joinder of claims or parties that was so improper as to violate the Due Process Clause would undoubtedly also be prejudicial.

FN4. As explained above, the 1919 Act was not intended to codify a rule of per se reversal for particular rights, much less for misjoinder. Similarly, as the majority points out, nothing in the legislative history of Rule 8 indicates an intent to do anything more than set forth the technical requirements for and limitations on the joinder of claims or defendants. Ante, at 729, n. 7.

Justice STEVENS' partial dissent recognizes two further exceptions: (1) "when an independent value besides reliability of the outcome suggests that [harmless-error] analysis is inappropriate," and (2) "when the harmlessness of the error cannot be measured with precision." Post, at 745. **739 Although the cases he cites to support these additional exceptions involved constitutional errors, Justice STEVENS may well be correct in asserting that they also apply to errors governed by the statutory harmless-error provisions. I need not decide that question to conclude, as does Justice STEVENS, that--like the first two exceptions--neither applies to misjoinder.

The applicability of the exception to protect values other than reliability is easily disposed of. Rules respecting joinder are based on recognition that the multiplication of charges or defendants may confuse the jury and lead to inferences of habitual criminality or guilt by association. McElroy, 164 U.S., at 80, 17 S.Ct., at 32. Apart from this, however, joinder rules do not serve "an independent value besides reliability of the outcome" justifying an exception to the harmless-error principle. Surely it cannot be maintained that misjoinder affects a right so fundamental to a fair trial that it " 'infect[s] the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained.' " Post, at 745, n. 15 (quoting Rose v. Lundy, 455 U.S. 509, 544, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting)).

*463 The exception for errors as to which the prejudicial effect cannot be measured with precision requires closer consideration. As previously noted, McElroy held that misjoinder is per se reversible because a court can never safely conclude that it was not prejudicial. 164 U.S., at 81, 17 S.Ct., at 33. However, trial courts routinely inquire into possible prejudice from joint trials when considering motions for severance under Federal Rule of Criminal Procedure 14, and appellate courts just as routinely perform that inquiry in reviewing Rule 14 rulings. [FN5] To be sure, problems of jury confusion arising from misjoinder may be substantial. It is also quite easy for the jury to be prejudiced by evidence of other crimes or by inferences from an accused's association with other defendants. Thus, it may be that, once the proper test for harmless error is applied, most misjoinders will in fact result in reversal. However, the prejudice that may result from misjoinder is not so difficult to ascertain that it must always be presumed to be present. Whatever force the holding in McElroy may once have had, its precedential force has been greatly eroded by the 1919 Act, whose legislative history disapproves of such presumptions, supra, at ----, and by subsequent decisions such as

Kotteakos. [FN6] Today, adherence to the view that misjoinder is per se prejudicial would stand out as a stark and unjustified anomaly, leading to just the sort of unnecessary reversals that inspired enactment of the *464 1919 Act. To the extent that McElroy states a contrary holding, I would overrule it.

FN5. The Court correctly notes in its opinion, see ante, at 732, n. 12, that while the nature of the inquiry under Rules 8 and 14 is similar, the purposes and scope of these Rules are different.

FN6. Kotteakos rejected the argument that variance between the indictment and proof at trial should be per se reversible because such errors "naturally" result in prejudice. Relying on the legislative history of the harmless-error rule, the Court concluded that such presumptions should not lightly be inferred. "The only permissible presumption," the Court said, "would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting." 328 U.S., at 765-766, 66 S.Ct., at 1248.

III

The Court goes on to resolve the harmless-error question. I respectfully dissent. To begin with, I agree with Justice STEVENS that "[u]ndertaking a harmless-error analysis is perhaps the least useful function that this Court can perform." Post, at 746. See United States v. Hasting, 461 U.S., at 520, n. 2, 103 S.Ct., at 1986, n. 2 (opinion of BRENNAN, J.); see also, Connecticut v. Johnson, 460 U.S. 73, 102, 103 S.Ct. 969, 985, 74 L.Ed.2d 823 (1983) (POWELL, J., dissenting). Having concluded that a harmless-error inquiry is required, I, like Justice STEVENS, think we should remand to the Court of Appeals, **740 which is in a better position than we are to study the complete trial record with care.

Moreover, it is apparent that the Court's perfunctory effort to evaluate the effect of this error is inadequate. The Court tells us simply that the error is harmless "[i]n the face of overwhelming evidence of guilt shown here...." Ante, at 739. But where is the "examination of the proceedings in their entirety" called for by Kotteakos? See 328 U.S., at 762, 66 S.Ct., at 1246. Kotteakos instructs the reviewing court to "ponde[r] all that happened without stripping the erroneous action from the whole," and expressly states that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." Id., at 765, 66 S.Ct., at 1248. Obviously, the existence of overwhelming evidence is relevant to determining the "effect the error had or reasonably may be taken to have had upon the jury's decision." Id., at 764, 66 S.Ct., at 1247. But I would have thought it equally obvious that, at the very least, consideration of the magnitude of the error in the context of the trial would also be called for; this the Court has not done. The Court also tells us that the error was harmless because the same evidence "would likely have been admissible" at a joint retrial of the defendants without the improper count. Ante, at 732-733. However, as I thought *465 iKotteakos made clear, that is irrelevant. The crucial thing is the effect the error had in the proceedings

which actually took place, not whether the same thing could have been done in hypothetical proceedings. See 328 U.S., at 762-765, 66 S.Ct., at 1246-1248. Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a "substantial effect" upon that body.

Justice Traynor of the California Supreme Court wrote that "the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." R. Traynor, The Riddle of Harmless Error 80 (1970). It is a task this Court is manifestly ill-equipped to undertake. See United States v. Hasting, supra, at 516-518, 103 S.Ct., at 1984-1985 (STEVENS, J., concurring in judgment). I would remand the cases for the Court of Appeals to undertake the task.

Justice STEVENS, with whom Justice MARSHALL joins, concurring in part and dissenting in part.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

"Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." (Emphasis added.)

The question presented in No. 84-744 is whether a misjoinder of defendants prohibited by Rule 8(b) is an error which affects substantial rights. [FN1] In my opinion, the Court *466 has answered that question incorrectly; moreover, its opinion unfortunately confuses rather than clarifies the law of "harmless error."

FN1. Rule 8(b) of the Federal Rules of Criminal Procedure provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

I

Our central task is, of course, to construe Rule 8(b) of the Federal Rules of Criminal Procedure. Thus, we must consider the history, purpose, and language of that Rule.

Prior to the adoption of the Federal Rules of Criminal Procedure, this Court decided that the misjoinder of defendants, as well as the misjoinder of offenses, was an error that deprived the accused of "a substantial right." McElroy v. United **741 States, 164 U.S. 76, 80, 17 S.Ct. 31, 32, 41 L.Ed. 355 (1896). McElroy concerned both kinds of misjoinder. Five defendants were charged with offenses committed on April 16, 1894, and May 1, 1894, but only three of them were charged with a separate offense committed on April 16, 1894. The two defendants who were not charged with the separate offense made essentially the same objection to their joint trial as did Dennis Lane in this case. As to those two defendants, the Government confessed error and the Court unanimously reversed and remanded for a new trial. [FN2] As to the other three defendants, *467 the majority of the Court held that a misjoinder of

offenses had occurred, and required a new trial without any special showing of prejudice. After reviewing the misjoinder of defendants and of offenses, the Court concluded:

> FN2. "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried.
>
> * * *
>
> "It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed ...." 164 U.S., at 80, 17 S.Ct., at 32.
>
> In confessing error, the Government seemed to concede that reversal was appropriate without any specific showing of prejudice. See Brief for United States in McElroy v. United States, O.T.1896, No. 402, p. 6 ("It cannot be certainly affirmed that Stufflebeam and Charles Hook were not embarrassed and prejudiced, in their defense to the indictments under which they stood charged, by the fact that they were compelled to make their defense in a proceeding in which McElroy, Bland, and Hook were prosecuted for arson committed April 16, 1894, which was on the same day of the assaults and fifteen days before the arson for which they were tried").

"Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." Ibid.

Thus, almost a half century before the adoption of Rule 8, the Court squarely held that protection against misjoinder was a "substantial right," and that the violation of the misjoinder rule required reversal.

Today, the Court does not dispute that McElroy required reversal for misjoinder. Instead, the Court suggests, rather obliquely, that three developments have undermined that holding: (1) the adoption of Rule 8; (2) the adoption of Rule 52(a) and the passage of the harmless-error statute; and (3) the development of a harmless-error doctrine in constitutional law. Ante, at 729-730. The reliance on the harmless-error developments will be addressed in more detail. Since we are construing Rule 8, however, the majority's bare citation to it--and apparent reliance on the history of its passage--must be first considered.

The majority seems to be of the view that the adoption of Rule 8 cast doubt on the validity of McElroy. Ante, at 729. Far from disavowing McElroy, however, the Federal Rules continued the misjoinder rule. The notes of the Advisory Committee on Rules state that both subdivisions of Rule 8 represent "substantially a restatement of existing law." Neither the text of Rule 8, nor the Advisory Committee Notes, nor the history of the Rule contains any suggestion that Rule 8 was intended to change the rule of the McElroy case. Indeed, the Advisory Committee displayed a keen awareness of the McElroy precedent by citing the opinion in *468 its discussion of misjoinder. [FN3] At the time the Federal Rules were being considered, moreover, commentators shared the Advisory Committee's view that the Rules merely continued the misjoinder doctrine in its then current form, and restated existing law. [FN4]

The principle **742 that misjoinder deprives the accused of "a substantial right" and therefore is "revisable on error" thus remained the law when the Federal Rules of Criminal Procedure became effective in 1946.

FN3. See 5 Federal Rules of Criminal Procedure: Documentary History, Second Preliminary Draft, Feb. 1944, Note to Rule 8, pp. 35-36 ("Since the counts of two or more indictments consolidated for trial, under 18 U.S.C. s 557, are 'put ... in the same category as if they were separate counts in one indictment,' McElroy v. United States, 164 U.S. 76, 77, 17 S.Ct. 31, 32, 41 L.Ed. 355 (1896), this type of joinder is more widely practiced than is generally realized").

FN4. See Maguire, Proposed New Federal Rules of Criminal Procedure, 23 Ore.L.Rev. 56, 59 (1943) ("Subdivision (b) of Rule 9 provides for a joinder of defendants where they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting or resulting in an offense, and that they may be charged in one or more counts, together or separately, in any manner indicating their respective participation in the offense or offenses.... This rule merely restates the present Federal statute ..."). "Rule 9" became the current "Rule 8" without substantial change. See Orfield, Joinder in Federal Criminal Procedure, 26 F.R.D. 23, 28-29 (1960).

Furthermore, if one reads Rule 8 in conjunction with Rule 14, it is immediately apparent that the draftsmen of the Rules regarded every violation of Rule 8 is inherently prejudicial. For Rule 14 authorizes the Court to grant a severance, even in the absence of a Rule 8 violation, if either the defendant or the Government is prejudiced by a joinder of offenses or defendants. [FN5] Thus, it seems clear that the draftsmen of the Rules regarded violations of Rule 8 as inherently prejudicial, and recognized that even joinders that were not prohibited by the Rule should be forbidden if a party *469 could demonstrate actual prejudice. This is the way Professor Charles Wright interpreted the intent of the draftsmen in his 1969 treatise. He wrote:

FN5. Rule 14 provides, in pertinent part: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

"Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain a reversal, in theory at least, if he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those

limits were complied with, and the draftsmen would have been better advised to allow unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial." 1 C. Wright, Federal Practice and Procedure, s 144, p. 329 (1969). [FN6]

FN6. In his current edition, Professor Wright notes that a number of federal courts have held that misjoinder may be harmless error, but he concludes that "there remains much to be said for what was once the almost-unanimous view that misjoinder is never harmless error." 1 C. Wright, Federal Practice and Procedure: Criminal, s 145, p. 532 (2d ed. 1982).

Other commentators have agreed that the structure of the Federal Rules strongly supports the conclusion that the draftsmen viewed a violation of the misjoinder rule as inherently prejudicial. [FN7]

FN7. See Note, Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion, 6 Hofstra L.Rev. 533, 544, n. 65 (1978) ("Implicit in the assertion that rule 8 sets the limits of tolerable prejudice is the argument that if its purpose is not to set such limits there is no purpose in the rule. Rule 14 would vest all questions of joinder in the trial court.... As both rule 14 and rule 8 were included in the rules, rule 8 must have been intended to establish the outer bounds within which the trial court has discretionary power under rule 14"). In my view, the majority's discussion of this issue, ante, at 732, n. 12, fails to answer this straightforward reading of Rule 8 and Rule 14.

*470 Thus, a review of the state of the law of joinder at the time the Federal Rules of Criminal Procedure were adopted, of the Advisory Committee's intent to restate then-existing law, and of the text of the Rules themselves requires a conclusion that a Rule 8 misjoinder violation is an error that affects the substantial rights of the accused and therefore requires reversal of a conviction.

**743 II

In addition to its unexplained reference to the adoption of Rule 8, the Court suggests that its new misjoinder rule--that prejudice must be shown to justify reversal of a Rule 8 misjoinder error--is supported by its interpretation of developments in the law of "harmless error." Specifically, the Court observes that the McElroy approach has been undermined by the passage of a harmless-error statute and rule, ante, at 729, and by the development of a harmless-error doctrine for constitutional errors, ante, at 729-730. Although the majority does not distinguish between these two categories, they require separate analysis. Neither category, however, remotely supports the majority's bald assertion that misjoinder should not be viewed as affecting "substantial rights," and thus not be viewed as inherently prejudicial.

The majority refers to the current harmless-error statute, 28 U.S.C. s 2111, and to Rule 52(a). As the majority points out, both define harmless error in terms of whether a violation affects "substantial rights." [FN8] Since this Court had already made clear that misjoinder affected "substantial

*471 rights," McElroy, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 (1896), it is curious that the majority concludes, with no support at all, that the passage of a statute and Rule which allowed for correction of errors that did not affect "substantial rights" somehow changed the legal status of a violation that had been described in precisely those words. This view is especially curious when it is remembered that the Rule governing joinder was viewed by the draftsmen as a restatement of existing law.

FN8. See 28 U.S.C. s 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"); Fed.Rule Crim.Proc. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

To be sure, McElroy was decided before the first harmless-error statute was passed in 1919. That statute, a reaction to the hypertechnicality that had developed in American jurisprudence, did mark a significant change in our system's view of the effect of error. [FN9] But it is a long leap from that recognition to a view that the passage of the harmless-error statute in 1919--and the subsequent adoption of Rule 52(a) in 1946 and the passage of the current harmless-error statute in 1949--summarily jettisoned all prior jurisprudence on the errors that affected "substantial rights." Indeed, interpretations of the 1919 statute accorded it a very different mission. As Justice Frankfurter explained in refusing to require a showing of prejudice to justify reversal for a statutory violation: "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." Bruno v. United States, 308 U.S. 287, 294, 60 S.Ct. 198, 200, 84 L.Ed. 257 (1939). And, while Rule 52(a) and the 1949 harmless-error statute were changed in a way that some commentators have found significant, [FN10] the *472 continuation **744 of "substantial rights" as the benchmark for assessing the harmlessness of error provides no support for the proposition that anyone intended to change something that had been found to affect a "substantial right" into something that did not affect a substantial right.

FN9. For a discussion of the background of the 1919 statute, see Kotteakos v. United States, 328 U.S. 750, 758-760, 66 S.Ct. 1239, 1244-1245, 90 L.Ed. 1557 (1946).

FN10. The 1919 statute referred to "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181, 28 U.S.C. s 391 (1946 ed.) (emphasis added). Rule 52(a) referred to "[a]ny error, defect, irregularity or variance which does not affect substantial rights"; the 1949 statute referred to "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. s 2111. See Note, 6 Hofstra L.Rev., supra n. 7, at 540 (discussing

possible significance of change). But cf. H.R.Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (new harmless-error statute intended to "incorporate" former harmless-error statute); Rule 52(a), Notes of Advisory Committee on Rules, 18 U.S.C.App., p. 657 (Rule intended as "a restatement of existing law"); Kotteakos, 328 U.S., at 757, n. 9, 66 S.Ct., at 1243, n. 9 (citing Advisory Committee comment that Rule 52(a) was intended as " 'a restatement of existing law' ").

Thus, neither the harmless-error statute, passed within a few years of the adoption of Rule 8, nor Rule 52(a), adopted at the same time as Rule 8, changed the interpretation of the misjoinder rule reflected in Rule 8.

The harmless-error statute and Rule are, however, at least relevant to the inquiry at hand. In contrast, the majority's reliance on Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), ante, at 729-730, is plainly misplaced. The majority observes: "Clearly, Chapman and Hasting dictate that the harmless-error rule governs here." Ante, at 730. Nothing could be less clear. This case does not involve a claim of constitutional error. The harmless-error doctrine that was enunciated in Chapman thus does not settle the issue raised by this case. Simply because constitutional errors may be subject to a harmless-error inquiry does not mean that all nonconstitutional errors must be subject to harmless-error analysis, and this Court has never so held. [FN11] Rather, our mission in *473 reviewing nonconstitutional errors is, first, to discern whether the rule or statute which is being violated was intended to be subject to harmless-error analysis. If there is a definitive answer to that question, our inquiry should be at an end. [FN12] If there is no definitive answer, then we must try to assess the rule or statute in question in light of the purpose of the harmless-error rule and statute. We should not, however, rewrite existing law by adopting a presumption that, simply because a violation is nonconstitutional, it is automatically subject to harmless-error inquiry.

FN11. That the Court has recognized the difference between constitutional and nonconstitutional harmless-error inquiries is reflected in the considerable difference in the Court's standards on these two subjects. Compare Chapman, 386 U.S., at 24, 87 S.Ct., at 828 ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"), with Kotteakos v. United States, 328 U.S., at 765, 66 S.Ct., at 1248 (in nonconstitutional cases, "[t]he inquiry ... is ... whether the error itself had substantial influence"). To the extent that the majority ultimately cites the Kotteakos standard as governing this case, ante, at 731-732, it is consistent with this distinction in our case law; to the extent that the majority suggests that Chapman controls the outcome of this case, however, ante, at 730, it reveals confusion about this distinction.

FN12. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for

the court ... must give effect to the unambiguously expressed intent of Congress").

As the majority observes, the Court's willingness to invoke the harmless-error doctrine has expanded dramatically in recent years. This expansion is a source of considerable concern, [FN13] particularly because the Court has often been unclear and imprecise in its increasingly frequent invocation of harmless *474 error. [FN14] In my view, **745 harmless-error analysis is inappropriate in at least three situations: (1) when it is clear that a statute or Rule was not intended to be subject to such a rule; (2) when an independent value besides reliability of the outcome suggests that such analysis is inappropriate; [FN15] and (3) when the harmlessness of an error cannot be measured with precision. [FN16] In my view, misjoinder clearly falls into the first *475 category. It also has elements of the second and third. Misjoinder implicates the independent value of individual responsibility and our deep abhorrence of the notion of "guilt by association." Our criminal justice system has expanded considerably in its tolerance of multiple joinders and massive conspiracy trials. The rule against misjoinder remains, however, as an ultimate safeguard of our cherished principle that one is tried for one's own deeds, and not for another's. [FN17] The harmfulness of misjoinder is also the type of error that has consequences that are difficult to measure with precision. [FN18] These concerns may or may not outweigh the societal interests that motivate the Court today, but they are surely strong enough to demonstrate that the draftsmen of the Federal Rules acted responsibly when they adhered to the time-honored rule of the McElroy case. The misjoinder Rule that they crafted is clear, and should be respected. [FN19] Misjoinder affects "substantial rights," and should lead to reversal.

FN13. See Comment, Harmless Error: Abettor of Courtroom Misconduct, 74 J.Crim.L. & C. 457, 475 (1983) ("The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules"); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J.Crim.L. & C. 421, 422 (1980) ("the doctrine of harmless constitutional error destroys important constitutional and institutional values"); Note, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L.Rev. 538, 540 (1979) ("increased use of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law") (footnotes omitted); Cameron & Osborn, When Harmless Error Isn't Harmless, 1971 Law & Social Order 23, 42 ("while the harmless error doctrine is an extremely useful device ... it is not one that is without its dangers"). Cf. United States v. Jackson, 429 F.2d 1368, 1373 (CA7 1970) (Clark, J., sitting by designation) (" 'Harmless error' is swarming around the 7th Circuit like bees.... [T]he courts may have to act to correct a presently alarming situation").

FN14. See Field, Assessing the Harmlessness of Federal Constitutional Error--A Process in Need of a Rationale, 125 U.Pa.L.Rev. 15, 32 (1976) (

"In sum, the case law on the content of the harmless error standard is less than lucid. There is some indication that Supreme Court opinions slip back and forth from one suggested standard to another, without explicit notice of the change, though the change could produce different results in many cases"); Saltzburg, The Harm of Harmless Error, 59 Va.L.Rev. 988 (1973) ("Chaos surrounds the standard for appellate review of errors in criminal proceedings"); Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn.L.Rev. 519, 557 (1969) ("the Court, if only in an effort to further the interest of net judicial economy, should attempt to delineate certain well-defined classes of constitutional error which require automatic reversal").

FN15. In the constitutional area, the Court has made clear that certain independent values render a harmless-error analysis inappropriate. See, e.g., Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) (racial discrimination in the selection of a grand jury is not subject to harmless-error analysis); Chapman, 386 U.S., at 23, 87 S.Ct., at 827 ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). Cf. Rose v. Lundy, 455 U.S. 509, 544, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting) (some constitutional errors "are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained").

FN16. In Holloway v. Arkansas, 435 U.S. 475, 491, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978), Chief Justice BURGER explained that harmless error was inappropriate in assessing the constitutional error of inappropriate joint representation in part because such an inquiry required "unguided speculation." See also Note, 64 Cornell L.Rev., supra n. 13, at 563-564 ("Holloway's rationale naturally extends beyond the sixth amendment: it suggests that a rule of automatic reversal should apply to those fundamental, pervasive errors that have uncertain prejudicial impact.... The rule of automatic reversal should be extended to all errors, whether or not pervasive or constitutional, that result in unascertainable prejudice") (footnotes omitted).

FN17. Cf. Krulewitch v. United States, 336 U.S. 440, 457-458, 69 S.Ct. 716, 724-725, 93 L.Ed. 790 (1949) (Jackson, J., concurring) ("Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice").

FN18. See Note, 6 Hofstra L.Rev., supra n. 7, at 563 (harmless error "is inaccurate as a test for ascertaining the prejudice resulting from misjoinder because of the impossibility of determining the extent of that prejudice").

FN19. The majority's suggestion that two Supreme Court opinions have held

misjoinder subject to the harmless-error rule is erroneous. The majority writes: "A holding directly involving misjoinder again indicated the harmless-error rule should apply." Ante, at 730. The decision cited by the majority for this proposition, Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960), explicitly found no Rule 8 error and explicitly disavowed the type of "indication" claimed by the majority. See 362 U.S., at 517, 80 S.Ct., at 948 ("The harmless-error rule, which was the central issue in Kotteakos, is not even reached in the instant case, since here the joinder was proper under Rule 8(b) and no error was shown"). Thus, the majority's discussion of Schaffer, ante, at 730-731, is completely beside the point. Indeed, one year after Schaffer was decided, it was read to support, not the majority's conclusion, but the viability of the McElroy rule. See Ward v. United States, 110 U.S.App.D.C. 130, 137, 289 F.2d 877, 878 (1961) (Burger, J.) (citing Schaffer and McElroy to reject Government suggestion that defendant must show prejudice to obtain reversal after misjoinder of defendants has been established).

Similarly, the majority's claim that Kotteakos "suggested that the harmless-error rule could similarly apply" to misjoinder, ante, at ----, vastly overstates the case. The Court noted that a possible joinder violation gave added weight to its conclusion that the error before it was not harmless. 328 U.S., at 774-775, 66 S.Ct., at 1252. The Court observed that "s 269 [the harmless-error statute] carries the threat of overriding the requirement of s 557 for substituting separate counts in the place of separate indictments, unless the application of s 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." Id., at 775, 66 S.Ct., at 1253. This expression of concern about the possible effect of harmless error on misjoinder, however, hardly supports the notion that Kotteakos held misjoinder subject to harmless-error analysis. And, despite the majority's view that its holding is the only way to bring harmless error and misjoinder into "substantial harmony," ante, at 732, a conclusion that misjoinder necessarily affects substantial rights produces the same harmony.

*476 **746 III

Undertaking a harmless-error analysis is perhaps the least useful function that this Court can perform, cf. United States v. Hasting, 461 U.S. 499, 516-518, 103 S.Ct. 1974, 1984-1985, 76 L.Ed.2d 96 (1983) (STEVENS, J., concurring in judgment). For that reason, a decision that a harmless-error inquiry is required should lead to a remand to the Court of Appeals, which is in a far better position than we are to study the complete trial record with care. The majority's opinion in this case confirms the general advisability of that approach.

The Court's conclusion that Dennis Lane suffered no prejudice is based on three cursory observations. First, the Court asserts, with no explanation, that there was "overwhelming evidence" of his guilt. Ante, at 732. There are at least two problems with this observation. The first is that the majority fails to appreciate the Kotteakos recognition that the harmless-

error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry. [FN20] The second is that, *477 even if it were faithfully applying the Kotteakos distinction between sufficiency of the evidence and harmless error, the majority utterly fails to explain its statement about "overwhelming evidence." A reading of Kotteakos reveals that only the most painstaking and thorough review of an entire trial record can justify a conclusion that its standard has, or has not, been met. The opinion the Court announces today contains no indication that it has made that kind of analysis of the case against Dennis Lane. [FN21]

FN20. In Kotteakos, the Court accepted the defendants' concession that the evidence was not "insufficient, if considered apart from the alleged errors relating to the proof and the instructions at the trial." 328 U.S., at 753, 66 S.Ct., at 1242. The Court went on to emphasize that the harmless-error analysis is fundamentally different from the sufficiency analysis. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Id., at 765, 66 S.Ct., at 1248. Even though the evidence was concededly sufficient without the errors, the Court thus found the errors not harmless, and the convictions reversible. The majority quotes the relevant passage from Kotteakos, ante, at 732, but fails to reflect its principle in its analysis.

FN21. The only specific evidence even mentioned by the majority--the testimony of Heard and Lankford, ante, at 732, n. 13--represents accomplice testimony. Such testimony is, of course, generally recognized as posing special evidentiary problems. See, e.g., 1 J. Weinstein & M. Berger, Weinstein's Evidence P 107[04], pp. 107-50--107-51 (1985); 3 S. Gard, Jones on Evidence s 20:60, pp. 736-737 (6th ed.1972).

Second, the Court notes that the jury was properly instructed to evaluate the evidence under each count and against each defendant separately. Since that instruction should be given routinely in every case in which there is a joinder of defendants or offenses, it surely cannot be regarded as an adequate response to a claim that a misjoinder was prejudicial. [FN22]

FN22. Indeed, in the year following Kotteakos, this Court made clear that proper jury instructions might not alleviate the problems inherent in joint trials:
"The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants." Blumenthal v. United States, 332 U.S. 539,

559, 68 S.Ct. 248, 257, 92 L.Ed. 154 (1947).

*478 **747 Finally, the Court rather hesitantly suggests that the evidence on Count 1 "would likely have been admissible" in a joint retrial on Counts 2-6, ante, at 732. The Court thus assumes that a joint retrial is inevitable. Of course, if misjoinder is found only as to Dennis Lane, as I suggest below, then the majority's point collapses. In any event, nothing in Kotteakos or in our harmless-error precedents suggests that this Court should find an error harmless because of the Court's completely untested speculations about a possible future retrial. Not surprisingly, Kotteakos suggests precisely the opposite. [FN23]

FN23. "The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under s 269 [the harmless error statute]." 328 U.S., at 767, 66 S.Ct., at 1249.

A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice. [FN24] Even if the majority is correct that Rule 8 misjoinder should be subject to harmless-error analysis, I am convinced that the majority's summary finding of harmless error in this case fails to give the issue the attention it deserves. [FN25]

FN24. See R. Traynor, The Riddle of Harmless Error 80 (1970) ("[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. Each evaluation bears upon our traditional understanding that fair trial encompasses not only fair notice and an adequate opportunity to be heard before the appropriate tribunal, but also an orderly presentation of evidence and a rational application of the law thereto").

FN25. A more searching review of the record might require the majority to confront certain troublesome aspects of this erroneous joinder. The majority might have to confront the fact that at least 9 of the Government's 26 witnesses--more than one third--addressed the El Toro fire, the offense for which Dennis Lane was not charged. See Testimony of Morris Loewenstern, Tr. 33-43; Testimony of Earl Simpson, id., at 44-50; Testimony of Cindy Wright, id., at 58-59; Testimony of David Lard, id., at 62-89, 96-103; Testimony of Ben Shaw, id., at 103-112; Testimony of Jack Stotts, id., at 113-123; Testimony of Wayne Cox, id., at 123-132; Testimony of Jay Messenger, id., at 139-157; and Testimony of Sidney Heard, id., at 230-243. It might have to confront the fact that two of the defense witnesses similarly focused on the El Toro fire. See Testimony of Janie Malone, id., at 681-736; Testimony of Jess Maddox, id., at 891-894. It might have to confront the fact that, in their closing arguments, both

the Government and the defense counsel devoted considerable attention to the El Toro fire. See id., at 989-993; defense's closing arg., id., at 1008-1014. And it might, finally, have to confront the fact that the prosecutor's closing words to the jury were that "each of these charges has been proved against J.C. Lane and Dennis Lane beyond a reasonable doubt." Id., at 1051 (emphasis added).

This is not to say that I have studied the record with sufficient care to conclude that, if misjoinder is subject to harmless-error analysis, the error here was not harmless. Rather, it is to say that I am convinced that the majority's opinion gives no indication of having wrestled with the complexities of the 1,000-page trial transcript in a manner that would permit its confident assertion that the error was harmless.

*479 IV

I agree with the Court's conclusion that the evidence was sufficient to sustain both convictions of mail fraud and therefore join Part III of its opinion. I also agree with the judgment insofar as it upholds the conviction of James Lane. It is perfectly clear that the violation of Rule 8(b)--the rule prohibiting the improper joinder of defendants --occasioned by the misjoinder of Count 1 did not affect James Lane because he was the defendant in Count 1. But since there is no claim that the son, Dennis Lane, took any part in Count 1 (the mail fraud regarding the 1979 El Toro Restaurant **748 fire), I believe that his right not to be joined as a defendant in his father's trial for that felony was a "substantial right" that was adversely affected by the misjoinder.

In my view, the Court's opinion misconstrues the history and purpose of Rule 8, sows further confusion in the Court's *480 harmless-error jurisprudence, and fails to make the kind of harmless-error analysis that Rule 52(a) requires. Because I do not consider these errors harmless, I respectfully dissent from the judgment regarding Dennis Lane in No. 84-744.

END OF DOCUMENT

Act of concealment = overt act in furtherance if done to "lull" victims into not discovering crime

Citation 9 F.3d 1025 (CITE AS: 9 F.3D 1025)
Database CTA
Mode Page
FOUND DOCUMENT

UNITED STATES of America, Appellee,
v.
Steven E. ROGERS, Defendant-Appellant.
No. 1184, Docket 92-1111.
United States Court of Appeals,
Second Circuit.
Argued April 1, 1993.
Decided Nov. 16, 1993.

Defendant was convicted in the United States District Court for the Southern District of New York, Charles S. Haight, Jr., J., of wire fraud, transporting fraudulent securities in interstate commerce, and conspiring to commit those crimes. Defendant appealed. The Court of Appeals, Pierce, Circuit Judge, held that: (1) evidence supported finding that telexes were overt acts of conspiracy within statute of limitations, which established timeliness of prosecution; (2) evidence supported convictions for wire fraud, even if defendant did not personally send telexes; and (3) defendant's Sixth Amendment rights were violated by district judge's refusal to instruct jury on definition of "securities" and to let jury decide whether fictitious equipment leases were within meaning of statute prohibiting transportation of stolen "securities." Affirmed in part, reversed in part, and remanded.

[1] CRIMINAL LAW k149
110k149
Evidence supported finding that telexes sent within limitations period were intended to stall repayment of credit previously issued on collateral of fictitious equipment leases and to lull lender into not discovering fraud and, thus, communications were acts within wire fraud statute and overt acts of conspiracy, rather than acts of concealment after attainment of objectives of conspiracy. 18 U.S.C.A. s 3282.

[1] CRIMINAL LAW k150
110k150
Evidence supported finding that telexes sent within limitations period were intended to stall repayment of credit previously issued on collateral of fictitious equipment leases and to lull lender into not discovering fraud and, thus, communications were acts within wire fraud statute and overt acts of conspiracy, rather than acts of concealment after attainment of objectives of conspiracy. 18 U.S.C.A. s 3282.

[2] TELECOMMUNICATIONS k363
372k363
Evidence supported convictions for wire fraud based on findings that defendant was consulted before coconspirator sent telexes to lender, that communications were integral to scheme to defraud lender through fictitious equipment leases offered as collateral for line of credit, and that communications were reasonably foreseeable part of scheme in which defendant participated, even though defendant did not personally send or instruct coconspirator to send telexes. 18 U.S.C.A. s 1343.

[3] CRIMINAL LAW k641.5(7)
110k641.5(7)
Coconspirator's joinder in motion to disqualify defendant's attorney was sufficient to assert conflict of interest supporting disqualification even though coconspirator had never been client of attorney; coconspirator had been privy of his employer at deposition of coconspirator in prior civil lawsuit against employer in which attorney had appeared on behalf of employer.

[4] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
Defendant's Sixth Amendment right to counsel was not violated by district court's disqualification of defendant's attorney for conflict of interest from prior representation involving coconspirator, despite district court's failure to personally address defendant on disqualification; attorney had agreed to withdrawal and district court had authority to insist that defendant be represented by counsel who did not have conflicts of interest. U.S.C.A. Const.Amend. 6.

[5] CRIMINAL LAW k1173.2(2)
110k1173.2(2)
District court's decision not to charge jury on all elements of charged crime is error that has effect of relieving prosecution of its burden of proving every element beyond reasonable doubt.

[6] JURY k34(3)
230k34(3)
Defendant's Sixth Amendment rights were violated by district judge's refusal to instruct jury on definition of "securities" and let jury decide whether fictitious equipment leases were within meaning of statute prohibiting transportation of stolen "securities," after district court had made preliminary determination that leases in question possibly could be "securities." U.S.C.A. Const.Amend. 6; 18 U.S.C.A. ss 2311, 2314.
See publication Words and Phrases for other judicial constructions and definitions.

[6] RECEIVING STOLEN GOODS k9(1)
324k9(1)
Defendant's Sixth Amendment rights were violated by district judge's refusal to instruct jury on definition of "securities" and let jury decide whether fictitious equipment leases were within meaning of statute prohibiting transportation of stolen "securities," after district court had made preliminary determination that leases in question possibly could be "securities." U.S.C.A. Const.Amend. 6; 18 U.S.C.A. ss 2311, 2314.
See publication Words and Phrases for other judicial constructions and definitions.

[7] CRIMINAL LAW k1170(1)
110k1170(1)
District court's refusal to allow defendant to present evidence that equipment leases at issue were not "securities" within meaning of statute prohibiting

transportation of fraudulent "securities" and refusal to instruct jury on issue created structural error in trial process that required reversal of defendant's conviction. 18 U.S.C.A. ss 2311, 2314.

[7] CRIMINAL LAW k1173.2(2)
110k1173.2(2)
District court's refusal to allow defendant to present evidence that equipment leases at issue were not "securities" within meaning of statute prohibiting transportation of fraudulent "securities" and refusal to instruct jury on issue created structural error in trial process that required reversal of defendant's conviction. 18 U.S.C.A. ss 2311, 2314.

[8] CRIMINAL LAW k1190
110k1190
Reversal of conviction for offense of transporting fraudulent securities did not affect conviction for conspiracy to commit wire fraud and to transport fraudulent conspiracies, or convictions for underlying wire fraud; additional conspiratorial conduct of wire fraud still supported conspiracy conviction after reversal of conviction for other object of conspiracy.
*1026 Michael S. Devorkin, New York City (Doar Devorkin & Rieck, of counsel), for defendant-appellant.
Nelson W. Cunningham, Asst. U.S. Atty., New York City (Roger S. Hayes, U.S. Atty. S.D.N.Y. of counsel), for appellee.

Before OAKES, PIERCE and PRATT, Circuit Judges.

PIERCE, Circuit Judge:
Steven E. Rogers appeals from a judgment of conviction, entered after a jury trial in the United States District Court for the Southern District of New York (Charles S. Haight, Jr., Judge). Rogers was convicted of conspiring to commit wire fraud and to transport fraudulent securities in interstate or foreign commerce, in violation of 18 U.S.C. s 371; wire fraud, in violation of 18 U.S.C. s 1343; and transporting a fraudulent security in interstate or foreign commerce, in violation of 18 U.S.C. s 2314. For the reasons set forth below, we affirm in part and reverse in part, and remand to the district court.

BACKGROUND

Steven E. Rogers was the Director of International Operations of Trend International, a subsidiary of the Trend Group. Leonard Hoffman was Vice President of Administration and oversaw the finances of Trend Group in Connecticut. Trend Group was primarily a financial services business and Lease Trend, one of its subsidiaries, was mainly in the business of leasing equipment, which it had purchased, to end users of the equipment. The lessee submitted an application to Lease Trend and agreed to make periodic payments once the equipment was delivered, installed and accepted. To obtain financing for the purchase of the equipment, Lease Trend borrowed money from a funding source, such as a bank. The funding source, in turn, would get a security interest in the equipment and an assignment from Lease Trend of the payments it was to receive from the lessee.
In July 1984, Trend Group established a one-year, $2 million revolving line of

credit with Banque de L'Union Europeenne ("BUE"), a French bank, to finance equipment lease transactions. To draw upon the line of credit, Trend Group was to present a complete lease package, including a lease signed by the lessee and a letter from a financing source stating that it would lend money for permanent financing of the equipment. The money BUE lent to Trend Group was to be partial financing for the purchase of the equipment, to pay the manufacturer while he finished installing the equipment. Trend Group was permitted to borrow the funds from BUE for 180 days.

Rogers and Hoffman were the individuals at Lease Trend responsible for administering the BUE line of credit. As of August 15, 1984, Trend Group had tendered signed leases it had on hand to borrow approximately $950,000 from BUE. Despite this, by the end of August 1984, Trend Group had, according to Hoffman, "almost zero cash in the company." Hoffman testified that he reported this to Rogers and the two of them agreed to submit falsified lease packages to BUE *1027 and to borrow money on this collateral. Hoffman constructed phony lease packages and brought them to Rogers, who signed his own name on behalf of Trend Group and forged the signatures of the lessee where required. Hoffman and Rogers submitted fifteen to twenty phony lease packages. By March 1985, Trend Group had exhausted its $2 million line of credit with BUE, and there was no possibility of drawing further on the line of credit. Trend Group began falling behind on interest payments for both the phony and legitimate leases, as some of both types of leases remained in BUE's possession longer than the 180 days permitted under the revolving credit line. In late March 1985, Christiane Godchaux, whose duties included loan administration and documentation at BUE, began requesting the payment of back interest and explanations of why the older leases had not been repaid within 180 days.

Hoffman responded in a series of letters and telexes. He testified that he was "stalling for time." In these communications, Hoffman falsely represented the status of the phony lease packages and stated false excuses for the late payments. Hoffman discussed these series of communications with Rogers before sending each of them out. In one telex, sent on June 4, 1985, Hoffman falsely stated that several leases held by BUE for nearly a year were experiencing installation problems, and he set out a schedule of when the equipment covered by the leases should be installed. In a letter dated June 6, 1985, Hoffman offered to exchange four older legitimate leases for a new phony lease. He then forwarded a phony lease package with Focus 4, Inc., a California printing concern, as the lessee. In the lease package, Rogers had forged the signatures of Focus 4 officials. Hoffman testified that this lease package was sent out so that Trend Group would not have to repay BUE $191,000 then owing on the four older leases. BUE permitted the exchange of the four older leases with the Focus 4 lease. Through June 1985, Godchaux continued to request from Trend Group payment of unpaid interest and principal. On June 25, 1985, Hoffman sent her another telex falsely stating that the leases in BUE's possession would be taken out in accordance with the schedule set out in the June 4, 1985 telex.

Trend Group never repaid the $2 million it had borrowed under the line of credit with BUE. BUE sued and obtained a judgment against Lease Trend, and made efforts to collect on the leases it held as collateral. Prior to indictment, Rogers executed for the prosecution's benefit a written waiver of the statute of limitations for any offenses committed on or after May 30, 1985.

On June 12, 1990, a four-count indictment was filed against Rogers and Hoffman. Count One charged them with conspiring to commit wire fraud, in violation of 18 U.S.C. s 1343, and conspiring to transport forged and fraudulent securities in interstate and foreign commerce, in violation of 18 U.S.C. s 2314. The objects of the conspiracy were the creation by Rogers and Hoffman of a scheme to defraud investors to obtain money and property by means of false and fraudulent representations and promises using wire communications, and the transportation of forged securities in interstate commerce. The indictment alleged that the conspiracy was achieved by the defendants and their co-conspirators via the forging and creation of fictitious equipment leases which were provided to BUE, as collateral, to induce BUE to advance monies to Lease Trend; and that the defendants and their co-conspirators forged and created fictitious equipment leases and assorted documentation, and provided them to BUE so that Lease Trend would not have to repay earlier loans. Listed also as overt acts were: Hoffman's sending of telexes from Lease Trend's Connecticut office to Paris, France, on June 4 and 25, 1985; Rogers' causing a letter to be sent from Lease Trend to Godchaux at BUE on June 6, 1985; and that on June 6 and 21, 1985, Hoffman caused letters to be sent from Lease Trend to Godchaux at BUE. Count Two charged Rogers and Hoffman with committing wire fraud through a telex wire communication on approximately June 4, 1985, in violation of 18 U.S.C. s 1343, and Count Three charged them with committing wire fraud through a telex wire communication on approximately June 25, 1985. Under Count Four, Rogers and Hoffman were charged with transporting *1028 a fraudulent security in interstate commerce on or about June 6, 1985, in violation of 18 U.S.C. s 2314.

Prior to trial, Rogers moved to dismiss Counts One through Three, claiming that the alleged conspiracy had terminated in March 1985 and that prosecution under the conspiracy and substantive wire fraud counts was barred by the five-year statute of limitations, 18 U.S.C. s 3282. He moved also to dismiss Count Four because the Focus 4 lease was not a security within the meaning of 18 U.S.C. s 2311. In an order dated January 24, 1991, the district court denied his motion, ruling that the statute of limitations had not lapsed, and that the Focus 4 lease was a security as a matter of law. Also, the court denied Rogers' request for a hearing to offer testimony on the question of whether the equipment lease named in Count Four was a security.

On January 2, 1991, Hoffman pleaded guilty to Count Four of the indictment and agreed to testify on behalf of the Government at Rogers' trial. On January 7, 1991, the Government moved to disqualify as Rogers' attorney, Gary D. Rafsky, Esq., who is Rogers' son. In its memorandum of law in support of the motion, the Government asserted that in preparation for trial it had recently discovered that Rafsky had represented Hoffman at a 1986 deposition in connection with a civil lawsuit arising out of the same facts; that it anticipated that Hoffman would be a key trial witness against Rogers; and that this created a conflict of interest for Rafsky. The Government argued that Rafsky, in representing Rogers and cross-examining Hoffman, would unfairly rely upon confidential attorney-client communications he received from Hoffman, and that Rafsky, to avoid becoming a fact-witness at trial, might limit his cross-examination of Hoffman, which might impair his representation of Rogers.

A hearing was held the next day, at which Hoffman joined in the Government's motion. After hearing the Government's presentation, the judge asked Rafsky

his "perception" on the motion for his disqualification. Rafsky responded:

I do believe it's clear that there is a conflict in my representation, particularly in light of the fact that having just learned that Mr. Hoffman will be a key witness and in that regard, while I am not happy with the prospect of disqualification, I understand what the obligations are and would have to concur with the government in that respect.

Rafsky also stated that when he had suggested to Rogers the possibility of continuing to represent him, but not to cross-examine Hoffman, Rogers had decided against such a limitation. After a brief discussion, the court excused Rafsky from the case as Rogers' primary attorney. The Assistant United States Attorney then stated: "Mr. Rogers is in court, and I should note for the record that he has been present throughout this entire proceeding." The judge then instructed Rogers that he could apply for the appointment of counsel, if warranted under his present economic circumstances. Thereafter, John Burke, Esq., was appointed, pursuant to the Criminal Justice Act, as substitute counsel.

On January 24, 1991, Burke raised the issue of whether Rafsky would be able to assist in Rogers' defense "in any way possible with the exception of the cross examination or anything to do with Mr. Hoffman in this matter." The district court issued an order the next day addressing that issue. In that order, the court directed that in any consultation between Rafsky, as former counsel to Rogers, and Burke, as successor counsel, Rafsky was not to reveal and Burke was not to inquire into any confidential information or secrets Rafsky had obtained during his previous representation of Hoffman. Burke was also not to engage in any discussions referring to that representation with Rogers or anyone else on the defense team.

On June 3, 1991, Rogers' jury trial began. Prior to the selection of the jury, Burke requested that Rafsky be permitted to sit at counsel table and that, with respect to the prior deposition, if the Government wanted "to make an issue out of it that he represented Mr. Hoffman, that's their business." The district judge ruled that Rafsky could sit at counsel table and that the Government would *1029 be permitted to elicit that Hoffman was represented at the deposition by Rafsky. Hoffman was the only witness who testified that Rogers was involved in the crimes. During Hoffman's testimony, the Government elicited that Rafsky was Lease Trend's corporate attorney, that he had attended the deposition with Hoffman, and that before the deposition Rogers told Hoffman: "Don't do anything to hurt yourself." Hoffman stated that he believed that Rogers meant he was to protect himself and that if he had told the truth during the deposition he would not have been protecting himself. On cross-examination, Hoffman stated that he lied approximately twenty to thirty times during the deposition. After the Government rested, Rogers did not put on a defense case, but defense counsel moved for a judgment of acquittal. The court denied the motion.

In its instructions to the jury, the court charged that the Focus 4 lease was a security as a matter of law, and the court, without objection, charged the jury that it had to consider whether the communications alleged to have occurred after May 30, 1985, were designed to lull BUE into a false sense of security, postpone its ultimate complaint to the authorities and make the apprehension of Rogers less likely than if those communications had not taken place. The jury returned with verdicts of guilty on all counts. On February

18, 1992, Rogers was sentenced to concurrent terms of four years' imprisonment on Counts One and Two; and to concurrent terms of five years' probation on Counts Three and Four, to be commenced following his imprisonment. A mandatory special assessment was imposed upon each count. Rogers is now serving his sentence. This appeal followed.

DISCUSSION

On appeal, Rogers contends that his convictions under Count One--the conspiracy count--and Counts Two and Three--the substantive wire fraud counts--were barred by the statute of limitations. He notes that, in accordance with Grunewald v. United States, 353 U.S. 391, 396, 77 S.Ct. 963, 969, 1 L.Ed.2d 931 (1957), the Government had to prove beyond a reasonable doubt that he was responsible for an act, on or after May 30, 1985, that was executed in furtherance of a continued main object of the alleged scheme. Rogers maintains that the trial evidence established that Lease Trend drew its last funds from BUE in March 1985 and that the indictment did not allege, either as an object or a means of the scheme, an agreement by the co-conspirators to conceal the alleged conduct, either before or after the main objects of the conspiracy were accomplished. Consequently, he argues that the sending of the telexes in June 1985 was not charged as part of the original conspiracy and that the prosecution should not have been permitted to rely upon that evidence.

Grunewald v. United States considered the statute of limitations in conspiracy prosecutions. The Supreme Court stated:

> [T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.

353 U.S. at 397, 77 S.Ct. at 970 (footnote omitted). Grunewald noted that "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." Id. at 405, 77 S.Ct. at 974 (emphasis in original). "Thus, the life of a conspiracy cannot be extended for statute of limitations purposes by acts of concealment occurring after the conspiracy's criminal objectives have been fully accomplished even if those acts are 'done in the context of a mutually understood need for secrecy.' " United States v. Fletcher, 928 F.2d 495, 499 (2d Cir.) (quoting Grunewald, 353 U.S. at 402, 77 S.Ct. at 972), cert. denied, --- U.S. ----, 112 S.Ct. 67, 116 L.Ed.2d 41 (1991).

[1] We disagree with Rogers' contention that the statute of limitations barred his prosecution under Count One. Count One herein charged that Rogers and Hoffman conspired to, inter alia, commit wire fraud, *1030 and that the sending of the telexes in June 1985 was part of that conspiracy. In the context of wire fraud, the Supreme Court has stated that mailings occurring after the receipt of goods obtained by fraud are within the statute if those mailings were designed "to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." United States v. Lane, 474 U.S. 438, 451-52, 106 S.Ct. 725, 733, 88 L.Ed.2d 814 (1986) (citations and internal quotation marks omitted). In this case, based upon the evidence presented at trial, the jury could have properly

found that the conspiracy to commit wire fraud, which was charged in Count One of the indictment, was not complete until after the June 1985 telexes were submitted to BUE. As such, the June 1985 communications listed in Count One were overt acts of the conspiracy that took place within the statute of limitations. See United States v. Elkin, 731 F.2d 1005, 1008-09 (2d Cir.) (fraudulent verification letter sent to Government two years after defendant had received improperly obtained money from Government was part of scheme to defraud Government), cert. denied, 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43 (1984). Similarly, prosecution of Rogers for wire fraud, under Counts Two and Three of the indictment, was not barred by the statute of limitations because the June 1985 communications could properly be considered by the jury to have been designed to lull BUE into not discovering the alleged fraud. Lane, 474 U.S. at 451-52, 106 S.Ct. at 733.

[2] Rogers also challenges the sufficiency of the evidence under Counts Two and Three. According to him, there was insufficient evidence of an intent by him to join Hoffman in sending the June telexes. He argues that the Government did not prove that, within the statute of limitations, he personally sent or instructed anyone to send telexes on June 4 and 25, 1985.

We do not agree. Under the wire fraud statute, the Government was required to prove beyond a reasonable doubt that Rogers caused a wire communication to be transmitted for the purpose of executing his scheme to defraud. See 18 U.S.C. s 1343. For purposes of the wire fraud statute, "an act [can be] caused not simply when it was a physical consequence of the person's conduct but when, in addition, the actor either knew the consequence would occur or its occurrence was reasonably foreseeable." United States v. Muni, 668 F.2d 87, 89-90 (2d Cir.1981) (footnote omitted).

Herein, Hoffman testified that in late August 1984 he reported to Rogers that there was almost no cash in Lease Trend, that the two of them agreed to submit falsified lease packages to BUE as collateral, and to borrow money on this collateral. Hoffman thereafter composed phony lease packages and Rogers forged the signatures of the lessee, where required, on these documents. After Lease Trend had submitted these leases and exhausted its line of credit and began falling behind on interest payments, BUE began requesting the payment of back interest. Hoffman then sent out a series of telexes, including communications on June 4 and 25, 1985, which falsely represented the status of the phony lease packages and misrepresented reasons for the late payments. He testified that he discussed both of these communications with Rogers before sending them out. Based upon this evidence, the jury could have found beyond a reasonable doubt that Rogers was consulted prior to when the challenged communications were sent out, that these communications were integral to the scheme to defraud BUE, of which Rogers was a part, and that these communications were a reasonably foreseeable part of the scheme. United States v. Keats, 937 F.2d 58, 64 (2d Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 399, 116 L.Ed.2d 348 (1991).

[3] Next, Rogers argues that he was denied his sixth amendment right to counsel of choice. Rogers claims that Rafsky was not subject to disqualification because there was no previous attorney-client relationship between him and Hoffman, since Rafsky was representing Lease Trend, and not Hoffman at the deposition. Rogers also claims that he did not waive his sixth amendment right to counsel because in considering the Government's motion to disqualify Rafsky, the district *1031 court failed to advise him personally

of his right to counsel and to question him personally.

A criminal defendant's sixth amendment right to counsel of choice is circumscribed in several important respects. For instance, a defendant may not "insist on the counsel of an attorney who has a previous or on-going relationship with an opposing party, even when the opposing party is the Government." Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). Nor can a defendant insist upon being represented by an attorney "where the attorney in question is potentially in a position to use privileged information obtained during prior representation of the movant." United States v. James, 708 F.2d 40, 45 (2d Cir.1983) (quotation marks and citations omitted).

Rogers is correct that, when Hoffman testified at the deposition, it was on Lease Trend's behalf, see Fed.R.Civ.P. 30(b)(6), and that it was not Hoffman but Lease Trend, the corporation, on whose behalf Rafsky appeared. Accordingly, Lease Trend was the client and the holder of any attorney-client privilege with respect to any information Rafsky may have obtained in relation to the deposition. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348-49, 105 S.Ct. 1986, 1990-91, 85 L.Ed.2d 372 (1985). The record does not indicate Lease Trend's position regarding the possible use by Rafsky, in his defense of Rogers, of information obtained during his employment at Lease Trend. Our observation in United States v. Cunningham, 672 F.2d 1064, 1072 (2d Cir.1982), is equally pertinent here:

> No case has been called to our attention, and we are aware of none, in which an attorney has been disqualified on grounds of conflicting prior representation solely at the behest of a person other than the former client or its privy.... '[A]s a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.' The refusal to disqualify in the absence of a motion by the former client is all the more appropriate in the context of a criminal prosecution with its implication of constitutional rights.

(quoting In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 88 (5th Cir.1976) (footnotes omitted)). We believe, however, that in this case, Hoffman, as an employee at Lease Trend when he was deposed, should be considered a privy of the company. As such, his joinder in the motion to disqualify Rafsky was sufficient to assert the adverse nature of his interest in the confidences he may have disclosed to Rafsky vis-a-vis Rogers' continued representation by Rafsky, and presented the district judge "with a plain duty to act" on the disqualification motion. Yarn Processing, 530 F.2d at 89. In this Circuit, when faced with a motion to disqualify a criminal defendant's attorney, and the defendant indicates that he desires to waive his right to representation by an attorney without a conflict of interest, a district court must:

> (i) advise the defendant of the dangers arising from the particular conflict; (ii) determine through questions that are likely to be answered in narrative form whether the defendant understands those risks and freely chooses to run them; and (iii) give the defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel.

United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir.1986) (citation omitted). We have also stated that motions for disqualification should be made pre-trial. Id.

[4] We reject Rogers' contention that his right to counsel was violated because the district court failed to advise him personally of his right to counsel and to question him personally prior to disqualifying Rafsky. The record supports the district court's conclusion that Rafsky could no longer participate as Rogers' primary attorney, but that he could, with certain limitations, continue to assist in Rogers' defense. Upon discovering that Rafsky, as corporate counsel, and Hoffman, an employee of Lease Trend, had attended a deposition in connection with a civil lawsuit arising out of the same facts, the government moved to disqualify Rafsky. At a hearing on the motion, Rafsky agreed to *1032 withdraw, stating "while I am not happy with the prospect of disqualification, I understand what the obligations are and would have to concur with the Government in that respect." He also stated that Rogers had considered and previously rejected the possibility of Rafsky continuing to represent him, but not cross-examining Hoffman. It would have been preferable for the court to personally address Rogers, who was present in the courtroom during the entire proceeding, to insure that he had been properly advised of his constitutional rights. Although Rogers was not questioned as to Rafsky's imminent disqualification, the district court did not abuse its discretion in disqualifying Rafsky. "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.... Thus, where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that [a] defendant[ ] be [represented by conflict-free counsel]." Wheat, 486 U.S. at 160, 162, 108 S.Ct. at 1697, 1698.

Rogers contends that the district court denied him his sixth amendment right to a jury trial on each issue of fact when it decided as a matter of law that the Focus 4 leases were "securities," and so charged the jury.

[5] We agree with Rogers' claims on this issue. A trial court's decision not to charge the jury on all the elements of a charged crime is an error that has the effect of relieving the prosecution of its burden of proving every element beyond a reasonable doubt. United States v. Smith, 939 F.2d 9, 10-11 (2d Cir.1991) (per curiam) (citing Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970, 85 L.Ed.2d 344 (1985)). As the Supreme Court noted recently, in reversing a conviction entered after the jury was given constitutionally deficient instructions:

> The [sixth amendment right to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the [prosecution], no matter how overwhelming the evidence.

Sullivan v. Louisiana, --- U.S. ----, ----, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993) (citation omitted).

Section 2314 prohibits the transportation in commerce of stolen goods, wares, and merchandise valued at $5,000 or more, stolen securities, or falsely made, forged, altered, or counterfeited securities. The term "security," as used in s 2314, is defined in 18 U.S.C. s 2311. [FN1] Herein, the district court relied upon United States v. Wexler, 621 F.2d 1218 (2d Cir.), cert. denied, 449 U.S. 841, 101 S.Ct. 119, 66 L.Ed.2d 48 (1980), to rule against Rogers.

In Wexler, we held that the defendants, by conceding the issue at trial, had waived their ability to challenge in this Court the issue of whether the equipment leases therein were "securities" within the meaning of ss 2311 and 2314. Id. at 1222-23. In any event, we went on to state that "securities are 'instruments which have intrinsic value and are recognized and used as such in the regular channels of commerce,' " id. at 1223 (citing United States v. Canton, 470 F.2d 861, 864 (2d Cir.1972)) (emphasis in original), and that "it appears that the decision in each case depends upon the particular facts of that case." Id. at 1224 n. 4. We then analyzed the trial evidence and concluded that "each *1033 equipment lease in this case is the type of instrument Congress intended to and did include in the definition contained in s 2311." Id. at 1225.

FN1. Section 2311, in part, provides:
"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; valid or blank motor vehicle title; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing ...

[6][7] We believe that it may have been proper for the court to determine preliminarily whether or not an item could possibly be a security. See Canton, 470 F.2d at 862 (New York motor vehicle certificate not "security" as defined in s 2311); cf. In re Vericker, 446 F.2d 244, 248 (2d Cir.1971) (FBI documents not "goods," "wares" or "merchandise" under, inter alia, s 2314). But once the court concluded that the Focus 4 leases may have been securities, then, provided there was sufficient evidence in the case and upon timely request, Rogers was entitled to have the judge instruct the jury on what a security is and to let the jury decide whether the items at issue were securities. See United States v. Johnson, 718 F.2d 1317, 1323-25 (5th Cir.1983) (en banc). The district court prevented Rogers from presenting evidence in support of his claim that the Focus 4 leases were not securities, declined to instruct the jury on this issue, and the indictment did not set forth an alternative theory of prosecution for Rogers' alleged violation of s 2314. See United States v. Jackson, 576 F.2d 749, 756 (8th Cir.), cert. denied, 439 U.S. 828, 99 S.Ct. 102, 58 L.Ed.2d 122 (1978). We therefore conclude that Rogers suffered a "structural error" in the trial process and that his conviction under Count Four must be reversed, and remanded to the district court for appropriate proceedings. Sullivan, --- U.S. at ----, 113 S.Ct. at 2083; Smith, 939 F.2d at 11.

[8] We do not agree with Rogers' further contention that a reversal on Count Four affects his convictions under Counts One through Three. Count One charged a conspiracy, the objects of which were to commit wire fraud and to transport forged and fraudulent securities in commerce. Counts Two and Three charged Rogers with substantive wire fraud. Thus, although we reverse Count Four, which supported one of the objects of the conspiracy, the indictment alleged, and the jury found, that Rogers engaged in other conspiratorial conduct, namely, the sending of a telex on approximately June 4, 1985 with intent to defraud (Count Two) and the sending of a telex on approximately June 25, 1985 with intent to defraud (Count Three). Thus, Rogers' convictions under Counts One through Three are unaffected. See Brennan v. United States, 867 F.2d 111, 114-16 (2d Cir.) (affirming general jury verdict finding conspiracy to violate and substantive RICO violation predicated upon wire fraud and violations of the Travel Act, despite subsequent invalidation by the district court of the wire fraud convictions because "[t]he very same telephone calls that formed the basis of every separate wire fraud count also formed the basis of a Travel Act count.") (emphasis in original), cert. denied, 490 U.S. 1022, 109 S.Ct. 1750, 104 L.Ed.2d 187 (1989).

CONCLUSION

We find no merit in the remaining issues Rogers raises on appeal. We affirm the district court's judgment of conviction on Counts One through Three of Rogers' indictment, charging him with conspiracy to commit wire fraud, and substantive wire fraud. However, we reverse the district court's judgment of conviction on Count Four of Rogers' indictment, charging him with transporting a fraudulent security in interstate or foreign commerce, and remand to the district court for appropriate proceedings, because the judge was erroneous on the law.

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Citation
67 S.Ct. 224
91 L.Ed. 196
(CITE AS: 329 U.S. 211, 67 S.CT. 224)

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suggests that subsequent act of concealment may be an overt act (where conspiracy is to conceal)

FISWICK et al.
v.
UNITED STATES.
No. 51.
Dec. 9, 1946.
Argued Nov. 19, 20, 1946.

Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph were convicted of conspiring to defraud the United States in the exercise of its governmental functions, which conviction was affirmed by the Circuit Court of Appeals, 153 F.2d 176, and the defendants bring certiorari.

Reversed.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[1] CRIMINAL LAW k423(9)
110k423(9)
Where indictment charged alien defendants with conspiring from 1939 to 1944 to defraud the United States by concealing and misrepresenting their membership in the Nazi party but the last overt act alleged was the filing of a false registration by one defendant on December 23, 1940, such registration was adequate as an overt act in furtherance of conspiracy to make a false return but could not serve as an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been made so as to make admissible against codefendants separate admissions of defendants in 1943 and 1944, and instruction that admissions of each were admissible against all if there was a conspiracy and all of them were in it, was error. Alien Registration Act of 1940, s 30 et seq., 8 U.S.C.A. s 451 et seq.; Cr.Code, s 37, 18 U.S.C.A. s 88.

[1] CRIMINAL LAW k779
110k779
Where indictment charged alien defendants with conspiring from 1939 to 1944 to defraud the United States by concealing and misrepresenting their membership in the Nazi party but the last overt act alleged was the filing of a false registration by one defendant on December 23, 1940, such registration was adequate as an overt act in furtherance of conspiracy to make a false return but could not serve as an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been made so as to make admissible against codefendants separate admissions of defendants in 1943 and 1944, and instruction that admissions of each were admissible against all if there was a conspiracy and all of them were in it, was error. Alien Registration Act of 1940, s 30 et seq., 8 U.S.C.A. s 451 et seq.; Cr.Code, s 37, 18 U.S.C.A. s 88.

[2] CRIMINAL LAW k423(9)
110k423(9)

That a conspiracy produces a continuing result does not make the conspiracy a continuing one so as to make admissible acts or declarations of a conspirator against coconspirators, but continuity of action to effect the object of the conspiracy is necessary, since a 'conspiracy' is a partnership in crime. Cr.Code, s 37, 18 U.S.C.A. s 88.
See publication Words and Phrases for other judicial constructions and definitions.

[3] CONSPIRACY k27
91k27
At common law, it was not necessary to aver or prove an overt act in order to complete the offense of conspiracy but under the Criminal Code an overt act is essential. Cr.Code, s 37, 18 U.S.C.A. s 88.

[4] CRIMINAL LAW k150
110k150
The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy.

[5] CRIMINAL LAW k423(1)
110k423(1)
The act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, but all such responsibility is at an end when the conspiracy ends.

[6] CRIMINAL LAW k423(6)
110k423(6)
The confession or admission of a conspirator after he has been apprehended is not in furtherance of the object of the conspiracy so as to be admissible against coconspirators.

[7] CRIMINAL LAW k1186.4(4)
110k1186.4(4)
Formerly 110k1186(4)
If an error in a criminal case had substantial influence on the result or if there is grave doubt about it the conviction cannot stand even if it is supported by evidence. Jud.Code, s 269, 28 U.S.C.A. s 391.

[8] CRIMINAL LAW k1186.4(4)
110k1186.4(4)
Formerly 110k1186(4)
Where court erroneously permitted separate admissions after termination of alleged conspiracy to be used against all defendants and thereby strongly bolstered a weak case the conviction could not be sustained by resort to the harmless error statute. Jud.Code, s 269, 28 U.S.C.A. s 391.

[9] FEDERAL COURTS k452
170Bk452
Formerly 106k383(1)
Where conviction of alien of conspiracy to defraud the United States would

seriously embarrass him in event of deportation or naturalization proceedings and brand him as a felon with possible loss of civil rights a wrongful conviction would not be permitted to stand and the certiorari dismissed as moot because defendant had served the sentence imposed on him. Alien Registration Act of 1940, s 30 et seq., 8 U.S.C.A. s 451 et seq.; Cr.Code, s 37, 18 U.S.C.A. s 88.

**225 *213 Frederick M. P. Pearse, of Washington, D.C., for petitioners.

Leon Ulman, of Washington, D.C., for respondent.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The Alien Registration Act of 1940, 54 Stat. 670, 8 U.S.C. s 451 et seq., 8 U.S.C.A. s 451 et seq., required aliens, with certain exceptions, to register pursuant to regulations of the Commissioner of Immigration and Naturalization. [FN1] Among the disclosures required was whether during the preceding five years the alien had been 'affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.' [FN2]

FN1 See 5 Fed.Reg. 2836 for the regulations.

FN2 Regulations, supra, note 1, s 29.4(1)(15).

Petitioners are German nationals who registered under the Act, the last of the three, Mayer, registering on December 23, 1940. Each stated when he registered that he was not affiliated with or active in such an organization. Each failed to disclose in **226 answer to another question pertaining to 'memberships or activities in clubs, organizations, or societies' that he was in any way connected with the Nazi party. They were indicted in 1944 with 28 others for conspiring to defraud the United States in the exercise of its governmental functions (see Curley v. United States, 1 Cir., 130 F. 1, 4) in violation of s 37 of the Criminal Code, 18 U.S.C. s 88, 18 U.S.C.A. s 88.

*214 The indictment charges that petitioners continuously between September 1, 1939, and the date the indictment was returned, September 13, 1944, conspired with each other and with Draeger, the German consul in New York City and leader of the Nazi party in this country, with Draeger's secretary, Vogel, and with other representatives of the Third Reich, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. It charges that since 1933 the Nazi party was devoted to furthering the political activities and policy of the German Reich in this country, that each petitioner during the five years prior to his registration was a member of that party, that Draeger and Vogel directed petitioners in registering under the Act to conceal and falsify their connection with the Nazi party, that petitioners followed such directions, that after their registration they continued from day to day to misrepresent to the government their connection with and activities in the Nazi party. The indictment alleges that as a means of accomplishing the conspiracy the petitioners appeared for registration and in registering falsely failed to disclose their connection with and activities in the Nazi party. The indictment sets forth 40 overt acts. Many related to instructions given by Draeger and Vogel to various defendants from September to December 1940, in

connection with their registration. Others related to the registering by petitioners in November and December, 1940. The last over act alleged to have been committed by any of petitioners was the filing by Mayer of his registration statement on December 23, 1940.

Of the 31 indicted, only the three petitioners were convicted after a jury trial. [FN3] Fiswick and Rudolph were sentenced *215 to imprisonment for 18 months each. Mayer was sentenced to imprisonment for a year and a day. The judgments of conviction were affirmed by the Circuit Court of Appeals, one judge dissenting. 3 Cir., 153 F.2d 176. The case is here on a petition for a writ of certiorari which we granted because the rulings of the lower courts on the continuing nature of the conspiracy were apparently in conflict with decisions of this Court. See United States v. Irvine, 98 U.S. 450, 25 L.Ed. 193; United States v. Kissel, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168.

FN3 Six entered pleas of guilty. There was a dismissal as to one, a severance as to 14. Ten were tried. The jury acquitted three and disagreed as to the other four.

First. The nature and duration of the conspiracy assumed great importance at the trial for the following reason. Each petitioner after he was apprehended made damaging statements to agents of the Federal Bureau of Investigation. Mayer, in November, 1943, stated that he had applied for membership in the Nazi party and had not disclosed the fact because Vogel told him not to. Fiswick's statement made in April, 1944, was to the same effect. Rudolph made substantially the same admissions in November, 1943, and then in September, 1944, retracted them insofar as he had said that in registering under the Act and in failing to disclose his Nazi party affiliation he had followed instructions. His later reason for non-disclosure was his asserted desire to protect his family. Each of these statements was admitted at the trial. At first, each was admitted only as against the maker. At the close of the government's case, however, the District Court ruled that each of these statements was admissible against each of the other coconspirators. It so charged the jury. Later the jury returned to the courtroom for further instructions. One of the questions on which the foreman stated that they desired instruction **227 related to that part of the charge 'where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals.' *216 The judge then repeated that the admissions of each were admissible against all provided there was a conspiracy and they were all in it.

[1][2][3][4][5][6] The Solicitor General now rightly concedes that that ruling was erroneous. Though the result of a CONSPIRACY may be continuing, the CONSPIRACY does not thereby become a continuing one. See United States v. Irvine, supra. Continuity of action to produce the unlawful result, or as stated in United States v. Kissel, supra, page 607 of 218 U.S., at page 126 of 31 S.Ct., 54 L.Ed. 1168, 'continuous co-operation of the conspirators to keep it up' is necessary. A CONSPIRACY is a partnership in crime. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253, 60 S.Ct. 811, 858, 84 L.Ed. 1129. Under s 37 of the Criminal Code, the basis of the present indictment, an overt act is necessary to COMPLETE the offense. [FN4] The statute of LIMITATIONS, unless suspended, [FN5] RUNS from the last overt act

during the existence of the CONSPIRACY. Brown v. Elliott, 225 U.S. 392, 401, 32 S.Ct. 812, 815, 56 L.Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the CONSPIRACY.

FN4 At common law it was not necessary to aver or prove an overt act. See Hyde v. United States, 225 U.S. 347, 359, 32 S.Ct. 793, 799, 56 L.Ed. 1114, Ann.Cas.1914A, 614. The same is true under the Sherman Anti-Trust Act, 15 U.S.C.A. ss 1--7, 15 note. Nash v. United States, 229 U.S. 373, 378, 33 S.Ct. 780, 782, 57 L.Ed. 1232; United States v. Socony-Vacuum Oil Co., supra, at page 252 of 310 U.S., at page 857 of 60 S.Ct., 84 L.Ed. 1129. But s 37 of the Criminal Code requires not only an agreement to do the unlawful act but also the doing of 'any act to effect the object of the conspiracy'. See Hyde v. United States, supra, at page 359, of 225 U.S., at page 799 of 32 S.Ct., 56 L.Ed. 1114, Ann.Cas.1914A, 614.

FN5 See, for example, s 1 of the Act of August 24, 1942, 56 Stat. 747, 18 U.S.C.Supp. II, s 590a, as amended by s 19(b) of the Act of July 1, 1944, 58 Stat. 649, 667, 18 U.S.C.Supp. IV, s 590a, 18 U.S.C.A. s 590a.

In this case the last overt act, as we have noted, was the filing by Mayer of his registration statement on December 23, 1940. That act was adequate as an overt act in furtherance of a conspiracy to make a false return. But there is difficulty in also making it serve the function of an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been *217 made. All continuity of action ended with the last overt act in December, 1940. There was no overt act of concealment which followed the act of making false statements. If the latter is permitting to do double duty, then a continuing result becomes a continuing conspiracy. If, as we think, the conspiracy charged and proved did not extend beyond the date of the last overt act, the admissions of each petitioner were improperly employed against the others. While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, and cases cited, all such responsibility is at an end when the conspiracy ends. Logan v. United States, 144 U.S. 263, 309, 12 S.Ct. 617, 632, 36 L.Ed. 429; Brown v. United States, 150 U.S. 93, 98, 14 S.Ct. 37, 39, 37 L.Ed. 1010. Moreover, confession or admission by one coconspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators. Gambino v. United States, 3 Cir., 108 F.2d 140, 142, 143.

**228 [7] It is earnestly argued, however, that the error was harmless. The 'harmless error' statute, Judicial Code, s 269, 28 U.S.C. s 391, 28 U.S.C.A. s 391, provides that 'On the hearing of any appeal, certiorari, * * *

or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' We have recently reviewed the history of this statute and the function *218 it was designed to serve in criminal cases. Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239. The Court there stated, page 1248 of 66 S.Ct.: 'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'

[8] We cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners. It is not enough to say that there may be a strong case made out against each petitioner. The indictment charges a conspiracy, not the substantive crime of falsely registering. The evidence that petitioners conspired with each other and with Draeger, Vogel, and others, is not strong. Though we assume there was enough evidence to go to the jury on the existence of that conspiracy, the case was one which a prosecutor would be anxious to bolster.

The prosecutor's case, apart from the admissions, may be briefly summarized. Draeger and Vogel were active in the affairs of the Nazi party in this country. Their stenographer, a government witness, testified that applications for membership in the party were received at their *219 office. Dues were paid there. A car file of members of the party and of applicants for membership was kept there. The name of each petitioner was on the list. A letter was sent to all on the list in August or September, 1940, over Draeger's signature, requesting them to discuss a matter with Draeger. Those who appeared in response to the letter were told to conceal their Nazi party membership or affiliation when they registered under the Act. Another witness for the government--a defendant in the case who was granted a severance--also testified that Vogel gave instructions to party members not to disclose their affiliation with the Nazi party. And a clerk in Draeger's office testified for the government that the party members who came to the consulate were told to say in their registration statement that they were members of an innocuous sounding association of German nationals. There was no evidence that petitioners came to the consulate seeking advice. There was no direct evidence that petitioners had received the instructions from the consulate to conceal their party membership. There was no direct evidence that petitioners came to the consulate in response to the letter which was sent. They were not identified as being with any group which called there. There was no evidence that they conferred with Draeger or Vogel or with each other.

The Solicitor General states with commendable candor that in this state of the proof it was manifestly important for the prosecutor 'to bring into the case

against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy.' The admissions served that purpose. They supplied the first direct evidence that petitioners **229 acted pursuant to the instructions of the consulate. It is true, *220 as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. And when the jury was told that the admissions of one, though not implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added. Without the admissions the jury might well have concluded that there were three separate conspiracies, not one. Cf. Kotteakos v. United States, supra. With the admissions the charge of conspiracy received powerful reinforcement. And the charge that each petitioner conspired with the others became appreciably stronger, not from what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. The admissions apparently became of considerable importance in the deliberations of the jury, for, as we have noted, they asked for clarification of the instructions on that point. And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the 'harmless error' statute. The use made of the admissions at the trial constituted reversible error.

[9] Second. A further question remains. As we have noted, Fiswick was sentenced to imprisonment for 18 months. No fine was imposed. It now appears that he has served his sentence. Accordingly, it is suggested that the cause is moot and that the writ of certiorari should be dismissed as to him. We followed that procedure in St. Pierre v. United States, 319 U.S. 41, 42, 63 S.Ct. 910, 911, 87 L.Ed. 1199, saying that since the sentence had been served, 'there was no longer a subject *221 matter on which the judgment of this Court could operate.' We added, however, that the petitioner had not shown that 'under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied.' At page 43 of 319 U.S., at page 911 of 63 S.Ct., 87 L.Ed. 1199.

The situation here is different. Fiswick is an alien. An alien sentenced to imprisonment for one year or more 'because of conviction in this country of any crime involving moral turpitude' is, unless pardoned, subject to deportation if the crime was committed within five years after the alien's entry into the United States. 39 Stat. 874, 889, 8 U.S.C. s 155, 8 U.S.C.A. s 155. The conspiracy with which Fiswick is charged was formed and executed within that five year period, as his last entry was in 1937. The conspiracy of which he was convicted was one to impede the government in one of its lawful functions, to prevent it from obtaining information which the Executive and Congress deemed vital to our internal security, to conceal by fraud, deceit, and perjury [FN6] the ramifications of an organization in our midst bent on our undoing. We need not determine in this collateral way whether conviction for such a crime would involve 'moral turpitude' within the meaning of the

deportation laws. [FN7] But the judgment, **230 if undisturbed, stands as unimpeachable evidence that Fiswick committed *222 the crime charged. The hazards of deportation because of that fact are real. [FN8] To leave him to defend a deportation order on the ground that the crime of which he was convicted did not involve 'moral turpitude' is to add to his burdens by depriving him of his best defense--that he was not properly convicted.

FN6 The registration statements required by the Act were sworn statements. Regulations, supra note 1, s 29.4(g), (j).

FN7 Convictions for perjury, Kaneda v. United States, 9 Cir., 278 F. 694, for frauds on the revenues, Guarneri v. Kessler, 5 Cir., 98 F.2d 580, United States ex rel. Berlandi v. Reimer, 2 Cir., 113 F.2d 429, for frauds with respect to property, United States ex rel. Medich v. Burmaster, 8 Cir., 24 F.2d 57, have been held by the lower courts to meet that test. And counterfeiting was so classified by the Court in United States ex rel. Volpe v. Smith, 289 U.S. 422, 53 S.Ct. 665, 77 L.Ed. 1298. As to deportation for violations of the Alien Registration Act of 1940 see s 20(b)(4) and (5). See also Alien Enemy Act of 1798, Rev.Stat. ss 4067--4070, as amended 40 Stat. 531, 50 U.S.C. ss 21--24, 50 U.S.C.A. ss 21--24; Presidential Proclamation No. 2655, 10 Fed.Reg. 8947.

FN8 Although deportation is not technically a criminal punishment, it may visit great hardship on the alien. Bridges v. Wixon, 326 U.S. 135, 147, 65 S.Ct. 1443, 1449, 89 L.Ed. 2103. As stated by the Court, speaking through Mr. Justice Brandeis, in Ng Fung Ho. v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, deportation may result in the loss 'of all that makes life worth living.'

Moreover, other disabilities or burdens may flow from the judgment, improperly obtained, if we dismiss this cases as moot and let the conviction stand. If Fiswick seeks naturalization, he must establish that during the five years immediately preceding the date of filing his petition for naturalization he 'has been and still is a person of good moral character.' 54 Stat. 1137, 1142, 8 U.S.C. s 707(a)(3), 8 U.S.C.A. s 707(a)(3). An outstanding judgment of conviction for this crime stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse. And even though he succeeded in being naturalized, he would, unless pardoned, carry through life the disability of a felon; [FN9] and by reason of that fact he might lose certain civil rights. [FN10] Thus Fiswick has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. In no practical sense, therefore, can Fiswick's case be said to be moot.

FN9 'All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies.' Criminal Code s 335, 18 U.S.C. s 541, 18 U.S.C.A. s 541.

FN10 Thus Mo.R.S.A. s 4561 renders such person incompetent to serve on a

jury and forever disqualifies him from voting or holding office, unless pardoned.

*223 It is said however, that having served his sentence, Fiswick may not be resentenced on a new trial and that if his conviction is reversed, he thereby escapes deportation. The argument is that he thwarts the deportation policy by electing to serve his sentence. We cannot assume, however, that Fiswick is guilty of the conspiracy charged. He was not accorded the trial to which he is entitled under our system of government. The conviction which he suffered was not in accordance with law. The errors in the trial impeach the conviction; and he must stand in the position of any man who has been accused of a crime but not yet shown to have committed it. To dismiss his case as moot would permit the government to compound its error at Fiswick's expense. That course does not comport with our standards of law enforcement.

Reversed.

END OF DOCUMENT

dx conspiracy to avoid filing CTRs and conspiracy to conceal transactions.

Citation
885 F.2d 45
113 A.L.R.Fed. 883
(CITE AS: 885 F.2D 45)

FOUND DOCUMENT

Database
CTA

Mode
Page

UNITED STATES of America
v.
DONAHUE, Joseph P., Appellant.
No. 89-5133.
United States Court of Appeals,
Third Circuit.
Submitted Under Third Circuit Rule 12(6)
Aug. 8, 1989.
Decided Sept. 6, 1989.
Rehearing and Rehearing In Banc Denied Oct. 6, 1989.

Defendant was convicted by jury in the United States District Court for the Middle District of Pennsylvania, Richard P. Conaboy, J., of various offenses relating to his participation in money laundering scheme, and he appealed. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) defendant could be convicted of conspiring to willfully and knowingly avoid filing currency transactions reports on basis of his agreement with bank branch manager to willfully conceal bank's duty to file those reports or by aiding and abetting that violation, even though he himself could not have been held liable for failure to file those reports, and (2) venue on count relating to transportation of currency to Grand Cayman Island without filing of requisite Currency and Monetary Instrument Reports was proper in district where offense "began"--i.e., where defendant, bearing that currency, boarded first of successive flights.

Affirmed.

[1] CONSPIRACY k40.2
91k40.2
Defendant could be convicted of conspiring to willfully and knowingly avoid filing currency transaction reports on basis of his agreement with bank branch manager to willfully conceal bank's duty to file currency transaction reports, even though defendant himself could not have been held liable for failure to file those reports. 18 U.S.C.A. s 371; 31 U.S.C.A. ss 5313, 5322.

[2] CRIMINAL LAW k113
110k113
Venue on charge of transporting currency without filing required reports was proper in district where offense "began," i.e., where defendant, bearing large sums of unreported currency, boarded first of successive flights to Grand Cayman Islands. 18 U.S.C.A. ss 2, 3237(a); 31 U.S.C.A. ss 5316, 5322.

*45 Gregory T. Magarity, Stanley R. Scheiner, William C. Nugent, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for appellant.

William A. Behe, Gordon A.D. Zubrod, James J. West, U.S. Atty., U.S. Attorney's Office, Harrisburg, Pa., for appellee.

OPINION OF THE COURT

Before SLOVITER and GREENBERG, Circuit Judges, and FISHER, District Judge. [FN*]

FN* Honorable Clarkson S. Fisher, Judge, United States District Court for the District of New Jersey, sitting by designation.

GREENBERG, Circuit Judge.

On April 19, 1988, a three-count indictment was returned against appellant, Joseph Donahue, and his co-defendant Michael Coffey, in the Middle District of Pennsylvania. Count I charged both defendants, along with unindicted co-conspirator Frederick Luytjes, with conspiring in violation *46 of 18 U.S.C. s 371 [FN1] (1) to willfully and knowingly avoid filing Currency Transaction Reports (CTRs), relating to domestic currency transactions, as required by 31 U.S.C. ss 5313 and 5322; (2) to willfully and knowingly avoid filing Currency and Monetary Instrument Reports (CMIRs), relating to international transfer of currency and monetary (negotiable) instruments, as required by 31 U.S.C. ss 5316 and 5322; and (3) to defraud the United States of lawful revenue in violation of the foregoing currency transaction reporting laws, as well as 26 U.S.C. ss 7201 and 7206. Count II charged Donahue and Coffey, as well as Luytjes, with a substantive and aiding and abetting violation, 18 U.S.C. s 2, of 31 U.S.C. ss 5316 and 5322, by transporting, causing to be transported, or aiding and abetting the transportation of approximately $1,000,000 in currency from Lackawanna County, Pennsylvania, to the Grand Cayman Island, British West Indies, without filing the CMIRs. [FN2] Count III of the indictment charged Coffey alone with a substantive violation of 31 U.S.C. ss 5313 and 5322. [FN3] On motion by the government the defendants' trials were severed and, on November 16, 1988, Donahue was convicted at a jury trial on Counts I and II. He appeals his conviction on both counts. For the reasons that follow we will affirm.

FN1. 18 U.S.C. s 371 provides:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

FN2. Count II also charged violations of 31 U.S.C. ss 1101 and 1059, the predecessors of ss 5316 and 5322(b).

FN3. Again, Count III also charged violation of 31 U.S.C. s 1059.

I.

Donahue's conviction stems from his participation in a money laundering scheme with Coffey, branch manager of United Penn Bank in Scranton, Pennsylvania, and Luytjes, a drug trafficker. Luytjes, who had entered into a plea agreement with the government and was its primary witness at Donahue's trial, testified that in 1984, he was tried in Florida for drug trafficking and ultimately was acquitted. During the course of his trial, however, he managed to earn between $10 and $13 million from drug smuggling, which he planned to stash away in the event he was convicted. [FN4] He and his agents deposited $10 million

of these proceeds into accounts at United Penn Bank. Luytjes testified that he told Coffey, the officer with whom he dealt at United Penn, that the money had come from the sale of his business, Air America, and that he had written up a fictitious agreement to sell the company and represented that the buyer had paid him in cash. [FN5] He further testified that Coffey asked him if he would be interested in smuggling money to the Cayman Islands in order to avoid paying taxes on it, and that they agreed that Coffey would launder $4 million in exchange for a fee of $100,000. Pursuant to this agreement, Luytjes on various occasions delivered cash to Coffey. Although Coffey refused to disclose to Luytjes how he was transporting the money to the Cayman Islands, he introduced Luytjes to Donahue, suggesting that Luytjes might want to invest in Donahue's scuba diving business in the Cayman Islands. According to Luytjes, Donahue revealed to him that he was working with Coffey in moving Luytjes' money to the Cayman Islands.

FN4. Luytjes testified as to how he did this as follows: On the weekends of the trial I scheduled approximately seven flights, seven weekends of the 11-week trial. And I would leave Tampa, the court, and fly back to Pennsylvania, get in another airplane, fly down to Colombia, spend the night, get up in the morning, fly back to the United States on Sunday morning and get back to Pennsylvania Sunday night, get in another airplane, fly back to Tampa and go back to court for the week.

FN5. Luytjes had unusual assistance in carrying out this farce, as the agreement of sale was prepared by a large Philadelphia law firm which thought the sale was legitimate.

Donahue and Coffey dealt with the cash Coffey received from Luytjes in a number *47 of different ways. On one occasion, Coffey converted a million dollars in cash received from Luytjes into five cashier's checks of $200,000 each. Coffey filled out a CTR upon receipt of the cash, but never filed it. Coffey gave the cashier's checks to Donahue, who transported them to Grand Cayman Island. On other occasions Coffey gave Donahue cash, which Donahue took to various banks in Pennsylvania and New York for conversion into cashier's checks under $10,000 which he then transported to Grand Cayman Island. [FN6] Finally, from time to time Donahue would transport cash given to him by Coffey, apparently in $200,000 allotments, from Pennsylvania to Grand Cayman Island. Coffey did not file CTRs for the cash he gave to Donahue. Donahue never filed a CMIR when he left this country.

FN6. A total of 143 cashier's checks were purchased in northern Pennsylvania in amounts less than $10,000, and deposited in Donahue's accounts in the Cayman Islands.

Upon arrival at Grand Cayman Island, Donahue would deposit the cash and cashier's checks into his own bank accounts, from which it was transferred into Luytjes' accounts there. Donahue told Luytjes that he was being paid $50,000 for his role in the money laundering scheme.

As part of his plea agreement with the government, Luytjes taped a number of his conversations with Donahue. Various statements made by Donahue on these

tapes indicate his knowing participation in the above-described money laundering scheme. [FN7]

FN7. After his acquittal in Florida, Luytjes decided to report his drug trafficking proceeds as income and pay taxes on them. Again using the ruse of the sale of Air America, he reported the money as a long-term capital gain rather than as ordinary income so as to pay less tax. Id.

II.

[1] Donahue's primary challenge to his conviction on Count I of the indictment relates to the charge that he, Coffey and Luytjes conspired, in violation of 18 U.S.C. s 371, to willfully and knowingly avoid filing CTRs in violation of 31 U.S.C. ss 5313 and 5322. The essence of his argument is that he was held criminally liable for "structuring" currency transactions, conduct which, during the relevant time period, was not unlawful.

31 U.S.C. s 5313(a) authorizes the Secretary of the Treasury to require both financial institutions and other participants in a currency transaction to file a report on the transaction. During the time period relevant to this case, the Secretary required only financial institutions to file reports on transactions of more than $10,000. 31 C.F.R. s 103.22(a) (1983). Nothing in the Act or regulations expressly prohibited a bank customer from "structuring" transactions to keep each transaction under $10,000, in order to avoid triggering, or in an attempt to conceal, the bank's obligation to file.

In United States v. Mastronardo, 849 F.2d 799 (3d Cir.1988), we held that prior to the Act's 1986 amendment, [FN8] a customer could not be held criminally liable for structuring transactions to avoid the reporting requirements. The defendants in Mastronardo, all bank customers, had been convicted of participating in a conspiracy to defraud the United States in violation of 18 U.S.C. s 371, and participating in a scheme to conceal material facts from the United States in violation of 18 U.S.C. s 1001. We noted that "while this appeal does not involve a specific conviction for the act of 'structuring' transactions, both the s 1001 convictions and the s 371 conspiracy convictions rely upon the purported illegality of 'structuring' in order to impose criminal liability upon these defendants." Id. at 803-04. We went on to reverse these convictions, reasoning that the statute and regulations "did not give a reasonable bank customer fair notice that 'structuring' cash transactions to avoid the reporting requirement is criminal." Id. at 804.

FN8. In 1986 Congress expressly proscribed the structuring of transactions to evade the reporting requirements. See 31 U.S.C. s 5324.

Although Donahue maintains that our decision in Mastronardo mandates reversal of his conviction, we fully agree with the *48 district court's contrary determination. [FN9] As the district court recognized, the theory of the government's case on the conspiracy charge was not that Donahue conspired to violate section 5313 by structuring transactions, but rather that he did so by agreeing with Coffey to willfully conceal United Penn's duty to file CTRs or by aiding and abetting that violation. When Luytjes delivered quantities of cash exceeding $10,000 to Coffey, Coffey should have but did not file reports

of the transactions, and Donahue collaborated in Coffey's efforts to conceal that the cash had ever been received. Donahue was convicted, then, not in the capacity as a bank customer or for conduct involving structuring, but rather as a co-conspirator or abettor in a financial institution's scheme to avoid filing CTRs. Thus, Mastronardo is inapposite. The fact that part of the scheme to conceal involved structuring transactions at other banks is immaterial.

FN9. We regard the Mastronardo issue in the context of this appeal, as well as the venue issue discussed below, as involving the interpretation and application of legal precepts and thus we are undertaking a plenary review on these issues. United States v. Adams, 759 F.2d 1099, 1106 (3d Cir.), cert. denied, 474 U.S. 906, 971, 106 S.Ct. 275, 336, 88 L.Ed.2d 236, 321 (1985).

While Donahue himself could not have been held liable for a failure to file CTRs, this does not foreclose his criminal liability for conspiring to do so. A person, even though incapable of committing the underlying substantive offense, can be convicted of conspiracy under 18 U.S.C. s 371. See, e.g., United States v. Hayes, 827 F.2d 469, 472-73 (9th Cir.1987). The same is true of aiding and abetting under 18 U.S.C. s 2(a). See United States v. Standefer, 610 F.2d 1076, 1085 (3d Cir.1979) (in banc), aff'd, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). [FN10]

FN10. Although Count I of the indictment does not specifically charge Donahue with "aiding and abetting" under 18 U.S.C. s 2(a), the absence of specific reference to 18 U.S.C. s 2 in an indictment is not fatal. See United States v. Catena, 500 F.2d 1319, 1323 (3d Cir.), cert. denied, 419 U.S. 1047, 95 S.Ct. 621, 42 L.Ed.2d 641 (1975). Here, the district court in fact charged the jury under an aiding and abetting theory.

Our recent decision in United States v. American Investors of Pittsburgh, Inc., 879 F.2d 1087 (3d Cir.1989), lends support to our analysis here. There, we affirmed the conviction of one of the defendants [Zytnick] for conspiring with a financial institution to circumvent the currency reporting laws in violation of 18 U.S.C. s 371 and/or aiding and abetting the scheme in violation of 18 U.S.C. s 2(a). The evidence established that Zytnick collaborated in the financial institution's violation, not by structuring transactions, but by concealing the extent of his transactions through various other means. [FN11] We recognized that "under United States v. Mastronardo, Zytnick could not be charged with the substantive offense of failing to file CTRs since he had no duty to do so." 879 F.2d at 1103. We nonetheless affirmed his liability on conspiracy and aiding and abetting grounds, noting that "the relief afforded to customers under Mastronardo does not apply to Zytnick...." 879 F.2d at 1103 n. 20. [FN12]

FN11. In fact, one of Zytnick's arguments was that "if he had been aware of the CTR requirement he could have structured his transactions to avoid any violation." 879 F.2d at 1103 n. 20.

FN12. We also held in American Investors that a customer of a financial institution could be held criminally liable for willfully causing the institution to fail to file CTRs pursuant to 31 U.S.C. s 5313 and 18 U.S.C. s 2(b), and that Mastronardo did not compel a contrary holding because there the defendants had been acquitted of violating 18 U.S.C. s 2(b). Under American Investors, liability under sections 5313 and 2(b) can be imposed on a customer if (1) the financial institution had the legal obligation to file CTRs--i.e., the legal capacity to commit the crime--and if (2) the customer had the intent to preclude the financial institution from filing CTRs.

In sum, we reject Donahue's argument that under Mastronardo his conviction on Count I must be reversed. Because we find Donahue's remaining objections to his conviction on that count likewise lacking in merit, we will affirm his conviction on Count I. [FN13]

FN13. Donahue challenges his conviction on Count I on an alternative ground in relation to that portion of the count charging him with conspiring to defraud the United States by participating in a scheme to evade income taxes in violation of 31 U.S.C. ss 5313, 5316 and 5322 and 26 U.S.C. ss 7201 and 7206. He maintains, inter alia, that the district court improperly failed to charge the jury that in order to convict Donahue on this charge, the evidence had to establish that he had the specific intent to help Luytjes evade his taxes, and that in any event such evidence was lacking. The district court charged the jury that it had to find a "mutual understanding" to "move money in such a way, money of Mr. Luytjes in such a way that the government would be deprived of the ability ... to decide whether or not there was a tax ... due," in which scheme Donahue "willfully and intentionally" joined. Thus, the district court apprised the jury of exactly what Donahue claims it did not know. Furthermore, we find that the evidence introduced by the government was sufficient to sustain the jury's verdict on this charge.

*49 III.

[2] Donahue's principal contention that his conviction on Count II of the indictment must be reversed is predicated on a claim that venue of the charge on that count was improper in the Middle District of Pennsylvania. "Congress has incorporated the basic constitutional provisions on venue in Rule 18 of the Federal Rules of Criminal Procedure which provides, in relevant part, that 'the prosecution shall be had in a district in which the offense was committed.' " United States v. Passodelis, 615 F.2d 975, 977 (3d Cir.1980). Donahue contends that the crime charged in Count II was not committed in the Middle District of Pennsylvania. We, however, agree with the government that Count II involves an offense "begun in one district"--the Middle District of Pennsylvania--"and completed in another" under 18 U.S.C. s 3237(a) and therefore could be prosecuted in the Middle District of Pennsylvania.

As noted earlier, Count II charged Donahue with violating 31 U.S.C. ss 5316 and 5322 by knowingly transporting currency from Pennsylvania to Grand Cayman Island without filing reports required by the Secretary of the Treasury. [FN14] Section 5316(a) provides in relevant part:

FN14. Count II charged that such transportation was "part of a pattern of illegal activity involving transactions of more than one hundred thousand dollars ($100,000) in a 12-month period" so as to invoke the enhanced penalty provided by 31 U.S.C. s 5322(b). The count also charged Donahue with aiding and abetting the substantive violation, thus leading the government to contend, brief at 20, that his "accessorial acts in the Middle District of Pennsylvania" justified venue there. While there may be force to this contention, inasmuch as Donahue in Pennsylvania assisted Coffey and Luytjes in the transportation of the money and they might each be viewed as a person who "has transported" monetary instruments, we prefer to predicate our decision on Donahue's direct conduct as a transporter.

(a) ... a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly--
(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time--
(A) from a place in the United States to or through a place outside the United States[.] [FN15]

FN15. In October of 1984, section 5316(a)(1) was amended to raise the amount transported from $5,000 to $10,000. The text of section 5316(a) was amended in 1984 and 1986 but not materially to this case. We quote the 1986 version.

Section 5316(b) directs that the report be filed "at the time and place the Secretary of the Treasury prescribes." In turn, the applicable regulations provide that the report must be filed "at the time of departure," "with the Customs officer in charge at any port of ... departure." 31 C.F.R. s 103.26(b)(1), (3).
In its efforts to prove the charges in Count II, the government introduced evidence at trial that on a variety of occasions Donahue flew from Pennsylvania to Miami, where he changed planes and continued directly on to Grand Cayman Island. [FN16] Donahue asserts, and the government does not dispute, that "[a]ll of the evidence showed that Donahue went through Customs in Miami," and that "the government neither alleged nor proved that Donahue had a legal duty to file CMIRs in the M.D. of Pa." Appellant's brief at 33. Asserting *50 that " 'where the crime charged is failure to do a legally required act, the place fixed for its performance fixes the situs of the crime,' " Donahue maintains that the government failed to establish venue in Pennsylvania because the "situs of the crime" was Miami--the place where the reports should have been filed. Brief at 28-34 (citing Johnston v. United States, 351 U.S. 215, 220, 76 S.Ct. 739, 742, 100 L.Ed. 1097 (1956)).

FN16. The government introduced, inter alia, some of Donahue's plane tickets and travel itineraries documenting various of his trips to and from Grand Cayman Island. Government Exhibits 18.1, 18.2. The exhibits showed that the layovers in Miami were only a few hours at most.

The problem with this analysis is that it focuses on one aspect of the conduct proscribed by section 5316, the failure to file a report, to the exclusion of the other element of the offense--the transportation of currency. It is true, as Donahue notes, that it is often helpful to look at the statutory verb in the description of the offense in determining where an offense was committed. See, e.g., 2 Wright, Federal Practice & Procedure: Criminal 2d s 302 (1982). However, his choice of "file" in 31 U.S.C. s 5316(a) as the only relevant verb in the section ignores the fact that standing alone the failure to file a report is not unlawful; such failure must be accompanied by the knowing transportation of currency out of the country to become a crime. Although Donahue cites a case, addressing issues other than venue, for the proposition that " 'the crime which [s 5316] punishes is not the transportation of more than [$10,000] in currency out of the United States, but rather the failure to file the required report,' " appellant's brief at 37, [FN17] the fact remains that absent the transportation or intent to transport the failure to file is unobjectionable. [FN18] Thus, Count II of the indictment charged that the offense was the transportation of the currency, without the filing of the report.

FN17. Donahue cites United States v. Rojas, 671 F.2d 159, 162 (5th Cir.1982). See also United States v. Warren, 612 F.2d 887, 891 (5th Cir.) (en banc), cert. denied, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980).

FN18. Moreover, in making his venue argument Donahue relies not upon the language of section 5316 itself, which merely requires a report to be filed "at the time and place the Secretary of the Treasury prescribes," but upon the federal regulations implementing the Act. The fact that Congress did not explicitly designate the place of filing weakens any argument that it intended to restrict venue in the manner Donahue suggests.

In view of the foregoing, we agree with the government that the conduct underlying Donahue's conviction on Count II constituted an offense "begun in one district and completed in another" under 18 U.S.C. s 3237(a). [FN19] The evidence established that Donahue, bearing large sums of currency, on various occasions boarded a plane in Pennsylvania, [FN20] changed planes in Florida without filing the requisite report, and proceeded on to Grand Cayman Island. In our view, this uninterrupted series of events is properly regarded as one continuing offense for purposes of venue, beginning in Pennsylvania and ending in Grand Cayman Island. Cf. United States v. Rigdon, 874 F.2d 774, 779-80 (11th Cir.1989) (venue for failure to file CTR as required by 31 U.S.C. s 5313 not only proper in Washington, D.C., where CTRs can be filed, but also in *51 Northern District of Florida where cash was exchanged for cashier's checks.)

FN19. That section provides:
s 3237. Offenses begun in one district and completed in another
(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and

prosecuted in any district in which such offense was begun, continued, or completed.
Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

FN20. Donahue's airline tickets indicate that he flew from Scranton/Wilkes Barre in the Middle District of Pennsylvania to Philadelphia, then from Philadelphia to Miami, and then on to the Grand Cayman Island. The stop in Philadelphia does not affect the existence of venue in the Middle District of Pennsylvania under our analysis. We, of course, are not concerned with whether venue would have been proper if Donahue had picked up the currency in Miami, rather than leaving Pennsylvania with it.

We agree with the government that this case is distinguishable from Travis v. United States, 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961), cited by Donahue. In Travis, the defendant was charged with filing a false non-Communist affidavit with the National Labor Relations Board in violation of section 9(h) of the National Labor Relations Act, and section 35A of the Criminal Code (since replaced by 18 U.S.C. s 1001). Although the affidavits were filed in Washington, D.C., the defendant was tried in Colorado, where he had executed and mailed them. The Court held that venue lay only in Washington, D.C., rejecting the government's argument that the charged offense was a continuing one under section 3237 beginning in Colorado. The Travis court did state that "[w]hen a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place." Id. at 636, 81 S.Ct. at 362. While, viewed in a vacuum, this statement arguably lends support to Donahue's position, in Travis "only the single act of having a false statement at a specified place [was] penalized." Id. at 637, 81 S.Ct. at 362. [FN21] Transportation of the document was not an element of the offense in Travis. Here, however, as discussed above, the elements of the offense included not only a failure to file but also the transportation of currency outside of the country, and thus Travis is not controlling. [FN22]

FN21. Significantly, the Court noted that section 9(h) provided only that the Board could not make investigations or issue complaints on questions raised by labor organizations unless non-Communist affidavits were filed, and did not require the filing of such affidavits. It stated that "[i]f it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense." Id. at 635, 81 S.Ct. at 361. Here, in contrast to Travis, filing was required by the applicable regulations.

FN22. A number of courts have limited Travis to its particular facts. See, e.g., United States v. Mendel, 746 F.2d 155, 165 (2d Cir.1984), cert. denied, 469 U.S. 1213, 105 S.Ct. 1184, 84 L.Ed.2d 331 (1985) (

" 'the decision [in Travis] surely was meant to be confined to the facts on the unusual statute involved' " (citations omitted)); United States v. Herberman, 583 F.2d 222, 227 (5th Cir.1978) (Travis does not mandate that every defendant whose forms are filed in another district must defend there). We also note that Donahue relies on our decision in United States v. Valenti, 207 F.2d 242 (3d Cir.1953), which was approved in Travis. For the same reasons we find Travis not controlling, Valenti is not applicable here.

Indeed, the second paragraph of section 3237(a), which has been described as "a specific application of the general provision about continuing offenses in the first paragraph of the section," Wright, supra, s 303, expressly provides that offenses involving foreign commerce are continuing and may be prosecuted in any district "from, through or into which such commerce ... moves" (emphasis added). We think that for venue purposes, this case is more analogous to those involving the transportation of stolen objects in interstate or foreign commerce than to "one-step crime" [FN23] cases like Travis, where the only act of significance was the false filing. Cf. United States v. Infanti, 474 F.2d 522, 527 (2d Cir.1973) (prosecution for transporting stolen stock certificates in foreign commerce in violation of 18 U.S.C. s 2314 proper in district where stolen certificates in possession of co-defendant before transportation began.) [FN24] While the mere transportation of the currency outside of the country was not unlawful, it became so when coupled with Donahue's failure to file the CMIRs.

FN23. See United States v. Dekunchak, 467 F.2d 432, 438 (2d Cir.1972).

FN24. We see no reason to hold that the fact that no national boundary had yet been crossed when Donahue left Pennsylvania defeats venue there. While we will assume, arguendo, that under 31 U.S.C. s 5316 the offense was not completed in Pennsylvania, undoubtedly the commission of the offense was eventually completed and the transportation in the Middle District of Pennsylvania was an integral part of it. Cf. United States v. Hankish, 502 F.2d 71 (4th Cir.1974) (offense of transporting goods stolen from interstate commerce committed as soon as defendants began transporting them, not when they crossed state line, and venue under section 3237 proper in district where transportation began.)

*52 In sum, we hold that Donahue's commission of the offense proscribed by section 5316--the transportation of currency from the United States to a place outside the country without filing a report--began in the Middle District of Pennsylvania, where he boarded the first of the successive flights which ultimately would land him in Grand Cayman Island, and that venue was proper there, even assuming that the report required by section 5316 could only have been filed in Miami. [FN25]

FN25. Because of our holding it is unnecessary to address the government's alternative argument that Donahue waived his right to challenge venue by not timely raising the challenge.

IV.

Although Donahue voices a variety of other objections to his conviction, we find them to be lacking in merit. [FN26] Accordingly, we will affirm his conviction on both counts of the indictment.

FN26. Donahue contends that a recorded conversation between himself and Luytjes introduced at trial should have been suppressed under 18 U.S.C. s 2515, which prohibits the use as evidence of certain intercepted wire or oral communications. Although 18 U.S.C. s 2511(2)(c) sets forth an exception to 18 U.S.C. s 2515 when the communication is intercepted by a "person acting under color of law" and "one of the parties to the communication has given prior consent to such interception," Donahue maintains that the exception is inapplicable here because Luytjes did not voluntarily consent to the interception but was misled into doing so by false promises in his plea agreement. Despite Donahue's efforts to characterize his objection as involving Luytjes' consent to the interception, what he is really challenging is the government's authority to grant Luytjes what he indisputably received by virtue of his plea agreement; he maintains, for instance, that the government lacked the authority to compromise Luytjes' civil tax liability in the agreement but does not claim that the government reneged on this promise. We therefore reject Donahue's challenge to his conviction on this basis.
Donahue raises a number of other grounds for reversal of his conviction, including claims that the Assistant United States Attorney should have been recused; that he breached a rule of professional conduct; and that certain hearsay testimony was improperly allowed at trial. We have examined these arguments and find them lacking in merit.

END OF DOCUMENT

① Co-conspirators are liable for reas. foreseeable criminal acts done in furtherance of conspiracy
② Illegal acts not specifically contemplated by Δ may be part of

Citation 616 F.2d 2 | Rank(R) R 5 OF 8 | Database ALLFEDS | Mode Page
5 Fed. R. Evid. Serv. 373
(CITE AS: 616 F.2D 2)

UNITED STATES of America, Appellee,
v.
Harold V. GLEASON, Paul Luftig and J. Michael Carter, Defendants-Appellants.

Nos. 125, 126 and 137, Dockets 79-1147, 79-1151 and 79-1208.
United States Court of Appeals,
Second Circuit.
Argued Oct. 9, 1979.
Decided Dec. 19, 1979.
Certiorari Denied March 17, 1980. See 100 S.Ct. 1320.

Former officers of national bank were convicted before the United States District Court for the Southern District of New York, Thomas P. Griesa, J., of making false entries in bank records with intent to defraud and CONSPIRING to perpetrate such frauds on the federal Government, bank shareholders and prospective lenders, and they appealed. The Court of Appeals, Mansfield, Circuit Judge, held that: (1) although improper, instruction likening job of jury's drawing an inference to a spectator at a football game who, having observed quality of play, makes certain inferences concerning the coaching provided was not reversibly erroneous; (2) since object of alleged CONSPIRACY was to falsify operating statements for the first quarter to make it appear that the bank had earned a profit, it was not necessary that each coconspirator have comprehended full scope of the scheme, i. e., false evaluation of securities as well as fictitious foreign exchange transactions; (3) instruction that term "individual" in false entry statute included depositors was not inflammatory; and (4) although deceptive foreign exchange transactions actually took place and were reflected in bank's books, the subject entries, showing a profit rather than loss, were "false entries".

Affirmed.

[1] CRIMINAL LAW k1172.2
110k1172.2
Although circumstantial evidence instruction likening the job of the jury drawing an inference to the spectator at a football game who, having observed the quality of play, makes certain inferences concerning the coaching being provided, was ill-conceived, confusing and inappropriate it did not require reversal of conviction of high bank officers of making false entries in bank records with intent to defraud as jury was otherwise advised of nature of circumstantial evidence, was repeatedly told to use common sense in drawing inferences and court carefully stated that "football coach" example was an illustration and had nothing to do with the case. 18 U.S.C.A. ss 1005, 1014.

[2] CRIMINAL LAW k785(3)
110k785(3)
It is the trial court's duty, in instructing on witness' credibility, to give balanced instructions.

[3] CRIMINAL LAW k785(3)
110k785(3)

Where the trial court points out that testimony of certain types of witnesses may be suspect and should therefore be scrutinized and weighed with care, such as that of accomplices or coconspirators, those who have made plea bargains or are awaiting sentence, those who have been granted immunity, and defendants, it must also direct the jury's attention to the fact that it may well find such witnesses to be truthful in whole or part; in short, the court should not emphasize the suspect nature of the testimony of certain witnesses without pointing out that they may be believed.

[4] CRIMINAL LAW k811(5)
110k811(5)
Although a trial judge has the right to comment on credibility of specific witnesses, such right is limited and its exercise is appropriate only when necessary to assist the jury.

[5] CRIMINAL LAW k742(1)
110k742(1)
Credibility issues are left solely to the jury which, as the conscience of the community, is expected to act with sound judgment.

[6] CRIMINAL LAW k785(3)
110k785(3)
Although credibility was essential issue in view of diametrically conflicting testimony of government witnesses, including accomplices, and the defendants, charge on credibility was not weighted in favor of the Government where court pointed out that the Government is frequently required to rely on participants, accomplices and persons who have committed crimes and that jury must view such witnesses with particular caution and scrutinize them with great care and it did not follow that because a person had a vital interest he was not capable of telling the truth and that it was for the jury to determine credibility.

[7] BANKS AND BANKING k62
52k62
Alleged motives of bank officials, charged with falsifying operating statements with intent to defraud, were relevant but were not elements of the crime and were not required to be proven. 18 U.S.C.A. ss 371, 1005, 1014.

[7] CRIMINAL LAW k342
110k342
Alleged motives of bank officials, charged with falsifying operating statements with intent to defraud, were relevant but were not elements of the crime and were not required to be proven. 18 U.S.C.A. ss 371, 1005, 1014.

[8] CONSPIRACY k40.1
91k40.1
To be convicted as a member of a CONSPIRACY, a defendant need not know every objective of the CONSPIRACY, every detail of its operation or means employed to achieve the agreed-upon criminal objective or even the identity of every coconspirator; however, there must be agreement on the essential nature of the plan and on the kind of criminal conduct in fact contemplated. 18

[9] CONSPIRACY k24.5
91k24.5
Formerly 91k23
A CONSPIRATOR must agree to and participate in a scheme which he knows to have an illegal objective. 18 U.S.C.A. s 371.

[10] CONSPIRACY k40.1
91k40.1
If in course of a CONSPIRACY there occur other illegal acts not specifically contemplated by an individual CONSPIRATOR but reasonably akin to the anticipated illegality and in furtherance or in consequence of the scheme, a CONSPIRATOR may not on that account escape liability for participation in the CONSPIRACY. 18 U.S.C.A. s 371.

[11] CONSPIRACY k48.2(2)
91k48.2(2)
CONSPIRACY instruction in prosecution of high bank officers for CONSPIRING to make false entries in bank records was sufficient, notwithstanding contention that CONSPIRACY involved two distinct transactions, i. e., false evaluation of securities and fictitious foreign exchange transactions, since instructions described general goal and various federal offenses alleged to have been committed, with court selecting one of the alleged objects in interest of simplicity and expounding thereon, and jury was told that to convict they must find a single CONSPIRACY of the type alleged and that acquittal was necessary if jury found two separate, independent CONSPIRACIES. 18 U.S.C.A. ss 371, 1005.

[12] CONSPIRACY k40.1
91k40.1
As long as jury, in prosecution of high bank officials for CONSPIRING to make false entries in bank records with intent to defraud and making false statements to federally insured bank to influence fulfillment of loan commitment, found one CONSPIRACY to falsify bank books in order to produce a false income statement and that each defendant played a part in the CONSPIRACY it was unnecessary for the Government to establish that each defendant agreed to each of the unlawful acts, i. e., false evaluation of securities and entry into fictitious foreign exchange contracts, or means that might be used to achieve that goal. 18 U.S.C.A. ss 371, 1005, 1014.

[13] CRIMINAL LAW k1173.2(2)
110k1173.2(2)
Even if it was error to deny bank president a charge that if jury found a CONSPIRACY to falsify quarterly earnings statement solely by fictitious exchange transactions it should not convict him, error was harmless as jury could have found that CONSPIRACY was not carried out solely by fictitious foreign exchange transactions. 18 U.S.C.A. ss 371, 1005, 1014.

[14] CONSPIRACY k48.2(2)

91k48.2(2)
Evidence that each defendant, including high bank officers, in his own way joined in a scheme to falsity bank's earnings statement was sufficient to permit the giving of a Pinkerton charge with respect to the reasonably foreseeable crimes that might be committed by fellow CONSPIRATORS in furtherance of that scheme, especially since obvious purpose of falsifying earnings statement was to commit frauds, notwithstanding that there was little evidence of bank president's knowledge of or participation in fictitious foreign exchange transactions or of chairman of the board's participation in false evaluation of the trading account securities. 18 U.S.C.A. ss 371, 1005, 1014.

[15] INDICTMENT AND INFORMATION k144.1(1)
210k144.1(1)
Count charging senior vice-president of bank's investment division with making false entries in bank records with intent to defraud by causing bank to enter into fictitious foreign exchange contracts showing a nonexisting profit would not be dismissed on ground that the vice-president had not personally participated in foreign exchange transactions since under the evidence the jury could find that the vice-president joined a CONSPIRACY to falsify bank's first-quarter financial statement and could reasonably anticipate that his partners in crime might commit other criminal acts, including use of fictitious foreign exchange transactions. 18 U.S.C.A. ss 371, 1005.

[16] CONSPIRACY k48.2(2)
91k48.2(2)
Pinkerton charge that CONSPIRACY count related to bank entry statute and that some substantive counts related to Securities Exchange Act and false statements statute but that if any defendant was found guilty on CONSPIRACY count the jury was obliged to reconsider guilt on substantive count under consideration was not objectionable as committing jury, once it found a CONSPIRACY to violate one statutory provision, to hold a CONSPIRATOR liable for violations of other provisions not among the objects of the CONSPIRACY and not done in furtherance thereof, especially when viewed in context and considering the evidence as to substantive violations. 18 U.S.C.A. ss 371, 1005, 1014, 1623; Securities Exchange Act of 1934, ss 10(b), 32, 15 U.S.C.A. ss 78j(b), 78ff.

[17] CRIMINAL LAW k62
110k62
A person who causes an innocent party to commit an act which, if done with the requisite intent, would constitute an offense may be found guilty as a principal even though he personally did not commit the criminal act. 18 U.S.C.A. s 2(b).

[18] CRIMINAL LAW k792(1)
110k792(1)
Since there was sufficient evidence to permit finding that at least one defendant or coconspirator participated in each of the alleged criminal acts, either as a principal, an aider and abettor or under Pinkerton as a

coconspirator who could reasonably foresee that substantive crimes might be committed by fellow CONSPIRATORS in furtherance of the CONSPIRACY and absent indication that there was a failure to prove that a defendant committed one of the alleged criminal acts or participated knowingly in commission of such an act by another, refusal to require jury first to identify the principals and then, the aiders and abettors was proper. 18 U.S.C.A. ss 2, 371.

[19] CRIMINAL LAW k792(3)
110k792(3)
It is sufficient that the court instruct the jury that in order to convict someone on basis of aiding and abetting, the criminal actions must have been committed by someone. 18 U.S.C.A. s 2.

[20] JURY k31.3(1)
230k31.3(1)
Formerly 230k31(11)
Instruction that term "any * * * individual person" in statute governing false entries in bank records includes depositors and other customers did not destroy bank officers' right to an impartial jury on ground that most jurors were undoubtedly bank depositors since there was no indication that any juror was a depositor of subject bank and there was nothing inflammatory or unfair about such accurate description of the type of person whom the statute is designed to protect or an indication that any defendant was prejudiced. 18 U.S.C.A. s 1005.

[21] CRIMINAL LAW k1172.1(1)
110k1172.1(1)
To warrant reversal, error in instructions must be shown to have been prejudicial or likely to have been so.

[22] WITNESSES k270(2)
410k270(2)
Although showing that prior to false evaluation of bank securities at issue bank's vice-chairman of investment division engaged in prior similar misconduct without knowledge of vice-president would have some probative value on issue whether he was acting under latter's direction at time of instant transactions it would not preclude a finding that both officers, charged with making false entries in bank records, had joined together in such misconduct and, hence, trial court properly limited vice-president's cross-examination of vice-chairman as to prior transactions, permitting evidence as to one transfer on ground that matter had been opened up on cross-examination. 18 U.S.C.A. s 1005.

[23] CRIMINAL LAW k1153(4)
110k1153(4)
Trial court ruling limiting cross-examination is tested by the standard of whether exclusion of evidence constituted clear abuse of discretion.

[24] CRIMINAL LAW k338(1)

110k338(1)
Refusal to permit bank's chief executive officer, charged with making false entries, to testify that several weeks after principal conduct at issue he opposed issuance of press release, as favored by principal stockholder, which failed to disclose certain hidden foreign exchange transactions unrelated to transactions at issue was not abuse of discretion since any dispute between the pair was collateral to matters at issue. 18 U.S.C.A. ss 1005, 1014.

[25] WITNESSES k269(8)
410k269(8)
It was not abuse of discretion, in prosecution of bank officials for making false entries, to preclude chief administrative officer from cross-examining vice-chairman of investment division to bring out that the latter had vigorously opposed before board of directors a management proposal to disband municipal dealer department, which evidence allegedly indicated unlikelihood that vice-chairman would have done president's bidding to falsely value securities by backdating transfers from trading to investment account, as such was outside scope of cross-examination, was tenuous and would have opened up collateral matters. 18 U.S.C.A. s 1005.

[26] CRIMINAL LAW k427(5)
110k427(5)
Testimony of partner in CERTIFIED public accounting firm that he was told by senior vice-president of bank's investment division that backdated transfer of government securities had been ordered by someone superior to vice-chairman of investment division was not objectionable as a postconspiracy narrative as to the president, charged with making FALSE entries, as there was sufficient independent evidence that a CONSPIRACY was still alive on date of statement and that president and senior vice-president were participants. Fed.Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A.; 18 U.S.C.A. s 1005.

[27] CRIMINAL LAW k361(1)
110k361(1)
Underlying corporate memorandum authorizing transfer of securities from trading to investment account and entry confirming the instruction were properly admitted, as a record made in regular course of business, in prosecution of bank officers for making false entries in bank records, and, hence, testimony of chief financial officer that after chief administrative officer left the bank the financial officer ordered vice-president of investment division to reverse such transfers and to revise quarterly financial statement was admissible to explain the background of the document and, in any event, assuming that admission was error, it was harmless. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.

[27] CRIMINAL LAW k436(3)
110k436(3)
Formerly 110k436
Underlying corporate memorandum authorizing transfer of securities from trading to investment account and entry confirming the instruction were properly admitted, as a record made in regular course of business, in prosecution of

bank officers for making false entries in bank records, and, hence, testimony of chief financial officer that after chief administrative officer left the bank the financial officer ordered vice-president of investment division to reverse such transfers and to revise quarterly financial statement was admissible to explain the background of the document and, in any event, assuming that admission was error, it was harmless. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.

[27] CRIMINAL LAW k1169.1(2.1)
110k1169.1(2.1)
Formerly 110k1169.1(2)
Underlying corporate memorandum authorizing transfer of securities from trading to investment account and entry confirming the instruction were properly admitted, as a record made in regular course of business, in prosecution of bank officers for making false entries in bank records, and, hence, testimony of chief financial officer that after chief administrative officer left the bank the financial officer ordered vice-president of investment division to reverse such transfers and to revise quarterly financial statement was admissible to explain the background of the document and, in any event, assuming that admission was error, it was harmless. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.

[28] CRIMINAL LAW k627.7(2)
110k627.7(2)
Rule obligating the government, on request, to permit a defendant to inspect any relevant written or recorded statements made by him and in possession of the government is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.

[29] CRIMINAL LAW k627.7(2)
110k627.7(2)
Neither ten-year-old letter written by chairman of board of directors of national bank, at a time he was aspiring to presidency, urging that the head of the bank closely follow its earnings nor notations in his handwriting on various financial statements and agenda of board meetings around time of alleged false entries at issue and after he had become chairman were required to be disclosed under criminal discovery rule; such statements became "relevant" for impeachment only after he testified that he did not personally keep acquainted with day-to-day operations, and prior to trial he had been provided with an inventory of such documents and was not hindered in preparing a defense. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.
See publication Words and Phrases for other judicial constructions and definitions.

[30] CRIMINAL LAW k627.7(2)
110k627.7(2)
Rule obligating the government, on request, to permit a defendant to inspect

any relevant statement made by him within government's possession does not obligate the government to anticipate every possible defense, assume what a defendant's trial testimony will be if he decides to testify, and then furnish him with otherwise irrelevant material that might conflict with his testimony; with respect to any such material, if any obligation to disclose exists under the rule, it is satisfied by making underlying files available to defendant prior to trial. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.

[31] CRIMINAL LAW k1166(10.10)
110k1166(10.10)
Formerly 110k1166(1)
Any violation of rule obligating the government, on request, to permit a defendant to inspect any relevant written statement made by him and in possession, etc., of the government did not require reversal of conviction absent showing of any legally cognizable prejudice as result of failure to have the documents in advance of trial. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.

[32] CRIMINAL LAW k726
110k726
Had defendant's summation been the first occasion for argument that profit figure which defendant allegedly had told codefendant the bank's foreign exchange department must have to avoid showing a loss was product of codefendant's imagination, Government's reply that adding machine tape showing loss on liquidation of government securities almost precisely matched such figure might be persuasive on claim of improper rebuttal as the Government could argue that it had no intention of referring to the computation until source of figures was challenged, although fairness would dictate that a copy be furnished defendant in advance instead of confronting him with a new theory, albeit based on record evidence, at last minute of a long trial. Fed.Rules Cr.Proc. Rule 29.1, 18 U.S.C.A.

[33] CRIMINAL LAW k1171.7
110k1171.7
Where Government represented that it was only after defendant's summation that it determined that total losses from bank's liquidation of government securities almost precisely matched figure used in the summation, wherein it was stated that figure which defendant allegedly told codefendant the bank must have to avoid showing a loss was product of codefendant's imagination, with Government referring to identity of such figures in rebuttal summation, reversal was not required in view of trial court's offering defendants an opportunity to respond by way of surrebuttal; also, absent showing that computation was erroneous, refusal of cautionary instruction was not abuse of discretion. Fed.Rules Cr.Proc. Rule 29.1, 18 U.S.C.A.; 18 U.S.C.A. s 1005.

[34] INDICTMENT AND INFORMATION k127
210k127
Each allegedly false financial statement of national bank could properly be charged in a separate count against defendant former officers. 18

[35] CRIMINAL LAW k700(3)
110k700(3)
Formerly 110k700
Former chairman of board of national bank was not denied a fair trial on charges of making false entries on ground that government suppressed exculpatory evidence by withholding evidence supporting multicount indictments filed against codefendants charging latter with falsifying average monthly foreign exchange profit and loss report and permitting one defendant to testify that he engaged in falsification on only three occasions during relevant period since the fraudulent transactions during such period were relatively few and were reflected in monthly and quarterly statements which were many and some statements were also charged as violations of other statutes. 18 U.S.C.A. s 1005.

[36] CRIMINAL LAW k1130(3)
110k1130(3)
Unjustified scurrilous statements indicating a reckless disregard for facts of record exceed the bounds of responsible advocacy. ABA Code of Professional Responsibility, DR7-102(A)(1, 2).

[37] CRIMINAL LAW k700(3)
110k700(3)
Formerly 110k700
Although following conviction of former chairman of board of national bank for making false entries superseding indictments were filed against principal stockholder and director of holding company charging the pair with causing the bank to conceal losses by misvaluing securities, the chairman was not deprived of a fair trial by failure to disclose evidence underlying such indictments notwithstanding that misvaluation of securities underlay false entries count against chairman, since subject indictments did not refer to the others' personal participation in the evaluation but merely to acts committed by their coconspirators in furtherance of CONSPIRACY to falsify earnings statement for subject quarter, for which Pinkerton liability would attach. 18 U.S.C.A s 1005.

[38] CONSTITUTIONAL LAW k257
92k257
Defendant's due process rights were not violated by failure to grant use immunity to alleged principal accomplice and coconspirator, who was named in a separate indictment charging participation in same false foreign exchange transactions as those forming a major part of case against defendant former bank officer, as there was no representation that if granted immunity the accomplice would furnish specific exculpatory evidence unobtainable from any other source and case was not one where government deliberately manipulated grants of immunity to get an unfair advantage. 18 U.S.C.A. s 1005; U.S.C.A.Const. Amends. 5, 14.

[39] SECURITIES REGULATION k195

349Bk195
Counts charging former officers of national bank with using interstate commerce to employ manipulative and deceptive devices in connection with purchase and sale of bank stock by use of false financial statements was not insufficient as failing to contain specific allegations of misconduct and failing to set forth all elements of the crime, where each count followed precisely the language of section 10(b) of the Securities Exchange Act, and by incorporating by reference specified paragraphs of CONSPIRACY count the Government established nature of alleged conduct in sufficient detail to enable defendants to prepare a defense and bar future prosecution for the same offense. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[40] INDICTMENT AND INFORMATION k144.1(3)
210k144.1(3)
Counts charging former officer of national bank with manipulative or deceptive practices in connection with purchase and sale of bank stocks by issuance of false financial statements were not required to be dismissed on ground of alleged failure to prove any reliance by specific purchasers on the false statements since the government need only prove that a false representation is one that a reasonable stockholder would rely on in purchasing or selling the relevant corporate shares, and trial court so instructed the jury. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[41] SECURITIES REGULATION k60.48(1)
349Bk60.48(1)
Formerly 349Bk119
Same standard, i. e., proof that the false representation is one that a reasonable stockholder would rely on in purchasing or selling relevant corporate shares, applies to civil and criminal liability under the securities law. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[41] SECURITIES REGULATION k193
349Bk193
Same standard, i. e., proof that the false representation is one that a reasonable stockholder would rely on in purchasing or selling relevant corporate shares, applies to civil and criminal liability under the securities law. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[42] FRAUD k68.10(1)
184k68.10(1)
A false entry statute may be violated by entering on the books a transaction known to be fraudulent, even though the entry might be accurate. 18 U.S.C.A. s 1005.

[43] FRAUD k69(2)
184k69(2)
While an entry is not false merely because the underlying transaction is illegal, counts charging making of false entries in bank records, as based on deceptive foreign exchange transactions showing the bank to have earned a profit, were not to be dismissed since profits shown on records of such

transactions were known by bank officials to be false and fictitious and were concocted for very purpose of distorting financial statement; such was a violation of statute prohibiting making of false entries in bank records with intent to defraud. 18 U.S.C.A. s 1005.

[44] JURY k136(7)
230k136(7)
Trial court's grant of one extra peremptory challenge to the Government without defendant's consent, after granting three peremptories to the defendants, although not in compliance with criminal rule, was not shown to have resulted in selection of a jury that was underrepresentative of the community or biased in any other way and proportional advantage accorded defendants by the rule, ten peremptories as against six for the Government, was approximately maintained, although court's action was improper absent defense counsel's consent. Fed.Rules Cr.Proc. Rule 24(b), 18 U.S.C.A.

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Harold R. Tyler, Jr., New York City (Michael B. Mukasey, Kenneth A. Caruso, Marjorie T. Coleman, Mark R. Hellerer, Patterson, Belknap, Webb & Tyler, New York City, of counsel), for defendant-appellant Luftig.

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John J. Kenney, Asst. U. S. Atty., New York City (Robert B. Fiske, Jr., U. S. Atty. for the Southern District of New York, Mary Ellen Kris, Charles M. Carberry, Richard D. Weinberg, Asst. U. S. Attys., New York City, of counsel), for appellee.

Moore, Berson, Liflander & Mewhinney, New York City (Earle K. Moore, Matthew L. Lifflander, New York City, of counsel), for amici curiae Group of Bankers.

Before LUMBARD, MANSFIELD and MESKILL, Circuit Judges.

MANSFIELD, Circuit Judge:

Harold V. Gleason, former Chairman of the Board of the Franklin National Bank [FNB], Paul Luftig, its former president and chief administrative officer, and J. Michael Carter, its former senior vice president in charge of its Investment Division, appeal from judgments of the District *9 Court of the Southern District of New York, entered on March 27, 1979, by Judge Thomas P. Griesa after an eight-week jury trial, convicting them (except for dismissal of charges in Count Three against Carter) of (1) making false entries in the bank's records on or about March 31, 1974, by false evaluation of securities with intent to defraud, thereby concealing operating losses in excess of $5 million and making it appear that FNB had a profit of $79,000, for the first quarter of 1974, all in violation of 18 U.S.C. s 1005 [FN1] (Count Two), (2) making false entries in the bank's records on or about March 31, 1974, with intent to defraud, by causing FNB to enter into fictitious foreign exchange contracts showing a non-existent profit in excess of $2 million, which falsely made the bank appear to have a profit for the first quarter of 1974 when in fact it had suffered heavy losses, also in violation of 18 U.S.C. s 1005

(Count Three),[FN2] (3) making false statements to the Manufacturers Hanover Trust Company on or about April 18, 1974, to influence its action in fulfilling a $35 million loan commitment previously made to FNB, by submitting to Manufacturers Hanover a consolidated income statement for the first quarter of 1974, ending March 31, showing a profit of $79,000 when in fact the bank had suffered losses of over $7 million, in violation of 18 U.S.C. s 1014 [FN3] (Count Four), (4) employing a manipulative scheme or device during March 1974 and on various dates in April and May 1974, in connection with the purchase and sale of FNB stock by using the foregoing falsifications of bank records to make it appear that the bank had realized a profit for the first quarter of 1974, when in fact it had suffered heavy losses, in violation of 15 U.S.C. ss 78j(b) and 78ff [FN4] (Counts Five through Fourteen), and (5) CONSPIRACY to commit each of the foregoing crimes, in violation of 18 U.S.C. s 371 (Count One). In addition, Luftig alone was convicted of making false material declarations *10 on or about March 15, 1977, with respect to some of the matters that are the subject of the foregoing charges in his testimony before a grand jury in violation of 18 U.S.C. s 1623 (Count Fifteen). Appellants claim that numerous errors were committed in the trial of the case. After careful consideration of each of these contentions we affirm the convictions.

FN1. Title 18 U.S.C. s 1005 provides in pertinent part:
"Whoever makes any false entry in any book, report, or statement of such BANK with intent to injure or defraud such BANK, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such BANK, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or EXAMINER appointed to examine the affairs of such BANK, or the Board of Governors of the Federal Reserve System
"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

FN2. The charge in Count Three against Carter was dismissed by the court at the end of the Government's case.

FN3. Title 18 U.S.C. s 1014 provides in pertinent part:
"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the national Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

FN4. Title 15 U.S.C. s 78j(b) provides:
"It shall be unlawful for any person, directly or indirectly, by the use of

any means or instrumentality of interstate commerce or of the mails.
"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."
Title 15 U.S.C. s 78ff provides:
"(A)ny person who willfully and knowingly makes, or causes to be made any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both . . . ."

The evidence, viewed favorably to the Government (as it must be at this stage, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942)), shows that, although FNB suffered an operating loss in excess of $7 million during the three-month period ending March 31, 1974, it issued a financial statement on April 18, 1974, for the same first quarter of 1974 falsely representing that it had realized earnings of approximately $79,000. The financial statement was of special significance to FNB because of its anticipated influence in obtaining Government approval of a proposed FNB merger with Talcott National Corporation, a factoring and finance company, and in borrowing some $35 million from Manufacturers Hanover to be used by FNB for the purchase from Michele Sindona, the principal stockholder of FNB, of his interest in Talcott.[FN5]

FN5. FNB, with deposits at the end of 1973 of $3.7 billion and assets of $5 billion, was a subsidiary of Franklin New York Corporation, registered with the Federal Reserve Bank of New York as a bank holding company. In 1972 Sindona purchased 21.6% of the holding company's outstanding stock for $40 million. In the spring of 1973 Sindona, through a company controlled by him (Fasco) purchased 1.6 million shares of Talcott for $27 million, which he later offered to sell to FNB for a price equal to his cost plus expenses and interest, subject to approval of the Board of Governors of the Federal Reserve Bank pursuant to the Bank Holding Company Act of 1956.

FNB had begun to suffer substantial losses during the first three months of 1974, partly due to a decline in the market value of government securities, which had been acquired with a view to realization of a profit when interest rates declined, but which then fell in value when interest rates increased. By the end of March those losses together with others had swelled to approximately $7 million. The loss was concealed to the extent of about $5 million by falsely showing FNB-owned securities as worth more than the prices at which they should have been carried. The balance of the loss was concealed by having FNB engage in four fictitious foreign exchange transactions with European banks controlled by Sindona and his colleague Carlo Bordoni, who at Sindona's request had served as a director of the holding company, Franklin New

York Corporation, which controlled FNB. These bogus transactions made it appear, by using fictitious exchange rates, that FNB had a $2.2 million unrealized profit when in fact its foreign exchange department had suffered a loss.

The false evaluation of securities was accomplished in part by backdating two transfers of government bonds from FNB's bond trading account to its investment account at inflated prices and by one such transfer of municipal and corporate securities at prices which had not been reduced to show losses in value. Securities in the bank's trading account, having been acquired for resale, were required to be carried at the lower of cost or market value, which was computed by determining the value of each security so held at the end of each month. Securities held in FNB's investment or portfolio account, on the other hand, were carried at cost with a straight line adjustment to amortize premiums or discounts. Upon transfer of a security from the bank's trading to its investment account, the bank was required to value the security at the lower of cost or market value on the date of transfer.

On March 26, 1974, Luftig, FNB's President, faced with mounting losses on the part of the bank, learned this evaluation rule from John Sadlik, FNB's chief financial officer, and asked Sadlik whether such a transfer could be backdated if instructions previously given to make the transfer had not been executed. After checking with Cornell Wright of Ernst & Ernst, FNB's independent certified public accountants, *11 Sadlik responded that backdating was permissible if there was documentary verification of the earlier instructions. Luftig then advised Sadlik that he had documentation showing that instructions had been given on March 8, 1974, to transfer $100 million in United States Treasury certificates from the bank's trading to its investment account. The market value of these securities on March 11, 1974, the next business day after March 8th, had been approximately $2 million higher than their value on March 26. Sadlik thereupon arranged for Wright to visit the bank on March 27 in order to verify the documentation of the March 8th instruction which Luftig represented he had given.

On March 27, 1974, according to the testimony of Howard D. Crosse, the bank's Vice-Chairman in charge of its Investment Division, Luftig advised Crosse that if Ernst & Ernst could be convinced that the claimed instruction to transfer the securities had been given on March 8th it would not object to the bank's evaluating the securities as of March 11, 1974, and asked Crosse in substance to assist in making this possible and falsely to tell Wright that the instruction had been given. As Crosse left the room, he first noticed Gleason standing in the doorway. Gleason patted him on the shoulder and said, "Good luck." At a meeting with Wright and Sadlik later the same day, after initial documentation proved unacceptable to Ernst & Ernst, Luftig falsely stated to Wright that the instruction had been given by him earlier in March and prepared a confirmatory memorandum.

On the following day, March 28, at a meeting with Sadlik, Wright and a more senior Ernst & Ernst partner, James Russell, Crosse corroborated Luftig's fraudulent representation by falsely confirming that he had been instructed by Luftig in early March to make the transfer and had relayed the instruction to Carter. The failure to carry out the instruction was then explained to Wright and Russell by J. Michael Carter, the bank's Senior Vice-President in charge of its Investment Division, who falsely told them that the transfer had not been

made because he had in effect misunderstood the earlier instruction as one to liquidate rather than to make a transfer between accounts.[FN6] Crosse added support to this explanation by furnishing to Ernst & Ernst his own handwritten memorandum falsely summarizing directions supposedly given to him by Luftig in early March and stating that the failure to execute them had only just been discovered.

FN6. Even assuming that an order to liquidate had been made by Luftig, Carter at trial testified it was not made until March 18, 1974.

Relying upon these false representations Ernst & Ernst did not object to the bank's March 29 transfer of the $100 million in Government securities to its investment account at March 11 market values, which enabled FNB to conceal a loss of about $2 million.

In the meantime, on March 27, 1974, Carter directed employees of the bank to transfer $62.5 million in U.S. Treasury and government agency bonds from the bank's trading account to its investment account at cost rather than at lower market prices in response to his false representation in writing that the securities had been purchased by traders without his consent when he had been instructed to keep security trading positions as low as possible. In fact, as Carter later conceded, the purchases had been authorized by him and he had not received any such instructions to the contrary prior to March 20, 1974. The effect of the transfer of $62.5 million of Government securities at cost was to conceal approximately $2 million in losses suffered by the bank during the first quarter of 1974.

The third transfer, which concealed a loss of approximately another $1 million during the first quarter, was made after Crosse, on or about April 12, 1974, was advised by Carter that municipal and corporate securities in the trading account had not been "marked to market" (i. e., evaluated at the lower of cost or market) at the end of March as was required. This information *12 was passed on by Crosse to Luftig who told Crosse to "transfer them to portfolio (investment account) as best you can." Crosse thereupon directed Carter to transfer the securities to the bank's investment account at March 11 market values, thus concealing an intervening decline in market value of approximately $1 million that had occurred by March 31.

The generation of approximately $2.2 million in fictitious profits from contrived foreign exchange transactions for the quarter ending March 31, 1974, was arranged by Gleason and Peter R. Shaddick, Executive Senior Vice-President of FNB and director of Franklin New York Corp., who was in charge of its International Division. Following a conference with Sindona in London on March 26, 1974, Gleason returned to New York where he advised Shaddick on March 27, 1974, that unless the foreign exchange department showed a $700,000 profit for the month of March the bank would have a loss for the quarter. After advising Gleason that the department would actually have a loss for the month of March Shaddick, upon learning from Andrew N. Garofalo, the head of the bank's foreign exchange department, that the loss would be from $1 million to $11/2 million, told Garofalo that they would probably have to "pass an entry" with Bordoni that would wipe out the loss and create an apparent profit of $700,000. The term "pass an entry" meant entering into a fictitious foreign exchange contract with a European bank controlled by Sidonona and Bordoni, showing a purchase or

sale of foreign currencies for future delivery at prices that would permit the bank to show a profit on the bank's earning statement.

Shaddick thereupon revealed to Gleason the loss and the steps that would be taken to reflect the fictitious $700,000 profit, receiving the latter's thanks. On March 28, after Bordoni was advised by Gleason of the foreign exchange department's predicament and agreed to help, Shaddick and Bordoni arranged for the FNB to "pass a contract" with the Amincor Bank in Zurich. Gleason was informed of the arrangement by Shaddick. Thereupon, pursuant to instructions from Shaddick, Garofalo entered into four contracts for future delivery of foreign exchange, two with the Amincor Bank and two with Banca Unione in Milan, a bank controlled by Sindona, of which Bordoni was managing director. The contracts were made at fictitiously high exchange rates unrelated to market prices, enabling the bank's foreign exchange department to show an unrealized profit of $2.2 million on the transactions and a $700,000 profit for the quarter.

The foregoing falsifications enabled FNB and its holding company to show a profit of $79,000 in their quarterly statement published and sent on April 18, 1974, to the bank's stockholders and to Manufacturers Hanover Trust Company, whereas in fact FNB had suffered a loss of over $7 million. In the meantime on April 3, 1974, FNB received from Manufacturers Hanover $30 million of the $35 million loan which the latter had obligated itself to make to FNB.

At trial the Government presented its case principally through accomplices (Crosse, Shaddick, Bordoni, Garofalo), various FNB employees, Ernst & Ernst partners Wright and Russell, Government agents, and documentary proof. Each of the three appellants testified in his own defense. Luftig denied knowledge of or participation in the making of any of the alleged false entries. He testified that on March 8, 1974, he had directed Crosse to transfer the $100 million in Government securities from the bank's trading to its investment account, ordering a liquidation of the trading account, and that when he found out on March 26 from Sadlik that the direction for the transfer had not been carried out he asked Sadlik to review the matter with Ernst & Ernst, furnishing a memorandum confirming his earlier instruction and later learning that Ernst & Ernst did not object to the transfer as of the date when the transfer order had been given. Luftig did acknowledge that on April 11, 1974, he had been advised by Crosse that a trader had failed to mark some securities to market.

*13 Carter testified that after the bank had with his approval increased its trading position in government securities by purchasing up to $100 million in December, 1973, he was authorized by Luftig on March 18, 1974, to liquidate these securities at a loss, which he undertook to do over the following weeks; that on March 27 he was instructed by Crosse to transfer all but $100 million of the securities from the trading account to the investment account at cost, with a memorandum noting that the securities being transferred had been purchased without Carter's knowledge and consent at a time when he had been instructed to keep the bank's trading accounts as low as possible; that he gave the instruction and he signed the memorandum knowing it to be false but did it because ordered; that with respect to the March 28 meeting with Sadlik, Crosse, Russell and Wright, he could only recall stating in response to an inquiry that he had heard of a bank transferring securities from its trading account to its investment account but that this had not been done at the Chase Manhattan Bank where he had previously worked; that thereafter at Crosse's directions he had

transferred the $100 million in Government securities at March 11th prices; and that in the first week of April under Crosse's orders he directed that municipal and corporate bonds be transferred to the investment account at cost although they had depreciated in value by $1 million and had not been marked to market at the end of March.

Gleason testified that his duties as Chairman were principally of a customer and public relations nature and that he did not involve himself in the day-to-day operations of the bank. He denied discussing the bank's earnings or the proposed Talcott merger with Sindona at their March 26, 1974, meeting in London, denied asking Shaddick to create a false profit through fictitious foreign exchange transactions or having any conversations about the matter, and denied having known that the bank's financial statement for the first quarter of 1974 was false.

Thus the trial of the case boiled down to a battle of credibility between each of the three defendants, on the one hand, and the Government witnesses, including accomplices, on the other, who gave diametrically opposed testimony with respect to material aspects of each of the alleged dishonest transactions forming the basis of the indictment.

DISCUSSION

Since certain errors claimed by appellants to have been committed during the trial apply to all and some to only specific appellants, we initially consider the jointly-shared arguments. The first of these relates to the trial judge's instructions to the jury, which, including post-instruction discussions with counsel, cover some 157 trial transcript pages and were discussed extensively by the judge with counsel before the charge was given.

The Instructions

(1) Circumstantial Evidence and Credibility

Appellants contend that they were irreparably prejudiced by a portion of the trial judge's charge in which he sought to illustrate the nature of circumstantial evidence and the drawing of inferences by reference to a football game. The pertinent portion of the instruction is footnoted.[FN7] Briefly *14 summarized, it advised the jury that on the basis of common sense and experience a jury could infer from a team's performance on the field what previous instructions and training had been given by the coach and what had been done by the players in preparation for the game, even though the jury had not been present in the locker room or on the training field and hence had not witnessed the instructions and training.

FN7. "Sometimes judges give illustrations to jurors about the use of circumstantial evidence. A familiar one is the one where if you look out the window and see a lot of people with umbrellas, you can infer it's raining. I never know how that is helpful to a jury. You are not really trying to decide whether some weather condition exists, at least I don't know that that's a major problem in this case. But the point is that I think if you thought for a minute you would realize that this is not a novel or unusual or super human kind of process that the lawyers and that the Court have asked you to give consideration to. Frequently in our every-day life, without calling it circumstantial evidence, we draw conclusions about what people must have done, must have thought, and must have said.

"Here is a little illustration that may show you that this is a matter which can well be accomplished by the use of common sense and common good judgment and experience. This is an illustration that quite obviously has nothing to do with the present case. Let's assume that you attend a football game. You see the players and the teams performing certain plays. You observe on the field many details about how well or how poorly the teams perform, whether there are a lot of passes or a lot of runs, whether there are many penalties or few penalties, whether there are many injuries or few injuries, whatever details go on before you.

"Now, on the basis of common experience and common sense, and on the basis of whatever information you know about football and about your observing this game, you can logically and reasonably infer some things about what people did and said and thought before that game and in preparation for that game, although you were not present in the locker room or on the training field and although no witnesses come to tell you what went on. You can infer that there are some things that you will be able to infer about whether the coach gave good or bad training, what instructions he gave, what he must have said in substance, what acts were done by the coach and the players in preparation for that game. There will be some things that a person in the audience could reasonably and logically infer and know beyond any doubt; there will be some things that they could not reasonably and logically infer beyond a doubt. But that kind of thought process, if anybody went through it, would be something which would not be a super human effort or bizarre or unusual.

"Now, you're being asked in this case to not only evaluate the direct evidence but to determine what the circumstantial evidence shows as to what various people did, said, and thought. The question for you is: What you can infer and what you cannot reasonably infer?"

[1] Unquestionably the example used in the instruction was ill-conceived, confusing and inappropriate. Since the three defendants were top officers of the FNB, the example exposed them to the risk that the jury might interpret it as implying that they could be considered to have played the role of "football coaches" who had from behind the scenes directed bank officials or employees on the "team" (e. g., Crosse, Shaddick, Garofalo, etc.) to commit the alleged crimes. As we thought we had made clear in United States v. Dizdar, 581 F.2d 1031 (2d Cir. 1978), the choice of an example too close or analogous to the facts of the case on trial is likely to be more prejudicial than "helpful" and is quite unnecessary when other clearly non-prejudicial examples are available.

Moreover, the example was inaccurate. Experience demonstrates that one cannot logically or reasonably infer that players' actions on a football field are necessarily or even probably the result of a coach's directions or training. It hardly requires an expert to appreciate that some "plays," "passes," "runs," "penalties" and "injuries," see n. 7 supra, may arise from circumstances unrelated to a coach's training or instructions, such as a quarterback's inspiration of the moment or sheer luck or happenstance. Well-trained and coached teams have been known to perform poorly and vice-versa. In effect, therefore, the example could be viewed as an invitation to speculate rather than to use logic and reason in drawing inferences from circumstantial

evidence.
Notwithstanding these weaknesses in the example, we are not persuaded that it calls for a reversal in this case. When the entire charge on the subject is viewed in context, as it must be, see United States v. Hanlon, 548 F.2d 1096, 1101 (2d Cir. 1977); United States v. Guillette, 547 F.2d 743, 750 (2d Cir. 1976), cert. denied, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977); United States v. Gentile, 530 F.2d 461, 469 (2d Cir.), cert. denied, 426 U.S. 936, 96 S.Ct. 2651, 49 L.Ed.2d 388 (1976), we do not view the example as having any serious prejudicial effect. The jury was adequately advised of the nature of circumstantial evidence. It was repeatedly told to use "common sense," "common experience" and "common good judgment" in drawing inferences from facts found by them and that inferences depended on the jury's acting "logically and reasonably." Moreover, before launching *15 into the "football coach" example the court carefully stated "This is an illustration that quite obviously has nothing to do with the present case." We believe it would be denigrating the intelligence of the average jury to conclude that it would forsake its own common sense and experience for the suggestions implied in the court's ill-conceived "example."
Turning to the court's instructions on the subject of credibility, we recognize that the witnesses' credibility was a central issue and played a decisive role in the case, in view of the diametrically conflicting testimony of the Government's witnesses, on the one hand, and the defendants, on the other, with respect to crucial material facts. Appellants contend that with this background the court's charge precluded a balanced assessment of the witnesses' credibility because it failed adequately to warn of the inherently suspect nature of the testimony of the accomplices called by the Government, some of whom had admitted to a series of frauds, perjury and other criminal acts, and others of whom had pleaded guilty pursuant to plea bargains and were awaiting sentence, and because it exaggerated the reasons for distrusting a defendant's testimony. We disagree.
[2][3][4][5] Unquestionably, it is the court's duty, in instructing a jury on the subject of witnesses' credibility, to give balanced instructions. Where the court points out that testimony of certain types of witnesses may be suspect and should therefore be scrutinized and weighed with care, such as that of accomplices or coconspirators, e. g., United States v. Santana, 503 F.2d 710, 715-16 (2d Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 632, 42 L.Ed.2d 649 (1974), those who have made plea bargains or are awaiting sentence, see, e. g., United States v. Corcione, 592 F.2d 111, 116-17 (2d Cir.), cert. denied, 440 U.S. 975, 99 S.Ct. 1545, 59 L.Ed.2d 794 (1979); United States v. Projansky, 465 F.2d 123, 136 (2d Cir.), cert. denied, 409 U.S. 1006, 93 S.Ct. 432, 34 L.Ed.2d 299 (1972); Good v. United States, 410 F.2d 1217, 1221 (5th Cir. 1969), cert. denied, 397 U.S. 1002, 90 S.Ct. 1131, 25 L.Ed.2d 413 (1970), those who have been granted immunity, United States v. DeLoach, 174 U.S.App.D.C. 138, 530 F.2d 990, 994 & n. 5 (D.C.Cir.1975), cert. denied, 426 U.S. 909, 96 S.Ct. 2232, 48 L.Ed.2d 834 (1976), and defendants, United States v. Rucker, 586 F.2d 899, 903-04 (2d Cir. 1978); United States v. Martin, 525 F.2d 703, 707 & n. 3 (2d Cir. 1975), it must also direct the jury's attention to the fact that it may well find these witnesses to be truthful, in whole or in part. United States v. Vega, 589 F.2d 1147, 1154 (2d Cir. 1978). In short, the court should not emphasize the suspect nature of

the testimony of certain witnesses without pointing out that they may be believed. Although a trial judge has the right to comment on credibility of specific witnesses, this right is limited and its exercise is appropriate only when necessary to assist the jury. Quercia v. United States, 289 U.S. 466, 469-71, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). Confidence in our jury system leads us to leave credibility solely to the jury which, as the conscience of the community, is expected to act with sound judgment.

[6] Applying these basic principles here we conclude that Judge Griesa's credibility charge, viewed in its entirety, satisfied all legal requirements and was neither unfair to the appellants nor weighted in favor of the Government's witnesses. The court pointed out that the Government is frequently out of necessity required to rely on participants, accomplices, and persons who have committed crimes including perjury, as witnesses and that "you must view these witnesses with particular caution and scrutinize them with particular care." Similarly, although Judge Griesa noted that a defendant "has a deep personal interest in the result of this prosecution" and "the greatest kind of stake in its outcome" which "creates, at least potentially, a motive for false testimony" and "is of a character possessed by no other witness," which has been the standard language used by district judges for many years, he continued with the same boiler-plate language to the effect that "it by no means follows that simply because a person has a vital interest in the end result *16 of a case he is not capable of telling a truthful, candid, and straight-forward story" and that it was for the jury, after weighing these factors, and giving "the most careful and fair consideration to the testimony of each defendant and to the factors which . . . could weigh for or against its credibility" to determine its credibility. Thus the instructions were balanced and did not preclude the jurors from making a fair assessment of the credibility of the witnesses who had appeared before them.

(2) CONSPIRACY

Appellants contend that since the alleged CONSPIRACY was one to engage in fraudulent falsification of entries (in violation of 18 U.S.C. ss 1005, 1014 and 15 U.S.C. ss 78j(b), 78ff) by means of two distinct types of transactions (i. e., false evaluation of securities and fictitious foreign exchange transactions), the trial judge was not only required to instruct the jury regarding the entire alleged plan or scheme, including all means to be used to effectuate it, but to advise the jury that no defendant could be convicted unless he comprehended its full scope and knew of every means which the jury found to have been employed in furtherance of the CONSPIRACY. They cite United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938), for this proposition. Failure to give such a charge, they claim, allowed the jury to convict defendants who may not have been knowing parties to the entire scheme.

The scope of the CONSPIRACY alleged in the present case, while rather broad and encompassing conduct that would violate several laws, was by the time of trial sufficiently defined to be clearly comprehensible and if proven, to warrant a conviction for violation of 18 U.S.C. s 371.

[7] The objective of the alleged CONSPIRACY was to falsify FNB's operating statement for the first quarter of 1974 so that the bank would appear to have made a profit when in fact it had suffered a loss of over $7 million, and thereby to deceive anybody who might normally be expected to rely on the statement (e. g., federal authorities, lenders, stockholders, etc.) as an

honest and accurate representation of the bank's operations for the quarter. The alleged motives, which were relevant but not elements of the crime and need not be proven, included the desire to gain approval of the proposed Talcott merger by Federal bank authorities. Two principal means were allegedly used to accomplish the goal of the CONSPIRACY: (1) false evaluation of securities, and (2) fictitious foreign exchange transactions.

[8][9][10] Review of a few basic principles of CONSPIRACY law is essential to determine whether the charge here was sufficient. To be convicted as a member of a CONSPIRACY, a defendant need not know every objective of the CONSPIRACY. United States v. DiGeronimo, 598 F.2d 746, 755 (2d Cir. 1979); United States v. Bernstein, 533 F.2d 775, 793-94 & n. 12 (2d Cir.), cert. denied, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1976); United States v. Papadakis, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975), every detail of its operation or means employed to achieve the agreed-upon criminal objective, Blumenthal v. United States, 332 U.S. 539, 557, 68 S.Ct. 248, 92 L.Ed. 154 (1947); United States v. Rosenblatt, 554 F.2d 36, 38 (2d Cir. 1977), or even the identity of every CO-CONSPIRATOR, United States v. Sperling, 506 F.2d 1323, 1340 (2d Cir. 1974); United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir.), cert. denied, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974). There must, however, be agreement on the "essential nature of the plan," Blumenthal v. United States, supra, and on the "kind of criminal conduct . . . in fact contemplated." United States v. Gallishaw, 428 F.2d 760, 763 n. 1 (2d Cir. 1970). See also United States v. Rosenblatt, supra, 554 F.2d at 38-39. In addition

> "a person may be held to intend that which is the anticipated consequence of a particular action to which he agrees, when that action is unreasonable in view of that consequence."

Developments in the Law CONSPIRACY, 72 Harv.L.Rev. 920, 932 (1959). See also 1 *17 Wharton's Criminal Law and Procedure s 90, at 197 (1957). In short, the CONSPIRATOR must agree to and participate in a scheme which he knows to have an illegal objective. If, in the course of the CONSPIRACY, there occur other illegal acts not specifically contemplated by an individual CONSPIRATOR but reasonably akin to the anticipated illegality and in furtherance or in consequence of the scheme, the CONSPIRATOR may not on that account escape liability for participation in the CONSPIRACY.

[11] With these principles in mind we are satisfied that Judge Griesa's CONSPIRACY charge was sufficiently clear to provide the jury with the basic legal principles it needed to determine whether there was a CONSPIRACY in violation of 18 U.S.C. s 371 and whether each defendant joined it with knowledge of its illegal objective. At the outset he accurately summarized Count One as charging generally that the three defendants "CONSPIRED to falsify the first-quarter 1974 financial statement of the Franklin National Bank, for various purposes." Having thus described the general goal, Judge Griesa described the various federal offenses which were alleged to have been committed in the course of the CONSPIRACY and correctly noted that in order to convict a defendant the jury need not find that he "CONSPIRED to achieve all of the objects alleged or to violate all of the statutes or rules referred to." (A.67).

The court's next step, stated as being in the interest of simplicity, was to select one of the alleged objects of the CONSPIRACY violation of 18 U.S.C. s

1005, which makes it a crime for an officer or director of a national bank to make a false entry in a report or statement of the bank with the intent to defraud as the vehicle for explaining the basic elements that must be proved beyond a reasonable doubt to establish the alleged CONSPIRACY. The court properly instructed that there must be proof of an agreement between two or more persons "to make a false entry, namely, the $79,000 net income item in the statement of earnings of the Franklin National Bank for the first quarter of 1974, with the purpose of defrauding or deceiving;" that "the particular defendant you are considering, knowingly joined in the CONSPIRACY;" and "that at least one of the CONSPIRATORS committed at least one overt act charged in the indictment." The jury was then accurately instructed that the FNB was a national bank within the meaning of s 1005 and that the $79,000 item in its first quarter statement of earnings was an "entry," as were the other figures in the quarterly statement including the earnings figures of $1,301,000 for the trading account and $2,454,000 for the foreign exchange trading account.

After defining accurately the term "false entry," "defraud," and "intent to deceive" as used in the statute and indictment, the district judge focused on the two means charged in Paragraphs 5 and 6 of Count One of the indictment as those whereby the CONSPIRACY was allegedly to be effectuated, i. e., by concealment of depreciation in the value of securities in the trading account and by fictitious foreign exchange contracts to create the false appearance of profits, pointing out that the jury was not required to find that both means had been used in order to convict the defendants, and that it might convict all three defendants if it found they had CONSPIRED to falsify the financial statement and used either or both means. This instruction was qualified by the statement that Carter could not be found guilty if the jury found that the CONSPIRACY was solely to falsify through foreign exchange contracts. The reason for this qualification and the court's dismissal of the Count Three charge (fictitious foreign exchange contracts) against Carter was that there was no evidence that he had anything to do with such contracts. Lastly, the court properly charged the jury that to convict on the CONSPIRACY count it must find a single CONSPIRACY of the type alleged. It also advised the jury that if it found two separate independent CONSPIRACIES it must acquit.[FN8]

FN8. This instruction was more favorable to the defendants than the law required, since it is subject to the qualification that where there is proof of the CONSPIRACY charged in an indictment, a finding of other CONSPIRACIES would not mandate acquittal. United States v. Tramunti, 513 F.2d 1087, 1108 (2d Cir.), cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).

*18 [12] Thus the CONSPIRACY instructions were adequate and conformed to basic principles of CONSPIRACY law as they have evolved. As long as the jury found one CONSPIRACY to falsify the bank's books in order to produce a false income statement for the first quarter of 1974 and that each defendant played a part in that CONSPIRACY it was unnecessary for the Government to establish that each defendant agreed to each of unlawful acts or means that might be used to achieve that goal.

It hardly necessitated any great mental gymnastics for any reasonable person logically to conclude in the present case that when a bank officer participated

in the falsification of bank entries designed to hide a huge depreciation in the value of the bank's assets he did so for the purpose of enabling the bank to falsify its quarterly financial statement, not for his own edification or to alter the bank's internal bookkeeping system but to mislead others who would normally rely upon the statement as a true representation of the bank's financial picture. Any major participant aware of the ultimate objective and its achievement through one type of false entry could also reasonably foresee that other types of entry falsification, such as fictitious foreign exchange transactions, might well be used to achieve that goal. There was an abundance of evidence from which the jury could infer that each of the appellants agreed to the general objective of fraudulently falsifying FNB's first quarter 1974 earnings statement.

Our earlier decisions in United States v. Peoni, supra, and United States v. Falcone, 109 F.2d 579 (2d Cir. 1939), affd., 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), relied upon by appellants, do not require a contrary conclusion. In each of those cases there was simply no evidence from which a jury could infer an agreement to which the defendant could have been a party or that he willfully or knowingly participated in the alleged CONSPIRACY. Here, on the other hand, there was ample evidence to permit a jury to infer a general agreement on the part of FNB's top officials to falsify its financial statement for the first quarter of 1974 and that each played some part in it.

No defendant here was held liable beyond "the fair import of the concerted purpose or agreement as he understands it." United States v. Peoni, supra, 100 F.2d at 403. The appellants would have us read this broadly, to mean that to be a CONSPIRATOR, one must have full knowledge of each facet of the CONSPIRACY. We have, however, read Peoni and Falcone more narrowly than this, see, e. g., United States v. Calabro, 467 F.2d 973, 981 (2d Cir. 1972), cert. denied, 410 U.S. 926, 96 S.Ct. 1357, 35 L.Ed.2d 587 (1973); United States v. Tramaglino, 197 F.2d 928, 930 (2d Cir.), cert. denied, 344 U.S. 864, 73 S.Ct. 105, 97 L.Ed. 670 (1952), and we do not believe they contradict our statement above of the legal principles involved here.

[13] Luftig contends that the court erred in failing to instruct the jury, as it did with respect to Carter, that if the jury found a CONSPIRACY to falsify FNB's quarterly earnings statement solely by fictitious foreign exchange transactions it should not convict him. We doubt that Carter, who did not participate in or know of the foreign exchange transactions, was entitled to this instruction, since there was evidence of his participation in the broad CONSPIRACY to falsify FNB's quarterly earnings statement and, as we stated above, it was unnecessary for the Government to prove that he knew of each means used to carry it out. Moreover, even if there was error in denying Luftig the charge, the error was harmless. Since the jury convicted Carter, it had to have found that the CONSPIRACY was not carried out solely by fictitious foreign exchange transactions. Thus Luftig's conviction could not have been based on a CONSPIRACY carried out solely by that means.

In any event, the jury found all defendants guilty of falsification by concealment of the depreciation in value of the securities in its trading account (Count Two) and Luftig guilty of perjuring himself before the *19 grand jury when he swore that he had in early March ordered the transfer of the $100 million from the bank's trading account to its investment account. Thus there was ample evidence to support a finding of CONSPIRACY to falsify the

bank's earnings statement in which Luftig played a major part.

(3) Pinkerton Charge

The Supreme Court in Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), held that a CONSPIRATOR may be found guilty of a substantive offense committed by a CO-CONSPIRATOR in furtherance of and as part of an alleged CONSPIRACY even though he personally did not commit the acts constituting the substantive crime itself. In accordance with Pinkerton Judge Griesa instructed the jury that if it found that a defendant was a member of the CONSPIRACY alleged in Count One but did not commit the acts constituting one of the alleged substantive crimes (e. g., violation of 18 U.S.C. ss 1005 (Count Two), 1014 (Count Three), or s 10(b) of the Securities Exchange Act), it might nevertheless find him guilty of a substantive crime committed by a CO-CONSPIRATOR in furtherance of the CONSPIRACY and as part of it, provided the conduct "was within the scope of the CONSPIRACY and a foreseeable consequence of it," since the defendant committing the substantive crime, like a partner, might then be treated as an agent of the other members of the CONSPIRACY.

Appellants contend that this instruction was erroneous. First they argue that no Pinkerton charge at all should have been given because there was insufficient evidence of the existence of a general CONSPIRACY, in furtherance of which the substantive offenses were committed, to warrant such a charge, cf. United States v. Sperling, supra, 506 F.2d at 1341-42. We disagree.

[14][15] There was ample evidence independent of the substantive crimes themselves from which the jury could find beyond a reasonable doubt that the top officers of FNB joined in a plan to falsify its first quarter earnings statements so that it would appear to show a profit and that to accomplish the unlawful objective some engaged in criminal acts that were either known or should have been reasonably foreseeable to the others. Although there was little evidence of Luftig's knowledge of or participation in the fictitious foreign exchange transactions or of Gleason's participation in the false evaluation of the bank's trading account securities, there was ample proof, crediting as we must the testimony of Crosse and Shaddick, that each defendant in his own way joined in a scheme to falsify the bank's earnings statement. This was sufficient to permit the giving of a Pinkerton charge with respect to the reasonably foreseeable crimes that might be committed by fellow CONSPIRATORS in furtherance of that scheme. Indeed, the obvious purpose of falsifying the bank's earnings statement was to commit frauds.[FN9]

FN9. Although the court dismissed Count Three against Carter on the ground that he had not personally participated in the foreign exchange transactions, this was not required since, upon the evidence before it, the jury could find that Carter joined the CONSPIRACY to falsify FNB's first quarter 1974 financial statement and could reasonably anticipate that his partners in crime might commit other criminal acts, including use of fictitious foreign exchange transactions, to misrepresent the bank's earnings.

Appellants' second objection is that the court's Pinkerton charge permitted the jury to find them guilty of substantive crimes which were not part of the CONSPIRACY. We disagree.

[16] When Judge Griesa explained the CONSPIRACY count to the jury, he used the s 1005 violation, which was one of the alleged objectives of the CONSPIRACY, as an example. He did not go through the s 1014 and Rule 10b-5 counts at that time; rather he stated that he had not stricken the others, but was trying to simplify his explanation. However, when it came time to explain the Pinkerton rule, the court said:

"And remembering that the CONSPIRACY count relates to 1005, and of course some of these substantive counts relate to other statutes 1014, SECTION 10(b) of the *20 Exchange Act, and so forth but nevertheless, if you have found any defendant guilty under Count one (the CONSPIRACY count), then you are obliged to reconsider his guilt on the substantive count you are considering."

Appellants argue that this statement permitted the jury, once it found a CONSPIRACY to violate one statutory provision, to use Pinkerton to hold a CONSPIRATOR liable for violations of other provisions not among the objects of the CONSPIRACY and not done in furtherance of the CONSPIRACY.

A diligent reading of the charge, however, reveals that Judge Griesa properly instructed the jury. He followed the passage quoted above with the instruction that in order to convict:

"You must find that the crime charged in the substantive count was committed by CO-CONSPIRATOR and that it was committed during and in furtherance of the CONSPIRACY charged in the CONSPIRACY count. You must find that the crime charged in the substantive count was within the scope of the CONSPIRACY and a foreseeable consequence of the unlawful agreement."

As already noted, he had previously instructed the jury that the alleged objective of the CONSPIRACY was to falsify FNB's first quarter 1974 financial statement by making a false entry to the effect that it had a net income of $79,000 when it had in fact suffered losses, all with a view to defrauding others. Thus the court's Pinkerton charge was in accordance with the principles enunciated by the Supreme Court, see Nye & Nissen v. United States, 336 U.S. 613, 618, 69 S.Ct. 766, 93 L.Ed. 919 (1949), and by this court, see United States v. Molina, 581 F.2d 56, 60-61 (2d Cir. 1978). The instruction was therefore sufficient, and there was ample evidence from which the jury could have concluded that the substantive violations were committed in furtherance of the CONSPIRACY charged, if indeed the jury found it necessary to reach the question of Pinkerton liability at all.

(4) Aiding and Abetting

The indictment charged and the court gave instructions regarding liability of the defendants for "aiding and abetting" or "causing" the various crimes, pursuant to 18 U.S.C. s 2.[FN10] Appellants argue that the court erred in failing to instruct the jury that before it might find any defendant guilty as an aider and abettor the principal must be identified, or in failing to identify the principal himself.

FN10. 18 U.S.C. s 2 provides:
"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[17] We have held that under 18 U.S.C. s 2(a) a person charged as an aider and abettor "cannot be found guilty . . . unless a principal whom he has aided and abetted committed the criminal act." United States v. Bernstein, 533 F.2d 775, 799 (2d Cir. 1976). See also United States v. Erb, 543 F.2d 438, 446 (2d Cir.), cert. denied, 429 U.S. 981, 97 S.Ct. 493, 50 L.Ed.2d 590 (1976). Under 18 U.S.C. s 2(b) a person who causes an innocent party to commit an act which, if done with the requisite intent, would constitute an offense may be found guilty as a principal even though he personally did not commit the criminal act.[FN11]

FN11. We are not confronted here with a case where any defendant was legally incapable of committing an alleged offense. See United States v. Ruffin, 613 F.2d 408, Dkt. No. 78-1361 (2d Cir.); United States v. Lester, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied, 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967).

[18][19] In the present case there was sufficient evidence to permit the jury to find that at least one defendant or CO-CONSPIRATOR participated in each of the alleged criminal acts, either as a principal, an aider and abettor, or under Pinkerton as a CO-CONSPIRATOR who could reasonably foresee that the substantive crimes might be committed by fellow CONSPIRATORS in furtherance of the CONSPIRACY.

*21 Absent some indication that there was a failure to prove that a defendant committed one of the alleged criminal acts or participated knowingly in the commission of such an act by another, we believe that the court's refusal to require the jury first to identify the principals and then to identify the aiders and abettors was proper. Several other circuits have held that there is no such requirement, see United States v. Staten, 189 U.S.App.D.C. 100, 109, 581 F.2d 878, 887 (D.C.Cir. 1978); United States v. Bryan, 483 F.2d 88, 93-94 (3d Cir. 1973) (en banc); United States v. Austin, 462 F.2d 724, 731 (10th Cir.), cert. denied, 409 U.S. 1048, 93 S.Ct. 518, 34 L.Ed.2d 501 (1972); Feldstein v. United States, 429 F.2d 1092, 1095 (9th Cir.), cert. denied, 400 U.S. 920 (1970), and we agree. It is sufficient that the court instruct the jury that in order to convict under 18 U.S.C. s 2 the acts must have been committed by someone. Judge Griesa's charge was entirely adequate in this respect, and there was sufficient evidence to permit the jury to find that at least one defendant or CO-CONSPIRATOR acted as principal in the commission of each of the crimes charged.[FN12]

FN12. We are not here confronted with a case where a possible principal was acquitted. See United States v. Ruffin, 613 F.2d 408, Dkt. No. 78-1361 (2d Cir.); United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979).

(5) Potential Adverse Effect on Bank Depositor-Jurors

[20][21] Appellants contend that by implying in his charge that bank depositors were victims of the crimes alleged, Judge Griesa destroyed appellants' Sixth Amendment right to an impartial jury, since most of the jurors were undoubtedly bank depositors and one had been a depositor in FNB.

The claim is so speculative as to border on the frivolous.
In the first place, the record gives no indication that any juror had been an FNB depositor. Regardless of this side-issue, the court's instruction did not suggest that depositors were victimized. Judge Griesa quite properly stated that the term "any other company or body politic or corporate or any individual person," as used in s 1005, "obviously includes persons who are depositors and other customers of the bank, borrowers from the bank; it also includes other banks which lend money to the particular bank."
We find nothing inflammatory or unfair about this accurate description of the type of persons whom the statute was designed to protect. Nor is there any indication that any defendant was prejudiced or likely to have been prejudiced by the description, which must be shown for reversal. Mikus v. United States, 433 F.2d 719, 724 (2d Cir. 1970). Cf. Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); United States v. Tramunti, 513 F.2d 1087, 1114 (2d Cir.), cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).
Evidentiary Rulings
(1) Prior Similar Conduct by Crosse
[22][23] Luftig contends that the district court erred in refusing to permit him to offer certain evidence tending to establish his innocence of any false evaluation of FNB's securities and unduly restricted his cross-examination of Crosse on the same subject. We disagree.
As evidence of Luftig's participation in the false evaluation of bank securities by backdating the transfer of some from the bank's trading to its investment account in March, 1974, and by failing to "mark to market" other securities in the trading account, the Government introduced Crosse's testimony regarding Luftig's instructions. In his defense Luftig sought to introduce a series of eight items, including evidence that during the period 1971-74 Crosse, both prior to and after Luftig's joining FNB, had without Luftig's knowledge repeatedly transferred securities from the bank's trading to its investment account without proper evaluation and had failed to reevaluate or "mark to market" securities in the trading account or establish adequate depreciation reserves, thus concealing hundreds of thousands of dollars of depreciation. *22 The purpose of the offer, of course, was to try to show that in March, 1974, as on prior occasions, Crosse had acted on his own without Luftig's knowledge and that Crosse's testimony implicating Luftig was incredible.
Judge Griesa restricted Luftig to two items, one a transfer at Crosse's discretion on September 20, 1973, of $37.85 million of securities at cost from FNB's trading to its investment account, which allegedly concealed more than $695,000 of depreciation and the other a failure in July, 1973, to "mark to market" securities in four trading accounts or to establish adequate reserves for some $3 million in losses, which were concealed from Crosse's superiors. Evidence regarding the other six items was excluded on the ground that whatever probative value the evidence might have was outweighed by the danger of confusing the jury regarding the issues on trial by diverting its attention to collateral issues.
Upon this review the propriety of the district court's ruling must be tested by the standard of whether the exclusion of the evidence constituted a clear abuse of discretion. Hamling v. United States, 418 U.S. 87, 124-25, 94

S.Ct. 2887, 41 L.Ed.2d 590 (1974); United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976). Given the circumstances before the trial judge, we find no such abuse.

A clear showing that Crosse had engaged in prior similar misconduct without Luftig's knowledge would have some probative value (though far from conclusive) on the issue of whether he later acted under Luftig's directions in March and April 1974. See, e. g., United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (exclusion of evidence of offer by one charged with fraud based on overdrafts to make good on deficiencies held error); United States v. Platt, 435 F.2d 789, 793 (2d Cir. 1970). Crosse's engagement in earlier wrongdoing, on the other hand, would not preclude a finding that Luftig and he joined together in the later misconduct, with Luftig willing to take the lead for obvious reasons. Moreover, where such proof, though of some relevance, may lead to confusing and time-consuming disputes with respect to collateral issues the trial judge may properly reject or limit it. United States v. King, 560 F.2d 122, 134 (2d Cir.), cert. denied, 434 U.S. 925, 98 S.Ct. 404, 54 L.Ed.2d 283 (1977); Fed.R.Evid. 403. This appears to have been the situation confronting the district court in this case.

Even with respect to the September 20, 1973, transfer of securities, serious collateral issues were raised regarding the extent of Crosse's involvement in the transfer and whether it was made by lesser employees (possibly by mistake), possibly without his knowledge. Moreover, the Government contended that some purchases of securities ostensibly for the bank's trading account were in fact made from the outset for the investment account, which had no traders of its own, using trading account traders and then transferring acquisitions to the investment account. If this were established, the transfer from trading to investment at cost might have been justified or excused as a mistake. Lastly, Carter vigorously opposed introduction of evidence as to the earlier security transfers and failures to "mark to market" since they might reflect upon his honesty as vice-president in charge.

Faced with these complexities, which could lead to "trials within the trial," Judge Griesa sensibly in our view limited Luftig to two of the earlier examples, permitting evidence as to the September, 1973, transfer on the ground that the matter had been opened up by the Government on its examination of Crosse.[FN13] We find no abuse of discretion in this ruling.

FN13. Even as to the September, 1973, transfer the record discussion regarding the side issues created by its introduction covered almost 50 pages of transcript.

(2) The May 12 Press Release

[24] Luftig next argues that the court erred in refusing to permit him to testify that on May 12, 1974, several weeks after the principal fraudulent conduct which was the subject of the indictment, he opposed *23 the issuance by FNB of a press release, favored by Sindona, which failed to disclose certain hidden foreign exchange transactions concededly "unrelated" to the transactions that were the subject of the indictment. We find no abuse of discretion in this ruling which properly avoided getting into more complicated collateral issues with respect to other differences that developed later between Luftig and Sindona, leading to the former's being asked to resign. At most the

evidence would show a disagreement between the two having nothing to do with the criminal conduct alleged in the indictment. Further evidence of Luftig's differences with Sindona over unrelated matters would be of doubtful probative value with respect to the issues on trial and could confuse the jury.[FN14]

FN14. Luftig was permitted to testify that beginning on May 6, 1974, despite Sindona's strong opposition, he actively supported a merger of FNB with Manufacturers Hanover, and that he (Luftig) requested an FBI investigation into the bank's non-disclosure of certain unrelated foreign exchange transactions.

(3) Cross-Examination of Crosse

[25] Similarly we find no merit in Luftig's claim that it was error to bar him from bringing out that Crosse had vigorously opposed before FNB's board of directors a management proposal to disband the bank's municipal dealer department. Luftig argues that the evidence indicates unlikelihood that Crosse would have done Luftig's bidding to falsely value $100 million of the bank's securities by backdating to March 11, 1974, their transfer from its trading to its investment account. Here again, aside from the tenuousness of the inference sought to be drawn and the fact that the subject was beyond the scope of cross-examination, since it had not been opened up on direct, see Fed.R.Evid. 611(b), to permit such questions could open up a flood of evidence regarding a possibly confusing collateral issue, with the Government seeking to establish dissimilarities or reasons why Crosse would act differently under one circumstance than under the other. We find no abuse of discretion in the judge's precluding cross-examination of Crosse on this subject matter. See United States v. Carr, 584 F.2d 612, 617 (2d Cir. 1978).

(4) Testimony Challenged as Hearsay

[26] Appellant Luftig argues that the court erred in admitting testimony by Cornell Wright, an Ernst & Ernst partner, that on May 17, 1974, he was told by Carter that the March 27, 1974, transfer at cost of $62.5 million of U. S. Government agency securities had been "ordered by someone superior to Howard Crosse." Luftig contends that the statement was POST-CONSPIRACY, narrative hearsay as to him, see United States v. Birnbaum, 337 F.2d 490, 494-95 (2d Cir. 1964). We disagree.

There was sufficient independent evidence to justify a finding by the trial judge that the CONSPIRACY was still alive on May 17 and that Luftig and Carter were participants. Carter's quoted statement was therefore admissible against Luftig under Fed.R.Evid. 801(d)(2)(E) as a statement in furtherance of it designed to allay suspicion on Wright's part regarding the propriety of the March transfer. United States v. Ruggiero, 472 F.2d 599, 607 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1973); United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970).

[27] The testimony of John Sadlik, the bank's chief financial officer, to the effect that after Luftig had left FNB Sadlik had ordered Carter to reverse the March, 1974, transfer from the bank's trading to its investment account and to revise the March 31 quarterly financial statement is also objected to by Luftig as hearsay. However, the underlying corporate memorandum and entry confirming the instruction was properly admitted as a record made in the

regular course of business, Fed.R.Evid. 803(6), and Sadlik's testimony was admissible to explain the background of the document. In any event, assuming the admission of the memorandum was error, it was harmless.

*24 Claims of Prosecutorial Misconduct

(1) Alleged Violation of F.R.Cr.P. 16(a) by Non-Disclosure of Statements

Appellant Gleason, formerly FNB's chief executive officer, argues that the Government violated F.R.Cr.P. 16(a)(1)(A) by failing to disclose before trial a letter written by him on August 30, 1965, to FNB's then Chairman, years before the events here in issue, and notations in his handwriting on various financial statements and agenda of FNB board meetings during the period from December 20, 1973, to March 28, 1974, after Gleason had himself become Chairman. We disagree.

The issue arose when the Government sought to use the foregoing material in its cross-examination of Gleason, who had testified on direct that following the creation in November, 1973, of the "Office of Chairman" at the bank (consisting of himself, Shaddick and Luftig) he (Gleason) ceased to be involved in the day-to-day activities of the bank. He testified that thereafter he devoted himself primarily to public relations activities on behalf of FNB, visiting important domestic customers and cultivating its foreign relationships with a view to improving its image, while Shaddick supervised the bank's international operations and Luftig its domestic operations. He denied being privy to any instructions by Luftig to Crosse to falsify the value of the bank's securities by backdating their transfer and denied asking Shaddick to create false profits by fictitious foreign exchange transactions. Thus Gleason sought to divorce himself from sufficient responsibility for the bank's earnings' statements to have been involved in the falsification of its earnings' report for the first quarter of 1974.

On cross-examination the Government, in an effort to impeach Gleason's denials and his posture of ignorance, confronted him with the August 1965 letter in which, in advocating himself for the presidency of the bank, he had urged that the bank's head should closely follow its earnings. He was also faced with his various handwritten notations on FNB Board agendas and earnings statements in early 1974 to indicate that he had been keeping himself advised of the bank's financial operations in some detail at the very time when, according to his direct testimony, he had been ignorant of these essential financial facts.

[28] Rule 16(a) obligates the Government upon request to permit a defendant to inspect "any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government." The rule, of course, is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him at trial.

[29] Gleason's 1965 letter, which predated by almost 10 years the events in issue, and his mere notations on agenda and financial statements, were hardly "relevant" to the crimes charged against him; they did not tend to show that he had participated in any falsification of the bank's earnings statement for the first quarter of 1974. The fact that a bank officer once believed that its president should follow its earnings statements does not implicate him in any dishonest underlying transaction that is not in the bank's earnings reports.

The Government was not therefore required by Rule 16(a) to disclose the documents because they were not "relevant . . . statements" within the meaning of that Rule. The documents became relevant for impeachment purposes only after Gleason testified on direct that he did not personally keep acquainted with the bank's day-to-day operations, thus seeking to corroborate his denials of involvement in the transactions at issue. See United States v. Hodges, 480 F.2d 229, 232-33 (10th Cir. 1973); United States v. Skillman, 442 F.2d 542, 550 (8th Cir.), cert. denied, 404 U.S. 833, 92 S.Ct. 82, 30 L.Ed.2d 63 (1971).

*25 The Government's failure to turn over the documents prior to trial, moreover, did not prevent Gleason from preparing to meet the charges against him. The documents were at all times in the custody of the Federal Deposit Insurance Corporation (FDIC) as liquidator of FNB and were as available to Gleason as they were to the Government, which obtained them on the eve of trial, approximately November 27, 1978. Although the FNB records in custody of the FDIC were voluminous,[FN15] Gleason had long before trial been provided with an inventory of them and in preparing a strategy of ignorance should have known that Board minutes and earnings statements to which he might have been exposed would be important and should, with the aid of the inventory, have been extracted from the mass for examination.

FN15. Gleason's counsel did visit the FDIC depository, but only once, and may have attended a deposition in a civil suit, In re Franklin National Bank & Securities Litigation, MDL 196 (E.D.N.Y.), at which the documents may have been used in the examination of Gleason.

[30] The Government is not obligated by Rule 16(a) to anticipate every possible defense, assume what the defendant's trial testimony (if he decides to testify) will be, and then furnish him with otherwise irrelevant material that might conflict with his testimony. With respect to such material, if any obligation to disclose existed under Rule 16(a) it was satisfied by making the underlying files available to the defendant prior to trial. United States v. Haldeman, 181 U.S.App.D.C. 254, 559 F.2d 31, 74 n. 80, 76 n. 93 (D.C.Cir. 1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977) (White House files); United States v. Cirillo, 499 F.2d 872, 882 (2d Cir.), cert. denied, 419 U.S. 1056, 95 S.Ct. 638, 42 L.Ed.2d 653 (1974) (wiretaps). From that point on it was Gleason's task to prepare his defense.

[31] Lastly, Gleason has failed to show any legally cognizable prejudice as a result of the failure to have the documents in advance of trial. It is not suggested that if he had received them he would have decided not to testify. Indeed, no request was made for a continuance to permit preparation of a more plausible reconciliation between the documents and his direct testimony.

(2) Alleged Improper Rebuttal Summation

Gleason argues that he was denied a fair trial because the prosecutor, in his rebuttal summation pursuant to F.R.Cr.P. 29.1, introduced prejudicial new matter and the court refused to give a curative instruction.

The controversy arose out of the apparent absence from the record of any explanation or basis for the $700,000 profit figure which Gleason told Shaddick that the bank's foreign exchange department must have for the month of March,

1974, if FNB was to avoid showing a loss for the first quarter. During his main summation the prosecutor commented sardonically that the defendants would probably claim the $700,000 figure was dreamt up by Shaddick on the beaches of Acapulco. Accepting this suggestion, Gleason's counsel in his summation then argued that the figure was indeed the product of Shaddick's imagination. The prosecutor responded in his rebuttal summation with an adding machine tape which totalled losses from the liquidation of government securities during the period March 15-27, 1974, at $699,431.86, almost precisely the same as the figure of $700,000 that had been used by Gleason in stating the profit needs of the foreign exchange department.

Gleason contends that it was unfair and improper to introduce such new material in a reply summation, citing Moore v. United States, 120 U.S.App.D.C. 173, 344 F.2d 558, 560 (D.C.Cir. 1965), and United States v. Rubinson, 543 F.2d 951, 956-66 (2d Cir.), cert. denied, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976), to which the Government replies that the material was not new but a response, based entirely on exhibits already in evidence, negating Gleason's claim in his counsel's summation that Shaddick invented the $700,000 figure.

*26 [32] Had Gleason's summation been the first occasion for the latter argument, the Government's reply might be persuasive, because it could then argue that it had no intention of referring to the computation unless and until Gleason challenged the source of the $700,000 figure. Fairness would dictate that a copy be furnished to Gleason well enough in advance of its use to permit a reply rather than confront him with a new theory (albeit based on record evidence) at almost literally the last minute of a long trial. See 1975 House Judiciary Committee Report regarding proposed F.R.Cr.P. 29.1 (H.R.Rep.No.94-247).[FN16] Since the argument of this appeal, however, the Government has represented in writing that only after Gleason's summation did it for the first time calculate the total losses and discover that they totalled approximately $700,000, which led to its use of the tabulation in its rebuttal summation.

FN16. The House Judiciary Committee commented:
"The Committee believes that . . . fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply."

[33] Had no action been taken by the court after the Government's surprise reply summation, a reversal might be required. But Judge Griesa, recognizing the eleventh-hour unfairness and surprise, offered Gleason and the other defendants the opportunity to respond by way of a surrebuttal summation after they had sufficient time to confer and review the trial transcript and exhibits forming the basis of the Government's computation. This in our view adequately protected the defendants against any prejudice. For reasons best known to themselves, possibly their inability to find any material errors in the Government's computation, defense counsel refused the court's offer and instead asked for a curative instruction.[FN17] Absent proof that the Government's computation was erroneous, the trial judge did not abuse his discretion in refusing a cautionary instruction.

FN17. We disagree with Gleason's argument that additional summations which might result in introduction of the Government's computation, could not resolve the problem because they would only serve to magnify the unfair impact of the prosecutor's rebuttal. If the computation, based on evidence already in the record, was accurate, the jury was entitled to have the summary as an aid in analyzing the complex proof before it rather than be forced to the laborious task of making its own computation.
The situation here is clearly distinguishable from that in cases relied upon by Gleason where the Government improperly referred to matter not in the record. See, e. g., Moore v. United States, supra; United States v. Rubinson, supra, 543 F.2d at 966.

(3) Alleged Suppression of Exculpatory Evidence

Gleason charges that the Government suppressed exculpatory evidence and permitted witnesses to give materially false testimony, thereby depriving him of a fair trial. The record reveals these charges to be both baseless and irresponsible.

Specifically Gleason contends that the Government withheld from the jury evidence supporting multicount indictments, filed on September 29, 1975, January 5, 1977, and March 19, 1979, against Sindona, Shaddick and Bordoni in the Southern District of New York, charging that prior to the falsification of FNB's March 1974 statement those three men, without Gleason's knowledge, had falsified every single monthly foreign exchange profit and loss report beginning with the month of January, 1973, yet permitted Shaddick to testify that he had engaged in falsifying the bank's books on only three occasions during this period and Bordoni to testify that he had participated in only six such transactions. In addition, Gleason argues that the superseding indictment filed against Sindona and Bordoni on March 19, 1979, after Gleason had been convicted, contains a paragraph [FN18] revealing that the Government had *27 evidence that Bordoni and Sindona were involved in the misevaluation of securities in FNB's bank trading account.

FN18. "On or about March 31, 1974, Sindona and Bordoni, the defendants, and other CO-CONSPIRATORS caused the Franklin National Bank to hide losses in the bond trading operation by misvaluing securities held in bond trading account." Indictment S75 Cr. 948, count I, Par. 54 (S.D.N.Y. March 19, 1979).

[34][35] The fallacy of Gleason's claims with respect to the 1973-74 false foreign exchange transactions lies in his failure to distinguish between a fraudulent transaction and a false financial statement. Although the fraudulent transactions during this period of time were relatively few, they were reflected in subsequent monthly and quarterly financial statements, which were many. Since each one of the financial statements could properly be charged in a separate count, see United States v. Huber, 603 F.2d 387, 398-99 (2d Cir. 1979), and some statements were also charged as violations of federal mail and wire fraud statutes, the number of counts in the superseding indictment far exceeded the number of fraudulent transactions. There is thus no proof that the Government knowingly allowed false testimony.

[36] Were Gleason's counsel unaware of this differentiation, his specious

charges might be pardonable. But the earlier superseded indictments (one filed on Sept. 29, 1975, and another on Jan. 5, 1977), which contain basically the same allegations with respect to the 1973-74 foreign exchange transactions, were made available to defense counsel before the trial of the present case, were used extensively by Gleason's counsel on his cross-examination of Bordoni and Shaddick, and could have been used to reveal the supposed perjury on their part. Under the circumstances, Gleason is wholly unjustified in labelling the Government's conduct, as he does in his brief on appeal, as "prosecutorial misconduct," "suppression of evidence," "knowing use of false testimony," failure "to correct false testimony," silence "in the face of their witnesses' perjury," "foul conduct," and resort to "slippery and less than thoroughly upright conduct." [FN19]

FN19. These scurrilous statements, which indicate a reckless disregard by counsel for the facts of record, exceed the bounds of responsible advocacy in our adversarial system and merit consideration by the Bar Association Grievance Committee for appropriate action. ABA Code of Professional Responsibility, DR 7-102(A)(1), (2).

[37] As for the allegation in the last superseding indictment that on March 31, 1974, Sindona and Bordoni caused FNB to conceal losses in its bond trading account by misvaluing securities, the simple and complete answer is that it does not refer to their personal participation in the false security evaluation but merely to acts committed by their CO-CONSPIRATORS in furtherance of the CONSPIRACY to falsify the bank's earnings statement for the first quarter of 1974, for which they could be held criminally responsible under Pinkerton v. United States, supra.

GOVERNMENT'S REFUSAL TO CONFER IMMUNITY ON SINDONA

[38] Gleason contends that his due process rights were violated by the Government's failure to accede to his request that use immunity (i. e., immunity from the use of his testimony and evidence derived from it in subsequent prosecution) be extended to an alleged principal accomplice and co-CONSPIRATOR, Sindona, who was at the time and remains a defendant named in a separate indictment, 75 Cr. 948, charging him and Bordoni with participation in the same false foreign exchange transactions as those forming a major part of the case against Gleason. We disagree.

As we pointed out in United States v. Lang, 589 F.2d 92, 95-96 (2d Cir. 1978), the law is

"well settled that the power of the Executive Branch to grant immunity to a witness is discretionary and no obligation exists on the part of the United States Attorney to seek such immunity. United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), cert. denied sub nom. Monsivais v. United States, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975); United States v. Ramsey, 503 F.2d 523, 532-33 (7th Cir. 1974), cert. denied, 420 U.S. 932, 95 S.Ct. 1136, 43 L.Ed.2d 405 (1975); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973); Earl v. United States, 124 *28 U.S.App.D.C. 77, 80, 361 F.2d 531, 534 (1966) (Burger, J.), cert. denied, 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967); People v. Sapia, 41 N.Y.2d 160, 166, 391 N.Y.S.2d 93, 359 N.E.2d 688 (1976), cert. denied, 434 U.S. 823, 98 S.Ct. 68, 54 L.Ed.2d 80 (1977).

"We note that this court has held that the government is not obligated to grant immunity to witnesses so that they may be made available to testify on behalf of the defendant. United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819, 97 S.Ct. 65, 50 L.Ed.2d 80 (1976)."

Moreover, there was no representation that if granted immunity Sindona would furnish specific exculpatory evidence unobtainable from any other source. The most that was suggested through Sindona's counsel, who refused to permit Sindona to talk with Gleason, was that Sindona "would deny any wrongdoing or conversations in furtherance of any wrongdoing with Gleason," which would at best be merely cumulative of Gleason's testimony and from an obviously interested witness who would be subject to intensive cross-examination that might well destroy his credibility.

Nor is this a case where the Government deliberately manipulated grants of immunity to gain an unfair advantage over any defendant, United States v. Lang, supra, 589 F.2d at 96-97. The major accomplices who testified (Crosse, Shaddick, Bordoni and Garofalo) were not granted immunity. Only two lesser figures, Thomas Murphy and Bruce Carlton, were promised by the United States Attorney that their statements to him would not be used against them. No sound reason exists, therefore, for departing from the general rule that the Government may refuse to grant immunity.

THE ALLEGED INSUFFICIENCY OF THE CHARGES AND PROOF OF USE OF DECEPTIVE DEVICES IN CONNECTION WITH THE SALE OF SECURITIES

[39] Gleason contends that Counts 5-14, which allege that the defendants, in violation of s 10(b) of the Securities Exchange Act, 15 U.S.C. s 78j(b) and Rule 10b-5, used interstate commerce and the mails to employ manipulative and deceptive devices in connection with the purchase and sale of FNB's stock, which was purchased by 12 identified persons on specified dates after the issuance of the false FNB financial statement for the first quarter of 1974, are insufficient for failure to contain specific allegations of misconduct and to set forth all of the elements of a crime. The contention must be rejected for the reason that each count of the indictment followed the precise language of s 10(b), thus alleging all of the essential elements of the crime charged, see Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); United States v. Carr, 582 F.2d 242, 244 (2d Cir. 1978). Moreover, by incorporating by reference paragraphs 6-8 of Count One into Counts Five through Fourteen the Government specified the nature of the alleged criminal conduct in sufficient detail to enable the defendants to prepare their defenses and to plead an acquittal or conviction in bar of any future prosecution for the same offense.

[40][41] Gleason's further contention that the counts should have been dismissed for the Government's failure to prove any reliance by the specified purchasers of FNB shares upon the bank's false financial statement for the first quarter of 1974 must also be rejected. Despite contrary suggestions in earlier decisions relied on by appellants, the law is settled that the Government need only prove that the false representation is one that a reasonable stockholder would rely on in purchasing or selling the relevant corporate shares, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969); cf. TSC Indus. v. Northway Inc., 426 U.S. 438, 449, 96 S.Ct. 2126,

48 L.Ed.2d 757 (1976), and Judge Griesa so instructed the jury. It is also settled that the same standards apply to civil and criminal liability under the securities law. United States v. Peltz, 433 F.2d 48, 53 (2d Cir. 1970), cert. denied, 401 U.S. 955, 91 S.Ct. 974, 28 L.Ed.2d 238 (1971).

*29 THE CLAIM THAT THE RECORDS OF THE FRAUDULENT FOREIGN EXCHANGE TRANSACTIONS ARE NOT "FALSE ENTRIES" WITHIN THE MEANING OF 18 U.S.C. s 1005

Gleason's last contention, derived principally from Coffin v. United States, 156 U.S. 432, 462-63, 15 S.Ct. 394, 39 L.Ed. 481 (1895), is that those counts of the indictment based on the four deceptive foreign exchange transactions which showed FNB as earning a profit must be dismissed because the transactions took place and were reflected in the bank's books, thus precluding a claim that they were "false entries" within the meaning of s 1005. The argument disregards the indictment and later authority controlling the interpretation of the term "false entry."

The indictment (e. g., Count Three) alleges that the defendants caused a false entry to be made in the bank's books and earnings statement by representing in its financial statement that the bank had earned a profit of $79,000 for the first quarter of 1974 when in fact it had suffered a loss of over $7 million and that this had been accomplished "by means of fictitious and false foreign exchange contracts between said bank and Amincor Bank, Zurich, Switzerland, and Banca Unione, Milan, Italy, which reflected a fictitious profit in the foreign exchange operations of approximately $2,000,000."

[42][43] It is true that in Coffin the Court stated that a crime of making a false entry is not committed if the transaction entered on the books actually took place and was entered as it occurred. 156 U.S. at 463, 15 S.Ct. 394. However, this was modified by Agnew v. United States, 165 U.S. 36, 52-54, 17 S.Ct. 235, 41 L.Ed. 624 (1897), holding that a false entry statute may be violated by entering on the books a transaction known to be fraudulent, even though the entry might be accurate. See United States v. Darby, 289 U.S. 224, 226-27, 53 S.Ct. 573, 77 L.Ed. 1137 (1933); United States v. Huber, 603 F.2d 387, 397-98 (2d Cir. 1979). While an entry is not false merely because the underlying transaction is illegal, see United States v. Manderson, 511 F.2d 179, 180-81 (5th Cir. 1975), here the profit shown on the record of the foreign exchange transactions was known by the defendants to be false and fictitious, concocted for the very purpose of distorting the financial statement. The result was a violation of 18 U.S.C. s 1005. See Billingsley v. United States, 178 F. 653, 663 (8th Cir. 1910).

[44] We find no merit in appellants' remaining contentions, which require little or no discussion. The district court's grant of one extra peremptory challenge to the Government without the defendants' consent after granting three peremptories to the defendants, while not in compliance with F.R.Cr.P. 24(b), [FN20] is not shown to have resulted in the selection of a jury that was unrepresentative of the community, or biased in any other way. Nor is any prejudice to appellants shown. The proportional advantage accorded defendants by Rule 24(b) (10 peremptories as against 6 for the Government) was approximately maintained. While the court's action was improper in the absence of defense counsels' consent, we do not believe that reversal is warranted in the absence of prejudice to the defendants.

FN20. Although F.R.Cr.P. 24(b) does not authorize the granting of

additional peremptories to the Government, it is not uncommon for the court to condition the grant of a defendant's request for additional peremptories on his consent to a proportionate increase being accorded to the Government.

The judgments of conviction are affirmed.

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In re Edwin MEESE III.

Division No. 87-1.

United States Court of Appeals,
District of Columbia Circuit.

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

July 12, 1990.

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

Ordered accordingly.

[1] COSTS ⇐ 293
102k293
Right to recover attorney fees in independent counsel investigations is based on waiver of sovereign immunity of United States and that standard must be strictly construed against application and in favor of sovereign. 28 U.S.C.A. § 593(f)(1).

[2] UNITED STATES ⇐ 40
393k40
That investigative jurisdiction over additional targeted individual subject was being requested and obtained by referral to independent counsel did not eliminate necessity for compliance with requirement of Independent Counsel Reauthorization Act that there be preliminary investigation and finding of reasonable grounds to believe that further investigation or prosecution of targeted official, as subject of investigation, was warranted. 28 U.S.C.(1982 Ed.) § 592(c)(1).

[3] UNITED STATES ⇐ 40
393k40
Reasons given for referral to independent counsel of investigation of United States Attorney General as to whether, as counselor to President, Attorney General violated conflict of interest laws were insufficient to constitute "reasonable grounds" required to justify application for further investigation by independent counsel; referral was made on basis of fragmentary and preliminary information that lacked specificity from the beginning. 28 U.S.C. (1982 Ed.) § 592(a)(1).

[4] COSTS ⇐ 308
102k308
United States Attorney General was entitled to recover attorney fees and costs incurred in connection with investigation by independent counsel as to whether Attorney General, as counselor to President, violated conflict of interest laws in assisting minority-owned corporation in its efforts to obtain government defense contracts; no indictment was brought against Attorney General upon completion of investigation and basis upon which referral was made and extreme expansion of resulting investigation subjected Attorney General to more vigorous application of criminal law than was applied to other citizens and caused him to incur legal expenses no ordinary citizen would have incurred but for independent counsel statute. 28 U.S.C.A. § 593(f)(1).

[5] COSTS ⇐ 308
102k308
Fact that United States Attorney General initially requested appointment of independent counsel had no bearing on his right to be awarded reasonable attorney fees under Independent Counsel Reauthorization Act. 28 U.S.C.A. § 593(f)(1).

[6] COSTS ⇐ 308
102k308
Reasonable attorney fees awarded under Independent Counsel Reauthorization Act are calculated according to prevailing market rates in relevant community, and applicant must produce satisfactory evidence--in addition to attorney's own affidavit--that requested rates are in line with those prevailing in community for similar services by lawyers of reasonably comparable skill, experience, and reputation. 28 U.S.C.A. § 593(f)(1).

[7] COSTS ⇐ 308
102k308
Attorney fee rates ranging from $100 per hour to $300 per hour were reasonable and could be recovered by United States Attorney General under

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

[8] COSTS ⇐ 308
102k308
United States Attorney General, in recovering attorney fees and costs under Independent Counsel Reauthorization Act, was not entitled to recover for paralegal and law clerk services which were purely of clerical nature. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[9] COSTS ⇐ 308
102k308
United States Attorney General, in recovering attorney fees under Independent Counsel Reauthorization Act, was not entitled to recover fees for services rendered in preparation of attorney fee applications; those fees were not for services rendered in asserting merits of Attorney General's defense to independent counsel investigation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[10] COSTS ⇐ 308
102k308
Attorney General, in recovering attorney fees under Independent Counsel Reauthorization Act, was not entitled to recover fees incurred in preparing him for testimony in trial of another person and his testimony before congressional subcommittee inasmuch as fees were not incurred in Attorney General's defense to independent counsel investigation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[11] COSTS ⇐ 308
102k308
United States Attorney General, in recovering attorney fees under Independent Counsel Reauthorization Act, was not entitled to recover fees incurred for responding to media inquiries which had no bearing on operation of independent counsel's investigation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[12] COSTS ⇐ 308
102k308
Fees incurred by United States Attorney General's attorneys in reviewing press clippings concerning independent counsel investigation, because of heavy media involvement, provided useful and important information that assisted counsel in representation of subject and was therefore reasonably related to defense of investigation and were recoverable under Independent Counsel Reauthorization Act. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[13] COSTS ⇐ 308
102k308
Fees for letter written by United States Attorney General's attorneys in requesting referral of matter to independent counsel were not incurred during investigation of Attorney General nor were they incurred in his defense and could not be recovered under Independent Counsel Reauthorization Act. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[14] COSTS ⇐ 308
102k308
United States Attorney General was not entitled under Independent Counsel Reauthorization Act to recover fees for services rendered after filing of final report by independent counsel. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[15] COSTS ⇐ 314
102k314
Where there is inadequate documentation for work performed during time billed, attorney fee award under Independent Counsel Reauthorization Act must be reduced accordingly. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[16] COSTS ⇐ 308
102k308
Under Independent Counsel Reauthorization Act, hours must be excluded from attorney fee request that are excessive, redundant or otherwise unnecessary. 28 U.S.C.A. §§ 591 et seq.,

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

[17] COSTS ⇐ 307
102k307
Expenses for business meals, support staff overtime, service fee, supplies, and photocopying were excessive or unnecessary and could not be fully recovered by United States Attorney General under Independent Counsel Reauthorization Act. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

[18] COSTS ⇐ 314
102k314
Attorney fee award recoverable by United States Attorney General under Independent Counsel Reauthorization Act had to be reduced by 10% of billings due to inadequacy of documentation. 28 U.S.C.A. §§ 591 et seq., 593(f)(1); Independent Counsel Reauthorization Act of 1987, § 6(b)(2)(A), 28 U.S.C.A. § 591 note.

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

PER CURIAM:

On May 11, 1987 the Acting Attorney General, by letter, referred the matter of Attorney General Edwin Meese III and his association with several individuals involved in "Welbilt Electronic Die Corporation," also known as Wedtech Corporation, to Independent Counsel James C. McKay, Esquire for investigation (hereafter "the referral"). The referral followed immediately upon a letter request by Meese dated the same date as the referral. At the time of the referral Mr. McKay was conducting an investigation into Franklyn C. Nofziger's representation of Wedtech Corporation ***1195 **189** and Comet Rice, Inc. [FN1] Giving rise to the referral for investigation of Mr. Meese were the circumstances of his official and "personal and/or financial relationships with ... [Wedtech Corporation, Franklyn C. Nofziger,] E. Robert Wallach, and W. Franklyn Chinn ..." [FN2] during the time that Meese had been serving as Counselor to the President. The referral did not request a focused investigation into any specific criminal offense but rather requested a generalized investigation into possible violations of all eleven of the federal conflict of interest laws, i.e., 18 U.S.C. §§ 201-211.

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

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

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

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

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

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

FN5. 28 U.S.C. § 591 et seq. (1988).

I.

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

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

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

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

[1] We have recently outlined the standards for awarding attorneys' fees in independent counsel investigations. These standards require proof that the fees are "reasonable," adequately documented, and would not have been incurred "but for" the Act. See In re Donovan, 877 F.2d 982, 994 (D.C.Cir.1989); In re Olson, 884 F.2d 1415, 1428 (D.C.Cir.1989); In re Sealed Case, 890 F.2d 451 (D.C.Cir.1989); In re Olson/Perry, 892 F.2d 1073 (D.C.Cir.1990). Satisfying the "but for" requirement is the most difficult. The right to recover attorneys' fees in such cases against the Government is based on a waiver of the sovereign immunity of the United States and that standard must be strictly construed against the application and in favor of the sovereign. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685, 103 S.Ct. 3274, 3277, 77 L.Ed.2d 938 (1983); McMahon v. United States, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 26 (1951); In re Donovan, supra, at 994; In re Olson, supra, at 1428; In re Jordan, 745 F.2d 1574, 1576 (D.C.Cir.1984).

A. The "But For" Requirement

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

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

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

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

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

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

> If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, ... then the Attorney General shall apply to the division of the court for the appointment of a [sic] independent counsel....

28 U.S.C. § 592(c)(1) (1982) (emphasis added). [FN8] Requiring a finding of reasonable grounds substantially changed the nature and amount of evidence required to support a request for the appointment of an independent counsel.

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

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

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

> 1. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his jurisdiction, he should consider whether to:
> (a) request or conduct further investigation; ...

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

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

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

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

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

1. The Referral

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

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

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

The letter of referral was limited to a request to Independent Counsel to investigate Meese's conduct involving Wedtech and his association with individuals involved in Wedtech:

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

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

2. Grounds Urged Upon Independent Counsel to Accept Referral

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

> In fairness to Mr. Meese, I should state that the reports we have received concerning Mr. Meese's relationships with Wedtech-associated individuals and entities are only fragmentary, and do not show that Mr. Meese ever received any compensation from Welbilt/Wedtech, nor that he ever invested in the securities of Welbilt/Wedtech. While I believe the Public Integrity Section is in possession of all relevant information developed to date by the U.S. Attorneys' offices in New York and Baltimore and by your office, it may well be that further investigation will be able to resolve definitively the questions raised by Mr. Meese's relationship to the Welbilt/Wedtech contract and to associates of the Welbilt/Wedtech Company.
>
> * * * * * *
>
> Finally, while as indicated above the information concerning Mr. Meese himself is fragmentary and preliminary, the present situation is somewhat unusual in that the various investigations have developed substantial evidence of Wedtech-related criminal conduct on the part of individuals other than Mr. Meese.

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

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

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

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

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

Nevertheless, despite the deficiency of inculpatory information, Independent Counsel was urged to accept the referral: (1) because the Independent Counsel was already investigating certain Wedtech related matters; (2) because the Department did not wish to "interfere with or otherwise burden" the Nofziger investigation; (3) because the Department of Justice considered that "public confidence in the administration of justice [would] be better served if these matters are resolved by an investigation conducted independently of the Department of Justice, which is headed by Mr. Meese;" (4) because the Department considered "that the most appropriate course [was] for ... [Independent Counsel McKay] to accept referral of this matter...." (5) because of Meese's prior association and relationship with two individuals being investigated in the Wedtech phase of the matter; (6) because two grand juries were conducting on-going related investigations of some of Meese's associates; (7) because conducting an independent investigation and thereby foregoing a duplicative investigation would serve the interests of the public and the convenience of the Department of Justice; and (8) because of the hope that additional investigation would definitively resolve unspecified circumstantial questions raised by Meese's relationship to Nofziger and his personal and business association with two individuals whose Wedtech related activities were being investigated. Id.

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

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

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

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

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

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

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

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

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

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

3. The Acceptance of the Referral and the Resulting Investigation

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

> Independent Counsel has accepted the referral as a matter related to the jurisdiction mandated by the February 2, 1987 Order of the Special Division of the United States Court of Appeals for the District of Columbia Circuit, In re Franklyn C. Nofziger.

Notice by Independent Counsel of Acceptance of Referral, In re Nofziger, Div. No. 87-1 (May 11, 1987). Upon receipt of McKay's notice, the Special Division immediately granted Independent Counsel leave to disclose his Acceptance of the Referral. [FN12] Thus, an extensive independent counsel investigation of Meese/Wedtech was publicly launched on the basis of the letter of referral to an existing Independent Counsel.

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

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

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

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

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

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

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

FN15. See supra note 4.

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

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

B. The Meese Request for an Independent Counsel Investigation

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

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

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

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

C. Compliance with the Reasonable Fee Requirement

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

1. Hourly Rates

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

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

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

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

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

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

[8] We also find the rates billed for the services of several paralegals and law clerks to be reasonable. Such rates ranged from $45 to $75 per hour. However, in light of the Supreme Court's recent decision in Missouri v. Jenkins, --- U.S. ----, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), which we have previously applied to the Act, In re Sealed Case, 890 F.2d 451, 454 (D.C.Cir.1989) we deduct $4253.75 for services billed at these rates that were of a purely clerical nature. In Missouri, the Court held, inter alia, that "reasonable attorney's fee," under the Civil Rights Attorneys' Fees Awards Act, included work performed by paralegals and law clerks. Missouri, 109 S.Ct. at 2470. However, the court stated:

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

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

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

2. Reasonable Amount of Time Expended by Attorneys

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

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

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

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

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

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

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

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

3. Adequacy of Documentation

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

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

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

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

CONCLUSION

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

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

2. Disallow fees for preparing fee application.

3. Disallow expense for "Travel."

4. Reduce photocopying expenses by $10,000.00.

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

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

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

8. Disallow fees for media related activity.

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

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

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

Judgment accordingly.

APPENDIX
Deductions By Subject Matter

1.	Business Meals						$457.61
2.	Service Fee (rental fee Nat'l Press Club)						$345.60
3.	Support Staff Overtime						$11,311.-25
4.	Supplies						$884.05
5.	Services Rendered in Preparation of Fee Application						$7,585.00
6.	Travel						$707.00
7.	Excessive Photocopying						$10,000.-00
8.	Fees incurred after filing of response to Independent Counsel Report:						
	Nathan	9.25	hrs.x	$300/hr.	=	$2,775	
	Lewin:						
	James Rocap:	16.50	hrs.x	$140/hr.	=	$2,310	
	Nicki Kuckes:	10.50	hrs.x	$100/hr.	=	$1,050	
	Paralegal:	4.0	hrs.x	$50/hr.	=	$ 200	
						$6,335	$6,335.00
9.	Fees incurred preparing Meese for testimony in U.S. v. Nofziger and before congressional subcommittee:						
	Nathan	6.50	hrs.x	$300/hr.	=	$1,950	
	Lewin:						
	James Rocap:	23.0	hrs.x	$140/hr.	=	$3,220	
						$5,170	$5,170.00
10.	Fees incurred prior to appointment of Independent Counsel:						
	Nathan	.5 hrs.	x	$300/hr.	=	$150.00	
	Lewin:						
	James Rocap:	.5 hrs.	x	$140/hr.	=	$70.00	
						$220.00	$220.00
11.	Media Related Activity:						
	Nathan	28.25	hrs.x	$300/hr.	=	$8,475	
	Lewin:						
	James Rocap:	50.8	hrs.x	$140/hr.	=	$7,112	
	Nicki Kuckes:	9.75	hrs.x	$100/hr.	=	$975	
	Pete Evans:	1.5	hrs.x	$60/hr.	=	$90	
						$16,652	$16,652.-00
12.	Clerical or secretarial work performed by paralegals and law clerks						$4,253.75

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

						TOTAL DEDUCTION--$115,088.94	

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

END OF DOCUMENT

In re Theodore OLSON.

Division No. 86-1.

United States Court of Appeals,
District of Columbia Circuit.

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

April 2, 1987.
As Amended May 1 and May 27, 1987.

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

Matters referred.

[1] ATTORNEY GENERAL ⇦ 6
46k6
Ninety-day period within which Justice Department had to complete its preliminary investigation of alleged wrongdoing within Department did not begin to run, for purpose of deciding whether Department's preliminary report was timely filed or whether all of allegations in House Committee report should have been automatically referred to Independent Counsel for investigation, until Department had been given "reasonable time" within which to evaluate House Committee's 3,000 page report on wrongdoing. 28 U.S.C.A. § 592(c)(1).

[2] ATTORNEY GENERAL ⇦ 6
46k6
Thirty days was not unreasonable period of time for Justice Department to evaluate 3,000 page report being prepared by judiciary committee of House of Representatives, to determine whether there was sufficient evidence of wrongdoing by Department officials to warrant even preliminary investigation; accordingly, this 30-day period was properly excluded from 90-day period during which Department had to complete its preliminary investigation or turn investigation over to Independent Counsel. 28 U.S.C.A. § 592(c)(1).

[3] CONSTITUTIONAL LAW ⇦ 74
92k74
Statute authorizing court to appoint an Independent Counsel to prosecute violations of criminal law involving high government officials was fully consistent with separation of powers doctrine. U.S.C.A. Const. Art. 2, § 2,

cl. 2; 28 U.S.C.A. § 591 et seq.

[3] CRIMINAL LAW ⇦ 639.2
110k639.2
Formerly 110k639(2)
Statute authorizing court to appoint an Independent Counsel to prosecute violations of criminal law involving high government officials was fully consistent with separation of powers doctrine. U.S.C.A. Const. Art. 2, § 2, cl. 2; 28 U.S.C.A. § 591 et seq.

[4] CONSTITUTIONAL LAW ⇦ 50
92k50
Responsibility imposed on Congress by Article II empowers it to enact laws to guard against evils of massive conflicts of interest involved in enforcement of federal criminal law against highest officials of government and to vest in courts the appointment of inferior officers to carry out this responsibility. U.S.C.A. Const. Art. 2, § 2, cl. 2; 28 U.S.C.A. § 591 et seq.

[5] CONSTITUTIONAL LAW ⇦ 58
92k58
Section of Constitution, requiring that president "take care that the laws be faithfully executed," does not require that president or his delegate execute laws, so that Congress may entrust power of execution to some other officer, as long as president or his delegate has right to remove officer for impropriety. U.S.C.A. Const. Art. 2, § 3.

[6] UNITED STATES ⇐ 40
393k40
Statute, providing that Independent Counsel may ask Attorney General or division of court to refer matters related to Independent Counsel's prosecutorial jurisdiction, did not give division authority to refer to Independent Counsel allegations of wrongdoing which Attorney General had specifically determined should not be pursued. 28 U.S.C.A. §§ 592(b)(1), 594(e).

[7] UNITED STATES ⇐ 40
393k40
Order appointing Independent Counsel to investigate alleged wrongdoing in Justice Department, which authorized her to investigate any allegation or evidence of wrongdoing by particular individual in Department, implicitly authorized her to investigate whether this individual had conspired with, or been aided or abetted by, any other person, including persons whom Attorney General had previously determined should not be investigated in their own right. 28 U.S.C.A. §§ 592(b)(1), 594(e).

[8] CRIMINAL LAW ⇐ 1224(1)
110k1224(1)
Members of Justice Department, who challenged authority or propriety of Independent Counsel's investigation into alleged illegal activity in Department, could do so only after indictment, if any, was returned by grand jury. 28 U.S.C.A. §§ 592(b)(1), 594(e).

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

PER CURIAM.

Pursuant to 28 U.S.C. § 594(e), the Independent Counsel has applied for referral of certain matters related to the investigative jurisdiction granted previously in our Orders dated April 23, 1986, and May 29, 1986. Specifically, the Independent Counsel in her Application for Referral of Related Matters ("Independent Counsel Application") seeks investigative and prosecutorial jurisdiction over "certain allegations against two former Department of Justice ("Department") officials, Edward C. Schmults ("Schmults") and Carol E. Dinkins ("Dinkins"), in a report of the Judiciary Committee of the House of Representatives ("Committee") entitled Report on the Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents in 1982-83 ("Committee Report")." Independent Counsel Application at 1-2. The Department of Justice has responded to the Independent Counsel's application for referral of related matters, urging that 28 U.S.C. § 592(b)(1) precludes the Division from granting the request of Independent Counsel. ("Department of Justice Response"). The Independent Counsel has in turn replied to the objections of the Department of Justice. ("Independent Counsel Reply"). We agree generally with the Department of Justice that the applicable statute requires us to deny the Application because the Attorney General has twice denied such request.

I
Background

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

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

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

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

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

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

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

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

(C)(1) Whether the conduct of former Assistant Attorney General Carol Dinkins, resulting in the undisclosed withholding of documents from the Judiciary Committee during its investigation, violated 18 U.S.C. § 1505, § 1001, § 1512, or any other provision of federal criminal law; and (2) whether the conduct of Mrs. Dinkins in preparing and submitting a declaration in the case captioned United States v. United States House of Representatives, Civil No. 82-3583 (D.D.C.), violated 18 U.S.C. § 1503, § 1621, § 1623, § 401, § 1001, § 1512, or any other provision of federal criminal law.

Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in United States House Judiciary Committee Report ("Report of Attorney General") at 3-5.

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

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

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

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

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

to investigate and pursue the question whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 [FN3] or § 1001, [FN4] or any other provision of federal law.

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

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

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

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

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

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

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

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

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

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

of the evidence;
(2) Mr. Olson's testimony cannot properly be viewed in such isolation, because there are at a minimum "reasonable grounds to believe that further investigation ... is warranted" with respect to whether Mr. Olson's testimony was part of a larger, concerted plan, including Mr. Schmults, Ms. Dinkins, or others, to obstruct or impede the Committee's investigation into the Department's discharge of its responsibilities in the EPA documents dispute, possibly in violation of federal criminal law;
(3) wholly apart from any participation by Mr. Olson in a scheme to obstruct or impede the Committee's investigation, there are at a minimum "reasonable grounds to believe that further investigation ... is warranted" with respect to the conduct of Mr. Schmults and Ms. Dinkins, whose active and apparently admitted roles in the withholding of documents from the Committee seem to merit further scrutiny at least as much as Mr. Olson's testimony at the very threshold of the inquiry; and
(4) my inquiry has turned up new information which justifies referral to me of the allegations as to Mr. Schmults and Ms. Dinkins.
It is, therefore, necessary that I request, pursuant to 28 U.S.C. § 594(e) and for the reasons set out below, that you refer to me, as matters related to my present jurisdiction over specific aspects of Mr. Olson's March 10, 1983 testimony, the allegations made against Mr. Schmults and Ms. Dinkins in the Committee Report, as well as the investigation, which is now being conducted by Public Integrity, of possible perjury charges against Robert M. Perry, EPA's General Counsel during the interbranch controversy over the Superfund documents. I also request that you refrain from personal consideration of the requests made herein on grounds explained below.
Id. at 3-4 (emphasis added).

Deputy Attorney General Burns, in a letter dated December 17, 1986 ("Burns letter"), informed the Independent Counsel that the Attorney General had, as authorized by 28 U.S.C. § 594(e), referred to the Independent Counsel the Department's ongoing investigation of Robert M. Perry (not a person covered by the Independent Counsel provisions of the Ethics in Government Act). The Attorney General had, however, denied granting the Independent Counsel authority to investigate Schmults or Dinkins. Deputy Attorney General Burns' letter emphasized that the Attorney General had already determined there were no reasonable grounds warranting further investigation or prosecution of the allegations against Schmults and Dinkins. In addition, the letter stated that although the Independent Counsel claimed that "newly discovered" evidence (not available to the Justice Department at the time of its April 10, 1986, report to the Division) warranted further investigation, the Attorney General either had already considered the evidence when he reported to the Division on April 10, 1986, or had considered the Independent Counsel's request for referral and determined that the evidence would not "alter [his] conclusion." Burns Letter at 3.

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

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

592(c)(1). Independent Counsel Application at 3 n. 7. Section 592(c)(1) provides in part: if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of a[n] independent counsel. The Department received the extensive Committee Report on December 12, 1985. Based on the results of the review of the Report conducted by Department attorneys, the Attorney General determined on January 10, 1986, that a preliminary investigation was warranted as to the allegations against Olson, Schmults, and Dinkins. This action was expeditious. The Attorney General's Report to the Division was filed on April 10, 1986. Section 592(a)(1) compels the conclusion that the Attorney General's Report was timely filed. Section 592(a)(1) provides in part: Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. We agree with the Department that "some period of time is often required to ... determin[e] whether the information is sufficient to trigger even a preliminary investigation [and thus] the Department must be afforded a reasonable period of time to make that determination before the 90-day period for the preliminary investigation begins to run." Department Response at 27 n. 14. In our opinion, thirty days is not an unreasonable period of time to properly evaluate a 3,000 page investigatory report.

II
The Independent Counsel Provisions of the Ethics in Government Act

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

A.
Historical Background of the Independent Counsel Provisions

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

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

(1) Teapot Dome Scandal

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

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

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

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

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

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

(2) Corruption in the Truman Administration

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

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

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

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

on June 29, 1954.

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

(3) Watergate Scandal

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

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

9 Weekly Comp.Pres.Doc. 431-32 (May 5, 1973). The Honorable Elliot Richardson was appointed Attorney General and a special prosecutor's office was established on May 25, 1973. [FN9] Professor Archibald Cox was then appointed by President Nixon as special prosecutor to lead the Watergate investigations. When Cox threatened to secure a judicial ruling that President Nixon was violating the order of the United States Court of Appeals for the District of Columbia Circuit to deliver certain presidential tapes to Chief Judge Sirica of the United States District Court, the President ordered him fired. The Attorney General refused to execute the President's order and resigned. Immediately thereafter the Deputy Attorney General was fired for the same reason. Cox was then discharged as special prosecutor by the Solicitor General, in his capacity as Acting Attorney General. The President also abolished the special prosecutor's office; the Watergate investigations were transferred back to the Department of Justice. A few days later President Nixon reversed his decision to abolish the special prosecutor's office and announced that a new special prosecutor would be named. Acting Attorney General Bork, by formal order, established "The Office of Watergate Special Prosecution Force." 38 Fed.Reg. 30738, 32805 (1973). Shortly thereafter, Leon Jaworski, a private attorney from Houston, Texas, was appointed by Acting Attorney General Bork to be the new Watergate Special Prosecutor. Jaworski continued to act in ***42 **176** that capacity until a number of convictions were obtained and most of the principal cases were disposed of. The vacancy in the office of Attorney General was not filled until Congress passed a special act to authorize the appointment of Senator William B. Saxbe. Pub.L. No. 93-178, 87 Stat. 697 (1973). The special act was necessary in light of his prior vote to increase the salary of the office which would otherwise have disqualified him under art. I, § 6, cl. 2 of the Constitution.

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

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

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

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

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

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

The voluntary action of the Attorney General, with the President's publicly voiced support, emphasizes that the statute authorizing such investigation is "necessary and proper" whenever a conflict of interest exists in the narrow circumstances covered by the Act.

B.
Constitutional Authority for the Independent Counsel Provisions

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

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

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

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

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

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

> FN10. See Act of March 3, 1863, 12 Stat. 768; Rev.Stat. § 793 at 149 (1878); 28 U.S.C. § 546 (1982) as amended by Pub.L. No. 99-646 § 59(d), 100 Stat. 3592, 3616 (1986).

Our history, as above outlined, has thus demonstrated that it is "necessary " when high government officials are being investigated for criminal wrongdoing by officials of their own party, and that is the usual situation, that the Congress to the extent it thinks "proper " "may by Law vest the Appointment of ... inferior Officers ... in the Courts of Law." In dealing with this problem a page of history is worth a ton of theory. The independent counsel provisions are tailor-made to meet all the requirements envisioned by the Constitution. And the Independent Counsel is clearly an "inferior officer"--he is appointed for a single task to serve for a temporary limited period.

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

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

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

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

Id. The Independent Counsel statute meets all these requirements.

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

[5] The minimal powers conferred on Independent Counsel do not by any means constitute an assumption of the constitutional field of action of the Executive Branch in enforcing the criminal law. The highly limited duties of the Independent Counsel are "fixed according to sense and the inherent necessities of the governmental [problem]." See Hampton & Co. v. United States, 276 U.S. 394, 405-406, 48 S.Ct. 348, 350-351, 72 L.Ed. 624 (1928). The provision of the Constitution providing that: "[The President] ... shall take care that the laws be faithfully executed." U.S. Const. art. II, § 3, does not require the President (or his delegate) to "execute the laws." The President's responsibility may be satisfied by Congress entrusting the power of execution to some other officer while the President's obligation would be satisfied by the right of the President (or his delegate) to remove the individual officer for impropriety, which may be done here. [FN11] Kendall v. United States ex rel. ***45 **179** Stokes, 12 Pet. (37 U.S.) 524, 9 L.Ed. 1181 (1838); see also, The Jewels of the Princess of Orange, 2 Opin.A.G. 482 (1832). A review of the Independent Counsel provisions of the Ethics in Government Act § 591 et seq., discloses that broad power and authority of the Attorney General are closely interwoven into the statutory scheme.

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

(a) The Attorney General conducts the investigation and determines whether the information is sufficient to constitute grounds to investigate that any person covered by the Act has committed a violation of any major "federal criminal law." § 591(a).
(b) The Attorney General also determines whether the investigation of other persons by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest. § 591(c).
(c) Even after the Attorney General determines that the evidence is sufficient to constitute grounds to investigate, he has discretion to conduct "such preliminary investigation of the matter as [he] ... deems appropriate." § 592(a)(1).
(d) If the Attorney General upon completion of the preliminary investigation finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, he notifies the Division of the Court and his decision is final. Thereafter the Division of the Court shall have "no power to appoint an independent counsel." § 592(b)(1).
(e) If the Attorney General upon completion of the preliminary investigation finds reasonable grounds to believe that further investigation or prosecution is warranted, he then applies to the Division of the Court for the appointment of an independent counsel. He merely "compl[ies] with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." § 592(c)(1).
(f) Even if the Attorney General has initially found that an independent counsel is not warranted, he may still, on the basis of additional information, apply for appointment of an independent counsel. § 522(c)(2).
(g) The Attorney General may also set forth in an application for an independent counsel sufficient information to assist the Division in selecting an independent counsel and in defining counsel's prosecutorial jurisdiction. This gives the Attorney General the power to suggest the type of independent counsel that is necessary and the nature and extent of the jurisdiction that should be set forth in the Division's order. § 592(d)(1).
(h) The Attorney General, in his discretion, may request the independent counsel to accept referral of a matter that relates to the independent counsel's prosecutorial jurisdiction. § 592(e).
(i) The Attorney General's determination under § 592(c) to apply to the Division of the Court for the appointment of an independent counsel is not reviewable in any court. § 592(f).
(j) The Attorney General may request the Division of the Court to disclose the identity and prosecutorial jurisdiction of such independent counsel as would be in the best interests of justice. § 593(b).
(k) The Attorney General may request the Division of the Court to expand the prosecutorial jurisdiction of an existing independent counsel. § 593(c).
(l) Upon showing of good cause by the Attorney General, the Division of the Court may grant an extension of the preliminary investigation

conducted pursuant to § 592(a) for a period not to exceed 60 days. § 593(f).
(m) The Attorney General's authority to exercise direction and control of those matters that specifically require the Attorney General's personal action under § 2516 of Title 18 (Authorization for interception of wire or oral communications) is not affected. § 594(a).
(n) The Department of Justice has discretion to assist the independent counsel at his request. This may include access to any records, files, or any other materials ***46 **180** relevant to the matters within such independent counsel's prosecutorial jurisdiction and the use of the resources and personnel necessary to perform such duties of the independent counsel. § 594(d).
(o) The Attorney General may, at the request of the independent counsel, refer a matter related to the independent counsel's prosecutorial jurisdiction. § 594(e).
(p) An independent counsel, except where not possible, is required to comply with the written or other established policies of the Department of Justice respecting the enforcement of the criminal laws. § 594(f).
(q) An independent counsel may dismiss matters within his prosecutorial jurisdiction at any time prior to prosecution only upon compliance with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws. § 594(g).
(r) The majority and minority members of the Judiciary Committees of Congress separately may request in writing that the Attorney General apply for the appointment of an independent counsel. If no such application is made, the Attorney General notifies the respective committee members why such application was not made. § 595(e).
(s) The Attorney General may by "personal action" remove from office an independent counsel "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." § 596(a)(1).
(t) The Division of the Court upon suggestion of the Attorney General may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under § 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. § 596(b)(2).
(u) Whenever an independent counsel is proceeding under a jurisdictional order, he may agree in writing that such investigation or proceedings may be continued by the Department of Justice. § 597(a).
(v) The Attorney General or the Solicitor General may make a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or in any appeal of such case or proceeding. § 597(b).

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

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

***47 **181** III
Application of the Statutory Provisions

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

> § 592(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a[n] independent counsel. (Emphasis added).
>
> * * *
>
> § 594(e) A[n] independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction.

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

To suggest that the division of the court can bring about this result acting alone, upon the sole request of the independent counsel, would undercut the plain intent of § 592(b)(1) and permit the accomplishment by indirect means of a result that the statute prohibits being accomplished by direct means. Section 594(e) cannot be read to achieve such an unreasonable result.

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

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

> to investigate and pursue the question whether testimony of Mr. Theodore Olson and his revision of testimony on March 10, 1983 violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law. [The Order also further grants] jurisdiction to investigate any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation and the Independent Counsel shall have jurisdiction to prosecute for any such violation.

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

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

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

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

IV

Miscellaneous

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

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

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

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

Order Accordingly.

ORDER

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

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

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

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

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

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

END OF DOCUMENT

In re SEALED CASE.

No. 87-5247.

United States Court of Appeals,
District of Columbia Circuit.

Argued Aug. 5, 1987.

Decided Aug. 20, 1987.

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

Affirmed.

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

[1] ATTORNEY GENERAL ⇦ 2
46k2
Attorney General had statutory authority to create Office of Independent Counsel: Iran/Contra and to convey to it investigative and prosecutorial functions and powers. 5 U.S.C.A. § 301; 28 U.S.C.A. §§ 509, 510, 515.

[2] ATTORNEY GENERAL ⇦ 2
46k2
Attorney General's delegation to independent counsel whom he appointed of investigative and prosecutorial functions and powers did not violate Ethics Act requirement that Attorney General and the Department of Justice to suspend all investigations when a matter is in the prosecutorial jurisdiction of an independent counsel appointed by special division of the Court of Appeals under the Ethics Act, where person appointed independent counsel by the Attorney General was the same person who had been appointed under the Ethics Act, so that his signing of appointment form constituted an agreement in writing that the Justice Department investigation could continue. 28 U.S.C.A. § 597(a).

[3] ATTORNEY GENERAL ⇦ 2
46k2
Because Independent Counsel: Iran/Contra appointed by Attorney General served only for so long as regulation delegating powers to him remained in force, he was charged with a performance of a duty of the Attorney General for a limited time and under special and temporary conditions and thus was an "inferior Officer" whom the Attorney General could appoint under the appointments clause without advice and consent of the Senate. U.S.C.A. Const. Art. 2, § 2. cl. 2.

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

[4] ATTORNEY GENERAL ⇦ 2
46k2
Although there was no evidence that associate counsel of the Independent Counsel: Iran/Contra had completed a standard affidavit of appointment and had been sworn in, their exercise of powers delegated to them by the Attorney General was proper where they had been properly sworn in as associates of the Independent Counsel appointed by special division of the Court of Appeals under the Ethics Act. 28 U.S.C.A. §§ 515(a), 596.

[5] ATTORNEY GENERAL ⇦ 2
46k2
Adequate direction had been given to Independent Counsel: Iran/Contra appointed by the Attorney General even though no letter of authority had been issued. 28 U.S.C.A. § 515(a).

[6] ATTORNEY GENERAL ⇦ 2
46k2
Attorney General may not create offices outside the Department of Justice.

[7] CONSTITUTIONAL LAW ⇦ 46(1)
92k46(1)
Issue of whether any aspect of relationship between special division of the Court of Appeals and the Independent Counsel violated Constitution was not

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

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

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

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

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

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

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

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

D.H. GINSBURG, Circuit Judge:

Lt. Col. Oliver North appeals an order of the district court holding him in contempt for refusing to comply with a grand jury subpoena. North challenges the contempt order on the ground that it was issued by a grand jury presided over by Independent Counsel Lawrence Walsh and his associate counsel who, North contends, lack the legal authority to conduct that grand jury proceeding. North can prevail only if we find that Walsh's investigation cannot rely on either of two claimed sources of authority: (1) the December 19, 1986, appointment of Walsh as an independent counsel under the Ethics in Government Act [FN1] (Ethics Act), or (2) the Attorney General's March 5, 1987, delegation of investigative and prosecutorial authority of his own to Walsh. North raises constitutional challenges to both sources of authority as well as statutory challenges to the Attorney General's delegation.

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

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

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

I. BACKGROUND

A. Appointment by the Special Division

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

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

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

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

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

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

B. Appointment by The Attorney General

Exercising his authority under 28 U.S.C. § 594(a)(1), Walsh empaneled a grand jury in this district on January 28, 1987. On February 24, 1987, North filed a complaint claiming that the independent counsel provisions of the Ethics Act are unconstitutional, and seeking to enjoin the grand jury proceedings. [FN5] In response to this constitutional challenge to Walsh's authority, the Attorney General on March 5, 1987, promulgated a regulation designed "to assure the courts, Congress, and the American people that [Walsh's] investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of [North's] litigation." [FN6]

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

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

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

FN7. Id. at 7271.

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

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

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

7272; with 28 U.S.C. § 596.

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

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

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

(a) Nothing in this chapter is intended to modify or impair any of the provisions of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code), or any order issued thereunder.
(b) If any provision of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code) or any provision of this chapter is held invalid for any reason, such invalidity shall not affect any other provision of this chapter, it being intended that each provision of this chapter shall be severable from the Act and from each other provision. [FN14]

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

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

C. North's Challenges to Walsh's Authority

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

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

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

FN17. Id. at 421.

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

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

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

FN20. Id. at 778.

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

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

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

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

We therefore remanded the case to the district court for it to determine "whether the Attorney General had legal authority to delegate the powers which he purported to convey in the [March 5, 1987] regulation ..., and if so, whether appropriate authority has been properly vested in Mr. Walsh and his associates." [FN22] In addition, because of our uncertainty about the precise application for this case of certain language in the Supreme Court's decision in Bowsher v. Synar, --- U.S. ---- n. 5, 106 S.Ct. 3181, 3189 n. 5, 92 L.Ed.2d 583 (1986), we also directed the district court to determine "whether any aspect of the relationship between the special division of this court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise valid." [FN23]

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

FN23. Id.

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

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

FN25. Id.

II. ANALYSIS

A. Appointment by the Attorney General

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

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

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

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

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

i. Is the Attorney General's Delegation Lawful?

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

FN29. See 52 Fed.Reg. at 7270-72. Section 301 of Title 5 of the United States Code authorizes a department head to issue regulations. Sections 509, 510, and 515 of Title 28 outline the authority of the Attorney General. Section 509 vests in the Attorney General, with four exceptions not relevant here, "all functions" of other officers, employees, and agencies of the Department of Justice. Section 510 authorizes the Attorney General to delegate this authority to "any other officer, employee, or agency of the Department of Justice." Finally, section 515(a) authorizes the Attorney General to conduct "any kind of legal proceeding, civil or criminal, including grand jury proceedings ... which United States attorneys are authorized by law to conduct," and it authorizes the Attorney General to delegate this authority to "any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law." Together, these provisions vest in the Attorney General the "investigative and prosecutorial functions and powers" described in the regulation, 28 C.F.R. § 600.1(a), and authorize him to delegate such functions and powers to others within the Department of Justice.

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

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

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

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

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

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

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

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

Citing Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), North contends that, given the substantial authority delegated to him, the Independent Counsel: Iran/Contra is not an "inferior Officer" but an "Officer of the United States" [FN32] who may be appointed only by the President with the advice and consent of the Senate. North raises essentially the same contention with respect to the authority given to the independent counsel under the Ethics Act. We need not decide whether the Ethics Act creates such an "Officer of the United States," however, in order to conclude that the regulation does not. The crucial difference is that the Independent Counsel: Iran/Contra serves only for so long as the March 5, 1987, regulation remains in force. Subject to generally applicable procedural requirements, the Attorney General may rescind this regulation at any time, thereby abolishing the Office of Independent Counsel: Iran/Contra. [FN33] As a result, we must conclude that the Independent Counsel: Iran/Contra "is charged with the performance of the duty of the superior [i.e., the Attorney General] for a limited time and under special and temporary conditions." United States v. Eaton, ***57 ****272** 169 U.S. 331, 343, 18 S.Ct. 374, 379, 42 L.Ed. 767 (1898). As such, "he is not thereby transformed into the superior and permanent official," id., but rather remains an "inferior Officer" whom the Attorney General, as the "Head[ ] of [a] Department[ ]," may appoint under the express terms of the Appointments Clause. [FN34] See id. at 343-44, 18 S.Ct. at 879; United States v. Germaine, 99 U.S. (9 Otto) 508, 509-10, 25 L.Ed. 482 (1878). [FN35]

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

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

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

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

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

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

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

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

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

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

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

FN39. Exhibit 6 to Brief of Appellant.

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

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

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

North also contends that the Attorney General failed to comply with the requirement of 28 U.S.C. § 515(a) that he "specifically direct[ ]" Walsh and his associate counsel to conduct a grand jury investigation. In so arguing, North relies upon the lack of any "letter of authority" from the Attorney General (or his delegate) to each attorney, which is customarily provided in order to define the scope of the grand jury investigation and identify the attorneys conducting it. Although the cases concerning compliance with section 515(a) almost uniformly involve a dispute over whether a particular "letter of authority" specifically authorized the investigation being conducted, [FN42] no court has held that section 515(a) requires that there be any "letter of authority" as such. In fact, as the Department of Justice emphasizes, the Seventh Circuit has recently held that an attorney was "specifically directed" to conduct a grand jury proceeding even though a "letter of appointment" had not been sent until after the indictment issued. United States v. Balistrieri, 779 F.2d 1191, 1207-10 (7th Cir.), cert. denied, --- U.S. ----, 106 S.Ct. 1490, 89 L.Ed.2d 892 (1985).

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

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

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

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

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

FN44. See supra note 4 and accompanying text.

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

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

iii. Summary

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

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

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

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

B. The Tenure Issue

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

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

> FN50. Order, In re Sealed Case, supra note 23 and accompanying text.
>
> FN51. The relevant provisions are found in 28 U.S.C. § 596(a): (1) A[n] independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.
>
> * * *
>
> (3) A[n] independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court [i.e., the Special Division] and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

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

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

In this case, the removal provisions in the Ethics Act and in the Attorney General's regulation are identical. [FN52] In general, they provide that the Attorney General may remove Walsh for cause only. What differentiates the two schemes is that the Attorney General may rescind or amend the regulation, thereby withdrawing the delegated authority or Walsh's security of tenure, whereas in order to effect the parallel result under the Ethics Act, the Congress and the President, or Congress overriding a veto, would have to legislate to repeal the statute, arguably a less likely development. North appears to argue that Walsh's more secure status under the Ethics Act, combined with the fact that under the Act's removal provisions the court that appointed him would review his removal, creates in Walsh a "here-and-now subservience" to the Special Division and, under Bowsher, compels us to reach the merits of his constitutional challenge. [FN53]

> FN52. Compare 28 U.S.C. § 596 with 28 C.F.R. § 600.3, 52 Fed.Reg. at 7272. In particular, the grounds for removal are identical.
>
> FN53. Brief of Appellant at 37-38.

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

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

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

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

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

FN57. We do not read Bowsher, however, to hold that the constitutionality of a statute is ripe for review any time a party raises a separation of powers claim. For example, suppose, improbably, that Congress transferred the National Weather Service from the Department of Commerce to the Administrative Office of the United States Courts, and that this prompted someone--perhaps an employee who had hoped to move up within the Commerce Department--to bring a declaratory judgment suit challenging the move on separation of powers grounds. In terms purely of when that issue would be "ripe" for judicial review, it is difficult to see how the change in allegiances occasioned by the move would realistically have any effect on how the Service's employees perform their duties. Accordingly, it would not be unreasonable for a court to consider such a declaratory judgment action unripe until a plaintiff complains of some conduct by the newly-moved Service that would likely have been different if it had remained within the Department of Commerce.

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

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

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

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

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

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

FN60. As we said in Deaver v. Seymour, see supra note 18, and as the district court said in North v. Walsh and Meese, see supra note 16, courts do not, except in very limited circumstances not alleged here, entertain the claim of a person subject to a criminal investigation that the investigation is unlawful and must therefore be enjoined. Courts exercise this restraint because, as Justice Frankfurter explained, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." Cobbledick v. United States, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940). In previously remanding this case to the district court, we found a narrow pre-indictment exception to this rule, under which a recalcitrant grand jury witness, such as North, may raise the claim that his or her subpoena was "applied for and issued under the signature of unauthorized persons." In re Sealed Case, supra note 19, 827 F.2d at 778. This exception, though, was not intended to swallow the general rule barring judicial interference with the conduct of a grand jury proceeding. As a result, in asserting that the subpoena issued to him was "unduly burdensome or otherwise unlawful," United States v. Ryan, 402 U.S. at 532, 91 S.Ct. at 1582, North may raise only those issues that relate to the specific subpoena with which he refused to comply. He may not rely upon the fortuitous circumstance of receiving that subpoena to effect an end run around the rule we announced in Deaver v. Seymour and in so doing challenge the entire investigation.

III. CONCLUSION

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

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

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

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

Affirmed.

WILLIAMS, Circuit Judge, concurring and dissenting:

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

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

I. REVOCABILITY OF THE REGULATIONS

North contends that Counsel Walsh's tenure under the Regulations violates the Appointments Clause, Art. II, § 2, by constituting him a "superior officer" whose appointment is not made pursuant to that clause, i.e., by the President with the advice and consent of the Senate. The court responds that since the Attorney General can rescind the Regulation "at any time," Majority ("Maj.") at 56, Counsel Walsh is merely filling a part of the office of the Attorney General " 'for a limited time and under special and temporary conditions,' " id. (citing United States v. Eaton, 169 U.S. 331, 343, 18 S.Ct. 374, 379, 42 L.Ed. 767 (1898)). Eaton upheld the non-presidential appointment of a vice consul to temporarily wield all the powers of an ailing consul, even though Art. II, § 2 specifically identifies consuls as "superior officers." Accordingly, Walsh's similarly defeasible appointment is also valid. So far, I agree.

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

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

The Supreme Court has long recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974) (citing Confiscation Cases, 7 (U.S.) Wall 454, 19 L.Ed. 196 (1869)) (other citations omitted); see also United States v. Batchelder, 442 U.S. 114, 123-24, 99 S.Ct. 2198, 2203-04, 60 L.Ed.2d 755 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). It recently reaffirmed this principle emphatically. Heckler v. Chaney, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985) (agency decision not to enforce "presumptively unreviewable"); Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985) ("the Government retains 'broad discretion' as to whom to prosecute"). In both Wayte and Chaney the Court found judicial review peculiarly

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

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

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

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

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

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

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

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

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

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

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

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

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

FN3. North notes that the Special Court's decision to vest in the Independent Counsel far broader jurisdiction than that proposed by the Attorney General followed communications to the Special Court from members of the then minority of the Senate Judiciary Committee, urging such an expansion. Letter from Joseph R. Biden, Jr., et al. to Special Division for Independent Counsel (Dec. 9, 1986). The episode suggests a point that should be borne in mind throughout: the label "independent" is not necessarily descriptive of true relations. Powers abhors a vacuum. Unhitching the Independent Counsel from the executive may make the office naturally prone to domination by the branch that represents its primary competitor.

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

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

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

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

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

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

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

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

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

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

> Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.

424 U.S. at 117-18, 96 S.Ct. at 681 (citing cases

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

* * *

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

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

No. 490.

Supreme Court of the United States

Argued March 18 and 19, 1963.

Decided May 13, 1963.

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

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

[1] FEDERAL COURTS ⇐ 503
170Bk503
Decision of Maryland Court of Appeals on petitioner's appeal in post-conviction proceeding, remanding case for retrial on question of punishment but not on question of guilt was "final judgment" within statute relating to federal Supreme Court review of final judgments by certiorari. Code Md.1957, art. 27, § 413; Code Supp. Md. art. 27, § 645A et seq.; 28 U.S.C.A. § 1257(3); U.S.C.A.Const Amend. 14.

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

[2] CONSTITUTIONAL LAW ⇐ 268(5)
92k268(5)
Formerly 92k257
Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[3] CONSTITUTIONAL LAW ⇐ 268(5)
92k268(5)
Formerly 92k257
Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A.Const. Amend. 14.

[4] CRIMINAL LAW ⇐ 734
110k734
Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. Const.Md. art. 15, § 5.

[5] FEDERAL COURTS ⇐ 371
170Bk371
State courts, state agencies and state legislatures are final expositors of state law under our federal regime. Const. Md. art 15, § 5.

[6] CONSTITUTIONAL LAW ⇐ 271
92k271
Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; Const.Md. art. 15, § 5; U.S.C.A.Const. Amend. 14.

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

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

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

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

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

FN1. Neither party suggests that the decision below is not a 'final judgment' within the meaning of 28 U.S.C. s 1257(3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that 'Final judgment in a criminal case means sentence. The sentence is the judgment' (Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt 'that presents a serious and unsettled question' (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528) that 'is fundamental to the further conduct of the case' (United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311). This question is 'independent of, and unaffected by' (Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See Largent v. Texas, 318 U.S. 418, 421--422, 63 S.Ct. 667, 668--669, 87 L.Ed. 873. Cf. Local No. 438 Const. and General Laborers' Union v. Curry, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.

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

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

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

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

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

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

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

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

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

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

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

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

the punishment of the defendant Brady.
'Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. * * *
'The appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree. We, therefore, see no occasion to retry that issue.' 226 Md., at 429--430, 174 A.2d, at 171. (Italics added.)

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

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

FN3. See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md.St.Bar Assn.Rept. 246, 253--254.

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

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

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

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

Affirmed.

Separate opinion of Mr. Justice WHITE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No. 94-2572.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 10, 1994.

Decided Nov. 29, 1994.

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

Reversed and remanded.

[1] CRIMINAL LAW ⇦ 986.4(1)
110k986.4(1)
Defendant who pled guilty to mail fraud and providing prohibited object to federal prisoner made sufficient objections to facts related in presentence report regarding amount of fraud and abuse of trust or use of special skill necessary to trigger trial court's obligation to hold evidentiary hearing; defendant objected to presentence report in timely fashion and requested evidentiary hearing. U.S.Dist.Ct.Rules D.Minn., Rule 83.10(f); U.S.S.G. § 3B1.3, 18 U.S.C.A.App.

[2] CRIMINAL LAW ⇦ 1311
110k1311
Government bore burden of proof on disputed issues of fact where they related to factors which would enhance defendant's sentence.

[3] CRIMINAL LAW ⇦ 986.4(1)
110k986.4(1)
Once defendant objects to presentence report, court must either make finding as to whether disputed fact exists or state that it will not take the disputed fact into account; if the sentencing court chooses to make finding with respect to disputed facts, it must do so on basis of evidence, and not presentence report.

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

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

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

PER CURIAM.

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

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

The district court determined that the factual

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

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

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

II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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UNITED STATES, Petitioner,
v.
Milton Dean BATCHELDER.

No. 78-776.

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

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

Reversed.

[1] CONSTITUTIONAL LAW ⚖ 62(5.1)
92k62(5.1)
Formerly 92k62(5)
Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[1] CONSTITUTIONAL LAW ⚖ 250.3(1)
92k250.3(1)
Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[1] CONSTITUTIONAL LAW ⚖ 270(1)
92k270(1)
Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[1] WEAPONS ⚖ 3
406k3
Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two

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

[1] WEAPONS ⇐ 17(8)
406k17(8)
Previously convicted felon convicted of receiving firearm that has traveled in interstate commerce under Title IV of Omnibus Crime Control and Safe Streets Act of 1968 was properly sentenced to five-year maximum term authorized for violation of that statute, even though his conduct also violated similar provision of Title VII of Omnibus Act; as so construed, statutory scheme was not void for vagueness, did not violate equal protection or due process on theory that they allowed prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to executive branch the Legislature's responsibility to fix criminal penalties. 18 U.S.C.A. §§ 922(h), 924(a); 18 U.S.C.A. App. § 1202(a).

[2] CRIMINAL LAW ⇐ 29(3)
110k29(3)
Formerly 110k29
When act violates more than one criminal statute, government may prosecute under either so long as it does not discriminate against any class of defendants.

[3] DISTRICT AND PROSECUTING ATTORNEYS ⇐ 8
131k8
Whether to prosecute and what charge to file or bring before grand jury are decisions that generally rest in prosecutor's discretion.

[4] CRIMINAL LAW ⇐ 1206.3(4)
110k1206.3(4)
Formerly 110k1208(2)
Just as defendant has no constitutional right to elect which of two applicable federal statutes shall be basis of his indictment and prosecution, neither is he entitled to choose penalty scheme under which he will be sentenced. U.S.C.A.Const. art. 2, §§ 2, 3; 28 U.S.C.A. §§ 515, 516.

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

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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

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

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

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

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

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

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

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

581 F.2d 626, reversed.

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

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

Mr. Justice MARSHALL delivered the opinion of the Court.

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

FN1. 82 Stat. 197.

I

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

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

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

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

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

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

*118 The dissent found no basis in the Omnibus Act or its legislative history for engrafting the penalty provisions of § 1202(a) onto §§ 922(h) and 924(a). 581 F.2d, at 638-639. Relying on "the long line of cases . . . which hold that where an act may violate more than one criminal statute, the government may elect to prosecute under either, even if [the] defendant risks the harsher penalty, so long as the prosecutor does not discriminate against any class of defendants," the dissent further concluded that the statutory scheme was constitutional. Id., at 637.

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

II

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

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

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

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

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

That Congress intended to enact two independent gun control statutes, each fully enforceable on its own terms, is confirmed by the legislative history of the Omnibus Act. Section 922(h) derived from § 2(f) of the Federal Firearms Act of *120 1938, 52 Stat. 1251, and § 5 of that Act, 52 Stat. 1252, authorized the same maximum prison term as § 924(a). Title IV of the Omnibus Act merely recodified with some modification this "carefully constructed package of gun control legislation," which had been in existence for many years. Scarborough v. United States, 431 U.S. 563, 570, 97 S.Ct. 1963, 1967, 52 L.Ed.2d 582 (1977); see United States v. Bass, supra, 404 U.S., at 343 n.10, 92 S.Ct., at 520; 15 U.S.C. §§ 902, 905 (1964 ed.).

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

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

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

**2203 In construing § 1202(a) to override the penalties authorized by § 924(a), the Court of Appeals relied, we believe erroneously, on three principles of statutory interpretation. First, the court invoked the well-established doctrine that ambiguities in criminal statutes must be resolved in favor of lenity. E. g., Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971); United States v. Bass, 404 U.S., at 347, 92 S.Ct., at 522; United States v. Culbert, 435 U.S. 371, 379, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978); United States v. Naftalin, 441 U.S. 768, 778-779, 99 S.Ct. 2077, 2084, 60 L.Ed.2d 624 (1979); Dunn v. United States, 442 U.S., at 112-113, 99 S.Ct., at 2197. Although this principle of construction applies to sentencing as well as substantive provisions, see Simpson v. United States, 435 U.S. 6, 14-15, 98 S.Ct. 909, 913-914, 55 L.Ed.2d 70 (1978), in the instant case there is no ambiguity to resolve. Respondent unquestionably violated § 922(h), and § 924(a) unquestionably permits five years' imprisonment for such a violation. That § 1202(a) provides different penalties for essentially the same conduct is no justification for taking liberties with unequivocal statutory *122 language. See Barrett v. United States, 423 U.S. 212, 217, 96 S.Ct. 498, 501, 46 L.Ed.2d 450 (1976). By its express terms, § 1202(a) limits its penalty scheme exclusively to convictions obtained under that provision. Where as here, "Congress has conveyed its purpose clearly, . . . we decline to manufacture ambiguity where none exists." United States v. Culbert, supra, 435 U.S., at 379, 98 S.Ct., at 1117.

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

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

III

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

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

A

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

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

B

[2][3] This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecutes *124 under either so long as it does not discriminate against any class of defendants. See United States v. Beacon Brass Co., 344 U.S. 43, 45-46, 73 S.Ct. 77, 79, 97 L.Ed. 61 (1952); Rosenberg v. United States, 346 U.S. 273, 294, 73 S.Ct. 1152, 1163, 97 L.Ed. 1607 (1953) (Clark, J., concurring, joined by five Members of the Court); Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962); SEC v. National Securities, Inc., 393 U.S. 453, 468, 89 S.Ct. 564, 572, 21 L.Ed.2d 668 (1969); United States v. Naftalin, 441 U.S., at 778, 99 S.Ct., at 2084. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion. See Confiscation Cases, 7 Wall. 454, 19 L.Ed. 196 (1869); United States v. Nixon, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978).

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

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

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

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

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

C

Approaching the problem of prosecutorial discretion from a slightly different perspective, the Court of Appeals postulated that the statutes might impermissibly delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties. *126 See United States v. Hudson, 7 Cranch 32, 34, 3 L.Ed. 259 (1812); United States v. Grimaud, 220 U.S. 506, 516-517, 519, 31 S.Ct. 480, 482-483, 484, 55 L.Ed. 563 (1911); United States v. Evans, 333 U.S., at 486, 68 S.Ct., at 636. We do not agree. The provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose. In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws. Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty. See United States v. Evans, supra, at 486, 492, 495, 68 S.Ct., at 636, 639, 640.

Accordingly, the judgment of the Court of Appeals is

Reversed.

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

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

United States Court of Appeals,
Second Circuit.

Argued Oct. 23, 1990.

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

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

Reversed and remanded.

Altimari, Circuit Judge, filed a concurring opinion.

[1] CRIMINAL LAW ⇐ 919(1)
110k919(1)
Whether introduction of perjured testimony requires new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury; where prosecution knew or should have known of the perjury, conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury; if it is established that the Government knowingly permitted the introduction of false testimony, reversal is virtually automatic; where Government was unaware of witness' perjury, new trial is warranted only if the testimony was material and the court is left with a firm belief that, but for perjured testimony, the defendant would most likely not have been convicted.

[1] CRIMINAL LAW ⇐ 940
110k940
Whether introduction of perjured testimony requires new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury; where prosecution knew or should have known of the perjury, conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the

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

[1] CRIMINAL LAW ⇐ 945(1)
110k945(1)
Whether introduction of perjured testimony requires new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury; where prosecution knew or should have known of the perjury, conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury; if it is established that the Government knowingly permitted the introduction of false testimony, reversal is virtually automatic; where Government was unaware of witness' perjury, new trial is warranted only if the testimony was material and the court is left with a firm belief that, but for perjured testimony, the defendant would most likely not have been convicted.

[2] CRIMINAL LAW ⇐ 706(2)
110k706(2)
Government should have been aware of witness' perjury concerning his gambling activities, so that use of the testimony required reversal where the

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

[2] CRIMINAL LAW ⇦ 1171.8(1)
110k1171.8(1)
Government should have been aware of witness' perjury concerning his gambling activities, so that use of the testimony required reversal where the Government questioned the witness extensively when presented with evidence of his gambling activities but, rather than proceeding with great caution when he was cross-examined about those activities, set out on redirect examination to rehabilitate him.

[3] CRIMINAL LAW ⇦ 1169.1(2.1)
110k1169.1(2.1)
Formerly 110k1169.1(2)
Even if Government did not know that witness was perjuring himself when he denied gambling activity after date on which he allegedly reformed himself, that perjured testimony required reversal; witness was one of two significant witnesses against the defendant; the other witness had admitted perjuring himself in other proceedings, and witness who perjured himself at defendants' trial had been involved in the acts with which the defendants were charged but was represented as having reformed himself and having ceased gambling.

[4] UNITED STATES ⇦ 40
393k40
Order of the independent counsel court giving independent counsel jurisdiction to investigate whether any provision of federal law was violated by Attorney General's relationship or dealings with certain persons did not give the independent counsel jurisdiction over violations of federal law by those other persons which was unrelated to the acts of the Attorney General.

[5] INDICTMENT AND INFORMATION ⇦ 10.1(1)
210k10.1(1)
Prosecutors were not biased against defendants because of prosecutors' relationship with the Attorney General so as to preclude them from being disinterested prosecutors and to render the indictment invalid.

[6] POSTAL SERVICE ⇦ 35(2)
306k35(2)
Essential elements of a mail fraud violation are a scheme to to defraud, money or property, and the use of the mails to further the scheme. 18 U.S.C.A. § 1341.

[7] POSTAL SERVICE ⇦ 35(5)
306k35(5)
To establish existence of scheme to defraud, Government must present proof that defendant possessed a fraudulent intent. 18 U.S.C.A. § 1341.

[8] POSTAL SERVICE ⇦ 35(9)
306k35(9)
Although money or property must be the object of mail fraud scheme, Government is not required to show that the intended victim was actually defrauded and need only show that defendants contemplated some actual harm or injury. 18 U.S.C.A. § 1341.

[9] POSTAL SERVICE ⇦ 35(9)
306k35(9)
Fact that defendants did perform some services for corporation, but not those for which payment was purportedly made to them, did not defeat charge of mail fraud as the corporation and the shareholders did not receive the services that they believed were being provided.

[10] CORPORATIONS ⇦ 180
101k180
Role of shareholders in governing conduct of corporation is minimal and limited to fundamental decisions, such as the election of directors or the approval of extraordinary matters and amendments of the articles of incorporation and bylaws; shareholders have no legal right to control day-to-day affairs of a corporation.

[11] CORPORATIONS ⇦ 182.1(1)
101k182.1(1)
Shareholders do not hold legal title to any of the corporation's assets; corporation, the entity itself, is vested with title.

[12] POSTAL SERVICE ⇦ 35(9)
306k35(9)
Shareholders ownership of stock in corporation was a property interest giving rise to a right to

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

[13] POSTAL SERVICE ⇐ 48(4.2)
306k48(4.2)
Formerly 306k48(4.8)
Allegation that defendants, in concert with insiders of corporation, set up a scheme to conceal the true nature of their dealings and the ultimate recipients of payments from the corporation adequately alleged deprivation of property belonging to the shareholders, and thus could support mail fraud conviction; misrepresentations permitted officers to pay out large sums from the corporation to undisclosed individuals for allegedly improper purposes, while maintaining the facade that the payments were in furtherance of legitimate corporation goals, and thus deprived the shareholders and the corporation of the opportunity to make informed decisions. 18 U.S.C.A. § 1341.

[14] FRAUD ⇐ 68
184k68
Fact that directors and officers of corporation have authority to act on behalf of corporation and shareholders does not preclude a criminal fraud from being perpetrated against the corporation when all officers are participants in the scheme. 18 U.S.C.A. § 1341.

[15] POSTAL SERVICE ⇐ 35(10)
306k35(10)
Credit card billings were central to scheme whereby corporate officer was allowed to use corporate credit cards for his own benefit, with the corporation paying the bills, and thus could support prosecution for mail fraud. 18 U.S.C.A. § 1841.

[16] POSTAL SERVICE ⇐ 35(10)
306k35(10)
Property was taken through a scheme whereby director of corporation was permitted to use corporation credit cards for his own personal benefit, and concealment of the payments to the director from the corporation by masking them as business expenses perpetrated a fraud on the corporation and its shareholders which could be prosecuted under the mail fraud statute. 18 U.S.C.A. § 1341.

[17] RECEIVING STOLEN GOODS ⇐ 1
324k1
To obtain a conviction under the National Stolen Property Act, Government must prove beyond a reasonable doubt that defendant transported property, as defined by the statute, in interstate commerce, that the property was worth than $5,000, and that the defendant knew that the property was stolen, converted or taken by fraud. 18 U.S.C.A. § 2314.

[18] RECEIVING STOLEN GOODS ⇐ 2
324k2
To establish violation of the National Stolen Property Act, Government must prove that the defendant was actually successful in defrauding his intended victim of property in excess of $5,000 and actual pecuniary harm must be shown; in contrast, Government need only prove an intent to defraud in order to obtain a mail fraud conviction and actual success of the scheme is not essential. 18 U.S.C.A. §§ 1341, 2314.

[19] RECEIVING STOLEN GOODS ⇐ 2
324k2
To obtain a conviction for transportation of stolen property, Government need not prove that defendant actually participated in scheme to defraud someone of property; proof that the defendant knew that the property had been stolen or procured by fraud is sufficient. 18 U.S.C.A. § 2314.

[19] RECEIVING STOLEN GOODS ⇐ 3
324k3
To obtain a conviction for transportation of stolen property, Government need not prove that defendant actually participated in scheme to defraud someone of property; proof that the defendant knew that the property had been stolen or procured by fraud is sufficient. 18 U.S.C.A. § 2314.

[20] RECEIVING STOLEN GOODS ⇐ 5
324k5
Fact that officers and directors of corporation were aware of everything that had transpired with respect to payments made by corporation and had willingly disbursed relevant funds did not preclude finding that those who received the funds were guilty of transporting stolen property. 18 U.S.C.A. § 2314.

[21] STATUTES ⇐ 241(1)
361k241(1)

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

[22] CONSPIRACY ⚿ 24(1)
91k24(1)
To establish existence of conspiracy, Government need only establish existence of agreement and an overt act in furtherance of the agreement. 18 U.S.C.A. § 371.

[22] CONSPIRACY ⚿ 27
91k27
To establish existence of conspiracy, Government need only establish existence of agreement and an overt act in furtherance of the agreement. 18 U.S.C.A. § 371.

[23] CONSPIRACY ⚿ 28(2)
91k28(2)
Conspiracy is a crime separate and apart from the substantive offense that is the object of the conspiracy. 18 U.S.C.A. § 371.

[24] CONSPIRACY ⚿ 24.10
91k24.10
Because it is the conspiratorial plan itself that is the focus of a charge of conspiracy, illegality of the agreement is not dependent upon the actual achievement of the goal.

[25] CONSPIRACY ⚿ 38
91k38
Impossibility is not a defense to a conspiracy charge. 18 U.S.C.A. § 371.

[26] CONSPIRACY ⚿ 24.10
91k24.10
Defendants could be charged with conspiracy to violate the conflict of interest of statute by making advance payment to a person whom they expected to be appointed to federal office and to continue to lobby for defendant's corporation, even though the person was never appointed. 18 U.S.C.A. §§ 203, 371.

[26] CONSPIRACY ⚿ 28(3)
91k28(3)
Defendants could be charged with conspiracy to violate the conflict of interest of statute by making advance payment to a person whom they expected to be appointed to federal office and to continue to lobby for defendant's corporation, even though the person was never appointed. 18 U.S.C.A. §§ 203, 371.

[27] CONSPIRACY ⚿ 24.10
91k24.10
Where conspiracy involves conduct intended to take place at a future time, relevant question is whether the alleged conspirators subjectively believed that the conditions necessary for attaining objective were likely to be fulfilled. 18 U.S.C.A. § 371.

[28] CRIMINAL LAW ⚿ 369.2(1)
110k369.2(1)
Even under the inclusionary approach to the introduction of similar act evidence, district court must be careful to consider the cumulative impact of the evidence on the jury and to avoid the potential prejudice that might flow from its admission. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[29] CRIMINAL LAW ⚿ 371(1)
110k371(1)
Evidence that defendant had accepted money to lobby the Attorney General to obtain support of the Government for a pipeline and did not disclose it on income tax returns was admissible to show his intent in dealing with the Government on behalf of another corporation from which he allegedly received payments in an illegal manner. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[30] WITNESSES ⚿ 274(2)
410k274(2)
Government is permitted to ask questions of character witnesses concerning their knowledge of specific acts of defendant's conduct, but the extent to which such collateral character evidence is admissible is limited to insure that the jury does not convict defendant for conduct with which he has not been charged. Fed.Rules Evid.Rule 405, 28 U.S.C.A.

[31] CRIMINAL LAW ⚿ 706(5)
110k706(5)
Although evidence that defendant, who was charged with deliberately receiving payments from corporation for lobbying efforts, had, while serving as attorney for two young children who were badly burned, settled the case for $1.7 million, retaining $1 million as his fee, and had obtained the approval of settlement over objections of the children's

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

[31] CRIMINAL LAW ⇐ 723(1)
110k723(1)
Although evidence that defendant, who was charged with deliberately receiving payments from corporation for lobbying efforts, had, while serving as attorney for two young children who were badly burned, settled the case for $1.7 million, retaining $1 million as his fee, and had obtained the approval of settlement over objections of the children's parents from a state court judge whom the attorney was recommending for appointment to the federal bench may have been technically admissible, to impeach character witness, the inquiry was expanded beyond the bounds of propriety and relevance when prosecutor characterized the defendant's behavior in the other case as an outrage and appealed for vengeance by inviting the jurors to stand in the shoes of the parents of the children.

[31] WITNESSES ⇐ 274(2)
410k274(2)
Although evidence that defendant, who was charged with deliberately receiving payments from corporation for lobbying efforts, had, while serving as attorney for two young children who were badly burned, settled the case for $1.7 million, retaining $1 million as his fee, and had obtained the approval of settlement over objections of the children's parents from a state court judge whom the attorney was recommending for appointment to the federal bench may have been technically admissible, to impeach character witness, the inquiry was expanded beyond the bounds of propriety and relevance when prosecutor characterized the defendant's behavior in the other case as an outrage and appealed for vengeance by inviting the jurors to stand in the shoes of the parents of the children.

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

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

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

MESKILL, Circuit Judge:

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

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

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

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

BACKGROUND

The convictions subject to challenge stem from the defendants' dealings with the now defunct entity known as Wedtech Corporation (Wedtech). Over a period of years, each of the defendants engaged in a series of transactions with Wedtech. At trial, the government contended and the jury found in a number of instances that the conduct of each defendant constituted a criminal offense. Defendants concede that they engaged in transactions with Wedtech, but they submit that as a matter of law their convictions cannot be sustained. Defendants advance several theories to support their position. Due to the complexity of this case and to ease understanding of the issues presented, we assume the accuracy of the government's facts as they relate to the charges in the indictment. We, therefore, begin our discussion by outlining the government's version of the facts. The facts are developed further in connection with our discussion of the defendants' legal arguments.

A. Facts

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

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

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

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

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

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

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

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

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

> Dear Tony:
>
> Congratulations to all upon the success of the public offering. It is well deserved.
>
> As we discussed, my fee for consultation relative to the registration and public offering is $125,000.
>
> It is a great privilege to work closely with you and your very estimable colleagues at Wedtech.

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

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

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

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

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

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

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

3. Wallach Introduces London and Chinn

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

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

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

a. Six Checks Totaling $99,999.98

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

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

b. December 1985 Agreement: Secondary Public Offering

In December 1985, Wedtech officers agreed to enter into an agreement with London to assist the corporation with its second public offering, scheduled for January 1986. The agreement called for London to receive $1 million as compensation for his services. Chinn was a silent party to this agreement. The purpose of the agreement was to get London and Chinn to create a demand for the newly issued stock by "parking" it. Additionally, London and Chinn were to pay $100,000 as a kickback to Guariglia to ensure their receipt of the $1 million. Wedtech officers also paid to London and Chinn $114,000 in related expenses. Thus, the total sum involved was $1.14 million. Finally, London, Chinn and Guariglia agreed that the $1 million would be paid to London's corporation, IFCI, and that, in turn, Chinn's share would be channelled to him via his corporation, FMI, and that Wallach was to receive a twenty percent share of the $1 million payment. This mode of disbursing the funds was adopted in order to avoid the SEC mandated disclosure of the payment to Chinn, a Wedtech director. The registration statement that was filed in connection with the public offering made no mention of this $1.14 million payment. Similarly, the final prospectus that was mailed to shareholders omitted any reference to the payment. In the spring of 1986, Wedtech's outside counsel discovered that a payment had been made. Accordingly, a committee was organized to investigate the fee. In response to committee inquiries, London denied that he had shared the fee, and he attributed the payment to marketing services he allegedly had rendered and would continue to render in connection with a metallic coating process that Wedtech had developed. The committee eventually decided to characterize the fee to comport with this new explanation.

4. Wedtech's Final Days

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

***454** C. The Indictment

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

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

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

D. The Verdict

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

1. Eugene Robert Wallach

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

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

***455** 2. Rusty Kent London

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

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

3. Wayne Franklyn Chinn

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

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

DISCUSSION

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

A. The Perjury Issue

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

The defendants argue that their convictions must be reversed because Guariglia perjured himself during the course of his testimony at trial. The government concedes that Guariglia committed perjury. Indeed, on June 26, 1990, Guariglia was indicted and charged with committing perjury during the course of the trial of the instant case. [FN2] Guariglia's perjury related to his testimony on direct examination that he had stopped his compulsive gambling in the summer of 1988. Specifically, Guariglia testified that he had not gambled from the summer of 1988 to the time of the trial in June 1989. He further testified that he stopped gambling at the direction of prosecutors in the Southern District of New York and because he recognized that he was "hooked" on gambling.

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

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

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

The question of Guariglia's perjury was again

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

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

[1] Whether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury. With respect to this latter inquiry, there are two discrete standards of review that are ultilized. Where the prosecution knew or should have known of the perjury, the conviction must be set aside " 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Perkins v. LeFevre, 691 F.2d 616, 619 (2d Cir.1982) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)); see also Sanders v. Sullivan, 863 F.2d 218, 225 (2d Cir.1988) (question is whether the jury's verdict "might" be altered); Annunziato v. Manson, 566 F.2d 410, 414 (2d Cir.1977). Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is "virtually automatic." United States v. Stofsky, 527 F.2d 237, 243 (2d Cir.1975) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)), cert. denied, 429 U.S. 819, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976). Where the government was unaware of a witness' perjury, however, a new trial is warranted only if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." Sanders, 863 F.2d at 226; see also United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir.1975) (The test " 'is whether there was a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction.' ") (citations omitted).

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

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

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

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

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

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

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

[3] ***458** Even assuming that the government had no knowledge of the perjury at the time of trial, we believe that reversal would still be warranted. The government acknowledges that it received additional information concerning the falsity of Guariglia's testimony in December 1989, months after the trial's conclusion. Specifically, the government learned that Guariglia had gambled in Puerto Rico in November 1988 and that he had been involved in another illegal scheme during the period of his cooperation with the government. This additional information in itself provides a sufficient basis for granting the defendants a new trial. We reach this conclusion cognizant that a motion for a new trial on the basis of newly discovered evidence " '[is] granted only with great caution ... in the most extraordinary circumstances.' " Sanders, 863 F.2d at 225 (quoting United States v. DiPaolo, 835 F.2d 46, 49 (2d Cir.1987)); see Stofsky, 527 F.2d at 243.

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

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

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

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

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

Applying that analysis here, we conclude as a matter of law that had the jury been aware of Guariglia's perjury it probably would have acquitted the defendants. Guariglia's false testimony regarding his gambling directly calls into question the veracity of the rest of his statements. Guariglia's testimony was essential to the government's case; indeed, he tied all the pieces together. And, as we have emphasized, he was the only witness who the jury was led to believe had undergone a radical moral transformation. Moreover, the ***459** government through its redirect and in its closing argument made much of Guariglia's motive for telling the truth. One of the prosecutors stated in closing:

> The government submits to you that Mr. Moreno and Mr. Guariglia are credible witnesses and you should credit their testimony for a number of reasons. First of all, they have confessed to their crimes, they have admitted their crimes, and they have pleaded guilty to serious felony counts. They entered into cooperation agreements with the government and those agreements are in evidence....
>
> You heard the terms of those agreements when they testified. If they perjured themselves, if they give false testimony in this trial, then the deal is off. They can be prosecuted for every crime they committed and everything they have said in interviews with the U.S. Attorney's office and every trial they have testified in their testimony can be used against them. That I submit gives them a powerful motive to tell the truth when they testified at this trial.

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

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

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

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

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

1. The Independent Counsel

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

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

> Independent Counsel James C. McKay shall have jurisdiction to investigate ... whether ... any ... provision of the federal criminal law, was violated by Mr. Meese's relationship or dealings at any time from 1981 to the present with any of the following: Welbilt Electronics Die Corporation/ Wedtech Corporation ...; Franklin C. Nofzinger; E. Robert Wallach; W. Franklyn Chinn; and/or Financial Management International, Inc.

(emphasis added). Defendants read this order and the Burns referral letter as having vested the IC with exclusive jurisdiction over their relationships with Wedtech. Thus, they argue when prosecutors from the Southern District of New York appeared before the Grand Jury on May 28 and 29, 1987, they did so without jurisdiction. Defendants stress that it was not until December 21, 1987, that the IC formally referred, pursuant to 28 U.S.C. § 597(a), the authority to indict to the Southern District.

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

2. Prosecutorial Bias and Conflict of Interest

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

C. The Mail Fraud Charges

1. Counts Twelve Through Fifteen

Counts Twelve through Fifteen charged London

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

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

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

[6][7][8] The federal mail fraud statute prohibits an individual from "devis [ing] or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. The essential elements of a mail fraud violation are (1) a scheme to defraud, (2) money or property, and (3) use of the mails to further the scheme. See McNally v. United States, 483 U.S. 350, 356, 107 S.Ct. 2875, 2879, 97 L.Ed.2d 292 (1987); United States v. Pisani, 773 F.2d 397, 409 (2d Cir.1985). To establish the existence of a scheme to defraud, the government must present proof that the defendants possessed a fraudulent intent. United States v. Schwartz, 924 F.2d 410, 420 (2d Cir.1991); United States v. Starr, 816 F.2d 94, 98 (2d Cir.1987). And although money or property must be the object of the scheme, McNally, 483 U.S. at 358-59, 107 S.Ct. at 2880-81, the government is not required to show that the intended victim was actually defrauded. The government need only show that the defendants contemplated some actual harm or injury. Starr, 816 F.2d at 98; United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2d Cir.1970).

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

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

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

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

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

[10][11] At the outset, we recognize that a corporation can only act through its agents--officers and directors. It is the directors who are charged with the responsibility for managing the affairs of a corporation. Diamond v. Oreamuno, 29 A.D.2d 285, 287, 287 N.Y.S.2d 300, 302 (1st Dep't 1968), aff'd, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969). Generally, the role of shareholders in governing the conduct of the corporation is minimal and limited to fundamental decisions such as the election of directors or the approval of extraordinary matters like mergers, a sale of substantially all corporate assets, dissolutions and amendments of the articles of incorporation or the corporate bylaws. See R. Clark, Corporate Law § 3.1.1, at 94 (1986); see also N.Y.Bus.Corp.L. §§ 703, 903, 909 (McKinney 1991); 1 Fletcher Cyclopedia of the Law of Private Corporations § 30, at 553 (Perm. ed. 1990) (hereinafter "Fletcher "). Thus, the shareholders have no legal right to control the day-to-day affairs of a corporation. Moreover, shareholders do not hold legal title to any of the corporation's assets. Instead, the corporation--the entity itself--is vested with the title. 5A Fletcher § 2213, at 323. " '[T]he corporation in respect of corporate property and rights is entirely distinct from the stockholders who are the ultimate or equitable owners of its assets.' " 5303 Realty Corp. v. O & Y Equity Corp., 64 N.Y.2d 313, 323, 486 N.Y.S.2d 877, 884, 476 N.E.2d 276, 283 (1984) (quoting Brock v. Poor, 216 N.Y. 387, 401, 111 N.E. 229, 234 (1915)).

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

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

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

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

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

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

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

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

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

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

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

2. Count Eighteen

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

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

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

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

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

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

[15] We conclude that under the government's theory the credit card billings were central to the scheme and essential to its continued success. This was not to be a "one shot" proposition. See id. at 711, 109 S.Ct. at 1448. Rather, the intention of the scheme was to enhance Chinn's compensation by paying him periodically for personal expenses that he incurred. Such payments were to be made under the guise of reimbursements for business related expenses. Therefore, unlike the situations in Parr and Maze, the credit card billings not only were anticipated by Chinn, but also were essential to the success of the scheme. In Parr and Maze, the alleged perpetrators had no intention of continuing to communicate with the victims of their fraud. Here, however, the government's theory is that Chinn had expressly agreed with Guariglia that an additional $100,000 in compensation would be forthcoming through payments that would be disguised as reimbursements for business related expenses. Absent the regular credit card company mailings, Wedtech could not have treated these payments as reimbursements for business expenses and Chinn's ability to continue to receive the payments would have come to an end. It thus cannot be said that " '[t]he scheme ... had reached [its] fruition' " once Chinn received the goods and services which he charged on the Wedtech accounts. Parr, 363 U.S. at 393, 80 S.Ct. at 1184 (quoting Kann v. United States, 323 U.S. 88, 94, 65 S.Ct. 148, 150, 89 L.Ed. 88 (1944)). The government's theory underlying Count Eighteen is legally sufficient.

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

D. The National Stolen Property Act Charges

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

In relation to all these charges, the government's theory was that through misrepresentation and deception London, Wallach and Chinn defrauded Wedtech and its shareholders. The product of this fraud was the receipt of Wedtech property, namely, the face value of the checks. Specifically, the

government alleged that the false invoice and the false letter submitted by Wallach, in connection with his receipt of the checks for $125,000 and $300,000, amounted to a "fraud" on Wedtech and its shareholders. Similarly, it was alleged that London and Chinn fraudulently obtained corporate funds by providing false and misleading information. These activities, the government charged, coupled with subsequent interstate transportation of the relevant checks, resulted in violations of the Act.

Defendants challenge the viability of these charges. Their arguments parallel, in large part, those advanced in connection with the mail fraud charges. We conclude, as we did with respect to the mail fraud charges, that the National Stolen Property Act charges are legally sufficient.

[17][18][19] To obtain a conviction under the National Stolen Property Act, the government must prove beyond a reasonable doubt the following elements: (1) the defendant transported property, as defined by the statute, in interstate commerce, (2) the property was worth $5,000 or more, and (3) the defendant knew the property was "stolen, converted or taken by fraud." Dowling v. United States, 473 U.S. 207, 214, 105 S.Ct. 3127, 3131, 87 L.Ed.2d 152 (1985); see United States v. Vontsteen, 872 F.2d 626, 630 (5th Cir.1989); United States v. Stack, 853 F.2d 436, 438-39 (6th Cir.1988). The government charged that the defendants transported the Wedtech checks in interstate commerce knowing them to have been procured by fraud. While the definition of fraud is generally the same under the mail fraud statute, 18 U.S.C. § 1341, and under the Act, 18 U.S.C. § 2314, see, e.g., United States v. Kibby, 848 F.2d 920, 922-23 (8th Cir.1988), there are two significant differences between the offenses. First, to establish a violation of section 2314 the government must prove that the defendant was actually successful in defrauding his intended victim of property in excess of $5,000--actual pecuniary harm must be shown. United States v. Lennon, 751 F.2d 737, 744 (5th Cir.), cert. denied, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985). In contrast, to obtain a conviction under section 1341, the government need only prove an intent to defraud; actual success of the scheme to defraud is not an essential element of the crime. See United States v. Gelb, 881 F.2d 1155, 1162-63 (2d Cir.), cert. denied, --- U.S. ----, 110 S.Ct. 544, 107 L.Ed.2d 541 (1989). Second, to obtain a conviction under section 2314 the government need not prove that the defendant actually participated in the scheme to defraud someone of property; proof that the defendant knew the property to have been stolen or procured by fraud is sufficient. Stack, 853 F.2d at 439.

Defendants maintain, as they did with respect to the mail fraud charges, that no fraud was committed because each of them provided valuable services to Wedtech even if these services were not accurately disclosed at the time payment was sought. We find little merit in this argument. The mere fact that the defendants may have performed some other services than those specified in their invoices and letters is irrelevant to the issue whether a fraud was perpetrated; the corporation and its shareholders did not receive the services stipulated in the documentation provided by the defendants. By providing misleading information, the defendants concealed essential facts from the corporation and its shareholders, facts which if disclosed might ***467** have led to the relevant payments being recouped and any similar future payments being halted. See Starr, 816 F.2d at 98; Regent Office Supply, 421 F.2d at 1182.

Relying on Dowling, 473 U.S. 207, 105 S.Ct. 3127, the defendants also argue that the charges for violating section 2314 are legally insufficient because no physical property crossed state lines. In Dowling, the Supreme Court reviewed a section 2314 conviction which was based on the interstate transportation of bootleg phonograph records which had been manufactured and distributed without the consent of those who owned the copyrights to the musical compositions performed on the records. The Court reasoned that the phonograph records themselves had not been stolen or procured by fraud, only the songs performed on the records were being improperly used. In reversing the convictions, the Court held that the statute does not apply to wholly intangible property interests such as those possessed by a copyright holder. Id. at 216-17, 105 S.Ct. at 3133 ("[T]he provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported."). The Court concluded that a copyright, like other forms of intellectual property, lacks the physical characteristic that the statute contemplates. Id. at 217-18, 105 S.Ct. at 3133.

In reaching this conclusion, the Court placed emphasis on the special nature of federal copyright law. Id. at 217, 105 S.Ct. at 3133. Specifically, a copyright holder does not enjoy complete and inviolable control over the use of his or her work. Id. The Copyright Act comtemplates, in limited circumstances, that others can make use of copyrighted information without obtaining the holder's permission. Id. Because federal law permits such intrusions, the Court reasoned: "[T]he property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods, wares, [or] merchandise,' for the copyright holder's dominion is subjected to precisely defined limits." Id. Given the distinct nature of copyrights, the Court noted that interference with a copyright "does not easily equate with theft, conversion, or fraud." Id.

The Dowling Court found additional support for its decision when it examined the history of the Act. The Court determined that section 2314 originally was adopted to criminalize conduct which absent its interstate characteristic would ordinarily have been left to the states to regulate. Because Congress had exclusive power over the area of copyrights, whether or not interstate commerce was involved, the Court stated that it would be "implausible to suppose that Congress intended to combat the problem of copyright infringement" when it passed section 2314. Id. at 220-21, 105 S.Ct. at 3135. The Court, therefore, held that section 2314 could not provide the basis for a prosecution stemming from the interstate transportation of copyrighted material.

The defendants argue that the reasoning of Dowling is directly applicable because the only property alleged to have been transported with knowledge that it was procured by fraud was the shareholders' "right to control" and their related interest in not having the earnings of the company artificially inflated. The defendants contend that these property interests, like the copyrights in Dowling, are entirely incorporeal and cannot provide the basis for a section 2314 conviction. We, however, do not find Dowling to be controlling.

In contrast to the situation in Dowling, the defendants herein were charged simply with transporting checks across state lines knowing them to have been procured through fraud. Each check at issue had a value that exceeded $5,000. The checks, unlike the copyrights in Dowling, without a doubt constitute physical property within the meaning of the statute. Moreover, the defendants' acquisition and transportation of that property wholly deprived Wedtech of the use and benefit of those funds; such a complete deprivation does not occur in the context of a copyright infringement. Finally, neither state nor federal law permits the assets of a corporation to be dissipated by corporate officials and those acting in concert with them for undisclosed ***468** purposes. As we made clear in our discussion of the mail fraud charges, the intentional provision of false and inaccurate financial information can constitute a fraud. A direct product of this fraud, under the government's theory, was the checks that were issued in payment for the services noted in the various invoices and letters submitted by the defendants. We are convinced that such allegations state a viable charge under the National Stolen Property Act.

[20] Furthermore, we reiterate that the participation of Wedtech officers in this alleged scheme does not rule out the existence of fraud. Defendants contend that because the officers and directors of Wedtech were aware of everything that had transpired and willingly disbursed the relevant funds there can be no violation of the statute. In short, they assert that one cannot acquire by fraud what one has been voluntarily given. As this Circuit has recognized: "Because the concept of 'stolen' property requires an interference with the property rights of its owner, property that has been transported, ... or otherwise disposed of, with the consent of the owner cannot be considered 'stolen' within the meaning of §§ 2312-2315." United States v. Bennett, 665 F.2d 16, 22 (2d Cir.1981).

The linchpin of the defendants' argument is that shareholders possess no right to control the day-to-day operations of a corporation and no possessory interest in corporate property. Notwithstanding the truth of these premises, shareholders do have a right to receive accurate and complete information and they are the beneficial owners of corporate assets. As we discussed in connection with the mail fraud charges, when false information is intentionally provided to the corporation, a fraud on the corporation and its shareholders is committed. Any monies dispersed to satisfy these false invoices, in

our opinion, also have been procured by fraud.

In this regard, we find the Sixth Circuit's reasoning in United States v. Gullett, 713 F.2d 1203 (6th Cir.1983), cert. denied, 464 U.S. 1069, 104 S.Ct. 973, 79 L.Ed.2d 211 (1984), to be persuasive. In Gullett, two partners in an accounting firm engaged in a scheme in which clients of the firm wrote checks to the firm for services that were never performed. In turn, the clients took a tax deduction and ultimately shared in the proceeds of the checks. The defendants, the accounting firm partners, attacked their section 2314 convictions asserting that the officers of the allegedly defrauded corporations had used their "agency powers to write checks for the purpose of generating cash to benefit the corporations." Id. at 1210. The Sixth Circuit rejected this argument stating: "This explanation ... ignores the parade of phony invoices and fictitious payees which were created in order to deceive uninvolved corporate officers and shareholders." Id. The Gullett Court further explained:

> Although corporate officers with broad agency powers authorized and participated in the scheme, the officers necessarily made false entries on the books of their corporations in order to secure the corporate payments. These false entries deliberately misrepresented the nature of the transactions to the corporation as an entity and hence to its owners, the shareholders, and its directors. In reliance on these false statements, the corporation made the payments. The defendants knew the invoices and documents were false and that the corporations would rely on them to make payments. Thus the basic elements of fraud--misrepresentation and detrimental reliance--are present.

Id. at 1211.

The defendants contend that Gullett is inapposite and should not be relied on because there not all the officers of the corporations involved were a party to the scheme. Here, they argue that the government does not contend that any Wedtech officers or directors were not aware of what was happening. We think that this argument completely misses the mark. Officers and directors owe a duty to the corporation and its shareholders. If all the officers and directors become a party to a scheme to use corporate assets improperly, the resulting injury to the entity and its owners--the ***469** shareholders--is no less than when only some of the officers are involved. Officers and directors do not have a license to plunder corporate treasuries acting individually or collectively. The defendants, according to the government, were completely aware that Wedtech's officers were requesting false invoices so as to mislead the corporation and its shareholders regarding the true purposes for the payments. In this respect, the defendants were knowing parties to this concealment, and their submission of the requested documentation made the scheme possible. As we once stated in a mail fraud prosecution, "regardless of the fact that higher officials directed the wrongful acts, the harm was no less injurious to the corporation." Weiss, 752 F.2d at 785.

The defendants advance one other argument to attack the validity of the section 2314 charges. They maintain that the Act does not unambiguously apply to the specific conduct charged in the indictment and therefore these charges should not be permitted to stand. They urge application of the "rule of lenity," which requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). The rule recognizes that legislatures and not the courts should define criminal liability. Liparota v. United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." Id. We conclude that application of the rule of lenity is unwarranted in this case.

[21] Application of the rule of lenity is warranted only where the statute's language or intended purpose is unclear. Quite recently the Supreme Court, in rejecting a similar challenge to another aspect of section 2314 stated: "This Court has never required that every permissible application of a statute be expressly referred to in its legislative history." Moskal v. United States, --- U.S. ----, ---- , 111 S.Ct. 461, 467, 112 L.Ed.2d 449 (1990). The Court further noted that in adopting section 2314 "Congress' general purpose [was] to combat interstate fraud," and emphasized that the statute should be broadly construed. Id. 111 S.Ct. at 468. In view of the government's theory with respect to

the section 2314 charges, we fail to see the merit in defendants' argument. Defendants are alleged to have knowingly participated in a scheme which resulted in monies being disbursed from Wedtech ostensibly for services that, in fact, had not been performed or for the benefit of individuals whose identity was concealed. Any property derived from such conduct and then transported across state lines plainly falls within the purview of section 2314. Accordingly, we conclude that the theory advanced by the government is sufficient to support the section 2314 charges and that the rule of lenity does not apply.

E. Count Five: The Conspiracy Charge

Count Five of the indictment charged Wallach with conspiracy, in violation of 18 U.S.C. § 371. The government charged that the conspiracy had two objects: (1) to defraud the citizens of the United States of their right to Wallach's honest and faithful services, and (2) to violate 18 U.S.C. § 203, which prohibits the receipt of or the agreement to receive any compensation for services to be rendered at a time when the intended recipient is an officer of the United States. Wallach attacks the legal sufficiency of these charges. Because of our decision to reverse all the convictions, we do not address Wallach's evidentiary challenges. We limit our discussion to Wallach's legal argument that only those individuals who actually become federal officials can be charged with conspiring to violate Section 203.

Section 203(a)(2) is aimed at preventing the corruption of public officials. During the relevant time period, the statute provided in pertinent part:

> (a) Whoever, otherwise than as provided by law for the proper discharge of ***470** official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another--
>
> ....
>
> (2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States ...
>
> in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency ... or any civil, military, or naval commission.

18 U.S.C. § 203(a) (1982).

Wallach never became a federal official or employee. Wallach, therefore, argues that mere anticipation of obtaining a position in the federal government provides a legally insufficient basis to maintain a prosecution under section 203. Essentially, Wallach argues that a person cannot conspire to violate a substantive statute when the substantive statute does not reach that person. Even assuming the correctness of Wallach's initial premise, we find his arguments to be unpersuasive as they relate to a conspiracy charge.

[22][23][24][25] "It is well settled that the law of conspiracy serves ends different from, and complementary to, those served by criminal prohibitions of the substantive offense." United States v. Feola, 420 U.S. 671, 693, 95 S.Ct. 1255, 1268, 43 L.Ed.2d 541 (1975). The law of conspiracy serves two independent values: (1) it protects society from the dangers of concerted criminal activity, and (2) it serves a preventive function by stopping criminal conduct in its early stages of growth before it has a full opportunity to bloom. Id. at 693-94, 95 S.Ct. at 1268. As the applicable law has been summarized:

> The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed. Criminal intent has crystallized, and the likelihood of actual, fulfilled commission warrants preventive action.

Id. at 694, 95 S.Ct. at 1268 (citations omitted). Thus, to establish the existence of a conspiracy the government need only establish the existence of an agreement and an overt act in furtherance of the agreement. United States v. Giordano, 693 F.2d 245, 249 (2d Cir.1982). "Whether the substantive crime itself is, or is likely to be, committed is irrelevant." United States v. Rose, 590 F.2d 232, 235 (7th Cir.1978), cert. denied, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979). Conspiracy is a crime separate and apart from the substantive offense that is the object of the conspiracy. Because it is the conspiratorial plan itself that is the focus of the charge, the illegality of the agreement is not

dependent on the actual achievement of its goal. Giordano, 693 F.2d at 249. Indeed, "it does not matter that the ends of the conspiracy were from the beginning unattainable." Id.; see also United States v. Petit, 841 F.2d 1546, 1550-51 (11th Cir.) (conviction for conspiring to receive stolen goods which had been transported by an interstate carrier affirmed even though goods themselves had not been stolen), cert. denied sub nom. Fernandez v. United States, 487 U.S. 1237, 108 S.Ct. 2906, 101 L.Ed.2d 938 (1988); United States v. LaBudda, 882 F.2d 244 (7th Cir.1989) (conviction for conspiring to sell stolen U.S. Savings Bonds proper even though government had not proven that bonds were in fact stolen). Impossibility, therefore, is not a defense to a conspiracy charge. See W. LaFave & A. Scott, Criminal Law 545-46 (2d ed. 1986). "[I]t is the intent of the defendants to violate the law which matters, not whether their conduct would actually violate the underlying substantive statute." LaBudda, 882 F.2d at 248 (citing cases). The central question becomes whether the government's proof could establish ***471** that the accused planned to commit a substantive offense which, if attainable, would have violated a federal statute, and that at least one overt step was taken to advance the conspiracy's purpose. Giordano, 693 F.2d at 249.

[26] Under the government's theory, Wallach agreed with Guariglia and other Wedtech officers to continue to lobby on behalf of Wedtech once he obtained a position within the federal government. In addition, the government contends that in contemplation of Wallach becoming a federal official a $300,000 advance payment was made to avoid any appearance of impropriety and to conceal Wallach's agreement to continue to lobby on behalf of Wedtech while holding a federal office. The parties to the agreement believed that Wallach would soon be a federal official and they structured their dealings accordingly. Thus, the government's theory encompasses the two essential elements of a viable conspiracy charge--agreement and overt act. At a retrial, a jury will have the ultimate responsibility for determining whether the government's evidence actually proves beyond a reasonable doubt the existence of these two elements. Under Wallach's approach, however, a charge of conspiring to violate section 203 could only be maintained if one of the parties involved actually was a federal official at the time of the agreement. We reject this interpretation.

Section 203 is aimed at limiting corruption within the federal government by safeguarding the integrity of the public administration. As the Supreme Court has explained:

> Conflict of interest legislation is "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."

Crandon v. United States, 494 U.S. 152, ---- n. 20, 110 S.Ct. 997, 1005 n. 20, 108 L.Ed.2d 132 (1990) (quoting United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562, 81 S.Ct. 294, 315, 5 L.Ed.2d 268 (1961)). To achieve its purpose, the statute precludes federal employees from receiving any compensation from private parties for providing services in connection with any matter in which the United States has an interest. See United States v. Evans, 572 F.2d 455, 480 (5th Cir.), cert. denied sub nom. Tate v. United States, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). A conspiracy to engage in conduct violative of the substantive statute is equally threatening to the integrity of the governmental apparatus that section 203 seeks to protect. Thus, recognizing the legitimacy of a conspiracy charge even when none of the alleged parties to the agreement is as yet a federal official is entirely consistent with section 203's purpose and intent.

[27] By its very nature, conspiracy law often is aimed at reaching behavior that is intended to take place at a future time and in many instances attainment of the conspiracy's object turns on certain conditions being met or satisfied. See Note, Conditional Objectives of Conspiracies, 94 Yale L.J. 895, 899 (1985). In our view, where such a situation is involved, the relevant question is whether the alleged conspirators subjectively believed that the conditions necessary for attaining the objective were likely to be fulfilled. See generally id. at 905-06. This approach appropriately focuses on the actual intent of the alleged parties to the conspiracy. The mere happenstance that Wallach's purported goal of obtaining such employment was not realized should not in our view insulate him from such a charge. Accordingly, we see no bar to the charge of conspiracy to violate section 203.

Wallach was also charged with conspiring to defraud the citizens of the United States of his honest and loyal services. We see no need to discuss in detail Wallach's arguments relating to this aspect of Count Five. However, in the event of a retrial, the district court should clarify the instructions relating to this particular charge by making it absolutely clear that the "honest and loyal" services at issue are those of ***472** Wallach himself and not those of Meese. By making this minor adjustment in the language of the instructions, any ambiguity should be removed and the potential for misinterpretation by the jury significantly lessened.

F. The District Court's Evidentiary Rulings

[28] Wallach asserts that the district court improperly permitted the government to introduce evidence regarding prior incidents of conduct. He submits that under Fed.R.Evid. 404(b) and under Rule 403 this evidence should have been excluded. Although we have adopted an "inclusionary approach" to the introduction of similar act evidence as long as the evidence is not being introduced to show propensity, United States v. Brennan, 798 F.2d 581, 589 (2d Cir.1986), a district court must be careful to consider the cumulative impact of such evidence on the jury and to avoid the potential prejudice that might flow from its admission. See United States v. Peterson, 808 F.2d 969, 974 (2d Cir.1987) (probative value must exceed potential for prejudice); 2 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 404[08] (1990).

[29] The evidence at issue involved a showing that Wallach accepted $150,000 to lobby Meese to obtain the support of the United States for a Mid-East pipeline. The evidence proffered and ultimately introduced showed that Wallach, through a series of transactions, one of which involved Chinn, received the $150,000 and did not disclose it on his income tax returns. The government argued that this evidence of "other crimes, wrongs, or acts" was probative of Wallach's intent in his dealings with Wedtech. The district court found this evidence relevant to show that Wallach's concealment of the Wedtech payments was not innocent. We see no error in the introduction of this evidence. The district court, however, also permitted the prosecution to delve into other instances of Wallach's conduct.

During the cross-examination of Wallach's character witnesses, the government was permitted to introduce evidence concerning Wallach's performance as a personal injury attorney in the California case of Bert v. Wenzel. Specifically, the government questioned the witnesses' knowledge about Wallach's handling of this personal injury case in which two young children were severely burned. The government's evidence focused on Wallach's agreement to settle the case for $1.7 million and to retain $1 million as his fee. The settlement was approved over the objections of the children's parents by then-California State Judge, Eugene Lynch. At the time of the approval, Wallach had been encouraging Meese to recommend Lynch for an appointment to the federal bench. The district court concluded the government had shown a "good faith basis" for inquiry into the matter.

[30] Under Fed.R.Evid. 405, the government is permitted to ask questions of character witnesses concerning their knowledge of specific instances of the defendant's conduct. 22 C. Wright & K. Graham, Federal Practice & Procedure, § 5268, at 609-11 (1978). This is because the defense essentially has placed character in issue. However, the reason the rules of evidence limit the extent to which such collateral character evidence is admissible is to ensure that the jury does not convict the defendant for conduct with which he has not been charged. 22 Federal Practice & Procedure, § 5239, at 437-38.

[31] Although the Bert v. Wenzel evidence may have been technically admissible, we believe that a district court must proceed with caution and carefully evaluate the cumulative effect of such evidence on a jury. The district court always has the authority and discretion to exclude such evidence under the balancing test mandated by Fed.R.Evid. 403. Here, with particular reference to the Bert v. Wenzel evidence, our concern has been elevated by the manner in which the prosecution argued this evidence to the jury. The prosecutor made a blatant effort to prejudice the jury in his appeal for vengeance by inviting the jurors to stand in the shoes of the parents of the children involved in the case. He also characterized Wallach's behavior ***473** as an "outrage." This was overzealous advocacy. These comments were unnecessary and in our view quite prejudicial. Wallach was not on trial for his conduct concerning the personal injury case.

While some limited inquiry into this matter may have been probative of the scope of knowledge on which Wallach's character witnesses were operating, we believe that inquiry into the entire matter was expanded well beyond the bounds of propriety and relevance. Thus, in the event of a retrial, steps should be taken to confine the use of such evidence to its intended purpose--challenging the basis for the character witnesses' opinions.

G. The Remaining Issues

We have considered the other arguments advanced by the defendants but choose to address at this time only those that are likely to recur at a retrial.

CONCLUSION

Because we believe that the perjury of one of the government's key witnesses infected the trial proceedings and interfered with the jury's ability to weigh his testimony, we reverse all the convictions. Additionally, our review of defendants' other arguments leads us to conclude that the charges advanced in the indictment are legally sufficient. Accordingly, we reverse all the judgments of conviction and remand for a new trial.

ALTIMARI, Circuit Judge, concurring:

I cannot subscribe to the notion that the Assistant United States Attorneys ("AUSAs") who represented the government in this case should have known that Anthony Guariglia was committing perjury at the time of trial. I do agree, however, that reversal is warranted despite the fact that the government had no knowledge of Guariglia's perjury. Accordingly, I write separately to express my views on these issues.

The idea that the government would knowingly rely on false testimony in obtaining a conviction is repugnant to the very concept of ordered liberty and is perhaps the most grievous accusation that can be levelled against a prosecutor. See Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959); see also Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). A review of the entire record including the post-argument submissions [FN1] leaves me with the firm conviction that the AUSAs properly discharged the obligations of their office. Therefore, in contrast to the majority, I do not believe that "a virtual automatic reversal" of the defendants' convictions is mandated. United States v. Stofsky, 527 F.2d 237, 243 (2d Cir.1975), cert. denied, 429 U.S. 819, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976).

FN1. I note with displeasure that much of the information regarding Guariglia's perjury and the government's response to that perjury was presented in a series of post-argument letters to the Court. As this Court has previously stressed, such submissions are looked upon with extreme disfavor. See United States v. Bortnovsky, 820 F.2d 572, 575 (2d Cir.1987) (per curiam). However, it was the defendants who initiated the submissions, to which the government merely responded.

To appreciate fully what the prosecutors knew about the admission of Anthony Guariglia's perjurious testimony, it is important to understand when and how this matter initially arose. During vigorous cross-examination, defense counsel confronted Guariglia with documents, obtained from the Tropicana Casino in Atlantic City, indicating that Guariglia had signed three markers totalling $15,000 in September 1988 and one $50,000 marker in October 1988. These markers provided strong circumstantial evidence that, despite his testimony to the contrary and despite the requirements of his cooperation agreement, Guariglia had gambled after the summer of 1988. On re-direct examination, Guariglia reiterated that he had not gambled. Instead, he claimed that he had exchanged the markers totalling $15,000 for cash and had used the $50,000 marker to obtain chips for Marshal Koplitz, a friend and business associate.

Certainly, if the government had simply accepted at face value Guariglia's somewhat ***474** dubious explanation, a legitimate question might be raised about the prosecutors' conduct. However, this is not what occurred. Rather, in the midst of trial, the AUSAs extensively questioned Guariglia about the events in Atlantic City and the truthfulness of his testimony. Moreover, in an attempt to ascertain the truth or falsity of Guariglia's story, the AUSAs located and interviewed Koplitz and another individual who was with Guariglia in Atlantic City. Both verified Guariglia's version of events. Additionally, the prosecutors--albeit with limited success--attempted to contact and interview

Tropicana Casino officials. Thus, it seems to me that the AUSAs did all that was reasonable to assure that they were neither relying on false testimony nor permitting false testimony to go uncorrected. Cf. Stofsky, 527 F.2d at 244 ("We do not employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should have been made by the government.").

It should also be realized that when the government did obtain meaningful evidence that Guariglia had perjured himself at trial, the AUSAs did not hesitate in undertaking an investigation and prosecution that ultimately resulted in Guariglia's perjury conviction. To my mind, this is a further illustration that throughout the proceedings the AUSAs sought to learn--not avoid or ignore--the truth.

Thus, I believe that the critical issue on this appeal is whether Guariglia's perjury is so material that "the jury probably would have altered its verdict if it had had the opportunity to appraise the impact [of the perjury] not only upon the factual elements of the government's case but also upon the credibility of the government's witness." Stofsky, 527 F.2d at 246. In considering this issue, the district court concluded that "this additional brace of wrongdoings, if known to the jury, would not in any way have had the slightest effect upon its verdict." United States v. Wallach, 733 F.Supp. 769, 771 (S.D.N.Y.1990). This conclusion was based on Judge Owen's consideration of a broad array of factors:

> The testimony was not material: Guariglia's gambling and skimming did not bear on the defendants' guilt or innocence, only on Guariglia's credibility. And here, these instances of falsehood would have been merely minor, cumulative additions to the massive mound of discredit heaped upon Guariglia over several days of both direct and cross-examination. The jury heard that Guariglia's past included: bribery of numerous government officials, including Congressmen Biaggi and Garcia, Richard D. Ramirez of the Navy, Gordon Osgood of the Army, Jerrydoe Smith of the Postal Service, Peter Neglia of the Small Business Administration and Vito Castellano of the National Guard; commercial bribes to bank officials and a Con Edison employee; countless false filings with the Securities and Exchange Commission, the Small Business Administration and the Internal Revenue Service; the use of kickbacks, frauds and the use of the 'FHJ slush fund' to steal $1,624,702 from Wedtech; the payment of over $500,000 in illegal payoffs to union officials for labor peace; the fabrication of a Navy telex to inflate Wedtech's apparent profit; concealing ill-gotten gains in nine foreign bank accounts; false statements to District Attorney Morgenthau and his staff when the investigation began, and, during the course of the investigation, obtaining a false Swedish passport. The defendants also brought out post-cooperation wrongdoing in connection with tax irregularities, arguable continued gambling in Atlantic City, and continued failure to make restitution to the Wedtech shareholders....

Id. at 771-72.

While the foregoing recitation is undeniably powerful, it is also somewhat misleading, because it fails to take proper account of the unique and oftentimes devastating impact of a witness perjuring himself in front of a jury. While disclosure of such perjury might not transform the jury's image of the witness from paragon to knave, see United States v. Gilbert, 668 F.2d 94, 96 (2d Cir.1981), cert. denied, 456 U.S. 946, ***475** 102 S.Ct. 2014, 72 L.Ed.2d 469 (1982), it may provide the proverbial straw that broke the camel's back. See, e.g., United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir.1975). Indeed, as the majority cogently explains, Guariglia was an essential witness at trial and, while there may have been heated argument over his credibility and misdeeds, his ongoing perjury had not been revealed to the jury.

In sum, I agree with the majority's conclusion that reversal of the convictions is warranted. But I do so solely on the ground that "the jury probably would have altered its verdict" had it been aware of Guariglia's on-going perjury. Stofsky, 527 F.2d at 246. In all other respects, I concur in the majority's well-reasoned opinion.

END OF DOCUMENT

FOIA(b)7 - (C)

From: Brett Kavanaugh
To: [redacted] JCLEMENT, [redacted] CCOPELAND
Date: 2/2/96 1:16pm
Subject: handwriting analyses for Foster note . . .

Can someone give me a full written run-down on all handwriting analyses that have been done of documents written by Foster in comparing them to the Foster note. In particular, who did analyses (was there analysis done in 1993, 1994, and 1995??); when; with what documents; were they originals; do we still have the original documents? We need to have this organized before the Senate goes charging down the same path next week.

USPP -
Fiske -
STARR

167 (K-4)
168 (K-5)
169 (K-6)
170 (K-7)

Office of the Independent Counsel

Two Financial Centre
10825 Financial Centre Parkway, Suite 134
Little Rock, Arkansas 72211
(501) 221-8700
Fax (501) 221-8707

Brett called –

⊙ Henry Lee found gunpowder inside the oven mitt.

⊙ Lead, antimony, & barium "gun shot residue"

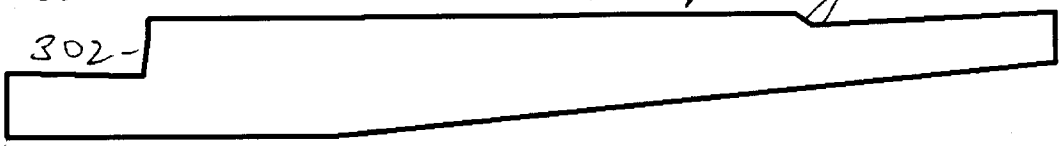
a gun has been in the mitt –

4/10/95

BK advised me that Mark Tousley had provided Jim Hamilton, Attorney, copies of the entire 302's of -

- Lisa Foster
- Beryl Anthony
- Sheila Anthony
- Sharon Bowman

BK said Hamilton will probably be mad abt the redacted part of the 302-



[I saw copies of Lisa's 302 in Hamilton's possession on 4-7. I had assumed JH got it from public record/archives. He said several things in the 302 were wrong. Lisa: saw VF last in front hall, not in kitchen].

FOIA(b)6

December 28, 1995

To: Ken Starr
John Bates
Hick Ewing
Brett Kavanaugh
Steve Colloton
Jim Clemente
Coy Copeland
Jeff Greene
[redacted] FOIA(b)7 - (C)

From: [redacted]

Re: Foster Investigation Issues

As you are aware, the investigators are currently performing a comprehensive review of the Foster death investigation. We hope to provide a report by the end of January which summarizes the results of the investigation with particular focus on identifying unresolved issues, possible areas for further investigation, and conflicts, inconsistencies and ambiguities in statements of various witnesses. We are reviewing FD-302s, FGJ transcripts, transcripts of Congressional testimony, lab reports, Park Police reports, and physical evidence. We are also closely examining the commentaries of those in the media and general public who have become expert in the Foster matter (e.g., Hugh Sprunt & Chris Ruddy).

This memo provides my preliminary thoughts regarding this process. I believe certain decisions about the nature and scope of the investigation must be made fairly soon if we hope to draw this matter to a successful conclusion in the next few months. Outlined below are issues I believe must be addressed at this time.

(1) Mission

The report of the Fiske investigation does not define the scope and objectives of that investigation. I believe this was a serious mistake. It seems to me the mission of the Fiske investigation may have been much more limited than that presumed by its many critics. Although I have no first-hand information in this regard, I believe the Fiske people may have viewed their mission as being quite specific. That limited mission might have been stated as follows: By the earliest possible date, make a

determination based on the information then available (eight months after the fact) whether the initial conclusion of the Park Police that Mr. Foster committed suicide in Ft. Marry Park was reasonable and consistent with the evidence. However, some might argue their mission was broader. Did their mission also require that they conclusively rule out even the outside possibility of foul play? Did their mission require them to determine beyond a reasonable doubt that the suicide had nothing to do with Whitewater? Were they required to ascertain exactly what factors drove Mr. Foster to suicide? The Fiske investigation succeeded if it was intended only a means of testing the general viability of the Park Police conclusions. It failed if its mission was broader in scope.

Unfortunately, we do not know the exact nature of the Fiske mission because the report is silent in this regard. I am reminded of controversies which have arisen in the past regarding FBI background investigations. The Bureau is very careful to avoid claiming our background investigations invariably uncover any and all problems in a person's background no matter how hidden they might be. Instead, we say only that we perform a reasonably thorough check into the person's past. What is reasonably thorough? The White House and our other clients are fully aware of the formula we use in each of these cases (e.g., number of references and associates interviewed, scope in terms of years) so there can be no squabble later if we happen to miss something. (A second similarity of this investigation to background investigations is that, to a large degree, the accuracy of the investigation's results depends upon how forthcoming and honest interviewees choose to be.)

Normal criminal cases are self-defined by the resulting prosecutions. A criminal investigation is sufficiently thorough if the crimes charged are proven beyond a reasonable doubt. This is true even though it may be that the defendant was actually guilty of plenty of other crimes not proven through the investigation.

Certain issues and theories about Mr. Foster's death may never be resolved by our investigation no matter how thorough we are. To the extent possible, we should consider defining the scope of our investigation in such a way that no reasonable person would expect us to provide answers to these riddles. We should also consider setting the scope of our investigation now, well before we publish our report. Otherwise, we risk criticism that we tailored the investigation's objectives after-the-fact to fit the results we were able to produce. It may also be prudent at this time to advise Congress, and perhaps even the media, in general terms of what we believe our mission to be. Through such an airing we could gauge whether others agree with our views on the proper scope of the investigation, or, on the other hand, determine whether some adjustment might be in order.

Defining the scope of the investigation at this time will also help us draw the case to a close. It seems to me that we could investigate certain questions about Mr. Foster's death indefinitely without ever reaching a resolution. If such questions are excluded from our mandate, we would be in a position to avoid these wild goose chases and instead concentrate time and resources on those matters which definitely fall within the defined scope of the case.

Due to the passage of time since July 1993, it may be that our mission must necessarily be more limited than might have been the case had we begun our investigation shortly after Mr. Foster's death.

We should undertake the process of defining our mission during the next month while the current review is ongoing. This process should occur naturally as we begin identifying unresolved questions and possible areas for further inquiry. Each such question should first be examined to determine whether it, and related topics, should be included in our mandate. Decisions in this regard should not be based on the amount of effort which would be required to resolve the matter, or on the likelihood of success, but rather on principled decisions as to what should, and should not, be included in our mission.

I will give a couple of examples at this time to illustrate the point. Many of us agree with the conclusion of the Fiske report that one of the Park Police officers or EMS personnel responding to the scene must have disturbed the body before the polaroid pictures were taken. This explains the contact stain on the face as well as the inconsistencies between the photographs and the CW's statements. Resolving this issue would require substantial additional investigation and probably require that we obtain some type of additional cooperation from a Park Police officer and/or EMS employee. (It may be that we will never conclusively resolve this inconsistency regardless of the amount of additional investigation we perform.) A related question which may also require further investigation involves the possibility that some of the polaroids taken by the Park Police are now missing. Again, we will not be able to resolve this mystery without help from a cooperative witness.

A second example of the type of investigation which may, or may not, be within our mandate involves the question of why Mr. Foster may have committed suicide. Simply put, are we obligated to determine exactly why Mr. Foster may have been depressed and therefore susceptible to a suicidal impulse, or is it enough to demonstrate that he was depressed without drawing conclusions about the reasons for his depression.

Before undertaking this additional investigation, we must ask ourselves whether resolution of these issues is essential to our mission. Apparently, the Fiske office decided there was not a need to push these issues since their report does nothing more

than speculate regarding the origin of the contact stain, says nothing regarding the possibility of missing polaroids, and does not thoroughly examine the potential reasons underlying his apparent depression. I will not outline here the arguments on both sides of these issues, but I do believe these questions can only be answered by analyzing them in terms of a frame of reference provided by a clear definition of our mission.

(2) Merger of Foster Death & Papers Investigations

I believe these investigations are inextricably bound together and should be merged. I also believe we should consider issuing a combined report for the two areas.

The subject matters of the two investigations are linked in three ways:

* First, the possibility that materials in Mr. Foster's office may have been disturbed by White House staffers could relate to "state of mind" issues. Could there have been a note or other documents in his office which clearly revealed his intent to take his life and/or reasons underlying that decision?

* Second, Mr. Sprunt and others have linked the death investigation to the "papers" investigation. We may need to follow suit if we intend to address the legitimate concerns of citizens such as Mr. Sprunt.

* Third, the ability of the Park Police to perform the original investigation was directly affected by the conduct of the White House staff. The Park Police should have been allowed to seal the office and thereafter review each and every document contained therein to determine whether any of the documents held clues about Mr. Foster's intent. (Any clearance problems could have been handled fairly easily.) I believe the White House staff's conduct impacted the ability of the Park Police to conduct the death investigation professionally. I further believe we should address this in our report.

(3) Timing of the Report

I know there are reasons why we would <u>prefer</u> to finish our work and issue a report as quickly as possible. I feel strongly, however, that this investigation, and particularly the report, are much too important to rush. As you will see below, there are many areas for possible investigation which we must consider in the next month or so. We either need to investigate each area as thoroughly as possible or make a defensible decision as to why each lies outside the scope of our case. The work of the proposed independent review panel will also prolong the

investigation. I know from personal experience that it will take these experts quite a long time to become familiar with all the facts developed in the investigation to date. I predict it will be late Spring or early Summer before we are ready to issue a report. Perhaps such a timetable should be revealed to Congress or others at this time in an attempt to relieve pressures which would be created by an earlier, arbitrary deadline.

(4) Issues/Areas needing Investigation

As part of the ongoing review, we have already identified numerous areas which might require further investigation. Decisions regarding each will need to be made. Are these issues within the scope of our investigation? Do we have the resources/time to conduct the investigation in question? Are there other factors precluding the investigation (e.g., lack of cooperation from the family or the White House)?

Listed below is a sampling of the issues/questions identified so far:

* Foster Finances---As previously suggested, a comprehensive investigation of the Foster financial situation may be in order. There is indication the family was having some problems in this regard. Also, severe financial problems are often found to be a contributing factor in suicides.

* Time Lines---Several accurate time lines should be prepared. One should document all of Mr. Foster's business and personal activities for several weeks prior to his death and anticipated activities for several weeks following his death. A detailed time line recording the relevant activities of all persons associated with the case should also be prepared for the period of a few days before and after the death. Finally, a detailed timeline regarding July 20th should be prepared.

* Car---We have a number of questions relating to Mr. Foster's car and its contents. It may be appropriate to talk to the family regarding the normal locations of the map, oven mit and other items, as well as what the children observed that morning. We might also talk to the Park Police regarding the photographs they took. Were the photos taken before any of the items in the car were moved? Also, we may need to resolve the questions regarding the inconsistent statements concerning the briefcase, winecoolers and suit jacket.

* Work Matters---A logical area of inquiry might involve the matters Mr. Foster was handling at work. Were any of them causing him stress or other types of problems? In this regard, further discussions about the planned meeting with Mr. Lyons

concerning Travelgate, the unexplained meeting with Marcia Scott, and the proposed reorganization of the White House may be in order. Included in this general area would be questions about his work on the Clinton blind trusts, Health Care task force issues, and the failed nominations.

* Rose Conflicts---The Rose conflicts, the missing billing records, and the question of Rose/Hillary's work for Madison may all be relevant to Mr. Foster's state of mind.

* Gun---We have discussed a plan of action regarding the gun. Perhaps the gun could be linked to the Foster family by showing that a revolver like the one in question was a part of Foster Sr.'s collection, that that revolver was given to Foster Jr., and that it is now unaccounted for within the Foster family. We also want to show the codicil did not list all of Foster Sr.'s guns. We could do this by showing there are guns which came from Foster Sr. which were not listed in the codicil.

* Unexplained Absences---Mr. Foster's unexplained, unusual absences from work on July 19 and 20 may need to be explored. His activities during those times may directly relate to his death.

* Hairs & Fibers---Many people have opined that we should seek to compare the hair and fibers found on Mr. Foster to known samples. We need to know going into this process that we risk not being able to match these items to any known source, or, on the other hand, proving nothing more than the fact that he had been in his home, office and car, and that he had come into contact with a hair of a relative or acquaintance at some unknown point in time.

* Knowledge of the Hale Search---There has been some indication Mr. Foster might have learned of the Hale search shortly before his death. Could this have been a factor?

* Park Police Issues---We have identified a number of issues regarding the handling of the death scene by the Park Police to include questions about the following: Was the body disturbed prior to the photos causing the contact stain and a change of the position of the hands from palms down to palms up; Were the car keys taken from the body at some point prior to their being "found" at the hospital; How was the car accessed; Were items in the car disturbed before the photos were taken; and, Are polaroids missing.

* People in Park---There were reports of people in the park during the afternoon of July 20 who have not been identified. It may be necessary to do everything possible to identify and interview these individuals. On the other hand, it could be argued this inquiry is not critical in that there may have been

numerous people in and out of the park that afternoon who did not see Mr. Foster and have nothing material to contribute to the investigation.

* Maryland Weekend---There have been inconsistent statements regarding the Maryland weekend particularly with respect to Mr. Foster's demeanor. Do we need to follow this and reinterview certain people and attempt to identify and interview others with whom Mr. Foster came into contact that weekend?

* White House Interviews---Immediately following Mr. Foster's death certain White House personnel expressed shock that Mr. Foster would have committed suicide. Later, these same people uniformly said that, indeed, Mr. Foster had seemed depressed. We might consider following these inconsistencies to determine whether there may have been some effort to coordinate stories about Mr. Foster's depression and, importantly, possible reasons for such depression.

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

FD-302 (Rev. 3-10-82)

KAVANAUGH

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/6/95

PATRICK GAVIN, Lieutenant, U.S. Park Police, Federal Law Enforcement Training Center (FLETC), Glynco, Georgia; (912) 267-2139, was contacted at his work telephone number, per his request. Gavin was aware of the identity of the interviewing agent from previous conversations.

[redacted] GAVIN had only taken a brief, cursory look in the vehicle. GAVIN clearly remembers beer containers inside of the vehicle because that seemed unusual to him. GAVIN also recalled a man's suit-jacket inside of the vehicle, but less clearly.

GAVIN stated that it was not his responsibility to search or inventory the vehicle [redacted]

GAVIN stated that he responded too hastily when asked about the briefcase. GAVIN recalls some mention of a briefcase in a report or newspaper article, and that he may be confusing his actual observations with what he has read or learned through other sources.

GAVIN stated that his best recollections were provided in his previous interview last year. GAVIN recalled that he did not mention anything about a briefcase in his previous interview.

GAVIN apologized for his mistake concerning the briefcase.

Investigation on 3/1/95 at (telephonically) Washington, D.C. File # 29D-LR-35063

by SA C.L. KAVANAUGH Date dictated 3/6/95

4/5/95

Brett K. –

Cliff Sloan – out Fri. July 9 –
ran into VF – VF had a box of clean –
putting into car – "This is Yeltsin stuff"

REVISED MEMORANDUM

TO: Judge Starr
Mark Tuohey
John Bates

CC: Jackie Bennett

FROM: Brett Kavanaugh

DATE: April 10, 1995

RE: Questioning of Bruce Lindsey about Foster Death and Foster Documents

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

Jackie and I will remain in contact on this issue and will revisit it periodically.

DRAFT

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Bill Duffey
Hickman Ewing
John Bates

CC: Amy St. Eve

FROM: Brett Kavanaugh

RE: Foster Office/Documents/Note Investigation

DATE: March 5, 1995

I have devised the following tentative schedule for Foster documents interviews over the next six weeks. Please review this schedule as soon as possible; if anyone has any suggestions or problems, please let me know immediately.

Grand Jury Interviews
(first of these subpoenas to issue on March 8, 1995)

To schedule for week of 3/13

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

To schedule for week of 3/20

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

To schedule for week of 3/27

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

To schedule for week of 4/3

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

For week of 4/10 and thereafter

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

Unsworn Interviews

To schedule for weeks of 3/6 and 3/13

* secretaries Deborah Gorham, Betsy Pond, and Linda Tripp

* Phil Heymann

To schedule for week of 4/10

ALL FOSTERS, ANTHONYS, AND SHARON BOWMAN RE: FOSTER DEATH INVESTIGATION

To schedule intermittently

* Paul Begala re: night of the 20th at WH

* Nicole Boxer re: night of the 20th at WH and phone conversation with HRC (daughter of Barbara Boxer)

* CNN confidential witness re: night of the 20th

* Eileen Watkins re: night of the 20th

* Heidi Schulman (wife of Mickey Kantor) re: night of the 20th

* Senator David Pryor re: night of the 20th

* Mrs. Pryor re: night of the 20th

Polygraph Offers

FOIA(b)7 - (C)

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL

1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D. C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett

Number of Pages: 32 (including this cover sheet)

Message: See p. 15 of 5/9/94 302

CONFIDENTIALITY NOTE

a:\faxform.nmr

FD-302 (Rev. 3-10-82)

-1- Death

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 5/16/94

ELIZABETH BRADEN FOSTER was interviewed in the offices of her attorney, JAMES HAMILTON, who is associated with the law firm of Swidler & Berlin, 3000 K Street, N.W., Washington, D.C. ELIZABETH FOSTER, who is also known as LISA FOSTER, is the widow of VINCENT W. FOSTER, JR., former Deputy Counsel to the President, who will be referred to as FOSTER in the remainder of this report of interview. Also participating in the interview of LISA FOSTER was RODERICK C. LANKLER, Deputy Counsel, Office of the Independent Counsel, Washington, D.C. After LISA FOSTER was advised of the identities of the interviewing agents and the nature of the interview, she furnished the following information:

LISA FOSTER arrived in Washington, D.C. to set up a permanent residence for her family on June 5, 1993. After her arrival, she and FOSTER went jogging along Rock Creek Parkway in the vicinity of Dumbarton Oaks. FOSTER appeared to LISA FOSTER to be jogging at his normal pace that day. After they finished jogging, LISA FOSTER and FOSTER went to a small neighborhood store, purchased orange juice and bagels, and went home and had breakfast. LISA FOSTER recalls that day as being a day of fun and one of their best days together in recent times.

When LISA FOSTER and FOSTER still lived in Arkansas, FOSTER used to jog approximately three to four times per week. LISA FOSTER also began to play tennis at that time. LISA FOSTER and FOSTER would frequently go to a nearby track where each of them would jog at his or her own pace.

When LISA FOSTER saw FOSTER after she arrived in Washington, D.C., she believed that he appeared awful. She believed that most of the weight which FOSTER had lost by that time had been lost prior to his arrival in Washington, D.C.

How much did they see each other Jan-June

didn't lose much weight '93

On June 8, 1993, LISA FOSTER noticed that FOSTER was emotionally down and was slumped in his chair just as his father had been when his father was ill. LISA FOSTER recalls that FOSTER always was worried and stressed. FOSTER told LISA FOSTER

Investigation on 5/9/94 at Washington, D.C. File # 29D-LR-35063

by SA FOIA(b)7 - (C) and SA Russell T. Bransford RTB:deg Date dictated 5/16/94

FD-302a (Rev. 11-15-83)

LR-35063

Continuation of FD-302 of ELIZABETH BRADEN FOSTER , On 5/9/94 , Page 2

that nothing at the White House was going right and he mentioned the example of the ZOE BAIRD nomination.

LISA FOSTER recalls that FOSTER did go jogging on Monday, July 19, 1993 but did not go jogging on July 20, 1993.

FOSTER complained to LISA FOSTER that he was suffering from insomnia, but he did not want to take sleeping pills because he was afraid that he would become addicted to them. FOSTER would get up in the morning and say to LISA FOSTER that he had not slept at all. FOSTER's typical work day began at 8:00 or 8:30 a.m. and continued until 9:30-10:00 p.m.

LISA FOSTER is aware that FOSTER had his blood pressure checked at the White House infirmary on or about July 16, 1993. FOSTER had complained to LISA FOSTER that his heart had been pounding. LISA FOSTER recalls that the blood pressure reading taken on FOSTER on July 16, 1993 did not sound particularly high. FOSTER told her that the White House medical personnel had taken his blood pressure again the same day, approximately ten minutes after the first reading. LISA FOSTER recalls that the initial blood pressure reading was approximately 160/100 and that the later reading was approximately 140/90. After FOSTER related the results of these blood pressure readings to LISA FOSTER, she told him that she would call DR. LARRY WATKINS, their family physician back in Little Rock, Arkansas. LISA FOSTER is not aware of any other time when FOSTER may have gone to have his blood pressure checked. LISA FOSTER is aware that FOSTER's father had suffered a stroke and his mother takes medication for high blood pressure.

LISA FOSTER is not aware of any history of depression within the FOSTER family. No one has ever mentioned such a family history to LISA FOSTER. LISA FOSTER is aware that an aunt of FOSTER had some sort of problem and never got married, but LISA FOSTER is not aware of any more specific information about the nature of this problem.

LISA FOSTER is not aware of FOSTER ever having been treated for depression previously or having had medication for depression prescribed for him.

When asked why she and her son called FOSTER's office at the White House on several occasions to ask about FOSTER's well-being, LISA FOSTER responded that she used to call her

FD-302a (Rev. 11-15-83)

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husband when he worked at the Rose Law Firm all the time, especially if she wanted money. VINCENT FOSTER was very quiet, and LISA FOSTER may have called his secretary just to get a better feel for his condition and state of mind. LISA FOSTER believes that her son, VINCENT W. FOSTER, III, may have called BERNARD NUSSBAUM, Counsel to the President, to confirm whether NUSSBAUM would be speaking to a group of legal aides who were working on Capitol Hill. VINCENT W. FOSTER, III was working for Arkansas Senator DALE BUMPERS at the time and was interested in trying to attend such a speech by NUSSBAUM. LISA FOSTER does not specifically recall any other occasions when she may have called FOSTER's office.

state of mind concerns

When LISA FOSTER was asked whether FOSTER ever experienced anxiety as a component of his depression, she responded by recalling the night that ZOE BAIRD withdrew from consideration to become Attorney General of the United States. LISA FOSTER recalls that FOSTER came to bed at approximately 2:30 a.m. and he was sweating profusely and just sick. FOSTER felt that everyone was criticizing him, even at home. FOSTER did not enjoy being in the public eye. As an indication of FOSTER's anxiety, LISA FOSTER cites the fact that he told her that he didn't have time to do the taxes. LISA FOSTER recalls that he began to start more of his sentences with the phrase "I just can't handle...." While the FOSTER family was still living in Little Rock, if FOSTER became anxious, he would just go out to his swimming pool in the backyard and work by the pool, particularly if there was a trial approaching. FOSTER was very intense. If an upcoming trial involved a major case, then preparation for that trial would be all that FOSTER would do. FOSTER had a one-track mind when he was preparing for or engaged in a trial. Once FOSTER began working at the White House, there were no breaks in his effort and also no successes. FOSTER was used to always winning, and LISA FOSTER does not recall any instances of FOSTER losing before he joined the administration.

FOSTER has had panic attacks in the past and LISA FOSTER thinks that he had one at least five years ago. At that time, FOSTER told LISA FOSTER that his heart was acting up. FOSTER had a heart monitor attached to him for 24 hours but no abnormalities were found. FOSTER also told LISA FOSTER that he was afraid to speak before crowds, and he said that his knees would shake under such circumstances. LISA FOSTER counseled him to work through his anxiety and ignore its effects simply by

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anticipating he would feel anxious whenever he spoke before a crowd. LISA FOSTER recalls that when FOSTER spoke before a crowd, he would sweat and turn slightly green in color. LISA FOSTER believes that FOSTER's commencement speech at the University of Arkansas Law School is a very good example of how FOSTER appeared when he was suffering such an anxiety attack. LISA FOSTER recalls that he appeared very stiff while making that address. LISA FOSTER recalls three other occasions when FOSTER appeared to be suffering from some sort of panic attack. On one such occasion, FOSTER called the FOSTER residence in Little Rock and left a recorded message on the answering machine about the need for him to resign from the Little Rock Country Club because of its alleged discriminatory practices. LISA FOSTER recalls that the sound of FOSTER's voice on the tape made her believe that FOSTER had been crying. The other two occasions when FOSTER sounded choked up and tense were when the Branch Davidian complex near Waco, Texas had burned, and the occasion of the issuance of the White House report on the Travel Office affair in which FOSTER was reprimanded.

LISA FOSTER does not recall any incidents in which FOSTER was hospitalized for physical or mental ailments. She recalls that FOSTER once cut his chin and received stitches as an outpatient. She cannot recall any other instances when FOSTER received care at a hospital.

FOSTER was greatly affected by the death of his father, VINCENT FOSTER, SR. FOSTER did not sob when his father died, but he also did not remain unaffected by the death. FOSTER cared for his father during the last few months of his father's life when he was suffering from cancer. LISA FOSTER recalls that she and FOSTER were told by the doctors that FOSTER's father would live approximately six to eighteen months. As soon as the FOSTER family left Arkansas and arrived in Michigan for a vacation, they learned that FOSTER's father was dying. FOSTER attempted to return to Arkansas from Michigan quickly, but he did not arrive home in time to be with his father before his father passed away. After the funeral for FOSTER's father had been held, FOSTER returned to Michigan with the intention of spending spend time with his family. Instead, he used his time with the family in Michigan to write thank you notes to people who had offered condolences to the other members of his family and himself.

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LISA FOSTER did have contact with DR. LARRY WATKINS subsequent to FOSTER's death. DR. WATKINS was the first person she called after she learned of her husband's death. She called DR. WATKINS the night of July 20, 1993 and asked him what in the hell happened. She also asked DR. WATKINS, "Could it have been the pill?" DR. WATKINS responded to LISA FOSTER that the pill could not have been the cause of the suicide and he further stated that FOSTER's depression must have been acute. DR. WATKINS is an internist who provided full physical examinations to both LISA FOSTER and FOSTER every two years.

In speaking with DR. WATKINS, LISA FOSTER learned that FOSTER had called DR. WATKINS and told him that he thought he was fighting depression. DR. WATKINS related to LISA FOSTER that he had then called in a prescription for an anti-depressant drug. LISA FOSTER did not know ahead of time that FOSTER was going to call DR. WATKINS, and she did not overhear the conversation between FOSTER and DR. WATKINS.

When LISA FOSTER was asked whether it would have been uncharacteristic of FOSTER to reach out to someone regarding a problem such as depression, she replied that FOSTER would have reached out if he were really scared or were at home rather than at the White House. During one conversation, FOSTER told LISA FOSTER that SHEILA (FOSTER's sister, SHEILA ANTHONY) says sometimes that "it" is chemical. FOSTER did not explain to LISA FOSTER what he was referring to when he talked about "it" or "this thing." LISA FOSTER did not understand what his reference meant when he referred to it as being chemical. LISA FOSTER offered to call a doctor for FOSTER but he said that he would make the call.

FOSTER had a prescription for a sleeping pill called Restoril (phonetic). LISA FOSTER had filled a new prescription for this sleeping pill, but she is now unable to find the pills. LISA FOSTER believes that FOSTER threw the pills away so that she would not be able to consume them once she learned of his death.

Prior to FOSTER's death, SHEILA ANTHONY never mentioned depression to LISA FOSTER in relation to FOSTER.

When asked whether FOSTER had ever approached LISA FOSTER for help in dealing with his problem with depression, LISA FOSTER recalls that he mentioned his depression to her on

approximately July 16, 1993. LISA FOSTER then arranged to go away for the weekend with FOSTER to the Tidewater Inn on the Eastern Shore of Maryland. LISA FOSTER made all the arrangements for the weekend and asked FOSTER to be home by 3:00 p.m. that Friday, which was July 16, 1993. Instead, FOSTER arrived home at approximately 4:00 p.m., and she and FOSTER had to drive through terrible traffic to reach the inn. Because FOSTER appeared to be under stress to her, LISA FOSTER offered to drive. FOSTER agreed to have her drive, but there was no opportunity to pull over and change drivers so FOSTER ended up driving the entire way to the Tidewater Inn.

LISA FOSTER has no knowledge of any available records which might indicate that her husband had previously received psychiatric counseling.

FOSTER did not experience either stress or depression while he was studying in law school. FOSTER never had to study at night because he was able to do his studying during the morning hours prior to class. After rising in the morning and driving LISA FOSTER to her place of employment, FOSTER would return home and study.

FOSTER did not attend his graduation from law school for a number of reasons. FOSTER graduated during the middle of the school year, i.e., in the month of January. Because of the timing of his graduation and because FOSTER had already begun work at the Rose Law Firm in Little Rock, Arkansas, FOSTER would have had to take off time from work in order to attend graduation. Other reasons why the FOSTERS did not attend the graduation were that the trip back to Fayetteville, Arkansas would have involved significant expenses and LISA FOSTER was pregnant at the time. LISA FOSTER recalls that the graduation ceremony was nothing special because it was conducted as part of the same ceremony held for other schools within the University.

LISA FOSTER has many copies of the text of FOSTER's commencement address to the University of Arkansas School of Law. She also has a copy of the videotape of that address by FOSTER. The text of FOSTER's speech is contained in the most recent copy of the University of Arkansas Law Review.

During the last few months of his life, FOSTER was reading such books as The Making of a President, Ross Perot's

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book, a book entitled Putting People First, and other books, titles unrecalled, on the subject of ethics. LISA FOSTER is unable to recall the titles of any of the books which FOSTER may have been reading for pleasure just prior to his death.

LISA FOSTER and her family did employ housekeepers in their residences in both Little Rock and Washington. In Little Rock, LISA FOSTER employed a housekeeper for approximately 22 years. In Washington, LISA FOSTER employed a woman named LORETTA SEARS who came to clean the FOSTER residence once a week. SEARS had worked for the tenants who had resided previously in the FOSTER house. LISA FOSTER does not believe that SEARS ever saw FOSTER because he typically left for work prior to her arrival at the house and he always returned home after SEARS had already departed.

When asked whether NUSSBAUM had given her an envelope in his office at the White House, LISA FOSTER responded yes, that he had given her a number of torn pieces of yellow in a white envelope. The envelope was already in the office when LISA FOSTER arrived there. NUSSBAUM showed the contents of the envelope to LISA FOSTER, and he assembled the pieces of yellow paper so that she could read the writing on it. NUSSBAUM had already had a transcript prepared of the content of this note. LISA FOSTER believes that she saw this torn note on the evening of July 26, 1993. When she saw the note, LISA FOSTER recognized the writing as being the handwriting of FOSTER. LISA FOSTER was not allowed to touch the note, and there was no other envelope or note.

LISA FOSTER's attorney, JAMES HAMILTON, interjected at this point in the interview that he had been at the White House when LISA FOSTER examined the note.

LISA FOSTER is not aware of any other note relating to the death of FOSTER.

LISA FOSTER is not aware of any personal or family reason which would account for FOSTER researching medical malpractice issues. First Lady HILLARY RODHAM CLINTON had asked FOSTER to write the malpractice section of the newly proposed health care plan. In addition, one of FOSTER's first legal cases had been a case involving medical malpractice.

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LISA FOSTER is not aware of any indication, nor does she suspect, that her husband had become aware of anything illegal or highly damaging to either the CLINTONS or the White House which would have presented him with irreconcilable pressures. LISA FOSTER notes that FOSTER never told her anything about his clients.

FOSTER never expressed any concern to LISA FOSTER about either Whitewater or Madison Guaranty Savings & Loan. LISA FOSTER had never even heard of either of these entities at that point in her life.

When asked to furnish an opinion as to what FOSTER may have been working on that caused him stress or might explain his condition of depression, LISA FOSTER responded that the Travel Office fiasco may have been the source of the stress. She noted that if the Travel Office had been the only difficulty facing FOSTER, it would not have been so bad. At one point, FOSTER called the family together and warned his family that the next six months might be particularly difficult. Toward the end of his life, FOSTER had no sense of joy or elation at work. The Branch Davidian incident near Waco, Texas was also causing him a great deal of stress. LISA FOSTER believes that FOSTER was horrified when the Branch Davidian complex burned. FOSTER believed that everything was his fault. On such issues as the ZOE BAIRD nomination and gays in the military, it seemed that the White House Counsel's Office was not doing a particularly good job, although LISA FOSTER felt that the attorneys themselves were doing good work. FOSTER was extremely fond of NUSSBAUM. If either President CLINTON or NUSSBAUM was being criticized, FOSTER felt that he was also being criticized. FOSTER was very happy about the nominations of JANET RENO as Attorney General of the United States and RUTH BADER GINSBURG as a Supreme Court Justice.

At this point in the interview, HAMILTON interjected that he sat next to Justice GINSBURG when she was first nominated for her position, and he noted that FOSTER was very touched by Justice GINSBURG's speech.

LISA FOSTER stayed home and did not attend the nomination ceremony for Justice GINSBURG.

LISA FOSTER is not aware of what may have been in her husband's office at the White House that led White House staff to

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search FOSTER's office immediately after her husband's death. LISA FOSTER also does not know anything about what may have caused NUSSBAUM to conduct an official search of her husband's office in a manner which excluded investigators from law enforcement agencies.

LISA FOSTER is not exactly aware of what role her husband played in the firing of the seven individuals from the White House Travel Office. FOSTER was distressed because he felt that if he had spoken first with WILLIAM KENNEDY, who was also an attorney in the White House Counsel's Office, then the Federal Bureau of Investigation would not have been called into the case. However, no one heeded FOSTER's advice on this matter.

LISA FOSTER is aware that FOSTER was compiling a list of attorneys to represent him regarding the White House Travel Office matter. FOSTER wanted to have an attorney represent him because he did not have time to do his work at the White House and prepare a defense for himself. LISA FOSTER recalls that Senator DOLE had written a letter on July 15, 1993 requesting a Congressional investigation of the Travel Office matter. VINCENT W. FOSTER, III had attended a Senate Judiciary Committee meeting when an investigation of the Travel Office matter was called for but the motion to conduct such an investigation was tabled. VINCENT FOSTER, III told LISA FOSTER about the proposal for Congressional hearings, but she did not think that it was a big deal.

LISA FOSTER does not think that FOSTER contacted any of the attorneys on the list of attorneys which had been furnished to him by BERYL ANTHONY. LISA FOSTER is aware that FOSTER contacted her attorney, JAMES HAMILTON, as well as attorney JAMES LYONS and, although she was not privy to the conversations, she believes that these conversations related to the Travel Office matter.

FOSTER had not kept a diary during the course of his relationship with LISA FOSTER. He used to keep trip logs whenever the family went on vacation. At the end of each day of a trip, FOSTER would write down what the family had done that day while on vacation. However, FOSTER did not keep such notes when he was at home or in relation to his work. LISA FOSTER believes that FOSTER may have begun to keep a diary on election night of

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1992 because he believed that from that time period forward would be a period worth remembering.

LISA FOSTER does not believe it would have been uncharacteristic of her husband to maintain such a diary because he was very excited about the formation of the new administration. As an indication of this excitement, she notes that he chose to write about election night, the inauguration, and the nomination of Attorney General JANET RENO.

LISA FOSTER's daughter, LAURA FOSTER, was the primary driver of the Honda automobile which was found at Fort Marcy Park, Virginia on July 20, 1993. The Honda automobile belonged to LAURA FOSTER and also to one of LISA FOSTER's sons. The son and daughter shared the automobile. LAURA FOSTER had used the Honda while she was attending Vanderbilt University and then had driven it to Washington. The Honda automobile was the only car which FOSTER and LAURA FOSTER had with them in Washington until LISA FOSTER arrived with the other family members and with the Lexus automobile owned by their family.

It was not only typical for FOSTER to drive the Honda to work at the White House, it was imperative.

The contents found in the Honda on July 20, 1993, e.g., the cigarette pack, beer cans, and corkscrew, belonged to LISA FOSTER's son. FOSTER himself did not smoke. FOSTER's sons had gone to the beach the weekend preceding July 20, 1993, and the refuse from the weekend was still in the passenger compartment of the Honda when it was searched by police at Fort Marcy Park.

The Honda is no longer in the possession of LISA FOSTER because she sold the car to her brother-in-law, who in turn is leasing the car to her brother in Nashville, Tennessee.

LISA FOSTER describes the color of the Honda as taupe or grayish. She further describes it as a light color.

FOSTER had not made specific plans for the weekend which followed his death. He had spoken with LISA FOSTER about going away for that weekend and about coming home early from work so they could get an early start on the weekend. LISA FOSTER had talked to him about trying to go away every weekend. They had

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spoken about trying to go to Pennsylvania the following weekend but had not made any reservations.

There were no domestic problems between LISA FOSTER and FOSTER during the entirety of their twenty-five year relationship.

In terms of people in whom her husband would confide, LISA FOSTER believes that he would have confided in herself and his sister, SHEILA ANTHONY. FOSTER would also be likely to confide in his children, particularly his daughter LAURA. FOSTER would also confide in his son, VINCENT FOSTER, III, and he would have confided in his father if his father were still alive.

On the evening of July 19, 1993, LISA FOSTER cooked dinner at home. When FOSTER returned home from work, he came into the house and smiled at LISA FOSTER while saying that a quarter to eight was not bad. LISA FOSTER responded to him that she was thinking that he would be home at 6:30 or 7:00 p.m. That night, FOSTER received a call from President CLINTON, who invited FOSTER to come to the White House to watch a movie. When FOSTER turned down the invitation from the President, LISA FOSTER was happy. She prepared scallops for all of the family members except for her son BRUGH, who was eating spaghetti.

FOSTER did not mention any conversations from earlier in the day of July 19, 1993 which might have disturbed him.

LISA FOSTER has some knowledge of three letters which were sent out by FOSTER from his office on July 19, 1993. LISA FOSTER is aware of a letter from FOSTER to his mother regarding some leases for mineral rights. LISA FOSTER only saw this letter after FOSTER's death because, as a result of FOSTER's mother signing the letter, LISA FOSTER inherited the mineral rights. LISA FOSTER does not recall exactly how she saw these mineral leases. One of the remaining two letters may have been for payment of a life insurance premium, but LISA FOSTER does not recall whether she or FOSTER mailed this letter.

FOSTER had never spoken to LISA FOSTER about visiting Fort Marcy Park in the past, and she had never heard of the park prior to her husband's death.

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LISA FOSTER does not know whether VINCENT FOSTER ever visited Fort Marcy Park prior to the day of his death but she doubts it.

LISA FOSTER has no idea what her husband did after he left the White House on July 20, 1993. She has checked both gas receipts and credit card receipts, but no purchases or other clues have been identified.

LISA FOSTER had no contact, including telephone calls, with her husband after he left their home on the morning of July 20, 1993. LISA FOSTER recalls one unusual event that morning which was that FOSTER asked her what she was going to be doing that day. It was uncommon for FOSTER to ask her about her plans, and it was also memorable to her that he asked because she was unusually busy that day.

LISA FOSTER is not aware of FOSTER returning home after leaving his office at the White House on July 20, 1993. It is her opinion that he did not return home on that date.

LISA FOSTER is not aware of any particular local spots frequented by FOSTER, such as restaurants or bars, which might assist investigators in attempting to trace FOSTER's activities on July 20, 1993. A Washington restaurant, La Tomate, was the only place where FOSTER would eat out during the business day.

On July 20, 1993, LISA FOSTER played tennis at approximately 8:30 a.m. At 11:45 a.m., she attended a meeting relating to multiple sclerosis. Prior to attending the meeting, LISA FOSTER woke her son so that he could drive her to the meeting. DONNA KAY MCLARTY had also invited LISA FOSTER out. LISA FOSTER had been in Washington for approximately six weeks, but she and MCLARTY had not seen each other much, so they agreed to go to a restaurant at the Four Seasons Hotel for lunch. At approximately 3:30 p.m., LISA FOSTER and MCLARTY took a taxi back to FOSTER's house. From there, LISA FOSTER and MCLARTY went to the MCLARTY residence where their respective sons met with each other. At approximately 5:00 p.m., LISA FOSTER returned home and called the White House to speak to her husband. LISA FOSTER thought that it was NANCY HEMREICH's week to be at the office, but she was told by DEBORAH GORHAM that HEMREICH's week would be the following week. GORHAM told LISA FOSTER that FOSTER was unavailable to come to the phone.

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When asked whether she had made a remark about FOSTER putting the gun in his mouth, LISA FOSTER replied that when she was notified of his death, someone kept saying that FOSTER had shot himself in the head. LISA FOSTER recalls that she was very concerned about how FOSTER had shot himself because she was trying to imagine what he looked like and wondering whether he had suffered. She further said that she was concerned about whether he had blown his head off.

FOSTER had never spoken with LISA FOSTER before about suicide and he had never attempted suicide before. LISA FOSTER believes that her husband took his life because he was so terribly depressed.

LISA FOSTER has no doubts that her husband took his own life and she had no such doubts on the night of July 20, 1993.

LISA FOSTER was concerned about the autopsy being performed on her husband because she wanted to know his mental state at the time that he died. She also wanted to know if he had taken the sleeping pills or if he had been consuming alcohol or was drunk. She did not have any influence or input into causing the autopsy to be conducted so promptly.

In terms of other drugs which may have been prescribed for FOSTER in the past, LISA FOSTER is aware of the sleeping pill Restoril having been prescribed. She also recalls that an antibiotic was prescribed for FOSTER in approximately December 1992. LISA FOSTER recalls that Feldene was prescribed for treatment of FOSTER's tennis elbow.

LISA FOSTER is aware that her husband took one 50 milligram dose of Trazadone on the evening of July 19, 1993 because she told her husband to take one pill and she watched him take it. She does not know if he took any sleeping pills on that evening. On the morning of July 20, 1993, FOSTER told LISA FOSTER that he did not go out for a jog because it would take him too long to cool off. LISA FOSTER notes that her house has only one bathroom for such a large family. She notes further that, due to her relatively early departure from home on July 20, 1993, there were several family members attempting to use the single bathroom during the same period of time.

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At the time of her husband's death, LISA FOSTER had some Valium which had been prescribed for her. However, at that time, she was not aware of any Valium pills missing from her prescription.

At this point in the interview, LISA FOSTER was asked to examine a pair of eyeglasses which had been found in Fort Marcy Park on July 20, 1993. LISA FOSTER held the glasses, examined them, and then stated that the eyeglasses appeared to be those of her husband. LISA FOSTER noted that the tips of the stems of the eyeglasses had bite marks on them, which was an observation consistent with one of her husband's habits. FOSTER had frequently chewed on the tips of his eyeglasses as a nervous habit.

LISA FOSTER then examined a revolver which had been brought to the interview by the interviewing agents. FOSTER examined the revolver, which had also been found at Fort Marcy Park on July 20, 1993, and stated that she believed it may be a gun which she formerly saw in her residence in Little Rock, Arkansas.

LISA FOSTER then examined a photocopy of a handwritten note which has previously been identified as having been written by her late husband. LISA FOSTER believes that the original note was written on or about July 11, 1993. LISA FOSTER is not entirely certain of this date and believes that the note was written sometime during the period between July 4 and July 20, 1993. She believes that the note was written by FOSTER in their Washington residence on a day when there were a number of young people in her house. Her son was working as a Senate aide and there were a number of other aides visiting him on that day. LISA FOSTER invited FOSTER to go with her to the store, but he declined to accompany her. FOSTER was upstairs in bed, alternately trying to sleep and work. LISA FOSTER suggested to FOSTER that he write down everything that "they" did wrong. She suggested to FOSTER that he go on the offensive and not continue to take responsibility for every mistake which was made in the White House. FOSTER agreed with LISA FOSTER's suggestion, and he sat up in bed and appeared energized. FOSTER told LISA FOSTER that he had not resigned yet, and he said that he had already written his opening argument in his defense. LISA FOSTER believes that the torn note which was found was actually FOSTER's opening argument in the event he had to testify before Congress.

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Although LISA FOSTER did not view or read the note on the day that FOSTER appeared to be energized by her remarks, she is confident that the comments written in the note were written on that same day. LISA FOSTER knows that FOSTER was upset about the Federal Bureau of Investigation (FBI) being called in regarding the Travel Office matter, but she does not believe that FOSTER believed that the FBI had lied. People know that representatives of the media were getting deals through the White House Travel Office. LISA FOSTER is aware that people knew of these deals, but she herself knew nothing about FOSTER's remarks in the note pertaining to the Republicans or the usher's office. LISA FOSTER believes that FOSTER was concerned about excessive costs being incurred by the usher's office, but FOSTER never discussed these matters with her.

On Tuesday night, July 13, 1993, FOSTER spoke with LISA FOSTER about resigning. LISA FOSTER encouraged him to stay in his position in the White House Counsel's office. She advised him that Congress would take a recess in August 1993. LISA FOSTER then suggested to FOSTER that he should stay in his current post until Christmas of 1993. LISA FOSTER understood clearly that FOSTER was speaking about the Travel Office when he was speaking of his depression and his concerns.

LISA FOSTER is aware of the whereabouts of some ammunition which was kept at the FOSTER residence in Little Rock prior to her husband's death. She recalls finding a number of shotgun shells in the top drawer of her dresser. She also recalls that there were a number of shotgun shells kept in a closet. In searching her house, LISA FOSTER found a number of 20 gauge and 12 gauge shotgun shells, some .22 caliber ammunition, and possibly some small handgun ammunition. LISA FOSTER does not recall seeing any such ammunition at her house in Washington, D.C.

LISA FOSTER believes that she may have seen the handgun which she examined previously during the interview at her residence in Washington. LISA FOSTER recalls that as she was packing her belongings in Little Rock in preparation for coming to Washington, D.C., she found a handgun inside a travel trunk which had been packed by FOSTER prior to his departure for Washington. Specifically, as LISA FOSTER was packing in Little Rock, she came across a silver-colored gun, which she then packed in with her other property. When LISA FOSTER unpacked the gun in

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Washington, FOSTER saw the gun and commented on it. LISA FOSTER had not had a prior conversation with FOSTER about bringing a gun to Washington, D.C., but she argued with FOSTER when the gun was unpacked. LISA FOSTER told FOSTER that she did not want any guns in her house in Washington.

LISA FOSTER is not aware of any photographs which may be kept in Arkansas which would depict the guns owned by FOSTER's late father. She is only aware of snapshots of family members going hunting.

LISA FOSTER is not aware of any records from the elder MR. FOSTER's estate which might describe the firearms he had owned. She is aware of a handwritten note from the elder MR. FOSTER regarding the disposition of his property after he passed away. According to this note, all of the elder MR. FOSTER's guns were left to FOSTER and a diamond was left to LISA FOSTER. After the funeral for FOSTER's father, FOSTER went down to his father's house and retrieved the guns. LISA FOSTER believes that there were approximately three to five handguns included in the guns retrieved by her husband. She believes that her husband obtained all of the guns which were left by FOSTER's father.

LISA FOSTER does not know where her husband kept the guns left to him by his father while the FOSTERS were still living in Little Rock.

LISA FOSTER believes that the shotguns from the estate of the elder MR. FOSTER are currently in the possession of her brother-in-law, who is the husband of her sister. SHARON BOWMAN, FOSTER's sister, has one handgun. LISA FOSTER believes that BERYL ANTHONY has one of the handguns from the estate here in Washington, D.C., but she has not asked ANTHONY that specific question.

FOSTER himself did not like guns. FOSTER's father had given guns to LISA FOSTER's sons, which displeased LISA FOSTER. LISA FOSTER also knows that FOSTER kept a gun in a closet in their home in Washington, D.C. LISA FOSTER was aware of the location of one gun inside her residence in Washington and she found that gun still in its usual location on the night of July 20, 1993. The gun which she found on that date was not the silver gun which she had earlier found in the trunk in Little Rock. LISA FOSTER believes that the gun found at Fort Marcy Park

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may be the silver gun which she brought up with her other belongings when she permanently moved to Washington. LISA FOSTER does not know with certainty, but she suspects that there were some bullets at the house in Washington, D.C.

Sometime within the last two weeks prior to July 20, 1993, LISA FOSTER told FOSTER to remove the guns from their house in Washington. FOSTER told LISA FOSTER not to remark about the guns in front of the boys. LISA FOSTER believes that she may have told her husband twice during that time to remove the guns, but she never checked to see if the guns had actually been removed.

LISA FOSTER assumes that ammunition was given to her husband in conjunction with his receipt of the guns from his father's gun collection, but she does not know for certain. She never knew FOSTER to buy any ammunition except for shotgun shells when he went hunting.

To the best of LISA FOSTER's knowledge, FOSTER never carried a handgun in his automobile. She never knew FOSTER to carry a gun with him to work. FOSTER parked his automobile in slot 16 on Executive Boulevard West whenever he was at the White House. LISA FOSTER knows that the trunks of vehicles are checked when the vehicles are driven onto the White House grounds. When not in use, the Honda was typically parked on the street adjacent to the FOSTER residence while the FOSTER family's Lexus was parked in a space behind their house.

LISA FOSTER believes that the guns which were brought by her family from Little Rock to Washington were transported on the moving van with their other belongings.

LISA FOSTER does not know where her husband might have obtained the two loose bullets which were discovered in the handgun found at Fort Marcy Park.

LISA FOSTER is not aware of any background information regarding her husband's possession of guns which could assist in tracing the gun found in his hand at Fort Marcy Park. SHARON BOWMAN told LISA FOSTER that FOSTER's father kept a gun by his bed while he was still living, and LISA FOSTER believes that that gun may be the same revolver she was shown by the interviewing agents.

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FOSTER's father served in the United States Navy during the World War II period and may have been stationed in California.

It is difficult for LISA FOSTER to believe that FOSTER may have come home on July 20, 1993 to get a gun.

LISA FOSTER still remembers her last contact with FOSTER on the morning of July 20, 1993 in their kitchen. She recalls that FOSTER was standing very stiffly in the kitchen prior to departing for work. LISA FOSTER now believes that he may have had the gun with him in his briefcase at that time. FOSTER did not kiss her goodbye before he left for work, but she notes that his not kissing her was not unusual for him. She believes that her son was at home and sleeping until approximately 2:00 p.m. on that afternoon. However, she has not questioned her son about whether he was asleep that afternoon because she has not wanted to expose her children to too many of the circumstances of their father's death.

LISA FOSTER believes that FOSTER was suffering from a major depression which was brought about by working too hard for such a long period of time away from his family. She believes that no one loved his children more than her husband.

FOSTER was unable to attend the ceremony in which the Arkansas Bar Association named him the Lawyer of the Year because he had to go to Boston, Massachusetts that same day to interview Judge STEPHEN BREYER. Judge BREYER was a candidate for a vacancy on the United States Supreme Court, but he was bedridden as a result of a traffic accident.

At this point in the interview, Attorney JAMES HAMILTON interjected that he had traveled to Boston to interview Judge BREYER with FOSTER on that occasion.

LISA FOSTER believes that FOSTER thought he would be able to attend the Arkansas Bar Association ceremony up until the very last minute. Both LISA FOSTER and FOSTER were very upset that they were unable to attend. She believes that his inability to attend the ceremony would have weighed very heavily on FOSTER and would have caused him to feel embarrassed before his peers in Arkansas.

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At the conclusion of the interview, HAMILTON, on behalf of LISA FOSTER, again asked that the original handwritten note which had been torn up be turned over to LISA FOSTER at the conclusion of the investigation. HAMILTON also reiterated his request that a photograph of the note not be released by the Office of the Independent Counsel should such a request be received under the Freedom of Information Act.

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OFFICE OF THE INDEPENDENT COUNSEL

Date of transcription 9/4/95

ELIZABETH "LISA" BRADEN FOSTER was interviewed at the offices of Swidler & Berlin, 3000 K St. NW, by Independent Counsel Kenneth Starr, Deputy Independent Counsel Mark Tuohey, Associate Independent Counsel Hickman Ewing, and Associate Independent Counsel Brett Kavanaugh. Also present during the interview was LISA FOSTER'S attorney, James Hamilton of Swidler & Berlin.

LISA FOSTER was advised of the nature and purpose for the interview by Independent Counsel Kenneth Starr. At various times during the interview, LISA FOSTER requested that certain statements be kept confidential to protect her family's privacy. Per direction of Independent Counsel Kenneth Starr, those statements were not documented.

LISA FOSTER stated that she is convinced that her husband committed suicide; VINCENT FOSTER (who shall be denoted throughout this document as FOSTER) was not murdered. LISA FOSTER does not specifically know the reasons why her husband took his life, and is not sure that she will ever know for certain. However, LISA FOSTER has no doubts regarding the suicide finding, and stated that she simply wants to go on with her life. LISA FOSTER expressed her discontent regarding the continued misinformation and exaggeration in the media, and its effect on her family and children.

LISA FOSTER stated the VINCENT FOSTER, JR. was right-handed.

The FOSTERS rented their home in Little Rock to Candy and Bill Lyle. LISA FOSTER left Little Rock during June 4th and 5th of 1993. The Lyles moved into the residence immediately after she left. There were some items that were left in the residence; one of the bedrooms was used as storage for the FOSTERS' items. There were some boxes of FOSTER'S containing items from his office at the ROSE LAW FIRM, some of these boxes were transported to D.C. LISA FOSTER stated that there was "no mystery" relating to these boxes, it was simply "stuff" from his office. There was

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an old file cabinet in the attic of the residence containing old personal documents. Also, there was a trunk that FOSTER packed, but did not take to D.C. LISA FOSTER stated that she has no knowledge of anyone from the ROSE LAW FIRM at the house after she left; specifically, LISA FOSTER had no knowledge of GEORGE JERNIGAN at the residence, and stated that she hardly knows JERNIGAN.

The FOSTERS moved into a much smaller residence in D.C. There were five of them living in the D.C. residence, with one bathroom; the living conditions were very cramped. LISA FOSTER recalled using graph paper to plan the placement of furniture in the residence. Enough furniture was left at the Little Rock residence for them to live there as well. The FOSTERS lived in a "very crowded situation" in D.C. LAURA FOSTER'S bedroom was FOSTER'S dressing room. He also dressed in the hall closet.

LISA FOSTER stated that the only records that FOSTER kept at their home in Little Rock were family tax records. In D.C., LISA FOSTER recalled boxes of personal documents and documents from the transition in administrations, including notebooks and copies of documents; "nothing significant".

At this point in the interview, JAMES HAMILTON stated that LISA FOSTER had certain miscellaneous records from the ROSE LAW FIRM, which were previously in the possession of VINCENT FOSTER. LISA FOSTER and HAMILTON examined the documents pursuant to a subpoena from the Inspector General of the FDIC. Some of these documents were produced in response to the subpoena. The ROSE LAW FIRM asserted a privilege on others, which the FDIC accepted.

The box of transition documents were brought home by VINCENT FOSTER a couple of weeks prior to his death. The box was labeled "Transition" in his handwriting.

In response to a question, LISA FOSTER stated that she is familiar with JIM GUY TUCKER.

LISA FOSTER stated that she is not familiar with JERRY PARKS, and then asked "Is he the one that got murdered"? LISA FOSTER could recall no conversations between PARKS and her husband.

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During the weekend prior to his death, FOSTER talked of quitting his job. However, he could not return to Little Rock because of the embarrassment it would cause him. LISA suggested that they could simply buy a boat and live on it. When they returned home from the Eastern Shore, VINCE talked with their son BRUGH about purchasing a boat. LISA FOSTER stated that FOSTER had not previously discussed buying a boat and had no familiarity with boats.

Finances were not a significant problem for the FOSTERS. Trust funds had previously been established for the children. The FOSTERS also owned stock in a variety of companies, including Wal Mart, Dillards, Federal Express, and Al-Tel/Systematics. LISA FOSTER recalled having stock in Mid-Life Investors, but stated that they never made any money. Regardless, VINCENT FOSTER was not particularly interested in investments, and did not follow the stock market. LISA FOSTER stated that "all he (FOSTER) ever did was work."

LISA FOSTER recalled a mistake on their automatic debit for Exxon charges through the White House Credit Union. They received overdraft notices from the credit union. There were also mistakes relating to ATM withdrawals. Subsequently, they requested weekly statements from the credit union to monitor the account more closely.

LISA FOSTER stated that a KINKO'S copying expense was for their personal tax records. FOSTER normally handled all aspects of the family's taxes. However, at one point, FOSTER simply said "I can't handle it," referring to the preparation of their tax returns. LISA and BRUGH attempted to help FOSTER with the tax preparation by handling some of the necessary copying. LISA FOSTER stated that she wanted to do everything she could to relieve some of FOSTER'S stress. LISA FOSTER stated that she tried to take care of everything at home.

The move to D.C. was a tremendous strain on LISA FOSTER; she had to handle everything. The logistics and coordination for the family move, and the details of renting the Little Rock residence were overwhelming. FOSTER was unable to return to Little Rock to help move the family. WEBB HUBBELL returned to help SUZY HUBBELL, but FOSTER would not leave his job at the WHITE HOUSE.

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LISA FOSTER could not specifically recall her husband ever mentioning "WHITEWATER." However, "everything was a problem" for FOSTER.

VINCENT FOSTER never voiced concerns regarding a "personal versus Presidential work conflict"; LISA FOSTER could not recall her husband expressing an ethical conflict with his work for the President.

LISA FOSTER did not recall her husband expressing concerns regarding a shortage of attorney's in the WHITE HOUSE COUNSEL'S OFFICE. However, he was concerned about the shortage of administrative support. VINCENT FOSTER'S secretary at the ROSE LAW FIRM had been with him a long time; FOSTER was used to excellent support personnel.

Subsequent to the WHITE HOUSE TRAVEL OFFICE reprimands, FOSTER was hurt that KENNEDY was disciplined, and that he wasn't. LISA FOSTER stated that she had heard that HILLARY CLINTON had ordered the firing of the WHITE HOUSE TRAVEL OFFICE employees, but LISA was not certain how she learned this information.

On a Saturday, two weekends prior to his death, FOSTER was in their bedroom trying to work and nap alternatively. There were a lot of kids in the house; it was crowded, noisy, and hot. FOSTER may have taken a sleeping pill the night before. FOSTER was brooding about his problems. He was consumed by the possibility of Senate Hearings concerning the Travel Office matter. LISA FOSTER thought the whole matter was "silly"; blown out of proportion. FOSTER was doing a good job; he was working very hard. LISA FOSTER did not think that he should blame himself for all of these mundane and superfluous matters. She told him to write down everything that was bothering him, to show him how comparatively insignificant they were. FOSTER immediately sat up and said "You're right." He picked up a legal pad and started writing. He seemed re-energized. LISA left the room. LISA was convinced that FOSTER would see how he was "blowing things out of proportion." LISA did not ever see what FOSTER wrote on the paper, but assumes it was the note that was found a week after his death.

FOSTER was prescribed an anti-depressant, Restoril, by Dr. Watkins. LISA was taking Valium at that time. There was a full bottle of Valium in the house; she had refilled the

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prescription for FOSTER.

FOSTER never specifically told LISA that he was depressed. However, when she looks back at all of the events during that time, it makes sense that FOSTER was suffering from depression. Particularly when noting that Dr. Watkins prescribed an anti-depressant, and that he took one of those pills the night before his death. LISA stated that she was present when he took the pill.

LISA FOSTER stated that FOSTER had never expressed any fear for his life. LISA had no knowledge of FOSTER ever being threatened, nor any reason why FOSTER would carry a gun to work.

FOSTER was somewhat paranoid about telephone conversations; he was often concerned that the phone might be tapped, or that others were listening to his conversations.

LISA FOSTER stated that she is convinced that FOSTER'S biggest concern was the Travel Office matter.

The FOSTERS received the Washington Post at home.

The weekend prior to his death, FOSTER and LISA went away for the weekend to Maryland's Eastern Shore. At first, FOSTER was very positive about the idea; he thought it would be a good opportunity to relax. However, the first night in the hotel he became upset, and was very emotional. He simply was unable to place his concerns in a proper perspective. He remained upset throughout the weekend. He complained of indigestion. They spent most of the weekend with the HUBBELLS at the CARDOZO'S house. The CARDOZOS were friends of the HUBBELLS. They were very active that weekend; tennis, golf, boating. FOSTER mainly stayed by their pool reading. FOSTER had a couple of beers and seemed to relax a little.

The evening that they returned home, FOSTER telephoned JIM LYONS, an attorney friend of FOSTER'S, who he relied on for legal advice. FOSTER was on the phone with LYONS for almost half an hour. LISA assumed it was about work, specifically the Travel Office matter.

The next morning, LISA told FOSTER to go jogging and that she would fix breakfast. She told FOSTER that they were

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going away every weekend until he started feeling better.

The following day (the day of his death), FOSTER didn't jog. He told LISA that it took too long to cool off afterwards.

LISA FOSTER did not think that FOSTER was aware of WEBB HUBBELL'S problems. LISA stated that FOSTER may not have committed suicide if he knew that HUBBELL may have needed him. Also, LISA did not think that FOSTER would have accepted his position at the White House if he knew of HUBBELL'S problems. FOSTER would have wanted to stay at the ROSE LAW FIRM to do what he could for HUBBELL.

The night before his death, FOSTER came home from work a little earlier than usual. However, he received a telephone call from the President. LISA recalled seeing a "smirk" on FOSTER'S face as he spoke with the President. Afterward, FOSTER told LISA that the President had wanted him to return to the White House to watch a movie with him and HUBBELL. FOSTER put his arm around LISA and told her that he told the President no. FOSTER did not say what the movie was, or who else was there besides HUBBELL. It was not uncommon for the President to invite friends to see movies at the White House; usually 10 to 12 people would be present for a show, which usually took place on Saturday evenings.

LISA FOSTER wanted FOSTER to be more "normal"; to take more time for himself and his family.

LISA FOSTER had no knowledge of any appointment that FOSTER had with the President for the day following his death.

On the day of VINCENT FOSTER'S death, he did not kiss LISA goodbye when he left for work. LISA recalled FOSTER standing very stiffly with his briefcase just prior to leaving. FOSTER didn't turn around to say goodbye, he simply walked out. LISA considered this somewhat odd, but given his behavior during the past month, LISA simply dismissed it to FOSTER being uptight about work.

LISA FOSTER was shown a dark brown leather briefcase, which was obtained from VINCENT FOSTER'S office. LISA identified the briefcase as the same one that FOSTER had when he left their residence on the day of his death.

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NANCY HERNREICH'S birthday was that week. LISA knew HERNREICH from ARKANSAS. LISA did not personally know MARSHA SCOTT.

LISA FOSTER stated that FOSTER was a perfectionist. A good example of this was the speech he wrote for the University of Arkansas Law School Commencement. FOSTER wrote and rewrote the speech. He made corrections to it and rewrote it again. Then he corrected his corrections.

LISA FOSTER stated that it was normal for FOSTER to take the onions off of his hamburgers.

After LISA FOSTER had been notified of her husband's death, she retrieved a handgun that was stored on a shelf in her closet, under her sweatshirts. The handgun was in an old leather "case". There were other handguns in the closet in LAURA FOSTER'S room. The handguns were placed there when they unpacked after the move. LISA thought that one of the handguns was silver. LISA FOSTER stated that she is completely unfamiliar with the guns, and had no interest in them, other than to try and convince FOSTER to get them out of the house. LISA FOSTER stated that she may have gone into LAURA'S closet to look for the guns after FOSTER'S death. LISA may have said that they (the guns) were not there.

LISA FOSTER does not recall looking for a note after FOSTER'S death, but she may have. LISA FOSTER is unable to specifically recall many of the events immediately after FOSTER'S death.

LISA FOSTER does not personally know CRAIG LIVINGSTONE.

The day after FOSTER'S death, LISA spoke with BERNIE NUSSBAUM. He told her that he should have let him (FOSTER) quit, or forced him to quit. LISA told NUSSBAUM that FOSTER would have killed himself anyway.

LISA FOSTER had no knowledge of the existence of the note until she returned to D.C., subsequent to FOSTER'S funeral. NUSSBAUM telephoned her, and told her about it.

LISA FOSTER stated that she is unfamiliar with FOSTER'S clients. LISA had no knowledge of SYSTEMATICS or AL-TEL.

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LISA FOSTER did not know where FOSTER was during the hours immediately prior to his death.

LISA FOSTER thought that FOSTER owned three handguns. She located one after his death, and does not know what happened to the others.

SHARON BOWMAN, FOSTER'S sister, was travelling to D.C. for a visit on the day of his death.

FOSTER was very serious about the criticism he was receiving in the newspapers. At one point, LISA recalled FOSTER taking a newspaper out of her hands and throwing it away.

LISA FOSTER recalled FOSTER taking Monday off, the week before his death. LISA considered this very unusual for FOSTER.

LISA FOSTER was shown a green pot holder-type mitt, which was obtained from the glove compartment of the vehicle FOSTER drove to FT. MARCY park. LISA identified the mitt as an item from their kitchen. A Swiss exchange student gave it to the family as a gift. LISA had no knowledge of how it came to be in the vehicle.

LISA FOSTER was also shown a white envelope which contained the registration to the family's Lexus sedan. LISA had no knowledge of the circumstances pertaining to the registration, envelope, or post-it note attached to the registration. Lisa stated that the writing on the envelope is similar to FOSTER'S, and that he was responsible for obtaining a vehicle inspection for the Lexus.

LISA FOSTER was unsure of where FOSTER normally carried his wallet, but thought that he usually carried it in the backpockets of his pants.

At the conclusion of the interview, LISA FOSTER stated that she has no doubt that her husband took his own life at FT. MARCY PARK as a result of the enormous pressure that he put on himself. FOSTER blamed himself for all of the CLINTON administration's problems. LISA FOSTER stated that there were lessons to be learned from the way FOSTER lived and died.

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OFFICE OF THE INDEPENDENT COUNSEL

Date of transcription 11/15/95

On November 8, 1995 writer telephonically contacted Mrs. LISA FOSTER at her residence located at 5414 Stonewall Drive, Little Rock, Arkansas, telephone number FOIA(b) 6. After returning writer's call FOSTER advised that her maid, RUNELL MCCLAIN would be available for an interview at 1:00 P.M. on Friday November 10, 1995. Writer offered to conduct the interview either at MCCLAIN's home or at the Office of the Independent Counsel (OIC) in Little Rock however; FOSTER suggested that the interview be conducted at the FOSTER residence.

On 11/10/95 SA CLEMENTE interviewed RUNELL MCCLAIN at the FOSTER residence. At the conclusion of the interview SA CLEMENTE requested that MCCLAIN advise FOSTER that the interview was over. As FOSTER was showing SA CLEMENTE to the door, FOSTER apologized for being curt with SA CLEMENTE in their telephone conversations on November 8, 1995. FOSTER further explained that she was upset at the time because she had just received a subpoena from the OIC. FOSTER asked SA CLEMENTE if he would like to see the subpoena and she then handed him a Federal Express envelope which contained a letter from OIC to her attorney regarding a requested document production. FOSTER further stated that she was tired of all of this and that she had thought this was all supposed to be over by now. SA CLEMENTE apologized for the continued intrusion and stated that we were simply doing a thorough investigation.

FOSTER then asked SA CLEMENTE if MCCLAIN had been able to identify the gun. SA CLEMENTE responded no and FOSTER asked if SA CLEMENTE had the gun with him. SA CLEMENTE responded yes to which FOSTER replied, "Can I see it". SA CLEMENTE responded, "Yes, but didn't you get a chance to see it previously?", to which FOSTER replied that she did not recall. FOSTER went on to explain that when they came to her house in Little Rock to show the gun to her children, she was so upset and emotional at the time that she does not believe that she even looked at the gun. All she remembers is the Park Police showing her pictures of a gun that looked small and dark.

Investigation on 11/8-10/95 at Little Rock, Arkansas File # 29D-LR-35063

by SA JAMES T. CLEMENTE IV Date dictated 11/14/95

OIC-302 (Rev. 8-19-94)

OFFICE OF THE INDEPENDENT COUNSEL

Date of transcription 11/15/95

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Investigation on 11/8-10/95 at Little Rock, Arkansas File # 29D-LR-35063

by SA JAMES T. CLEMENTE JTC Date dictated 11/14/95

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SA CLEMENTE then showed FOSTER the gun that was found on July 20, 1993 in VINCE FOSTER, JR.'s hand at Fort Marcy Park. LISA FOSTER then asked if she could touch the gun, which she did, after which she stated, "I don't know what all the mystery is about, I swear this is the gun that I unpacked." VINCE FOSTER, JR. had a footlocker he was planing to bring with him to Washington, D.C., but he never got around to packing it. When LISA FOSTER went to Washington, D.C., she took what was in the footlocker, boxed it and brought it to Washington with her. VINCE FOSTER, JR. had a gun and three hardcover books, one of which was "THE MAKING OF A PRESIDENT", in the footlocker. LISA FOSTER then stated, "I swear it was this gun, only it looked lighter in the front part. I thought it had a black handle and the front was silver."

FOSTER described the gun from the footlocker as looking like a "cowboy" gun, not "squared-off" like the other gun that they had in the house at the time. LISA FOSTER recalls that when she and VINCENT FOSTER, III were in the basement unpacking the boxes they had moved from Little Rock to Washington, D.C., VINCE FOSTER, III found the gun and said, "Oh shit, what is this doing here." LISA FOSTER didn't pay much attention to the gun because she is as afraid of guns as she is of snakes. LISA FOSTER seems to remember the front of the gun looking lighter. However, when the light plays off of the gun a certain way, it does seem silvery to her. LISA FOSTER stated that if she had been asked to draw a picture of the gun, it would have looked just like this one.

At this point, LISA FOSTER left the room and on her own volition telephoned VINCENT FOSTER, III at his office in Atlanta, Georgia and returned saying that VINCENT FOSTER, III remembers unpacking a Colt, but LISA FOSTER does not know the difference between a semi-automatic and a revolver and therefore did not ask her son to describe the type of Colt he unpacked. LISA FOSTER recalls telling VINCE FOSTER, JR. several times to get rid of the guns while they were living in Washington, D.C. LISA FOSTER also recalls that VINCE FOSTER, JR. got mad because she had mentioned the guns in front of their children. LISA FOSTER believes that VINCE FOSTER, JR. took a gun or guns from his father's office to keep them from his mother in case she got depressed after the death of her husband.

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LISA FOSTER recalls having two different types of guns in the house in Washington, D.C. One of these guns looked like a "cowboy" gun, the other one looked "squared- off." FOSTER stated that she still had the thing that slides into the handle of the "squared-off" gun. When asked, she produced a magazine from a .45 cal semi-automatic pistol containing one .45 caliber jacketed round. LISA FOSTER stated that she specifically remembers packing, in Little Rock, and unpacking in Washington, D.C., the "cowboy" gun. However, LISA FOSTER does not recall exactly how the "squared-off" gun got to Washington, D.C. LISA FOSTER does recall however, hiding the "squared-off" gun under her sweatshirts on the shelf in her closet. The second gun (the "cowboy" gun) had been kept by VINCENT FOSTER, JR. so far back in the closet that LISA FOSTER could not reach it.

After the U.S. Park Police told LISA FOSTER about VINCE FOSTER, JR.'s death, LISA FOSTER and WEBSTER L. HUBBELL searched the closet for the two guns. They found the .45 caliber semi-automatic in its holster on the shelf under LISA FOSTER's sweatshirts. The snap of this holster was so rusted that LISA FOSTER could not open it. VINCE FOSTER, JR. did not know that this gun was hidden there. LISA FOSTER and HUBBELL never found the other gun which LISA FOSTER describes as the dark "cowboy" gun that VINCE FOSTER, JR. kept further back in the closet.

When Mr. LANKLER, OIC, and Special Agent WILLIAM COLOMBELL, FBI, came to the FOSTER residence to show the FOSTER children the gun, LISA FOSTER was so upset that she does not recall if she even looked at it. It was too soon after VINCE FOSTER JR.'s death and all of the investigators were telling her about hair and fibers and semen stains and she was very upset. Now that LISA FOSTER looks at the gun without emotions, she remembers the black handle with the lighter front part and the elongated front. LISA FOSTER stated that it just seemed lighter when she saw it in the footlocker, but that it's funny what tricks your memory will play. SA CLEMENTE asked LISA FOSTER whether her son VINCENT FOSTER, III recalled unpacking a Colt revolver or a Colt semi-automatic to which LISA FOSTER responded by suggesting that SA CLEMENTE show the gun to VINCE FOSTER, III. LISA FOSTER requested that SA CLEMENTE call VINCE FOSTER, III, speak to him about the gun, and then go show it to him.

OIC-302a (Rev. 8-19-94)

D-LR-35063

Continuation of OIC-302 of LISA FOSTER, On 11/8-10/95, Page 4

LISA FOSTER then provided SA CLEMENTE with VINCENT FOSTER, III's address and telephone numbers as follows: VINCENT FOSTER, III, [redacted] FOIA(b) 6

LISA FOSTER stated that she was trying to go on with her life and that her children were also trying to go on with their lives. She had just finished boxing up all of VINCE FOSTER, JR.'s papers and books and she really did not want to look through all of this again. SA CLEMENTE responded that he understood her frustration, to which LISA FOSTER responded that she would much rather have us (the Office of the Independent Counsel) go through every paper in the house, than have to look through all those papers again herself.

LISA FOSTER volunteered that she would never allow an exhumation of VINCE FOSTER, JR.'s body, adding that she would never allow her children to be put through that ordeal.

WITHDRAWAL NOTICE

RG: 449 Independent Counsels

SERIES: IC Starr/Ray, FRC box 2291

NND PROJECT NUMBER: 37918 FOIA CASE NUMBER: 25720

WITHDRAWAL DATE: 11/05/2009

BOX: 00017 FOLDER: 0006 TAB: 6 DOC ID: 31296376

COPIES: 1 PAGES: 2

ACCESS RESTRICTED

The item identified below has been withdrawn from this file:

FOLDER TITLE: [Loose papers in Ewing Bx 2291 re Foster] 3/3

DOCUMENT DATE: 05/02/1997 DOCUMENT TYPE: Fax

FROM: Kavanaugh

TO: Ewing

SUBJECT: "I left a voicemail re: attached

This document has been withdrawn for the following reason(s):

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

WITHDRAWAL NOTICE

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hick Ewing
John Bates

FROM: Brett Kavanaugh

RE: Telephone Call from Chris Ruddy

DATE: Friday, May 26, 1995

Chris Ruddy called me at about 6:00 p.m. on Thursday, May 25. He had called and left approximately 8-12 messages for me in the previous two days.

Most of the conversation involved Ruddy ranting and raving about various matters. His only question to me regarding the investigation was whether I had heard of Carolyn Huber. I felt like saying, "Of course I have heard of Carolyn Huber, you idiot" but resisted the temptation and said only that I would not be able to confirm whether I had heard of particular individuals because that might indicate whether they were involved in the investigation.

Ruddy then made a number of points, which I generally listened to without responding:

1. He will be running a couple of articles next week, and I sense that at least one of them will concern the documents issue (and I also sense that Carolyn Huber may figure in at least one article).

2. Ruddy appeared as a guest on the Gordon Liddy show for a half-hour on May 25.

3. The full-page Accuracy in Media advertisement will appear in the Washington Post and New York Times on Sunday, June 4.

4. Ruddy said that Foster's death is the classic staged suicide. Ruddy thinks he knows how it all happened. When I asked him to tell me his theory/facts, he refused.

5. He said that Mark is not beyond redemption; that Mark is a left-winger but so was Miguel and left-wingers may distrust the police more than conservatives, which is good in this investigation.

6. He thinks Inslaw, Whitewater, the Travel Office, and Waco are unconnected to Foster's death and are red herrings.

7. He thinks Jerry Seper is in bed with the Park Police, so much so that Seper should receive a pension from the Park Police.

8. He likes Hick, but does not think Hick is as involved in the Foster investigation as is necessary.

9. He does not think that Ken plays much of a role in the Foster investigation and that in any event Ken is not a prosecutor.

4-24-95

1215 Brett – re IDE

- KS wants you to consider talking w/ Rudy prior to this wkend press conf.
- Tom Blatt MB Law (re: Pritchard) calls.

Hick - This is more palatable but I'd wait to see if this story develops to determine if any release is warranted.

Ken, Mark, Bill, Hick:

Here is the "short version."

Brett

In recent weeks, some members of the media and of the public have raised questions about the resignation of former Associate Independent Counsel Miguel Rodriguez and this Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. This Office's investigation into Mr. Foster's death has been, is being, and will continue to be conducted in a thorough, aggressive, and professional manner. I have been personally involved in all major decisions regarding the direction and scope of that investigation. Because the investigation is continuing before a federal grand jury, I will not comment on its substance; I can provide assurances, however, as to its continued thoroughness and professionalism.

Hick - I believe that this or any other statement makes it open season on this issue. Something along the lines of this will encourage Miguel to speak his mind. All I have seen from Ruddy et al so far strikes me as speculation and conjecture. My personal belief is that Miguel has not said much. He will if this goes out. BF

Ken, Mark, Bill, Hick:

Here is a draft press statement. Alex Azar, Steve Kubiatowski, and John Bates have provided edits and comments. We all have serious doubts whether this kind of statement is a good idea. That is especially true of the fourth paragraph.

If you want a statement shorter than this draft statement, perhaps some variation of the first and third paragraphs would be sufficient.

Brett

In recent weeks, some members of the media and of the public have raised questions about the resignation of former Associate Independent Counsel Miguel Rodriguez and this Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. Prior to offering his resignation to me in January, Mr. Rodriguez had been involved in this Office's investigation of Mr. Foster's death.

In the wake of Mr. Rodriguez's resignation, some have stated that this Office's investigation into Mr. Foster's death has been thwarted by a senior member of my staff and that the investigation is not being conducted in a thorough manner designed to elicit the truth. Mr. Rodriguez made similar statements to me in offering his resignation in January. At that time, I took his statements seriously and became personally and actively involved in investigating them. In so doing, I was assisted by numerous members of my staff, including many seasoned prosecutors and my Ethics Counsel, Professor Samuel Dash. After carefully reviewing and investigating Mr. Rodriguez's allegations, I found them to be without any merit whatsoever, as did every member of my staff who reviewed the matter.

The investigation into Mr. Foster's death has been, is being, and will continue to be conducted in a thorough, aggressive, and professional manner. I am fully satisfied that no one on my staff has thwarted or attempted to thwart the investigation of Mr. Foster's death. I have been personally involved in all major decisions regarding the direction and scope of that investigation. Because the investigation is continuing before a federal grand jury, I will not comment on its substance; I can provide assurances, however, as to its continued thoroughness and professionalism.

During my review of Mr. Rodriguez's allegations, I ultimately concluded not only that his allegations were unfounded but that, in the course of the investigation into Mr. Foster's death, Mr. Rodriguez had not conducted himself with the professionalism I demand of myself and of each member of my staff. I therefore accepted his offer to resign.

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MEMORANDUM

TO: All OIC Attorneys

FROM: Brett Kavanaugh

RE: Grand Jury Witnesses

DATE: February 22, 1995

For your information, we have the following witnesses scheduled for grand jury appearances over the next two weeks.

Thursday, Feb. 23

[redacted]

Tuesday, Feb. 28

[redacted]

Thursday, March 2

[redacted]

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

3-14-95

Caller
Brett K. –

4:18pm
-4:36pm

Rough Sked:

Fri, 4-7 Fosters – interview in Washington, DC –

Tues will Semet

Tues 3-21  G. Jury

4.5 Sylvia Matthews

G J – Tues & Wed. – next couple of wks –

SA Regini –

⊙ Park Maintenance – no written records –
people say fence there forever –

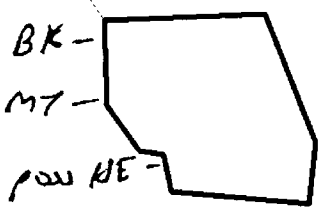
⊙ Neighborhood –
⊙ List

Advised him of source info record 3/9/95.

2-27-95

1150 Brett K. -

• Re: GJ this wk -



TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett

Number of Pages: 2 (including this cover sheet)

Message: I've starting going through all WHTO production we just received. I'll send interesting nuggets as I come across them. Here's the first - from interview of VWF by White House

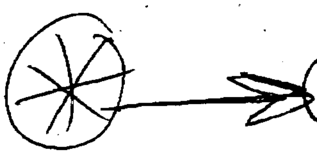
CONFIDENTIALITY NOTE

This facsimile is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. Dissemination, distribution, or copying of this facsimile or the information herein by anyone other than the intended recipient, or an employee or agent responsible for delivering the message to the intended recipient, is prohibited. If you have received this facsimile in error, please notify us immediately by telephone and return the facsimile by mail.

c:\faxform rdb

Todd
Anyone else involved in, Small reported survey. Are you aware of anyone else involved?

UF
I've never discussed this with survey.
I don't think there's any other way to ...
Never discussed ~~it~~ with Justice.



I think that's all I should say about that.

JCH what was critical mass?
UF Clear from Sat. that there's a management issue.
The when, and the how, and the who ... David

Todd ~~before~~ The sources of action included — (1) ~~B~~ T&M
UF when he said that — I ~~never~~ concerned myself with it again
in my mind, in my gut, it was a dead issue. Captain Harry said he was

Todd (2) ~~Reg~~ CC. Memo ~~#~~
UF I knew nothing about it 'til after it broke.
Did not know she was a cabin
I knew she'd worked in David's office; had a related role in
campaign, had worked there...

Todd why she was detailed there is nothing you know about

DCH Did you talk to Nancy w/ Eller?
UF no. not ... I may have spoke with Thomason separately, but not much.
I only had 2 calls with Jeff, they were short, and I wanted to stay
... ... the time ... ... heard HT summary.

Interviews - Foster Death/Documents:

Kavanaugh, Regini - week of May 1, 1995

1. Vince Foster's mother in Hope, AR
2. Bill and Candy Lile, 3 Paradise Court
3. RLF attorneys

MEMORANDUM

TO: All OIC Attorneys
Dana Gillis
Russ Bransford
Chuck Regini

FROM: Brett Kavanaugh

RE: Grand Jury Schedule

DATE: April 14, 1995

The following is the **Foster grand jury schedule** for the next two weeks.

Wed. April 19 [redacted]

Tues. April 25 [redacted]

Wed. April 26 [redacted]

[redacted]

We have numerous interviews outside the grand jury to be scheduled for the next 4-6 weeks, including some in Little Rock. Chuck Regini and I plan to be in Little Rock **the first week of May for several interviews.**

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett Kavanaugh

Number of Pages: 3 (including this cover sheet)

Message: WE HAVE BIG PROBLEMS W/ MIGUELS LEAKS.

c:\faxform rdb

MEMORANDUM

CONFIDENTIAL

Date: December 9-29, 1994

From: Miguel Rodriguez MR3

To: File

Subject: November 29, 1994 Meeting Concerning Foster Death Matter And Supplemental Investigation Prior to Grand Jury

---

Present for this meeting were Mark Tuohey, Brett Kavanaugh, Jeff Greene and me. The meeting was convened to discuss my review of the Foster death materials.

I began by citing my earlier memorandum indicating independent review observations, in summary. I explained that (1) the Fiske counsel report conclusions are not fully supported by the existing record and that the report contains misstatements and supposed facts that are inconsistent with the record; (2) there is not "overwhelming" evidence in the existing record to support voluntary discharge of the weapon in suicide or to support that VF was alone the afternoon of his death; and, (3) there is not "overwhelming" evidence to support the report's conclusions regarding motivation for suicide. Before any discussion, Tuohey disagreed.

I.

Regarding motivation, generally, I pointed out that numerous "state of mind" issues are inconsistent with suicide.

First, VF did not intimate suicide and facts indicate VF was not intent on fatally harming himself; indeed, VF indicated to a number of individuals that he was optimistic about work-related events to come and that he was planning future family events.

Second, the gravity of VF's apparent involvement in the travel office and usher matters did not indicate VF was in a dire predicament. The spirit of writing about the travel office, indicated Lisa Foster (LF), was optimistic and an effort to prepare for an offensive stance, <u>i.e.</u> that VF did not commit impropriety regarding the travel office. Moreover, I pointed out that those persons working closest to VF on the travel office matter indicated that VF was not obsessed with the matter. White House staffers Neel and Nolan declared that it was out of VF's hands. VF was not implicated in the travel office matter (or even the usher matter); the magnitude of the matters was, at worst, ethical violations by Clinton administration officials and

supposedly embezzlement by non-Clinton administration officials. Others conducted the review of the travel office matter -- GAO and (internally by) McLarty and Panetta;[1] the matters had been out of VF's hands for at least four weeks; and, to the extent VF

---

[1]The travel office matter involved the firing of seven career White House personnel for supposed mismanagement and embezzlement. This impropriety was "revealed" by Clinton's cousin who was "planted" in the travel office. This cousin was later put in charge of the travel office.

The White House and then the GAO issued separate reports on the travel office matter. News reports pointed out issues presented by the separate reports.

First, the GAO concluded that no laws were violated but certain conduct created "appearances" of impropriety and conflicts of interest. Can such appearances be gleaned from the White House review? For example, on the afternoon of Thursday, May 13, 1993 "[HRC] told [VF] that she heard about problems in the travel office." The GAO report did not mention HRC's conversation and provided no insight into HRC's source for these complaints. On the same day, HRC also asked McLarty "about the situation in the travel office." The GAO report ignored this discussion as well. Again, on May 13, 1993, "[VF] subsequently informed [HRC] that Peat Marwick was going to conduct a review of the [travel office matter]." The GAO report provided no information about this conversation either.

Second, the GAO's report stated WK - who initiated contact with the FBI concerning the travel office matter - told the FBI "that the matter was 'directed at the highest levels' in the White House." It remains unclear what Kennedy meant?

Third, the White House review described the firing of the travel office employees "as a result of a review conducted as part of the Vice President's National Performance Review." That is also the claimed reason the White House hired Peat Marwick to audit the office. However, the GAO report states "[a] representative of the Vice President's office informed us [GAO] that . . . [the audit] was not conducted under the auspices of the NPR."

And fourth, Peat Marwick began its audit on May 14, 1993. This is the same day HRC reportedly "urged that action be taken to get 'our people' into the travel office."

CR3-----Miguel Rodriguez-----

was upset, he was upset regarding William Kennedy's (WK) reprimand (as indicated in the internal McLarty/Panetta report). These facts were not pointed out by Fiske counsel.[2]

Third, I pointed out that there were additional matters on VF's mind that indicated VF's ability to cope with variables and stress, which matters were not addressed by Fiske counsel. These matters may not be disputed and at least include: (1) the blind trust; (2) the 1992 taxes, which taxes involved Whitewater concerns; (3) VF's wife, recently in Washington, D.C.; (4) the FBI's director was being replaced (after the FBI had not been accommodating to the White House on the travel office investigation); (5) new personnel in the counsel's office (Sloan and Castleton); (6) VF's weekend with Hubbell; (7) VF's visiting sister; and (8) financial concerns,[3] which concerns were demonstrated by VF's special authorization of release of financial statements, every Friday, to LF via VF's secretary.

---

[2]Fiske counsel also failed to consider: (1) the travel office matter involved David Watkin's (DW) staff and, specifically, Patsy Thomasson (PT); (2) the usher matter involved HRC and her staff, including Maggie Williams (MW); (3) both matters involved allegations concerning loosely managed money (the travel office from the press corp. and the usher's office from private donations); (4) money was allegedly mishandled in both matters resulting in controversy; (5) the legal counsel's office was called into each matter; (6) while VF was doing damage control on the travel office matter and usher matter, he learned certain facts (and possibly improprieties); (7) VF was involved in assessing the White House's actions; (8) VF was found dead; (9) PT and MW are in VF's office searching the evening of VF's death; and (10) DW requests PT to search and MW goes to the White House and searches after speaking with HRC. Against this background, the torn paper makes a distinction between the Clinton Administration's loyal staff and others. Also against this background, there are allegations that the Clintons received cash prior to moving to Washington, D.C. through Madison Guarantee -- closed due to loosely managed money.

[3]VF's secretary (Deborah Gorham) was "absolutely" certain VF had no financial difficulty. According to Gorham, the financial statement request was made merely because the Foster family checking account in Washington, D.C. was overdrawn. If such witnesses are correct about the Foster's not having financial trouble, VF's financial concerns may instead be his desire to monitor his account to ensure that, for example, no mysterious deposits (or withdrawals) were made or merely to ensure the Washington, D.C. account was not overdrawn again.

LR3-----Miguel Rodriguez-----MR

Fourth, apparently on VF's mind were private conversations VF had, at length, with two blonde females (Marsha Scott and Susan Thomases) prior to VF's death. Neither female can recall details of her conversation with VF. Neither female, however, indicated that her conversation with VF caused VF dire concern. Although Fiske counsel identified that such conversations occurred, no probe of the conversations was conducted. Thomases claimed attorney client privilege regarding her conversations with VF. I have advocated, however, that she has no such privilege and/or VF had no such privilege. I strongly recommended further exploration on her (and Robert Lyon's) dealings with VF and the privilege issues.

And fifth, on the day of VF's death -- in Arkansas -- the search warrant for Hale's office was executed. However, while VF's Rolodex contained Hale's telephone number, there is no indication that VF knew of the search or that VF was preoccupied by events concerning investigation of Hale. Later in Arkansas, reportedly, documents VF had worked on were removed from Rose law firm storage and were destroyed.

II.

In addition to "state-of-mind" inconsistencies, I reminded Tuohey that several issues -- VF's 1 1/2 days off the previous week, VF's weekend association with Hubbell (contrasted to the account by LF), VF's conversation with WJC and Lyons, and VF's concern for media attention in connection with the taxes (Whitewater) -- remained.

In addition, telephone logs from the counsel's office are incomplete. Betsy Pond, Nussbaum's secretary, said VF may have had a private phone line. Even if VF did not have a private line, was there more than one line into VF's office? Only one line, to date, has been investigated. Fiske counsel did not follow through in its investigation of these issues.

Tuohey agreed with my decision to investigate these issues but cautioned that no one in Little Rock and none of the Foster family members were to be contacted until he was further briefed on areas.

III.

I pointed out that little is known about VF's final week of activity involving WJC, Hubbell, Scott, Thomases, and Lyons. Regarding these individuals, I had pointed out the following.

Sunday and prior July 18, 1993	Monday July 19, 1993	Tuesday July 20, 1993	Wednesday July 21, 1993
-VF took 1 1/2 days off during this prior week. -During prior week, VF had met with Thomases (HRC's lawyer) at her hotel room and again for lunch with "friends."	-VF's office contained personal Clinton family documents including 1992 tax documents and Whitewater documents.	-No one admits to know what work related tasks VF did in morning or what he was to do in afternoon. -VF death -Thomases seen in VF's office searching	-Lyons came to Washington, D.C. supposedly to discuss with VF only travel office matters.
-VF took weekend vacation with Hubbell in attendance.	-VF had been working on Whitewater issues with Riki Seidman and with a paralegal (VF is concerned about tax related media attention says paralegal).	-Scott in White House the late evening.	
-Upon return on Sunday, VF has conversation with Lyons and conversation with WJC. -While VF is not implicated in the travel office matter or the Usher matter, VF is fully involved in the 1992 tax matter (involving Whitewter), which taxes must be filed imminently. -Lyons is not involved in the travel office matter but is fully involved in the tax matter. -Lyons and Foster agree to meet on Wednesday, July 21, 1993.	-VF meets with Scott for a long private discussion. -Hubbell is with WJC at White House and they call VF, supposedly only to invite him to watch a movie and not to discuss pending matters. -Pending matters undisputedly include taxes, blind trust, and weekend. -O'Neil sees Susan Thomases in VF's office on the night of death.		

Also, I reminded Tuohey that it seemed odd that WJC and Hubbell called for VF to come over on the eve before VF's death. Neither WJC nor Hubbell can recall details (except as to the movie invitation).[4]

[redacted]

[4]Ironically, the proposed movie was "In The Line of Fire," which movie involved a person's loyalty to the Office of the President and the person's willingness to sacrifice his life for the President. Also ironic is that VF's corpse was found under a cannon's line of fire.

LL3 -----Miguel Rodriguez----- MR3

IV.

I raised other issues occurring in the period before VF's death, and particularly Monday, July 19, 1993 (the day after VF and LF supposedly returned from vacation).

Specifically, I pointed out that cancelled checks indicate a home security system payment, medical lab report payment, radiology center payment and pediatric center payment, all within four weeks of VF's death. Tuohey acknowledged the need to investigate these expenses and a Kinko expense. Regarding the "Kinko" expense, I pointed out that, sometime on July 19, 1993, LF wrote a check to "Kinko's" for approximately $19.00. What was being copied (or purchased)? Did the Fosters leave documents to be reproduced over the weekend? None of these expenditures were explored by Fiske counsel.

I pointed out that the credit card receipts indicated that the Fosters checked out on Monday, July 19, 1993, and not Sunday. I will investigate this issue as well as the telephone records at the lodging. Moreover, some of VF's credit cards and other papers in his wallet have never been investigated. VF's wallet was returned to the legal counsel's office on the night VF died. See infra.

V.

Regarding the period before VF's death, I posed the following question: how did VF acquire the unidentified loaded weapon?

First, there was no definitive evidence that the bullets or weapon found at the death scene were linked to VF prior to July 20, 1993 -- the day of VF's death.

Second, I pointed out that on the day of VF's death, once VF left his residence, he was not observed to return. Thus, assuming VF's possession of the weapon on the 20th was voluntary and purposeful, VF either took it with him to the White House (carrying it from his residence on his person or in his car) or he acquired it after leaving the White House at 1:10 p.m. (acquired it from somewhere outside of his residence). At the present time, there is no evidence to believe there was another residence or area VF maintained. If VF did not go at 1:10 p.m. to a private place where he stored the weapon and his possession of the weapon was voluntary and purposeful, then VF must have had the loaded weapon on his person at the White House or it was unattended in his vehicle at the White House.

LL3 -----Miguel Rodriguez----- MR3

Third, even if VF was voluntarily and purposely carrying the loaded unidentified weapon on the day of his death, his motivation necessitating carrying a loaded weapon is unclear. In this regard, there is presently insufficient evidence of VF's intentions when he left his residence. On one hand, VF said no goodbyes and VF was not described to be morose or otherwise fatalistic when he departed family members. The lack of unusual behavior by VF is consistently reported by legal counsel staff in interview "notes" made by USPP. See infra. On the other hand, there is a lot of, apparently surprising, after the fact "state-of-mind" rhetoric from some friends and family that VF was mentally disturbed. Prior to VF's death, however, there is no direct non-testimonial evidence (medical/psychiatric reports of treatment[5] or even consultation[6]) for such a mental imbalance. Despite the after the fact rhetoric, VF is described by friends and family as the last anyone could imagine committing suicide and as a virtual well-spring of strength.

And fourth, as previously stated, while the weapon found at death has not been conclusively identified as belonging to VF or even the Foster family, VF did have a weapon -- his own weapon -- in his Washington, D.C. home. Fiske counsel did not determine if VF's weapon, found in the Foster's Washington, D.C. home, was registered. We then discussed the following questions:

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[5]According to VF's sister, VF was very anxious and concerned about his security clearance. In this regard, VF's sister stated that she tried to persuade VF to speak with a psychiatrist about job related anxiety. VF reportedly told his sister that he was concerned about revealing confidential information, placing the psychiatrist in jeopardy, and VF leaving a trail to medical help. Despite these concerns, VF supposedly accepted from his sister three psychiatrist names and telephone numbers. Also, despite VF's concerns about being linked to psychiatrists, VF apparently wrote the names and telephone numbers onto White House stationery and then loosely carried this writing in his daughter's car or in his wallet. See infra. And, despite VF's concerns about being linked to psychiatric help, each psychiatrist was demonstrably called from VF's office, which calls were boldly billed to VF's home phone number. Oddly, VF never personally spoke to any psychiatrist. Also oddly, VF billed the calls to his home phone instead of using his home phone telephone card (which he carried in his wallet) or a pay phone. Thus, in spite of VF's reported concerns, VF left a clear trail to each of the psychiatrists, while never speaking to any one psychiatrist.

[6]The Foster family physician reportedly spoke with VF the night before his death and prescribed medication for supposed depression; VF reportedly described himself to the doctor as anxious and as not being able to sleep.

(1) why would VF "surepticiously" get an unidentified gun (and where could he get two bullets only) to commit an "obvious" act of suicide when VF had his own weapon at his bedside, and (2) whose weapon did VF possess in his hand upon his death?

In sum, at the present time, there is insufficient evidence to conclude (1) how VF acquired the unidentified loaded weapon -- assuming his possession of it was voluntary and purposeful; and (2) it is not possible to conclude when, or why VF came to possess the loaded unidentified weapon. Against this background, I pointed out that it was odd that David Watkins and Bruce Lindsay, each upon receiving notice of VF's death (independent from the other), immediately inquired if the weapon was identified.[7] LF, upon notification, oddly immediately asked if the gun was placed in his mouth (as if this were a signal to her of some kind). LF was described as angry upon notification.

VI.

I next addressed the manner of VF's death. In doing so, I disputed that the weapon found in VF's hand was discharged from VF's hand.[8] Arguendo, I also disputed how the weapon was discharged: voluntarily or discharged in some other manner.

I pointed out that for voluntary discharge, according to how the weapon was found, VF must have held the weapon in a peculiar backwards position. Also, VF must have held the weapon in a manner that caused (along his index finger and thumb/finger webbing) an unusual amount of gun powder residue.

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[7]I speculated that if Watkins and Lindsay were already aware VF had died and the manner of death (or the location of death assuming suicide) was the object of a cover-up, Watkins and Lindsay would be waiting for confirmation that an unidentified weapon was located and planted.

[8]On one hand, of the first two individuals to see the corpse, neither W5 nor Fornshill saw a weapon in VF's right hand. Fornshill was the 1st response person to the corpse. On the other hand, Hall, the 2nd response person, glanced at what he thought was a gun but Hall could not describe it. Gonzales, the 3rd response person to the corpse, only saw what he believed to be the cylinder of a gun and disputed the photographs supposedly representing VF's arm position and the location of the gun in VF's hand. Gonzales did not describe the cylinder until he had seen a picture, thereafter he said it appeared to be a revolver. Arthur, the 4th response person, believed there was a different gun (a clip loading gun) than that depicted in the photograph that he was shown. Similarly, Wacha and Iacone saw a different gun (a silver gun).

(A later meeting -- with a D.C. forensic scientist who observed a photo of the gun powder hand residue -- revealed that such an amount of residue indicated numerous firings of the weapon. At this meeting, Greene agreed that numerous firings could be an explanation for such residue.) This gun powder residue is not only questionable due to amount but is also questionable due to its thumb/index finger placement on VF's right hand. See infra.

The backwards position of the weapon -- for a voluntary suicide discharge -- would have required a firm grip on the revolving cylinder with the right hand (with thumb through the trigger guard) and a firm grip on the gun handle by the left hand. The weapon is not small or of slight weight. However, on this humid summer day, though the weapon was found untouched in the clutch of VF's right hand (VF's thumb jammed in the trigger and guard), no fingerprints, partials or even smudges were found on the weapon. Also, no prints were found even though VF supposedly held the weapon tightly enough not to break or even chip his teeth upon discharge. Apparently, this would mean VF, supposedly contemplating his life, did not have moisture or sweat on his hands as he held the loaded weapon in his mouth.

Contrary to my position, Tuohey and Greene did not find these facts troubling. I added that the FBI latent examiner stated to me that the weapon appeared clean or wiped when he received it from the USPP. I also reported that agent Colombell had stated to me that (1) by the USPP's own admission to him, the USPP's latent test was rushed, (2) a "taping" of the entire weapon to recover prints possibly destroyed prints, partials or smudges, if any existed, and (3) the weapon was processed without the proper chain of custody transfer from the USPP scene evidence collector.

VII.

I pointed out that, on July 20, 1993, VF had a normal morning at work. "Notes" from initial USPP interviews, conducted immediately after VF died, revealed the following. VF's secretary, Deborah Gorham, stated that she noticed "nothing different from normal in [the] last week." Gorham said there was "nothing unusual in his [VF's] mood that morning" and it was "normal for him [VF] to be quiet." Pond, Nussbaum's secretary, stated that she observed "no depression" and that there had been "no difference in VF's emotional state." Pond added that she was "unaware of any weight loss." Months later, Pond confided to another White House staffer that VF really seemed OK when he left at 1:10 p.m. on July 20, 1993. Nussbaum similarly detected "no unusual behavior" prior to VF leaving the counsel's office at 1:10 p.m. on July 20, 1993. Moreover, the USPP notes indicate that at 12:17 p.m. on the 20th -- less than one hour before VF leaves the counsel's office -- VF was actively working and

returned Brant Buck's telephone call (presumably concerning the blind trust matter). Buck was out. VF nevertheless had a brief conversation with Buck's secretary, Linda Johnson. The USPP notes indicate that, according to Johnson, VF "appeared to be normal" and "nothing [was] out of the ordinary." Gordan Rather, (VF's long time friend and a partner at Bruce Lindsay's firm) also tried to communicate with VF on the day of his death. Rather stated that based on his past dealings with VF and, having personally met with him only 4 months earlier, "[VF] was the same Vince [Foster] he has always known" and Rather offered that "[VF] was a very impressive person." These initial interview statements were not addressed by Fiske counsel in its final report.

Subsequent FBI interviews of these witness and other legal counsel staff indicate that, contrary to earlier statements, VF was preoccupied and not fully responsive on the morning of his death. White House and legal counsel staff all -- oddly in these later interviews -- used similar descriptions of VF's preoccupied manner. Against this background, I reminded Tuohey that the legal counsel's office admitted that the secretaries had been "prepared". Also, with the exception of Colombell, FBI agents who I interviewed stated that, across the board, the counsel's office staff appeared to be incomplete or false in response to questions.

VIII.

I pointed out that while one secretary was unsure if VF left with his coat and a briefcase and another was sure he had no briefcase when he left with his coat, a legal counsel office clerk, Castleton, recalled that VF left with both a briefcase and coat.[9] Also, VF took a beeper, which beeper was supposedly off

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[9]At least four non-law enforcement, i.e. non-USPP, personnel observed a briefcase with VF's coat in the Ft. Marcy parking lot. Witnesses (Hall, Gonzalez and W5) observed the briefcase in VF's locked vehicle after the witnesses had observed VF's body. Hall and Gonzalez described the briefcase as black. Photos taken of VF's vehicle on July 20, 1993 -- in the Ft. Marcy parking lot -- depict a black briefcase on parking lot asphalt between VF's car and an adjacent responding USPP vehicle. W2 stated that he observed a briefcase at a time prior to discovery of VF's death. Moreover, the existing record is clear that VF had at least two briefcases. Indeed, PT searched one briefcase, Lindsay recalled two briefcases, and Nussbaum searched a different briefcase than that searched by PT. The briefcase searched by Nussbaum was later turned over to OIC. Fiske counsel only concluded one briefcase existed and failed to probe observations of a briefcase with VF's coat in the Ft. Marcy parking area.

when USPP arrived to VF's corpse. VF's intent to return is also demonstrated by his statement upon leaving: "I'll be back". Moreover, I pointed out that it was odd that VF appeared to be in a hurry or, at least, to be on a time schedule, i.e. VF appeared to have somewhere to go. This is demonstrated by the manner in which he left, how he ate and the manner in which he acquired his lunch. On the other hand, after a subsequent interview by Colombell regarding how VF acquired his lunch, Castleton stated that he was not sent by VF to hurry VF's lunch along.

IX.

On the day of VF's death, during the afternoon, I pointed out that LF was occupied by Watson's wife. (VF apparently was at odds with Watson because of the travel office matter.)

At approximately the time VF's corpse was being photographed by USPP, LF was seen and talked to by neighbors as she worked on her front yard. I advocated interviewing the neighbors at least concerning: conversations with Foster family members, dealings with VF, security concerns the Fosters may have expressed and regarding whether the Fosters stated their sentiments about being in Washington, D.C. Fiske counsel only interviewed neighbors in connection with Craig Livingstone's claimed presence in the neighborhood on the 21st morning.

X.

I next focused on Ft. Marcy park generally.

I stated that the FBI refused to provide me with a scale map and a map indicating all maintenance roads. I pointed out that I walked a maintenance road from the second cannon area (where VF's corpse was found) and that there was at least one additional, supposedly pedestrian only, entrance to the park (this second entrance is closer to the second cannon than the main entrance). The second entrance has a parking area. There is no evidence that this second entrance and parking area was secured or investigated at the time VF's corpse was processed by USPP. Fiske counsel has not investigated any aspects of this second entrance and it is not indicated in any FBI reports or USPP reports. It appears Congress did not know of the second entrance and second parking area. Since VF's death, it appears a fence has been erected at this second entrance and the area between the second cannon and the maintenance road has been altered.

[redacted].

As part of our general discussion, Greene, upon examining USPP on-the-scene polaroid photos, observed that the photos depict an unusual darkness background. Kavanaugh had also made this observation. By contrast, the body was found and photographed between 6:15 p.m. and 7:00 p.m. on a clear summer day.[10] (I investigated these photos with the assistance of paralegal Lucia Rambusch. See infra.)

Also, as part of our general discussion, I pointed out that -- although taken -- no 35mm photos were successfully developed and although there were at least five photographers, only 18 polaroid photos were provided by USPP to OIC.[11] The USPP provided OIC 18 "polaroid copies" of 18 polaroid photos and no 35mm photos of the death scene. The original polaroids were also provided. Both the original polaroids and the polaroid copies are of poor quality, depicting poor color and blurred, bleached objects. Obviously, the polaroid copies are even more distorted

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[10]At this point, I described the day according to the existing record: it was a hot, humid, July afternoon, the parkway traffic was crawling, and there was a clear sky.

[11]The following USPP were observed as polaroid photographers: Braun (VF's vehicle in Ft. Marcy parking lot), Edwards (VF corpse), Simonello (VF corpse), Ferstl (VF corpse), Rolla (VF corpse). Only photos from Braun, Edwards and Simonello have been received by OIC. Significantly, Ferstl's polaroids (which OIC does not possess) were taken before the special (Criminal Investigation Branch (CIB)) team -- Braun, Siminello and Rolla -- arrived. The gun in VF's hand supposedly changed color and position after this special team arrived and the glasses were also found after this special team arrived. Braun supplied 5 photos, Edwards supplied 5 photos, and Simonello supplied 8 photos. Ferstl estimated he took at least 7 photos but none have been provided. Witnesses observed Rolla taking polaroid photos but none have been provided. Regarding the polaroids, the original emulsion package numbers indicate at least 4 packages (minimum of 10 per package) of film was used (excluding an apparent 5th package for Ferstl's 7 photos). Thus, OIC does not have all polaroids.

At least, Simonello took 35 mm photos (in addition to polaroids). Other USPP may have taken 35 mm photos. However, none of his 35 mm photos resulted in a clear depiction -- the camera was improperly set and each frame was over-exposed. Despite the claimed best efforts and technology of the FBI, the existing 35 mm photos are useless.

than the original polaroids.[12] I also pointed out to Greene that the terrain and foliage depicted does not match in each picture. The second cannon appears only in one on-the-scene polaroid photo (wherein only the top of VF's head is barely discernable), despite the cannon being approximately 10 feet from the corpse. Also, VF's glasses are depicted in a strange arrangement, found completely folded approximately 20 feet from the head of VF's corpse, with no spatter or prints/partials/smudges. The glasses are found, after an unsuccessful preliminary search, by Simonello, USPP, who specially arrived from the USPP station in Anacostia over 30 minutes after the body was discovered.[13]

XI.

I then specifically focused on the first time Ft. Marcy park is possibly linked to VF.

I reported that at approximately 2:30 p.m. a witness (W1) driving on the G.W. Parkway observed an out-of-state Japanese-type metallic colored car dart, cut into, the Ft. Marcy parking area. The driver of the metallic colored car, says W1 during an initial interview, was alone and was a white male. W1 only saw the rear of the metallic colored car. W1 initially believed the car to possess out-of-state (Arkansas or Ohio) plates. However, when shown a photo of the rear of VF's car, W1 is confident that it was not VF's car. W1 stated that the car that cut him off was a different color and that the metallic colored car displayed a different type plate than VF's car. Despite a subsequent FBI interview by Colombell in which W1 supposedly cut back on his confidence in his recollections, W1 steadfastly maintained it was an Arkansas, or similarly identified plate on the car and that it was not VF's car, as depicted.

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[12]Moreover, only polaroid copies of original polaroids were analyzed by FBI lab technicians in blood spatter analysis and also by the forensic scientist team relied upon by Fiske counsel. Apparently, blow-ups of "polaroid copies of polaroid originals" were shown to EMT witnesses. All witnesses will thus have bases on "new evidence" to formulate their refreshed recollection, including the forensic scientist team relied upon by Fiske counsel. I have already taken successful steps in this direction.

[13]After preliminary review of some photos, Tuohey had to leave for a short time, then Kavanaugh left for a short time. Both counsel then returned and then again left at different times, as needed, during the afternoon. I continued with Greene and the counsel as each was present.

Although Tuohey's position (and the Fiske report) was contrary, I pointed out that VF was thus not identified by car at that time. Indeed, W1 could have observed anyone with out-of-state plates driving into the park, even someone who VF was to meet or who was otherwise coming to the scene. Indeed, a metallic colored car was later seen next to VF's car in the Ft. Marcy parking area. See infra. Despite W1's disagreement, that the metallic car was VF's car, Fiske counsel only stated that they were "unable" to conclude time of arrival of the car.

XII.

I pointed out that, in fact, the first time VF's car was observed at Ft. Marcy Park was at approximately 4:30 p.m. At that time, a witness (W2) stopped at Ft. Marcy park to urinate.

W2 saw VF's car parked where it was later found -- at a front (approximately 4th) parking space as one enters the lot. W2 walked along the side of VF's car. W2 saw, "draped over the driver's seat", VF's coat and VF's leather briefcase on the passenger side seat. W2 specifically recalled the presence of VF's briefcase. W2 clearly identified VF's car. In addition, W2 recalled a dark metallic Japanese type car near the front of the parking lot, i.e. near where VF's car was parked at 4:30 p.m. There was a dark complexion male in the car watching W2. In fact, as W2 walked near VF's car, the male in the metallic colored car got out of his metallic colored car and stood next to it.

The USPP, the FBI and Fiske counsel did not attempt to investigate the metallic colored car or its occupant. W2's recollection of the occupant as a person watching him as he was next to VF's car is not recounted in the Fiske report. Further, Fiske counsel did not address this witness' account of the metallic car in its public report.

XIII.

I next discussed W3 and W4. These witnesses, with intent to picnic, arrived at the park in one car at approximately 5:00 - 5:30 p.m. While reports stated W3 and W4 were in a white Nissan sedan, no pictures of the car exist. (What does the registration say?) W3 and W4 were seated in their car, backed into a space at the far end of the lot. W3 stated that she observed 4 people in the park before they (W3 and W4) were contacted by responding personnel. W3, as they pulled into the parking area, saw a dark haired male with no shirt sitting in the driver's seat of VF's car; she saw W5 and his van, see infra; she saw a sedan driven by a shaggy haired male pull into the lot and then pull out; and she later saw a big and burly dark haired male in jeans in the lower park area (after W3 and W4 left their car

to picnic). W4 stated he recalled at least 3 persons. W4 saw a shaggy haired blond male working under VF's car hood; W4 saw W5 and W5's white van, see infra; and a jogger type white male in the lower park area (after W3 and W4 left their car to picnic. The witnesses' USPP interview is contrary on each and every point. W3 boldly claimed, after reviewing the USPP interview report by USPP Braun, that the USPP report was flatly "untrue". Oddly, these two witnesses names, addresses, phone numbers and SSN were on David Watkins' White House stationery. Subsequent interviews resulted in one of the two witnesses stating wine coolers were in the witnesses' own car and that their car was a white 4-door Nissan with blue interior.

W3's and W4's recounting, on the other hand, of the white van, (belonging to W5 -- the confidential witness) is consistently reported.[14]

Later, W3 and W4 are found picnicking in another area of the park, an opposite end from the corpse.

Even though W3 and W4 corrected the USPP interview report with their later (FBI) statements, Fiske counsel did not state W3's and W4's observations of persons working on VF's car and sitting in VF's car. The observations occurred immediately before W5 observed VF's corpse, i.e. VF was already dead.

IVX.

W5, a confidential witness, was the next person to arrive at the Ft. Marcy parking area. W5 arrived at approximately 5:30 p.m. W5 was consistently observed by W3 and W4. W5 upon arriving in a white van, threw trash away and then walked the upper, north, path searching for a private area to urinate. W5 found his way to the second cannon area. W5 stated that he was familiar with Ft. Marcy park, having been to the park on a previous occasion. About the time (or after) W5 urinated, he saw the corpse. He went over to the corpse and stood approximately three feet from VF's head. W5 stared at VF, the corpse, for several minutes. W5 also observed a wine cooler type bottle, half-consumed, next to VF's body. W5 believed that there were wine cooler stains on VF's shirt. (Later review of autopsy

[14]Here, I digressed and offered the following observation, based on my reading of the entire death and document records: witness accounts were consistently reported (as re-interviewed) on issues suggesting suicide but inconsistently reported on other issues.

photos indicated that VF's shirt was wet and cleaned in spots, i.e., there is a wet spot detected on the shirt in the area depicted as containing a purplish spot.) W5 observed a trampled area below the corpse looking down from the berm. W5 left the scene and returned to the parking area. Upon returning to the parking area, W5 looked into VF's vehicle, the brown Honda, and observed VF's coat, briefcase, and tie. W5 then left the parking area and went to another park, Turkey Run park, and notified park workers who relayed this information at approximately 5:50 p.m.

XV.

Review of emergency vehicle dispatch logs indicate that the medic unit called, Medic 1, was dispatched at 6:03 p.m. At the same time, an Engine crew, Engine 1, was dispatched form the same fire house, Station 1. The dispatch logs also indicate that the medic unit and engine unit were packed up and on their way back to the station from Ft. Marcy at 6:37 p.m. Thereafter, the dispatch logs indicate that the U.S. Park Police (USPP) requested an ambulance to transport the body at 7:45 p.m. The ambulance unit was on scene at Ft. Marcy park to transport the body at 8:16 p.m. Thus, the USPP were in exclusive control of VF's corpse from 6:37 p.m. to after 8:00 p.m. Thus, there is no evidence that anyone other than USPP personnel (excepting Dr. Haut who arrived at 7:40 p.m.) were in Ft. Marcy park or anywhere near the death scene for approximately 1 1/2 hours.

XVI.

W6, a white female driving a Mercedes, arrived at the entrance of Ft. Marcy park at approximately 6:00 p.m. W6 was experiencing car trouble and abandoned her vehicle at the entrance to Ft. Marcy park. As she left her vehicle, she left the Mercedes' emergency lights on. W6 then walked into the Ft. Marcy parking area from the GW Parkway entrance. On the way, W6 observed a well-dressed white male sitting in a white Honda. The white male was looking at papers in the white Honda. The white male made comments to her, asking her if he could help her. He then started his engine and followed her into the park. Eventually, he went past her and into the parking area where he turned his vehicle around and then exited the parking area. W6 continued into the parking lot area, specifically, the upper parking lot area. W6 does not know what cars were in the lower parking lot area, e.g., W3 and W4's white Nissan. W6 observed at the upper parking lot area, VF's Honda and also a dark blue (metallic?) car. W6, not being able to find a public telephone, then walked back out of the Ft. Marcy parking lot area and proceeded to walk on the right shoulder of the G.W. Parkway.

XVII.

When the emergency vehicles arrived at approximately 6:10 p.m., there were supposedly only two vehicles in the Ft. Marcy parking area. The brown Honda, VF's car, and the white Nissan at the lower parking area (the vehicle used by W3 and W4).

Some emergency personnel recall there being a red or reddish Honda also present in the parking lot area or entrance area. Also, emergency personnel differ in their recollection of USPP arrival. In fact, USPP Fornshill arrived at the scene at approximately 6:10 p.m. It is unclear from the existing record whether Fornshill arrived before or after the emergency vehicles.

When the USPP vehicle and the emergency personnel got together, they decided to split into two teams to search for the reported corpse. The north path was pursued by Team 2, comprised of Gonzalez, Hall and USPP Fornshill. The lower (Pimmit Run) path, i.e. southern path, was investigated by the Engine 1 crew (Pisani, Iacone, and Wacha) and Arthur, EMT. Team 1, the Engine 1 crew and Arthur, passed W3 and W4 as they moved on the Pimmit Run path in the direction of the Potomac river. Upon notification from dispatch that Team 2 had found the corpse, Team 1 retraced their steps and saw W3 and W4 a second time. When Team 1 arrived in the parking area, USPP were in the area but not observed in the parking area.

Then, Team 1 personnel all went to the death scene area. In particular, Team 1 passed Team 2 on the way to the death scene and Team 1 received instruction on how to get to the death scene as they passed Team 2. Gonzalez (and Hall) before returning from the death scene, indicated the DOA status of the body to dispatch. As Gonzales and Hall were leaving the death scene area at cannon area 2, Gonzalez and Hall saw USPP personnel enter cannon area 2. Fornshill, however, stated that these personnel were other EMT or emergency personnel. In other words, Fornshill did not recognize these persons any more than Gonzalez and Hall recognized these persons.

XVIII.

Regarding Team 2, I explained that when Fornshill arrived at the corpse, it was approximately 6:10 p.m. Fornshill arrived with Hall nearby, then Hall rushed over, and seconds later, Gonzalez rushed over. Thus, the only USPP officer, of all seven responding personnel present and searching, located the corpse. When Hall rushed over, pursuant to Fornshill's shout of discovery, Hall saw and heard a person in orange moving swiftly away behind bushes on the maintenance path/road immediately below the berm and corpse. In a later re-interview, Hall supposedly cut back on his initial statement and said he may have seen and

heard a car on Chain Bridge Road. Chain Bridge Road, however, was approximately 100 yards away and Hall did not know Chain Bridge Road even existed. At the time, Hall was so sure of his observations on the park's path/road immediately below the berm, that he told Fornshill "there's someone down there."[15]

Gonzalez, upon rushing to the corpse, observed that the body was in a laid out position with no blood on the ground. The pictures show no blood on the ground. Gonzalez checked for a pulse but did not move the head or the body. Neither Hall nor Fornshill moved the body; similarly, no one present observed the other move the head or the body. The upper right side of VF's shirt, however, was spattered with blood and "unidentified" debris. (Why was the debris not identified?) Later interviews indicated the witnesses believed it to be vomit or dried, coagulated blood. Gonzalez, a paramedic, believed the decedent suffered a bullet wound to the head (with an entry point from the neck's bloody area?).

I reminded Tuohey that only two identical sets of 18 polaroid photographs were provided to OIC. One photo clearly depicts a dark, burnt appearing, blood area on VF's neck. The D.C. medical examiner who observed the photo stated that, if the picture were cropped and without knowing more, the burnt blood patch looked like a bullet hole or puncture wound. Based on my own experience and training, I am confident the traumatized area was caused by a "stun-gun" or "tazer" type weapon.

In addition, I pointed out that the third EMT to the body, EMT Arthur, concluded that there was a puncture wound or bullet wound on VF's neck. I offered that such wound(s) would explain the upper right shoulder blood. Arthur is also a "paramedic" EMT.

Regarding the trauma to the neck area, I jumped forward to an autopsy photograph depicting the right side of the neck. I offered my opinion that two puncture like wounds can be observed. The D.C. Medical Examiner similarly observed the appearance of crater-like indentations on the right side of the neck. The examiner stated that such could be caused by a foreign object folded into the neck upon transport. However, due to the burnt blood area observed and photographed at the scene, it is illogical that such occurred during transport. The autopsy report does not identify trauma to the neck.

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[15]Attached hereto is a reproduction of a diagram [redacted] The diagram depicts Ft. Marcy Park and the paths traveled by Team 1 and Team 2 vis-a-vis the cannon areas and corpse.

Against this background, the neck area and the original photographs have not been investigated by Fiske counsel.

IXX.

I next offered to provide the following written summary of USPP and emergency personnel (FBI 302) statements.

Apt, USPP, responding to the Ft. Marcy Park scene, stated that she received the call to respond at approximately 6:00 p.m. Apt recalled that before going into the parking lot, she took information regarding the abandoned Mercedes "on the entrance ramp" to the park. When she arrived at the Ft. Marcy parking lot Apt saw Spetz, USPP, interviewing the picnicking couple, W3 and W4. Apt then said she went to the death scene "immediately" with Rolla, Braun and Simonello, USPP. At the death scene, Apt saw Edwards, Ferstl, and Hodakievic. Apt saw Edwards "completing" taking polaroid pictures. Apt then saw Rolla "commence" taking polaroid pictures. She also saw Simonello taking 35 mm pictures of the corpse. Apt supposedly took careful notes of the death scene. Apt made observations of the corpse from a series of vantage points. It is unclear if Apt's notes were obtained by OIC. Apt provided her notes to Rolla after she returned to the USPP Anacostia substation. Apt says no one touched/moved corpse until deputy medical examiner Haut arrived, which was at approximately 7:40 p.m.

Arthur, EMT, in his first interview stated that he had been present for numerous suicide investigations and approximately 20 have been by gun shot. Arthur stated that Gonzales, EMT, and Hall, EMT, arrived at the parking lot together. Arthur separated from Hall and Gonzales by forming teams. On the scene, Arthur stated that during his team's search, they discovered two people together, later identified was W3 and W4. Arthur told a female uniformed USPP of W3 and W4. Gonzalez and Hall were running en route back to the parking area when Arthur started out in the direction of the corpse. Arthur stated that he later arrived at the area where the corpse was discovered. In fact, Arthur was the 3rd EMT to respond to the scene and observe the corpse. Arthur recalled seeing blood on the right shoulder and shirt area of the corpse. He also observed a bullet wound (possibly .45 caliber) on the right side of the neck under the jaw line. Arthur stated that the neck area had a small caliber bullet hole under the jaw line about halfway between the ear and the tip of the chin before seeing any pictures and before contact by law enforcement. Arthur also observed the gun in VF's right hand and that the gun barrel was "half-way" under VF's thigh. Arthur stated that he was at VF's right side near VF's head when he observed VF's neck and that he was approximately two to three feet from VF's right hand. Arthur believes that the gun that he saw was a "straight-barrel" 9 mm

"clip-loading" pistol. Arthur stated that he believed the bullet hole on the neck area to be caused by a different caliber weapon. Arthur stated that he did not touch or move VF at the death scene and further Arthur stated that he was not aware of anyone else touching the corpse.

Ashford, EMT, was assigned to take the corpse to the morgue at Fairfax Hospital. Upon arriving at the parking area, Ashford recalled seeing a number of USPP vehicles and a reddish Honda. Similarly, Arthur had observed a red car with its hazard lights blinking in the Ft. Marcy parking area. Ashford also saw a black cadillac in the parking area. When the corpse was lifted, Ashford saw no blood. Ashford could not recall USPP helping to lift the corpse. Ashford classified the death as homicide. Ashford saw the hospital physician examine the corpse by taking a pulse.

Lt. Bianchi, FCFRD fire fighter, was the officer-in-charge on Truck 1, with Jacobs (driver) and Makuch. When the Truck 1 team got to the death scene, the corpse was already in the body bag. Lt. Bianchi observed that Ashford and Harrison did not have blood on their clothes even though they had lifted the body. Lt. Bianchi had the body bag opened so that he could put a tag on VF's toe. Lt. Bianchi stated that Truck 1 got to Ft. Marcy at 8:00 p.m. Lt. Bianchi was aware of Ashford's "homicide" conclusion and of Arthur's statements. Due to these statements a gag order was made pursuant to existing policy. The gag order only applied when FCFRD personnel when they were on duty. Lt. Bianchi observed that VF's car was open when he arrived at approximately 8:00 p.m. Lt. Bianchi observed a 10-inch diameter pool of blood where he "assumed" VF's head had been located. However, by this time the corpse had been rolled, moved and carried to a body bag.

Braun, USPP, was at USPP Anacostia substation with Apt and Rolla when the call came in regarding a corpse at Ft. Marcy. Braun instructed that on-scene USPP should close the park gate. Braun arrived between 6:30 and 6:45. Braun recalled the Mercedes at the park entrance, VF's car and the car of W3 and W4. Braun saw Spetz questioning W3 and W4 when she arrived. Braun recalled Lt. Gavin on the scene. Lt. Gavin was the shift commander, and Gavin left quickly after Braun arrived. Braun, Rolla and Apt waited for Simonello to arrive. Braun walked to scene with Rolla, Apt, and Simonello. Braun saw the revolver in VF's hand when she arrived. Braun saw Rolla take polaroids, Simonello take 35 mm, and she knew that Rolla found the glasses. Braun said all pictures were taken prior to the corpse being moved, touched or disturbed. Rolla then checked the corpse for car keys. (Braun and Rolla later had to go to the morgue with Rolla to get the keys.) Braun went back to VF's car and found VF's coat with wallet (containing White House id). Lt. Gavin,

said Braun, confirmed advisement of the White House's identification for VF between 7:30 and 7:45 p.m. En route to the hospital, Braun was notified that Watkins wanted to go with USPP to the Foster residence. Either Braun or Rolla allowed the hospital to permit Livingstone and Kennedy to identify the corpse. Braun gave no times for any actions. When Braun, Rolla and Watkins arrived at the Foster residence, LF and Laura Foster were present, with sisters Sheila Anthony and Bowman. LF said/asked "whether her husband had put the gun in his mouth." Braun and Rolla left after WJC arrived. Hubbell was also present at the Foster residence. As Braun was departing, Watkins promised to seal VF's office. During the drive to the Foster residence, Watkins supposedly told Braun that VF was upset about the travel office matter. Why did Braun and Rolla agree to give notice under such conditions, i.e. where the officers had no control?

Hodakievic, USPP, happened to be near Ft. Marcy Park at 6:00 p.m., although she was off duty. After hearing of the corpse, Hodakievic went to Ft. March park. Hodakievic saw the abandoned Mercedes "on the entrance ramp". Hodakievic saw an EMT team in the parking area; she then went to the death scene. Sgt. Edwards, USPP, and Ferstl, USPP, were at death scene when Hodakievic arrived. No one else was present. Hodavievic was briefed by Sgt. Edwards and shown polaroids taken by Edwards (or possibly Ferstl). Edwards told her that VF had a revolver. Hodakievic walked around the corpse, but she did not observe a gun and she did not see blood. No one escorted Hodakievic to the death scene. (How did she get there?) Hodakievic was at the death scene for 10 minutes when Rolla, Braun and Apt arrived. Hodakievic escorted Haut to the death scene. (Who called Haut, why and at what time?) When Haut arrived only Rolla, Braun and Apt were present at the death scene. (Where were Edwards and Gavin?) Prior to this, Hodakievic only saw Rolla touch the corpse to check VF's pockets. She overhead Rolla tell Haut that the exit wound was behind the head. She saw VF's head raised so that Haut could see the exit wound and blood under VF's head. Hodakievic said that additional photos exist -- that were taken and shown by Edwards to her. (She knows other photos exist because those photos shown to her by the FBI were different than those she saw on the scene.)

Sgt. Edwards, USPP, by coincidence,[16] overheard radio of the corpse at Ft. Marcy park. He arrived at 6:20 p.m. Edwards had come from the USPP Communications Center on Ohio Drive, Washington, D.C. Sgt. Edwards said other USPP were already at the death scene when he arrived. (How did he get to

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[16]Fornshill, Hodakievic, Spetz, and Edwards (and Gavin?) all were available by apparent coincidence.

the scene that fast?) When Edwards got to the death scene, he specifically recalled Fornshill and Ferstl being present. Edwards sent Fornshill back to the G.W. Parkway/CIA gate. Edwards claimed blood was "running" down the side of the mouth. Edwards did not touch the corpse and did not see anyone touch the corpse. Edwards saw Ferstl take polaroids. Edwards was still at the death scene when Braun, Rolla and Simonello arrived. Edwards saw 35 mm photos being taken by Simonello. Edwards left only after the corpse was removed.

Ferstl, USPP, was assigned "patrol of the G.W. Parkway" when, at approximately 6:15 p.m., the dispatcher told him to go to Ft. Marcy regarding the corpse. En route, Ferstl heard Fornshill say -- over the radio -- he was responding too. Ferstl stated his arrival was at approximately 6:30 p.m. Ferstl recalled the Mercedes at the entrance. Ferstl saw VF's car and he saw a second car at the back of the parking area. When Ferstl arrived Fornshill was already at the death scene, with the two EMT's. Ferstl saw no one touch the corpse, the blood was not fresh. Ferstl saw no blood from nose and none on the shirt. Ferstl saw a gun in VF's right hand, but he gave no description. Ferstl said Fornshill told him there was a gun, but Fornshill said he never saw a gun. Ferstl left for crime scene tape. Ferstl did not see any evidence (glasses) in the area or any "wine bottles" when he returned and taped the area. (Thus, the area was taped off immediately. As Ferstl returned to the scene to tape it, EMT's were leaving. (In fact, all the EMT's left the parking lot area at 6:37 p.m.) Ferstl admits that he took polaroid photos, at least 7 photos; Ferstl stated the corpse was not moved when he returned with tape. Edwards arrived after Ferstl had taken the 7 photos and had taped off the area. Ferstl gave his photos to Edwards.[17] Edwards sent Ferstl away (as he had sent Fornshill away earlier) when the special team of Braun, Rolla and Simonello arrived. Then, after cursory review of death scene, Braun left with Ferstl to the parking area, where Braun found White House identification. Ferstl also assisted Spetz in interviewing W3 and W4.

Fornshill, USPP (Glen Echo Substation), coincidentally, was asked to work an overtime detail near Ft. Marcy park. Between 5:50 and 6:00 p.m., Edwards gave him

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[17]Edwards apparently showed these photos to Hodakievic, plus Edwards' own photos. Later, I suggested, after the corpse was staged with the revolver brought by Braun, Simonello and Rolla. New photos were taken and thus Ferstl's were never produced to OIC. This explained the different arm/body distance, gun/hand positions, Hodakievic's problems with the photos, Ferstl's missing photos and EMT problems with the photos (and their observation of a different gun).

permission to respond to the corpse at Ft. Marcy park. (Who called whom, and how could Fornshill get permission before the 911 call?) The sector or beat officer could not respond, so Fornshill did? (Who was the beat officer, what is the sector, what is the substation, how many substations, where, how many personnel?) (Wasn't Ferstl the beat officer?) Fornshill's "instructions" were to join up with the EMT personnel. Fornshill found the corpse. (How did Edward's know of EMT personnel? Did Fornshill have special or additional information from Edwards?) Fornshill did not see blood on face or shirt -- just a trickle of dried blood on corner of mouth. Fornshill did not see a weapon, and Fornshill saw no one touch the corpse. Fornshill said that after the EMT's pronounced VF dead, 2 or 3 additional EMT's arrived. (However, Gonzalez and Hall said it was USPP that arrived and specifically a short fat blonde female. Thus, when Gonzalez and Hall left they believed only USPP were still on scene; when Fornshill stood away, he thought he was leaving the corpse to EMT's. In fact, Arthur was still on his way because Arthur passes Gonzalez and Hall.) The next persons to arrive were Edwards and Ferstl (together?). Edwards then ordered Fornshill back to his CIA/G.W. Parkway post. Thus when Fornshill left, he believed he was leaving the body to 2-3 EMT's plus Edwards and Ferstl. Fornshill stated that he was only at the death scene less then 10 minutes. Fornshill only stated he saw the coat in VF's car. (Was he even asked about the briefcase? Was the car locked? and, who was present at the car?)

Lt. Gavin,[18] USPP, was the shift commander who arrived at park between 6:30 - 6:45 p.m. Fornshill and Edwards were at the corpse when he arrived; Ferstl and Hodakievic were in the parking area. Hodakievic directed Gavin to the corpse. The EMT personnel had already left the corpse and were also in the parking area. Gavin saw the Mercedes in the entrance ramp, VF's car and he denied he saw a "white Nissan." Gavin saw no blood on shirt and no blood from nose. He recalled a gun. Gavin saw all 13 death scene photos. Gavin said that he stayed for 30 - 45 minutes and that during the time he was there, no White House identification was discovered. (This is completely inconsistent with Ferstl and Braun as to finding of White House identification.) "Within 10 minutes" of getting the notice from Braun regarding White House id, Gavin called Burton who asked if the gun was registered and who owned the gun. Watkins then called Gavin and made similar inquiry. Gavin kept rough notes of calls, but OIC does not have the originals. Gavin's notes indicate "engine warm on vehicle."

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[18]Both Sgt. Edwards and Gavin, both commanders-in-charge the evening of the death, were transferred, after handling the death scene, to USPP in Glencoe, Georgia. Braun was promoted to Sergeant.

Gonzalez, EMT, responded in Medic 1 from FCFRD. Daylight was visible. Gonzalez saw the Mercedes, white Nissan, VF's car and the USPP car that came just after Medic 1. Dispatch had instructed that the corpse was near a cannon. Forhsnill (and Hall) got to the corpse first, seconds later Gonzalez arrived. VF "suffered a gunshot wound to the head." Gonzalez was not initially asked about an entry point. Gonzalez did not touch VF; but, he looked into VF's mouth and saw blood. Hall was with Gonzalez and may have touched the corpse. Gonzalez and Hall departed and then saw VF's car. As Gonzalez and Hall were departing, a "second" USPP in uniform and then "other investigators" began to arrive. In the car, Gonzalez saw a tie, coat and a "black briefcase." USPP officers were gathering around VF's vehicle. (Who were these officers?) No Fairfax County PD were at the scene. Once it was determined to be a death, FCFRD SOP required an ambulance unit. However, while the EMT's left at 6:37 p.m., no USPP call for an ambulance was made until 7:45 p.m. Gonzalez saw 3-4 photos and believed VF's hand was in a different position. On the second interview, Gonzalez said: there was no trauma to the neck and no puncture wounds to the neck; Gonzalez, however, did not observe the lower portion of VF's neck; Gonzalez could "only see the cylinder of the gun"; little blood was under the head; and he did observe blood on the shoulder. There was vomit and blood on VF's shoulders. Gonzalez estimated that VF had been dead 2-4 hours. Gonzalez did not comment on rigor mortis.

Iacone, EMT, was the officer in charge of Engine 1, which was assigned to Station 1 in McLean. Engine 1 was dispatched for a "shooting victim" at Ft. Marcy park. Arthur and the Engine 1 crew went in one direction, possibly toward Dead Run Creek/Pimmit Run. Engine 1 crew consisted of Pisani, Iacone and Wacha. While searching the woods, Iacone learned from dispatch that Gonzalez' team had found the corpse. Iacone and his entire group arrived at the corpse. Iacone did not recall observing any blood. He saw a gun in VF's hand, a revolver. He did not see an entrance wound. After Iacone's crew left, the EMT's went to the parking area. Iacone did not indicate who the EMT's left at the death scene. Iacone saw the coat "hanging" inside VF car. Hall and Iacone tried the doors, but the car was locked. Iacone told the USPP that the coat matched the pants on the corpse. (Does Iacone know if the car was opened before they left the parking area?) (Did Iacone see the briefcase?) Iacone recalled W3 and W4, both coming and going to Pimmit Run. When Iacone and his team arrived at the death scene, USPP (more than one) had already "secured the scene." Iacone is sure the gun was silver in color and different from the pictures he saw from the FBI.

Harrison, EMT, was the driver of the ambulance dispatched to pick up the corpse. USPP were waiting for the ambulance at the parking area. A USPP helped Harrison and

Ashford lift the corpse. Harrison and Ashford were at top portion of the corpse. Harrison saw no blood at the scene. There were 6-7 USPP officers at the death scene. Harrison did not see blood on the body or on the ground area. No blood was on Harrison or Ashford. The weather was clear.

Hall, EMT, said that USPP were already on site when Medic 1 arrived. Hall and Gonzalez went with USPP while the other emergency personnel (from Engine 1) went with Arthur. The only USPP present, Fornshill, located the corpse first. (Was it staged? Did USPP know where to go? Was the USPP leading them?) There was gun in hand. No description was given by Hall because be could barely see the gun. Hall checked for pulse. No blood was on the corpse shirt or body, except droplets. VF's right hand was under VF's right thigh. Hall "heard" someone in the woods and then saw someone in an orange vest moving in the woods. When the EMT's returned to the parking area, Hall looked into the windows of VF's car and saw the coat, black briefcase and perhaps a tie. On a second interview, Hall said that he saw someone moving in the trees surrounding VF's body. In his second interview, Hall responded affirmatively to the suggestion that maybe it was a car on Rt. 123. Hall stated that USPP were the next people to the corpse, even before Gonzalez.

Jacobs, EMT, was the driver of Truck 1, which truck was dispatched to help transport the corpse to the hospital. The corpse was already in the body bag when Jacobs arrived at the death scene. Medic 1 and Engine 1 had departed before Jacobs, in Truck 1, arrived. Jacobs heard Hall say the gun and gun hand were under the thigh. Jacobs saw VF's car, but did not say if she looked into the car.

Makuch, EMT, was on Truck 1, driven by Jacobs. The corpse was already in the body bag when Makuch arrived at the death scene. Markuch did not look into VF's car.

Pisani, EMT, was the driver of Engine 1. The Engine 1 crew went with Arthur "toward the Potomac River". Pisani's search team saw "a male and female in the woods," both going and returning from the Pimmit Run trail. USPP were in the parking lot area when the couple came out of the woods (about the same time Pisani's team returned and went toward corpse?). Pisani described the day as very warm, temperature in the 90's, humidity of 80%, daylight was visible. Pisani's team traveled to the death scene with a USPP officer. At the death scene, Arthur went to the corpse and "may" have checked the pulse. Pisani said he heard Arthur say there was a gun. Pisani never saw a gun. Pisani saw blood on VF's shoulder, but no blood on VF's face. Pisani did not see anyone move the corpse. Pisani did not see glasses on the scene. Pisani did not see any blood on the ground around the body. Pisani was shown pictures and he disagreed

that they accurately depicted the body. Pisani's team then went back to the parking area, where Pisani, Iacone and Wacha all looked into VF's car. Apparently, Pisani was not asked what he saw in the car.

Rolla, USPP, was designated the "primary investigator" for this matter by Braun. (What does this mean? Was Rolla a rookie, with no experience? It was his first death notification.) Rolla, apparently, was the investigator at the death scene. Braun was responsible for the parking area. Rolla, Braun and Apt arrived at approximately 6:35 p.m. "Orientation" by Ferstl occurred when they arrived at the parking area. Ferstl's briefing included: (1) VF "died of self inflicted gunshot wound to the head"; (2) corpse was "tentatively identified as Vincent Foster, Little Rock, Arkansas;" and (3) the Honda belonged to VF. (How could Ferstl know Vincent Foster's name if the identification is in the car?) After orientation in parking area, Rolla, Apt, Ferstl, and Hodakievic go to the death scene, where Edwards and Spetz are already present. Edwards gave Rolla polaroid photos and then briefed Rolla: (1) the corpse had not been touched, and (2) the area had been taped off. Rolla claimed there was blood under the head, but stated that the head was not moved. Rolla claimed blood was on upper right shoulder of shirt; it was wet but drying. Rolla took his polaroid photos within "15 minutes after arriving at the death scene." (Since Rolla arrived at parking area at 6:35 and then immediately went to death scene, photos must have been completed by 7:00 p.m. Moreover, Edwards already took his before Rolla arrived, so Edwards' and Ferstl's photos are before 6:45 p.m.) Rolla photographed the glasses approximately 15 feet from corpse's feet (21 feet from VF's head). (In such dense foliage, how did glasses get that far down hill?) Rolla claimed that VF was still warm with no signs of rigor mortis. Rolla stated there was extreme heat that day. Rolla claimed the body was dead 2-3 hours. Rolla looked for keys in VF's pockets, but did not find them. The search for keys and all touching of the corpse occurred only after all photos were taken. Rolla emphasized this 3 times. Rolla reviewed the polaroids and said they were true and accurate. (How does Rolla explain 35 mm photos and the absent emulsion numbered polaroids?) Rolla found a wine cooler bottle (but failed to collect it?). Haut arrived at 7:45 p.m. At that time, the corpse was rolled. Rolla claimed to find and feel an exit wound and to see a wet spot at the crotch. Rolla removed VF's beeper, Seiko watch, and one ring. Rolla does not mention the gun. Haut watched as Rolla and two ambulance persons put the corpse in a body bag. Rolla went to the parking area, where Braun was still engaged in car inventory. Rolla said Simonello took photos (35 mm) of the car. VF's coat was neatly "folded over the back of the front passenger seat". Rolla saw the White House identification. Rolla said there was a paper with names of 3 Washington, D.C. physicians in the car (not in

VF's wallet). Rolla said that he and Braun left at 8:45 p.m. to get keys for VF's car. (Is there a record of the keys being turned over from the hospital morgue?) Gavin called Rolla, after Rolla had obtained the keys, to contact Watkins. Then Gavin told Rolla to call Kennedy. Rolla gave morgue at hospital the okay to let Kennedy and Livingstone see the corpse. Rolla and Braun picked up Watkins and went to Foster residence, where two sisters and Hubbell were waiting. Laura Foster was met first, then she called her mother, LF. Rolla heard LF ask "did he [VF] put it in his mouth." No search of the residence occurred that evening; Rolla believed Laura Foster searched for VF's gun in the house. Rolla and Braun left after WJC arrived; they had been there approximately 45 minutes. Berl Anthony later told Rolla that his wife, Sheila Anthony, gave VF the list of 3 psychiatrists. Rolla reviewed VF's diary, 10-15 handwritten pages. Rolla got a letter to a bank to use as a handwriting exemplar. (Where is the exemplar?) Rolla said the autopsy (and the latent gun examination) was hurried because the White House wanted it.

Simonello, USPP, learned of the corpse at Ft. Marcy "shortly after 6:00 p.m." and he arrived at the parking area at approximately 6:30 p.m. (Where did he come from?) Simonello then "immediately proceeded" to the death scene. Simonello was designated the evidence technician. Already at the death scene were Edwards, Rolla, Apt, Ferstl, Braun and Hodakievic. (Thus, no one other than USPP were present at the death scene.) Simonello stated that within "approximately 15 minutes after arriving at the death scene, he took a series of 35 mm photographs, approximately 24 in number" (including some of Ft. Marcy parking area). During his interview, Simonello stated at least twice, emphatically, that all 35 mm photos were taken before the corpse was touched and before the gun was removed from the corpse. Simonello was advised by Rolla of the revolver in the corpse's right hand, and then Simonello saw that the corpse had a revolver in the right hand. Simonello observed blood on the corpse's face and right shoulder. He claimed there was a blood transfer pattern. When Simonello did touch the corpse, he noticed little rigor. (But, Simonello later said there was so much rigor that he may have destroyed prints in getting the gun from VF's hand). Simonello took possession of the glasses. (Glasses weren't observed before the arrival of Simonello, Braun and Rolla.) None of the USPP were asked about the second entrance, the path below, the maintenance road below or how the corpse got there. Simonello specifically stated that he photographed the area under the corpse, the pool of blood under the corpse. Simonello stated there were no signs of rigor in the fingers. Simonello stated that the gun was processed without his release of it, and that the processing was hurried because the White House wanted it processed. (Simonello told Colombell that the gun was mishandled during latent examination.) Simonello also collected the torn paper, gave it to Lockheart, US Capitol

Police, with a 1 page supposed known exemplar (bank letter). Lockheart, said Simonello, concluded the two were written by VF. (Why didn't USPP use the 15 pages of the diary, the diary is handwritten?) Simonello has the known sample used for comparison. Simonello stated that contamination of evidence resulted in the different powder on evidence.

Spetz, USPP, was at the Glen Echo station at 5:30 p.m. when Spetz overheard the dispatcher calling Ferstl to respond to the corpse at Ft. Marcy park. Ferstl was at the Glen Echo station too. (Doesn't this contradict Ferstl's statement of being on patrol on the G.W. parkway?) Ferstl and Spetz, in different cars, went to parking area. Spetz said that Ferstl and she were the second and third USPP, respectively, to arrive; Fornshill was the first. Spetz saw Mercedes "on the ramp" and she observed 2 cars: VF's car and a white Nissan, Maryland tag WFL154. When Spetz arrived EMT's were coming back into the parking area. (Unclear which EMT's, but one EMT said he "did not think it was a suicide, adding words to the effect that he'd seen a number of suicides and the body was 'too clean.'" Spetz later said that there were several USPP cars in the parking area, and she did not see Ferstl; thus she "assumed" Ferstl and other officers went to the death scene. Spetz decided on her own to look in the park for the occupants of the parking lot vehicles. Spetz stated she found W3 and W4 sitting, and talking on a blanket. Spetz said W3 and W4 said they saw a white van in the parking lot area. Spetz could not recall other comments made by W3 and W4. She interviewed them together. Spetz made no written report, but she did take notes. (Which notes are her notes, even if OIC has the notes?) Spetz said she briefed Braun; Spetz said she did not go to the death scene; Spetz said she then left. (It is unclear if VF's car was opened when Spetz was present.) What did Spetz see in the two cars?

Wacha, EMT, was on Engine 1. Pisani was the driver, Iacone was the officer-in-charge, and Arthur joined them to make search team 1. Wacha saw 3 cars in the parking lot: VF's car, a car that was running (no one inside), and a car she cannot recall to describe. Search team 1 found a "couple", W3 and W4. Wacha said her team went to the corpse after the radio message. Wacha said several USPP were present when they arrived. (Where were Gonzalez and Hall, was it the same USPP at the death scene that went with Gonzalez and Hall, did she pass Gonzalez (and Hall) on the way?) Wacha saw blood on VF's shirt and face. Wacha looked into VF's car and saw coat. (Was Wacha asked about briefcase?) Wacha saw no local police at the scene. Wacha shouted to W3 and W4 to ask if they were OK. Did not see "clothes flying." Wacha and her group passed Hall (also Gonzalez?) on the way to the death scene. Wacha saw no blood on the ground or area around the body. Wacha saw a silver colored revolver in the corpse's hand. Wacha thought she saw a cylinder. Wacha thought the gun was very

large, possibly a .45 caliber. Wacha was shown photos. (Unclear if she disagreed with the photos.)

XX.

Before returning to further discussion of USPP processing of the corpse, I briefly returned to the weapon evidence.

First, the weapon was not observed by W5 when he initially arrived at the corpse. See supra. W5 saw the corpse's hands with "palms up".

Second, the polaroid photographs depict the gun at different distances to the side of the body. By contrast, EMT's Hall, Gonzales, Arthur and Iacone (i.e. all EMTs to inspect the body, said it was tucked under VF's side. Also, the following EMTs said the gun was silver: Iacone and Wacha. Gonzales and Hall were not asked to describe the color. Why would the USPP move the gun (moving the gun and hand to photograph them would constitute tampering with the evidence). I stated my belief that the gun hand was clearly moved, and the pictures also indicate no gun was present.

Third, the position of the gun -- with thumb jammed between trigger guard and trigger -- is odd. How did VF hold the weapon, if VF's possession and discharge of it was voluntary? The powder residue on VF's hand is in a trace line consistent with normal discharge of the weapon according to forensic pathology texts; however, the gun must have been held backwards and thus the line should be on the other side of VF's right hand. How is it possible for VF's hand to have the powder pattern depicted in the photo -- if he held the gun backwards (as he must have given the thumb's jammed position). Also, the pathologists' report stated that powder is observed (by photo only) on the lower face; but, consistent with the large amount of right hand powder residue, the powder should also have been, at least, on the upper face.

Fourth, as previously stated, the evidence does not conclusively establish that the weapon recovered from VF's right hand was, in fact, the fatal instrument. In this regard, (a) the gun apparently was not the property of the Foster family; (b) no prints were found on the weapon (or even partials or smudges); (c) despite supposedly being in VF's mouth, no saliva or blood was recovered from a swab of the barrel of the weapon;[19] (d)

[19]A DNA swab indicated human contact on the weapon's barrel consistent with a person of VF's DQ alpha type. However, approximately 6% of humans possess such a DQ alpha type.

powder residue on the lower face, if any, was not tested; (e) (vaporized lead and fine particulate lead) powder residue on the shirt, while consistent, cannot be conclusively linked to the weapon; (f) (ball smokeless) powder on VF's glasses merely "could have come" from the bullet and casing found; (g) the hand powder residue (smoke) was not found on the glasses (smokeless) (despite being next to each other upon discharge); (h) while one type (ball smokeless) of gun powder residue is found on the glasses, another type (not ball-shaped) of gun powder residue is found in VF's mouth; (i) the same type of (smokeless) powder on the glasses (which is different from that powder on shirt and in mouth) is found on VF's shoes and socks; (j) the fatal bullet is never found; and (k) the exit wound has not been measured to determine if caused by a .38 caliber bullet.

And fifth, additional bullets to the weapon were not found in the Foster home or in the extended Foster family's possession. Indeed, other bullets that could have been fired from the weapon (recently found -- 1 1/2 years after the death), bear different identification markings. VF's fingerprints were not on these bullets. (Where are the remaining bullets -- or, alternatively, where did VF get only two bullets?)

XXI.

Regarding physical evidence, first, latent print analysis of evidence is incomplete. None of the 4 prints found outside of VF's car have been positively identified. The print on the underside of the gun handle has not been identified. The palm print on the torn note has not been identified. The latents of only three individuals have been used for comparison: Simonello, Owen and VF. Against this background, all evidence was processed (and apparently cleaned) by the USPP before being turned over to the FBI. See supra.

Second, "the blonde to light brown head hairs of caucasian origin which are dissimilar to the head hairs in the [ ] known head hair sample from Vincent Foster" have not been identified. These hairs were found from VF's T-shirt, pants and belt and socks and shoes.

And third, the FBI lab report indicated that semen on VF's boxer shorts was found to be excreted by VF. Greene flatly stated that under no circumstances is semen released upon a suicide caused by a fatal bullet to the head.

Moreover, the swab could merely reflect contact with VF's hand, which contact is not disputed.

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

~~CONFIDENTIAL~~

MR3

LR7

Meeting with Miguel Rodriguez

2-13-95 Mon. –

Mtg w/ MR at U. Club {MT worry WDC not KS ...}

Pam has duplicate copy of this file

. Rec. – stop – get handle on it – Then go fwd.
. MR – memos

17-94 memo 10-21-94
2 wks in office – . wanted to visit places

. pattern of interview or reinterview person – w/ no motive to lie.

. inappropriate Q's being asked – in 302's – provided examples to MT.

. MT has belief no pros. concern – death/docs
term – MR
BK
Lugia } Novel allegement
maintain status quo – don't reinterview

10-20-94 MT says interviews will go on – not status quo

MR gave MT leads, ideas.

MR rec – focus on tryh ...

FOIA(b)7 - (C)

1-2-94 [redacted] refused to give unredacted version of WS/CW 302 to MR. only to Fiske & Lenkle. FBI refused at 1st to take him to certain location.

made numerous request for FBI assistance.

Fiske approach – talk to everybody – tell a story –
Not prosec. approach.

[Different style – sensitive to appearances]
[conservative
[revisit issues]

-7-94 Memo MR requests Park map & SA's notes re: receipt of wiped gun. [redacted] refused; Any such request – ... version Fiske rpt. ... good reason shown.
Fiske – death investig is over ... talk ...

"I'm not a hot head, but I will defend myself if I have to, & so will Lucia."

-17-94 (5pg memo given to Starr)

11-16 Mtg

Mtg re VF Docs – BK, MT, MR

BK had been working w/ Stein.

Draft Rpt by Fiske had been generated.

several additional interviews – to complete telling the story.

<BK read this memo with/by MR>

-23-94 Memo to KS, MT, BK – MR has reviewed everything – not full comp. from FBI

Fiske Rpt contains misstmts – offers simplistic explan

Not overwhelming evidence

Hasn't even interview

<Urge this office not adopt Rpt of Fiske Council – rec. additl investig + use of GJ.

[numbered "accuse me of being unprofessional"]

1-28-94 MR pushed these ideas – focus on BN, MW, PT, DW – DOJ – Conspiracy – in light of stmt to shut down

— MT meets w/ CW/WS w/o MR's knowledge –

-WK Dec MT wants to know who MR wants Subp. to GJ -

2-5-94 Memo - to Starr + Touhey
• MT agreed in 11-24 mtg - GJ be used -
• Id. following for Subp -
•
•
•
•
•

[how he could be saying stuff abt me is wrong; really upset me] →

-12-94 Memo fm MR - to MT...
MT-MR Mtg - 8 points
• FBI agt to be assigned on tgt'ed issues
• GJ to be used -
• Go fwd re: USPP / GJ ...
• [redacted], etc. - up to MR
• Hold off GJ [redacted] til after USPP -
[BK to hold off on [redacted]]
[Greene - PI that MT's firm used ...]
• Lab - photos, etc. - Kinko's part ...
(Did not get to all these points ...) [We will do all of them.]
MT told MR that he & Ruth had met w CW/WS the week before.

MR to tell Gillis that MT said would get new agt

MR, Greene saw a forensic pathologist --
review files, checklist USPP, prep autopsies --
MR Tullock & Green alt post. watching autopsy.
Got leads fm Forensic Pathologist -
- Ft. Mann
- Beyer
- Autopsy
Poss. bullet wound chamber, shotgun, etc.

-30-04 Memo to MT -
will call [redacted] before GJ. Touhey agreed.
(also stated this at staff Mtg)
everybody knew this -
After - Gillis wanted to know why [redacted]? MR - didn't want to wait for SAgent to be assigned [redacted] - summ with.
Dana said not happy - they [HQ] going to micromanage this.
Outline -
2-3 wks for each area:
1)
2)
3) (3 days in a row) -
didn't know what order then.
MR - strategy - try to do [redacted] all in a row - not spread out.
[redacted] (subp - 2 weeks)

MT / Bates reviewed all the subps.

"I did nthg wrong. That guy beat the s— out of me."

MR went all out on this.
"Now, I'm sitting here w/ all these accusations."

End of mtg - sign up sheet for GJ —
first in WC under Starr.

WC before JAN GJ -

. 1st time MR showed Lucia the file (his memos) -
I didn't convince her. She convinced herself.

-30-94 1. Lucia's 1st memo (1-pg)
re: events of wk of 12-19, 12-27
12-19 org & review of photographic evid. [prep. for GJ]
(Colombell - whatever's there is there)
12-27 req. Colombell give all the photog. evid. -
no negs, no originals -
MR diverted her to take the evid. & put in locked files.

said trust'n all

("You all are losing 2 very good people...")

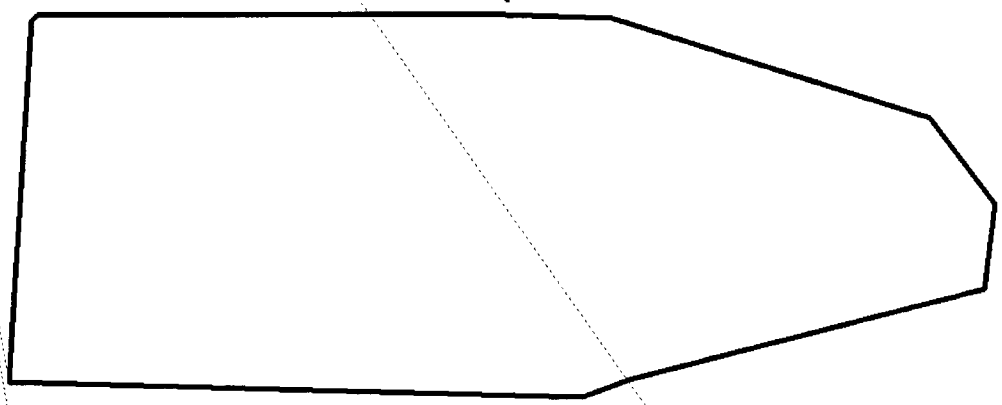
but
LR found negs, originals in FBI files
The death scene!

Tue.
-3-95 >

-4-95 MR, LR met w/ EMT's
(Bates, BK were invited; BK lead to they;
BK's car used)

① MT left for Puerto Rico

Thurs.
-5-95 GJ -
1st wit. - [redacted]
[served w typ - prep.]



[Not [redacted] there] >

Bates etc. all thought it was fine
nthg wrong w it

order
write up

* [See his colloquy w/ GJ - you will hear
for true direct witness]

[MR - I'm not
irrelevant why Mrs did or did not
bring witness before GJ.] >

[MR - offered Mrs individual copies of VF Firearms Rpt]

②
③ [redacted]

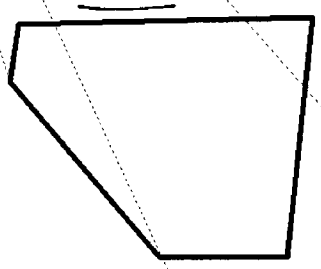
.6,7,8 All weekend - prep USAP / EMT

{ issued 2nd round subp. on 1-5. other meet w/ USAP 3 days in a row. } last wit on 1-6

10-95 ⊙ next Tue -

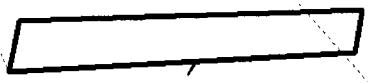
Tue Plan - GJ
[1-9, 1-10, 1-11, 1-16, 1-18]

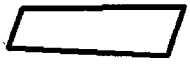
am -



Meal
1-9 Mtg - LR Memo - BK, MT, JB; LR, MR
2 hr. mtg. Either MT or JB always present at GJ

to into

pm - 

(MT is there when  testified)

5:30pm MT - MR alone in GJ Room -

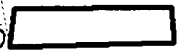
. Can I help you move your stuff to the other room.

. Excited there was a post- -sig. nif.

MT - where does that get you?

{ HE, AS, JC present at GJC - prep mtg w/ LD }

1-10-95 (Wed.)

⊙  - cont. - Later that -

Witness gave him s — for 4 hrs. MT came in late. (20 min. before lunch)

- "I've done nothing wrong in the GJ" -

→ At some point - new subj - what he saw - reminded him he was under oath { before lunch } (innocuous)

-11-95 (Wed) at end of the session -

[redacted] - "that was really tough on you - you were fair,

I'm not going to call that # they gave me to call

& complain abt you."

[Dinner - Wed - p.m. w/ MT]

-12-95 (Thu) MR / Bates at GJ -

[redacted] - great info

[GJ were to come back on next Tue 1-17 & Thu. 1-19]

13-95 (Fri.) MR gave HE memo (already prepared); sent 1 to BD, KS -

"what's happening to me"

-14/15-95 (Sat-Sun) Preps all weekend for GJ -

[Subp. out to [redacted]]

-13 6PM ~~[illegible]~~ heard that KS MT wanted to meet on Mon. (Fed. holiday)

later heard Bash to be present -

-16-95 (Mon.) - 2PM - MT, SD, MR ; KS - no show.

[MT had already talked to LR, BK ...]

- 6PM - MR asked BK - did you see him act unprofessionally? No

["You guys ambushed me."]

- At end of mtg [illegible] GJ [illegible] meet [illegible] (tomorrow) -

[illegible]

Wed.

LR stayed w/ the evid.

Lunch break -

MT asked him to go to separate room w/ MT & JBaker (top dog) -

vulgar threatening - beat me up.

NThg to this point to justify this.

Had been upfront on everything - gave MT memos.

MT - screamed [Baker present]

MT - tired of you, you being unprofessional, the way you have treated the USPP.

[No Advice of Rights on GJ subpoena]

[redacted] smartass remark - "" -

- you better stop it - stop there cockeyed & damned pre-judged theories" Back off the PK Police.

- it's your reputation, this Office & I will not back you up. Your rep. will be trashed.

MR - it was - v.i.e, no basis for it.

[I was waiting for pat on the back.]

. don't want you to be sarcastic.

MR - will repeat til he gets answer ...

Fin. Witness - [redacted] - 4 hrs.

MR flanked by JB, MT - "circus type atmosphere" -

"I got good stuff from this guy"

"I d[illegible]"

MT - is a fraud; has made promises to Fiske
Not going to embarass Fiske or anyone in the White House.
Does not have Starr's or your interest at heart.

1-17-95 (Tue) wrote memo to KS

1-18-95 (Wed) overnight mail

Ken got it nite of 1-18 or morn of 1-19.

His impression - We will play poker, but we're going to show everybody our hand.

- tell a story; not just after the truth;

They're using you right now - Put your name on it.

0840 KS, IDE, Brett IC. (on line in DC)

. BK's law school classmate's mother - Knows Lucia's mother - Brett was told by this lady - I heard abt Lucia's situation; LR's mother very upset abt the situation.

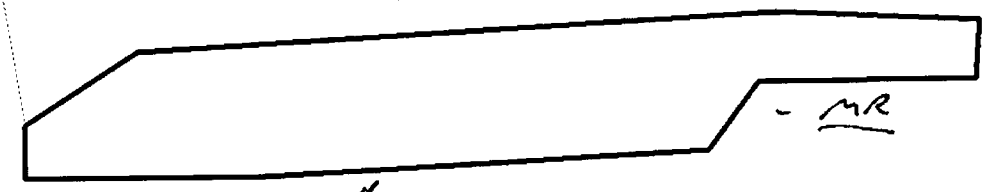
Re: MR

. BK talked to him mon. - a couple of minutes - The last 2 mos.; don't let your principles be compromised.

- Tues, 3-7 > shook hands; good luck.

Re: MR's assertion of finding new evid + leads -

. MR has not shared this w/ BK to any extent.



did not respond.

KS - [redacted] stmt 'I have made myself available for over a month' is a lie!!!"

3/10/95 AA, BK, JB called me at MEM home #

4:50 5:00pm

Alex –

talked to Lucia today –

KS wants LR to give ~~HE~~ her idea

LR wants to talk to KS before deciding abt talking to me.

· Possibly meet her Sun evening or Mon – NYC city

Brett – [redacted]

MR had told her it was OK

Will roam Tonight out probably.

Does not want to tell what MR thinks –

① Ken's beeper

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand Jury

0840 KS, IE, Brett K. (on line in DC)

. BK's law school classmate's mother - knows Lucia's mother - Brett was told by this lady - I heard abt Lucia's situation; LR's mother very upset abt the situation.

Re: MR

. BK talked to him mon. - a couple of minutes - The last 2 mos.; don't let your principles be compromised.

- Tues, 3-7 > shook hands; good luck.

Re: MR's assertion of finding new evid to leads -

. MR has not shared this w/ BK to any extent.

. Edwards GJ Tr - BK "it seems to me you have a theory; & we'd love to hear it" - MR did not respond.

KS - "Lucia's stmt 'I have made myself available for over a month' is a lie!!!"

3/10/95 AA, BK, JB called me at MDM home #

Alex – 4:50 5:00pm

talked to Lucia today –

KS wants LR to give HE her idea

LR wants to talk to KS before deciding abt talking to me.

· possibly meet her Sun evening or Mon – NYC

Brett – She was copying her BJ stmt

MR had told her it was OK

· will roam Tuesday probably.

Does not want to tell what MR thinks –

① Ken's lawyer

EVANGELICAL CHRISTIAN SCHOOL

General Administrative Offices

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To All Prospective Auction Bidders:

We are looking forward to having you at the ECS Eagle Auction! Please take a few minutes to read this letter which contains pertinent information concerning the auction.

1. **INVITATION** - This is self-explanatory. Please pass this on to a friend!

2. **RESERVATION CARD** - It is vital that you fill this out immediately and mail, along with your check, to Millie Young. This will secure your place at a table for the wonderful HORS D'OEUVRE BUFFET--best seating will be assigned as reservations and money are received. **Cards must be filled out in full.** There will be 10 people per table, and we would encourage you to sit with another couple or group for a really fun-packed evening. If you are planning to sit with friends, you must indicate this on your Reservation Card. You might want to send in one check to cover all reservations. If checks are mailed separately, make sure that you indicate with whom you would like to sit on all Reservation Cards.

3. **PROGRAM** - Please take some time between now and March 23rd to familiarize yourself with items to be auctioned, as well as the Rules and Procedures of the auction. There will be between 450-500 items to be auctioned, and it will be impossible for you to wait until that evening to view or decide on which items you would like to place a bid.

REMEMBER, YOU MUST BRING THIS PROGRAM WITH YOU THE NIGHT OF THE AUCTION.

See you at Woodland Hills on March 23rd at 6:00pm! ! !

Kathie Gieselmann
Co-Chairman

Marsha Cobb
Co-Chairman

MIDDLE & UPPER SCHOOLS
7600 Macon Road
P.O. Box 1030
Cordova, TN 38088-1030
901-754-7774

LOWER SCHOOLS
6655 Winchester Road
Memphis, TN 38115
901-794-3133

9750 Dogwood Road
Germantown, TN 38139
901-754-4420

735 Ridge Lake Blvd.
Memphis, TN 38120
901-683-9013

10-30-97 @ Rm @ H

Who in office when ...

Who notified when?

Lee ↓

[redacted] – redacted FBI note

Timeline

DW – time notified

* Timeline –

CW finds body

to

– next morning.

TC BK 11-3-97

BK – SS notified DW – 10s – 8:30 pm

– DW 302
– DW GJ

– Eileen

① DW portable phone records – start abt 9:00

① 10pm
- DW/EW
- WH/SB/SA
- Rolla/Bravo – pick DW up on the way.

11-11-97 Tues.

842 am VM from BK re: Q. Dillyer

627pm - Mon.

- took care of issue ----
- will call me Tues.

Brett – proposal – BK review
– "The diary" reviewed by Dana, Russ, Park Blice

Hamilton call – accusing Betty Currie of leaks ...

1002 <LSD arrived in WDC office – joined mtg>

Stafford ...

Hamilton has admitted conv. w/ Bernie>
views abt the search,

LSD – Breach of agreement ... Hale, etc.

[HE – 3/1/92 Memo fm Lynch to Hamilton, Kantor, Lyons, O'Keefe, Thomases ...

[LSD – re: Hamilton ... Hamilton met C's a got chase at Renaissance Weekend – Hamilton "errand boy" to LSD fm WHouse before Nightline ... Bernie/LSD – "deja vu"]

LSD "divided loyalty" – serving on Foster family lawyer, but also has prior relationship w/ C's ... transition counsel, <wanted to be WH Counsel, Dep. AG ...>

LSD – Jim had access to a lot of info – he is not a passive receiver of info – shows up all the time – assume he knows a hell of a lot.

1022 <Starkey arrived at Mtg>

Starr - • Listen
• LSD give his views - "not rule for the bench" -
• hear him out - get back to him soon.

Touhey - did tell Jim that he would not have to produce privilege log at that time. <LR subp.>
- it was not quid pro quo -
- claimed priv.

KS - package deal - "gamesmanship"

LSD - he's asking you to compromise your position...

BK - "a few good men" - New Yorker revelations

LSD - Hamilton "ans. to a higher cause" - Wilson

LAW OFFICES
JOHN H. CLARKE
720 SEVENTH STREET, N.W.
SUITE 304
WASHINGTON, D.C. 20001
(202) 332-3030

ALSO ADMITTED IN VIRGINIA
AND MARYLAND

FACSIMILE
(202) 639-0999

November 1, 1995

By Hand

Louis J. Freeh, Director
FEDERAL BUREAU OF INVESTIGATION
10th at Pennsylvania Avenue, NW
Washington, DC

By Hand

Brett M. Cavanaugh, Esquire
and
Russel T. Bransford, Special Agent
OFFICE OF INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, NW
Suite 490 North
Washington, DC

Re: Patrick J. Knowlton
Whitewater Grand Jury witness

Dear Gentlemen:

On Thursday, October 24, Agent Bradford served Mr. Knowlton at his home with a Subpoena to testify before the Grand Jury on Wednesday, November 1, at 12:00 noon.

During the time Mr. Knowlton spent in public that evening, he was continuously followed and repeatedly harassed. A dozen or more men walked towards him, or came from behind, and then gave him a purposeful, timed stares. He was followed on the street, into the drug store, into two restaurants, and home. He was also trailed by car. This orchestrated harassment continued throughout the following day, perpetrated by at least two dozen people.

I relayed this information to Agent Bransford when I was able to reach him on Monday. I asked that Mr. Knowlton be protected by the FBI, and possibly relocated. He declined. Agent Bransford stated that the FBI has neither followed nor harassed Mr. Knowlton, and that it appears unlikely that any harm will come to Mr. Knowlton. Agent

Bradsford also stated that he believed Mr. Knowlton's account.

Mr. Knowlton was followed on Monday and Tuesday.

My client and I were disappointed by the decision not to protect the witness Subpoenaed by the Office of Independent Counsel.

We are asking that the FBI take an active interest in Mr. Knowlton's safety.

Sincerely,

John H. Clarke

JHC:jeh
cc: Patrick Knowlton

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Bret

Number of Pages: 3 (including this cover sheet)

Message:

Please deliver to Hickman ASAP

CONFIDENTIALITY NOTE

c:\faxform rdb

HICKMAN EWING, JR.
ATTORNEY AT LAW
2124 S. GERMANTOWN RD.
GERMANTOWN, TN 38138

Phone: 901-755-2597

Facsimile: 901-755-7609

FACSIMILE TRANSMISSION COVER SHEET

TO: BRETT KAVANAUGH
JOHN BATES
OIC-WDC

DATE: 6-26-95

FAX#: 202-514-8802

FROM: HICKMAN EWING

FAX #: 901-755-7609

RE: AIM Post Cards

Total number of pages transmitted (including this page): 2

Message:

Began receiving postcards (all alike) at my Memphis office on Friday (2) and Saturday (23).

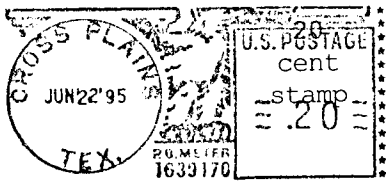
Believe these to be the ones referenced at AIM Press Conference. People were asked to send the cards to Ewing, Henry Lee, and The Washington Post.

I will arrive at Little Rock office about 1030 Monday morning.

V. E.

CC: OIC LR (D. Gershman)
501-221-8707

The David Holmes Agency
P.O. Box 117
Cross Plains, Tx 76443



Mr. Hickman Ewing, Jr.
Deputy Independent Counsel
2124 Germantown Road
Germantown, TN 38138

Dear Mr. Ewing:

Is the request that Dr. Henry Lee examine and evaluate the evidence in the Vincent Foster death a sign that the aggressive reinvestigation of this case did not end with the departure of Miquel Rodriguez? I hope so. But Dr. Lee is busy with 375 homicide cases, and he cannot be expected to come up with answers to the many questions that hang like a dark cloud over Foster's death.

To facilitate his task, I strongly suggest that you arrange to have Rodriguez brief Lee and explain what these questions are. I also suggest that you recommend that Rodriguez be asked to resume the vigorous grand jury investigation he was conducting.

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett Kavanaugh

Number of Pages: 4 (including this cover sheet)

Message: _____

CONFIDENTIALITY NOTE

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates

FROM: Brett Kavanaugh

RE: Foster Issues

DATE: June 6, 1995

As Dr. Lee prepares to give us advice, this seemed an appropriate time to outline my thoughts about the major steps we can and should take to complete our factfinding on the Foster death investigation. Dr. Lee will no doubt have further thoughts and may tell us that some of my proposed major steps are unnecessary or wasteful, but I thought it nonetheless might be useful to outline my ideas.

As I have stated before, the Foster death investigation can be divided into two related but distinct issues: (1) state of mind; and (2) physical evidence (which includes death scene observations, blood, forensic evidence, ballistics, etc.).

As I said in my last memo, we have made progress from the Fiske investigation on Foster's state of mind -- although we have not entirely solved that issue. Indeed, assuming arguendo a suicide, we still have not discovered a single triggering event that led to the death. Nor do we have a true suicide note.

With respect to the physical evidence, we have employed investigatory tools and procedural steps that were not utilized by the Fiske team. The most prominent example is our use of the grand jury in questioning witnesses who were at the scene or the autopsy. Nonetheless, it is important to recognize that these extra investigative tools have not as yet yielded any significant substantive results. (Indeed, if anything, some issues are more confused than ever thanks to witnesses making statements in the grand jury somewhat inconsistent with prior statements.)

In any event, the two most important issues to resolve in this case are rather obvious: (1) where was the fatal shot fired; and (2) who fired it.

It seems that the best way to determine where the shot was fired would be to find the bullet. If the bullet is in the park, then it seems to me that we would have established beyond a reasonable doubt that the shot was fired in the park. The Fiske team and the FBI conducted a rather elaborate search of the park for the bullet. Nonetheless, they did not go as far as they

could have gone. As is stated on page 56 of the Fiske report, "[t]he FBI Lab's search for the bullet focused on the most likely area for the bullet to have come to rest . . . It would have been enormously time-consuming, costly, and in all likelihood unproductive, to have searched the entire Park for the bullet" (emphasis added). Dr. Lee in our initial meeting suggested a broader search of the park, including of the trees in the park. I strongly recommend (subject to his continued agreement) that we pursue this tack. I also recommend that we get Ed Lueckenhoff intimately involved in implementing it because there is substantial resistance from the Washington FBI on this subject.[1]

As to who fired the gun, we should try to establish an individual's link to the gun. The best way to do that would be to determine ownership/possession of the gun as of July 20, 1993. Because no Foster family members can positively identify the gun and the gun cannot be traced, I believe the best remaining way to establish ownership of the gun would be to identify the person whose fingerprint is on the underside of the grip handle. We know that it is not Foster's fingerprint. We are currently attempting to determine whether it is Foster's father's fingerprint by having the military records center perform a search. If that does not turn up a match, we will have to go back to the drawing board on this issue.

Two other areas that are matters of some controversy -- although probably of lesser relevance -- are the identity of the person whose hairs were found on Foster's clothes and the identity of the carpets and/or furniture that were the source of the carpet fibers on Foster's clothes. Until Dr. Lee informed me otherwise, I believed that we could not match the hairs to any particular person because we do not have the roots from the hairs. That turns out to be incorrect. I therefore recommend (subject to Dr. Lee's concurrence) that we consider obtaining hair samples from Laura Foster; it we do not obtain a match with her hair, we can discuss how to proceed further. As to the carpet fibers, I recommend (subject to Dr. Lee's concurrence) that we implement a plan of obtaining carpet fibers from the various places that Foster was located on July 20: his house, his car, and the White House.

Finally, while not necessarily relevant to the Foster death as opposed to the Foster documents investigation, we can do more to determine the identity of the partial palm print on the Foster note. I recommend that we obtain palm prints from various people who we know touched the note. If we do not obtain a match from any of them, I recommend that we obtain palm prints from persons who we suspect touched the note. (We do not have Foster's palm prints, but we may also want to think of ways to determine whether we can lift a palm print of Foster's from any documents or items in Lisa Foster's possession.)

---

[1] Dr. Lee also noted that there may be other ways to establish that the shot was fired in the park; for example, by blowing up the scene pictures to determine whether there was any blood spatter on the surrounding leaves.

Conclusion

As Dr. Lee pointed out, we are likely to make progress over past investigations not by interviewing people who have already been interviewed but by reexamining the physical evidence to see what else can be learned from it. With that in mind and subject to change based on Dr. Lee's advice, the above listed items are the remaining major steps I propose we take with respect to the death investigation.

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates
LeRoy Jahn
Jim Clemente
Coy Copeland

FROM: Brett Kavanaugh

RE: Vincent Foster and the Whitewater Development Corporation

DATE: August 17, 1995

This memorandum summarizes the evidence about Vincent Foster's involvement in Whitewater matters, including his involvement in the tax treatment of Whitewater on personal Clinton returns and corporate Whitewater returns. The summary is based primarily on the documents from Foster's office that deal with Whitewater, supplemented by some testimonial evidence. This memorandum is not intended as any kind of final analysis, but only as a preliminary analysis so that we are all on the same page.

There is little doubt that Foster and others such as Yoly Redden were concerned prior to April 15, 1993, that the Clintons could be audited and required to pay more taxes if they claimed a loss with respect to the Whitewater investment on their 1992 personal tax returns. But as of this point, I believe the suggestion or implication made by newspersons in recent weeks (based on no more material than we possess) that Foster suffered continuing distress over Whitewater and/or was driven to commit suicide in whole or in part because of the Clintons' Whitewater investment, or their tax treatment of the investment, is quite far-fetched, as I will explain below. (I nonetheless caution that my analysis here is based on what I now know; there always could be some smoking gun document or testimony that has been destroyed or never given to this Office.)

Background

The Whitewater issue arose in March 1992 as the result of a news article by Jeff Gerth in the New York Times. (This article was in Foster's files at the time of his death.) The article was based in part on an interview with Jim McDougal and suggested, among other things, that the Clintons had improperly deducted at least $5,000 on their personal tax returns in 1984 and 1985 for interest paid on a portion of at least $30,000 in bank loan payments that Whitewater made for them. In addition, the article suggested that McDougal heavily subsidized the

Whitewater investment, insuring that the Clintons were under little financial risk.

When the story broke in 1992, Governor Clinton stated at a press conference that he believed he had lost about $25,000 in the Whitewater investment. The campaign then commissioned Jim Lyons to do a report on the investment. He did so, and concluded that the Clintons had lost nearly $59,000 on the investment, but also noted that the Clintons had taken certain improper deductions totalling $5,133 in 1984 and 1985 on their personal tax returns. (Because of their age, those improper deductions did not need to be repaid, but the Clintons did repay them in late 1993.) The story lay dormant for the remainder of the campaign and until late 1993 when it became known that the documents from Foster's office included Whitewater documents.

The basic issues remain to this day, however. Indeed, the New York Times editorial of Sunday, August 13, 1995, is not much different from earlier stories written about the Clintons' Whitewater investment and tax treatment of it. The Clintons have admitted they took improper deductions in the 1980's; the question remains whether they knowingly did so. And questions remain about the extent of the Clintons' risk in the Whitewater investment and about the extent of their contributions to the investment.

Foster's Involvement

The documents in Foster's office reveal that Foster's involvement in Whitewater breaks down into three distinct categories:

(1) sale of the Clintons' interest in Whitewater to Jim McDougal in December 1992;
(2) treatment of Whitewater on the Clintons' personal tax returns in April 1993; and
(3) filing of delinquent Whitewater corporate tax returns in June 1993.

The news stories in recent weeks (e.g., "can of worms") have focused on the second of these issues.

1. Sale of Interest in Whitewater to Jim McDougal

After the election in 1992, the Clintons decided to sell their interest in Whitewater to Jim McDougal. Foster's notes of a November 24, 1992, meeting with Foster, Lyons, Lindsey, Tisdale, and Hubbell show that a number of issues were discussed at that time, including:

(a) executive orders on the gag rule, gays in the military, and the reduction of White House staff;

(b) a Presidential retreat; and

(c) personal finances, including Whitewater and blind trust versus diversified trust.

It appears that Jim Blair was to take the lead for the Clintons in transferring their interest to McDougal. According to a Foster memo to file written on December 30, 1992, Blair intended to meet with McDougal and McDougal's attorney on December 22, 1992, to close the sale. Little Rock was fogged in, however, so Foster took the transfer agreement to Sam Heuer's office at Blair's request. The agreement stated that the Clintons would transfer their interest in Whitewater to McDougal for $1000. There was some discussion at the meeting about preparation of the delinquent corporate tax returns, but ultimately Heuer and McDougal signed the transfer agreement. The agreement stated that "Grantee [McDougal] warrants that all tax returns due for the period of Grantors' ownership of the stock being transferred shall be filed forthwith, and Grantee warrants that he shall cause said returns to be filed forthwith."

On December 23, 1992, Foster wrote a letter to accountant Yoly Redden enclosing the signed agreement and asking her to prepare the delinquent corporate tax returns for WWDC. The letter stated that "the Corporation will determine independently whether the returns are accurate and take the responsibility for filing them." Mrs. Clinton and Jim Blair were blind-copied on this letter. Also on December 23, 1992, Foster sent Jim Blair a copy of the transfer agreement.

On December 24, 1992, a $1000 check payable to the Clintons was mailed to Foster by Sam Heuer.

2. Preparation and Filing of Clintons' 1992 Taxes in April 1993

Having sold their interest in Whitewater for $1000, the Clintons had to decide how to treat the $1000 on their 1992 taxes. Did they have a gain or loss to report?

Foster received a letter on April 2, 1993, from Yoly Redden enclosing a draft of the Clintons' federal and state returns. It stated: "If I receive additional documentation from Mr. Patten of Patten, McCarthy & Associates in Denver, we may be able to claim a $10,000 to $15,000 loss in the disposal of Whitewater stock. The present return reflects no gain or loss on the disposal. I will let you know if a loss can be claimed. I realize that we need to take the most conservative approach possible and that was the position taken in the return."

On April 5, 1993, Foster sent a letter to Bob Barnett of Williams & Connolly enclosing the draft returns. The letter discusses several issues, but says the following about Whitewater: "At this point, there is no gain or loss reflected from the sale of the interest in Whitewater Development Corporation. The local accountant thus far has been unable to obtain documentation of payments to or for the benefit of the Corporation in excess of the stock sales price. This could change, however, in the next few days. Enclosed is a copy of the analysis by Jim Lyons and his forensic accountants on the Whitewater financial issues. There was an erroneous tax deduction taken in a prior year which was intended to be accounted for in this return."

On April 6, 1993, Foster sent a letter to Barnett with various supporting documents, including various federal and state returns and financial disclosure statements. Included is "a memorandum from the Media Research Office concerning news articles about financial and tax issues which were published during the campaign, including specifically articles about Whitewater Development Company. The memorandum also includes articles concerning the tax returns filed by the Bushes and the Quayles in 1989. I have confirmed that the Whitewater Development Company has not filed tax returns in recent years." It appears that this letter and the enclosures were likely sent in response to a phone call from Barnett.

On April 6, 1993, Yoly Redden sent a letter to Foster covering a few issues and concluding, "I should be calling you tomorrow afternoon concerning Whitewater."

Barnett apparently had another accountant review the returns in his office on April 6, 1993. That accountant prepared a letter dated April 7, 1993. The letter discusses a number of issues and says the following about Whitewater:

> I guess the treatment of the Whitewater investment will be a very sensitive item. I read the press reports you made available to me and it seems that the opposition was contending that the Clintons' investment in Whitewater was such that they had an opportunity to realize half of the profits if the project was successful but were protected against losses if the project was unsuccessful. The President responded that they had lost at least $25,000.
>
> The return currently shows that disposition of the investment on Schedule D at a cost of $1,000 and a sales price of $1,000 and no gain or loss. It seems to me that this treatment bolsters the opponents' position. That is, they claim he was protected against loss -- the President said he incurred a significant loss -- the return shows no loss.
>
> Judging from the return I assume that the Clintons are not expecting to get tax benefit from the loss. I further assume, based on the President's response as reported in the press, that they did not receive any proceeds upon disposition of the investment. [This was not true; thus, the remainder of this paragraph does not follow. BK] Thus, it appears that the $1,000 of proceeds on Schedule D is for cosmetic purposes. If that is the case, wouldn't the best course of action be to simply not report anything on the return. I am not aware of any provision in the tax law that requires one to claim all losses that have been incurred. And even if there were such a provision, the present method of reporting does not report the loss that the President says was incurred.

Barnett faxed a copy of this letter to Foster on April 7, 1993.

On Foster's handwritten notes that are undated (but likely are some time from April 7 to April 12) and list a number of different issues with respect to the draft returns, such as "pay

Keough" and "use of name Rodham," Foster notes the following: "Options: FN -- cost in excess but not documented yet $1000 gain." He also wrote notes to "call Sam Heuer, Jim Lyons."

On April 12, Foster sent a one-page FAX to Yoly Redden stating: "Insert re: WWDC: The estimated basis substantially exceeds the sales price; however, because of the unavailability of complete documentation, no basis is claimed."

On April 12, Redden wrote a letter to Foster. It is unclear whether this letter is before or after the above FAX. It states as follows:

> I am enclosing summary workpapers on Whitewater to document the assumed loss of $5,878.35. These include the report from Patten, McCarthy detailing their findings of an estimated investment of $68,880.07, workpapers that we had in our Whitewater file of payments made on behalf of Whitewater, deductions taken on tax returns, and lists prepared possibly by Carolyn Huber concerning the same items.
>
> I still recommend that we do not attach any statement to the tax return concerning Whitewater other than the listing of the sale of stock. We have a minimum basis of $500, which was the amount allocated on the corporate books as 50 percent of the capital stock. Because of the numerous problems with Whitewater records and the commingling of funds with other companies and individuals, I believe many explanations may have to be made if we claim a loss. I do not believe we should claim a gain, because the Clintons did suffer a loss, and that should be the implication in closing the transaction. . . .

Handwritten notes that are undated say the following: "Worst case -- IRS audits return, disallows $1000 loss -- press says 'you said you invested $25,000 and couldn't even prove 1000.'" (I am not sure these notes are in Foster's handwriting, but I might have an analysis done. All other notes referenced in this memo appear clearly to be Foster's handwriting.)

On Foster's handwritten notes that are undated but were probably taken at some time from April 7 through 13 and that appear to reflect one or more conversations with at least Yoly Redden, Norris Weese, and Jim Lyons, Foster wrote the following:

Q's

1. What was nature of deductions
   A. How deduct interest/principal payments for corp.?

2. Can you use contributions which predated incorporation?

3. Contribution/advancements of $68,900 to the McD

4. Inability to use $8000 capital loss.

500 eliminate precision
1000 arbitrary
0 would be presumed

JR [Yoly Redden] resists any gain since inconsistent with saying we had a loss -- zero is arbitrary

(were making payments because McD was missing)

opposes FN

reason is 0 is what IRS uses if you don't prove basis

JR -- we did not know WWDC existed in earlier years

Discussion Points

1. An argument that they were protected against loss:
A) wash is consistent with this theory

2. Improper to reduce basis by improper tax benefit

3. Computation of economic loss was based, in part, on assumptions whereas computation of tax gain or loss must be defensible in audit

Weese [he was one of the Denver accountants]

sometimes relied on Clinton's returns as evidence
don't want to go back into that box
Was McD trying to circumvent bank loss
why HRC getting loans from other

Lyons

HCR transaction re: lot
A) long-term capital loss limitation

raises Q's re

reasonable for forensic purposes vs IRS audit

On Foster's handwritten notes that are undated but were probably written at some time from April 7 through April 13, Foster made a list of various issues related to the returns, including "pay Keough," "Chelsea's return," and "California return." There also are notes about Whitewater. It is unclear, but these notes appear to reflect conversations with Yoly Redden and Ricki Seidman.

9. Whitewater

Discuss w/ Yoly **[query whether what follows reflects Foster's views or Redden's views. It at least appears to be the latter. BK]**

A. Colo. analyses of economic loss

1. did not take into account interest deductions

2. calculation included some items for which there were no cancelled checks

3. when back out [? BK] unsupported and deductions $5800 -- rec'd $1000 for tk

4. Yoly recommends vs taking a loss of $4800

A) other interest deduction of $4300 which cannot be sure were not WW

B) more importantly would result in an audit of proof of basis

can of worms you shouldn't open [I believe the "worms" are the next three listed items. BK]

1) propriety of characterizing pre-incorp payments on affiliated corporations ($10M to Great Southern Land)

2) propriety of taking

int deductions for debt
which should be corp

3) prior deduction of
$8000 prior [?]
payment in 1980

Colo came up with theory to justify but it is shaky

10. Options

$1000 basis so no tax effect but is arbitrary and still risks audit
versus 0 basis w/ $1000 gain avoids any audit of issue

political

in Ricki's view no significant difference in answering Q's for $4000 loss, no loss, $1000 gain

On April 15, 1993, Redden wrote a letter to Foster enclosing an original and a copy of the 1992 Arkansas return "which [she] revised to allocate to the President $500 of the gains from the sale of the Whitewater stock. I am sorry for the inconvenience of so many revisions."

The returns treated Whitewater as a $1000 gain with a 0 basis, so the only real concern over the returns' treatment of Whitewater was whether the press would seize upon those returns as an indication that the Clintons' statements during the campaign about the extent of their investment in Whitewater were incorrect. There was, however, no risk of an IRS audit on these returns, at least on the basis of their treatment of Whitewater.

As it turned out, the press had very little to say about these returns. I found only two articles mentioning the returns, both on Monday, April 19. The Washington Post reported as follows:

> They also reported a $1000 gain from the sale of their interest in Whitewater Development Corp., a land deal that became an issue last spring after disclosure that a partner, James McDougal, had been the head of a troubled state-chartered savings and loan. Spokeswoman Ricki Seidman said the Clintons sold their half-interest in the unsuccessful 230-acre Ozark Mountain resort development back to McDougal and his wife. Though the Clintons said they lost thousands of dollars on the investment, they listed its initial value for tax purposes as zero. "They decided to take the most conservative position," Seidman said. "The IRS needs extensive documentation to establish basis and not all the documentation was

available, so they declined to show the loss."

USA Today reported as follows: "The Clintons sold their interest in Whitewater Development, a company they and another couple created in 1978 to develop land in Arkansas' Ozark Mountains. The Clintons reportedly sank $69,000 into the project. They sold their interest in December for $1000, leaving a loss of $68,000, which they apparently claimed in previous years." The USA Today story was obviously somewhat inaccurate.

3. Whitewater Corporate Tax Returns

I have found very little documentation in Foster's files relating to the preparation of the Whitewater corporate tax returns. It appears that, consistent with the December 1992 sale, Jim Blair took the lead on this issue. Foster did receive a letter on June 23, 1993, from Yoly Redden stating "I am enclosing copies of the letters that were sent to Mr. Blair today, together with the income tax returns of Whitewater Development Company. Please let me know if you need copies of these returns for your files."

This letter suggests that Foster did not even see the returns before they were filed and that Foster was not involved in the filing of the Whitewater corporate tax returns. That is appropriate because it is difficult to see how he ethically could have been substantially involved in such matters for a corporation while a government attorney.

Conclusions

That summarizes the evidence we possess from Foster's office related to Whitewater. It seems likely that Foster, as well as Seidman, Barnett, Redden, and Lyons, were aware by April 15, 1993, if not earlier: (1) that it would be difficult for the Clintons to prove with documentation that the Clintons had contributed to, and therefore lost as much money on, Whitewater as the Lyons report had claimed (but note that this was stated publicly at the time of the 1993 tax returns); (2) that it might even be difficult for the Clintons to prove (although it did not appear that they would ever have to) that they were at risk of loss in the Whitewater investment; and (3) that the Clintons claimed improper deductions on their personal tax returns in the 1980's (which they conceded, at least in part, during the campaign).

In my view, any suggestion based solely on this evidence that Whitewater was a contributing cause of Foster's distress in July 1993 is quite far-fetched. Why would Foster kill himself or even feel uneasy about the filing of tax returns that had been handled properly and had generated no controversy over Whitewater? I could see that he may well have held his breath upon the filing of the returns in April because they could have generated press reexamination of the Lyons report and old tax returns, but in fact it created no controversy whatsoever. Indeed, this appears to have been one of the few issues that Foster handled in the White House that did not go wrong.

Perhaps Foster was such a worrier that he thought that it could someday come to light that the Clintons knowingly had taken improper deductions in the 1980's or really were at no risk of any loss in the Whitewater investment. But that does not make much sense because those allegations had already been made, and had not resulted in any continued problem for the Clintons. And even if such allegations were renewed and even investigated, there was no possibility of criminal liability given the statute of limitations. Moreover, because the documentation relating to Whitewater was so spotty, it would be at least as difficult to prove such allegations in a civil tax or congressional proceeding as it was to disprove the allegations in the personal tax returns. More to the point, even if I am wrong about all of this, would a person kill himself because of the potential tax problems related to returns of someone else that were filed many years ago and with respect to which the person played no role? It seems unlikely.

In sum, absent more evidence, the "Whitewater contributed to Foster's death" allegations make little sense to me, although I am willing to listen to contrary views. Nonetheless, in the event that we write a report discussing state of mind, I do not think we are qualified to say what issues in effect caused his suicide. The best we can do is to point out the issues that Foster was working on and/or those issues that reasonably could have caused Foster concern at one point or another. With respect to Whitewater, we can say simply that in April 1993, the treatment of Whitewater in the tax returns was an issue of some sensitivity and difficulty that appears from the written record to have caused Foster (as well as others) some degree of concern.

TO: BRETT KAVANAUGH Revised 7/25/95

FROM: SA FOIA(b)7 - (C)

SUBJECT: DISCREPANCY LIST

The following list is my last comprehensive outline of all of the noted discrepancies, inconsistencies, and problems that have been identified in the Vincent W. Foster death investigation to date. The outline is broken down into the following areas: U.S. Park Police, Emergency Medical Technicians (EMTs), the White House, Northern Virginia Medical Examiner, Miscellaneous, and Forensic Examinations. Although mostly the same as the previous list of 6/21/95, there are a few additions, particularly under USPP and Medical Examiner:

I. U.S. Park Police
A. No gunshot residue samples of the decedent's hands.
B. Lack of complete documentation of the gunshot residues on the left hand.
C. Poorly diagrammed death scene; lack of measurements.
D. No photo log; no documentation regarding who took what photographs, and the total number of photos.
1. Edwards initialed Ferstl's photographs.
2. Ferstl is unsure of the exact number of photographs he took with Edwards camera.
E. Death scene 35mm photos did not develop.
F. No documentation regarding the initial search of the decedent's vehicle at the death scene- no inventory.
G. Photo of an unidentified briefcase next to a U.S.P.P. vehicle.
H. Decedent's pager returned too soon; no records obtained regarding previous pages.
I. Suicide weapon processed with dust prior to other laboratory exams.
1. No latent prints of any kind; value/no-value.
J. Inconsistent statements regarding moving and searching the body. (Rolla, Braun, Simonello, Hodakaviec)
K. Inconsistent and poorly documented autopsy.
1. Morrissette's report.
2. No gunshot residue samples from hands.
3. No fingernail clippings/scrapings.

1-Tuohey
1-Ewing
1-Lueckenhoff
1-Kavanaugh
1-Gillis
1-FOIA(b)7 - (C)
1-Clemente
1-29D-LR-35063

4. No major case prints of decedent.
5. No photo of left hand.
6. Possible contamination of evidence subsequent to autopsy at M.E.'s Office.
7. Inconsistent statements regarding what was done to the body prior to autopsy.
8. No description of body and clothing prior to autopsy.

L. Possible contamination of evidence at U.S. Park Police facility.
M. Poor interview and documentation of witnesses at death scene (Doody and Feist).
N. Photo of an unidentified white male wearing plainclothes at death scene.
O. Inconsistent statements regarding vehicle doors being locked/unlocked. (Braun, Rolla, Hodakievic, Simonello, Gavin)
P. All photographs not produced pursuant to initial subpoena.
Q. Inadequate and incomplete metal detector search by the USPP. (Operators had no prior experience or training)
R. Eyeglasses and revolver lifts contain trace evidence.
S. Case was closed prior to completion of laboratory exams.
T. Inconsistent statements of Officer Watson, Jeff McGaughey, and Braun regarding Watson's and McGaughey's actions/observations at the scene.
1. Watson is the Special Forces officer that responded to the scene.
U. Watson did not notify Gavin, as requested by Braun at approximately 7:30 p.m.
V. No neighborhood investigation.
1. Did not obtain video from Saudi residence of second entrance.
W. Incorrect number of torn pieces of note in Simonello's report.
X. No documentation of the latent prints of value that were obtained from the decedent's vehicle.
1. The prints were identified by the FBI Lab.
Y. Incomplete search of the decedent's vehicle.
1. Numerous items were not taken as evidence; they were later obtained by OIC FBI agents.

II. Inconsistent statements and observations of Fairfax County Fire and Rescue personnel.
A. Wound on neck (Arthur: .45 cal. bullet hole.)
B. Gun under thigh.
C. Wound on upper right front of skull (Gonzales).
D. Briefcase in vehicle.
E. Unidentified person in woods (Hall).
F. Vehicle doors locked.
G. Death scene photos do not accurately depict scene.
H. Two unidentified white males walking from death scene.
I. Color of gun was silver.
J. Type of gun was semiautomatic pistol (Arthur).
K. Statements of initial paramedics at scene regarding their actions are inconsistent with Fairfax County paramedic protocols.

L. Report coded as a homicide (Ashford).

III. Medical Examiner

A. X-rays

1. Autopsy report indicates x-rays were taken.

2. Morrissette's report indicates Beyer told him x-rays were taken.

B. All individuals present at autopsy not indicated on autopsy report.

C. No photographs of decedent's left hand.

D. Inconsistent statements regarding removal of decedent's tongue and palate.

E. Inconsistent "on-scene" times reported for Dr. Haut; 7:40 pm and 7:15.

F. Stomach contents; no definitive digestion time, or positive identification.

G. "Cross-hatched" lines in autopsy diagram- discrepancy between Dr. Luke's autopsy review and 7/13/95 conversation with Dr. Beyer.

IV. White House

A. Foster's office unsecured until 7/21/93, approximately 10:10 a.m.

1. Patsy Thomasson, Maggie Williams, Bernie Nussbaum search Foster's office.

B. Confidential trash bag removed and replaced.

C. Nussbaum enters office; removes small photo.

D. Pond rearranges papers on Foster's coffee table.

E. Exclusive initial review of documents by Nussbaum.

F.Torn note found one week later in briefcase previously searched by Nussbaum.

G. Note not released to investigators until the following week; a day after it was discovered.

V. Miscellaneous

A. CW's inconsistencies.

1. positioning of decedent's hands.

2. no gun.

3. winecoolers and briefcase in vehicle.

4. trampled area around death scene.

5. does not see white car occupied.

B. Inconsistencies between Doody and Feist's statements.

1. Inconsistencies between USPP interviews and FBI interviews of Doody and Feist.

2. Their statements re- other people at the park were "completely ignored" by Fiske investigators.

C. No initial investigation of the park's "second entrance".

D. No one heard a gunshot.

E. The gun exemplifies a "drop gun".

F. No matching ammo at the decedent's residence.

G. The decedent's grip on the gun was not the simplest nor the easiest to shoot himself in the mouth.

H. The decedent never previously spoke of suicide.

I. The decedent had no particular obsession, "dire

predicament", or one thing that would have put him over the edge.

J. The decedent had dealt with stress before.

K. The suicide weapon has never been positively identified as belonging to the decedent, or the decedent's father.

1. Family members have been unable to reliably and conclusively identify the gun.

L. Lisa Foster's initial spontaneous question "was the gun in his mouth?".

M. Five unaccounted for hours between the time the decedent left work and was discovered dead.

N. Lack of blood at death scene.

O. No bullet.

P. No cadaveric spasm causing decedent to clench gun.

Q. The gun did not fly out of the decedent's hand.

R. No chipped teeth noted by M.E.

S. No flashburns inside mouth noted by M.E.

T. The mortician lost the original embalming report and diagram.

U. The decedent's glasses were discovered 13' downslope from his body.

V: The positioning of the body is inconsistent with suicide; body neatly laid out; "as if it was in a coffin".

W. Fairfax Hospital Laboratory Supervisor statement re-gunshot wound to middle of head.

X. Helen Dickey telephone call to Roger Perry.

Y. Committed suicide at an unfamiliar location.

Z. No suicide note.

A1. No previous mention of suicide.

B1. Ate lunch prior to committing suicide.

C1. Jeff McGaughey's statements are inconsistent with Officer Watson's.

D1. USSS memo of SA Scott Marble, dated 7/20/93, re-decedent's body discovered in his car, and revolver recovered in car.

E1. Other witnesses were in the park (Ruddy article of 6/14/95).

1. Several men wearing orange vests.

2. Several people who entered the park through the rear entrance and encountered police.

F1. Enhanced photographed depicts a wound on neck.

G1. Not an independent investigation (Ruddy article of 6/19/95).

1. Tuohey conflicts.

2. Colombell oppositon/resistance.

H1. Eyeglasses found 13' from body.

VI. Forensic Examinations

A. Unidentified latent print inside grip of suicide weapon.

B. Unidentified blonde head hairs.

C. Unidentified carpet fibers.

D. Unidentified stain on shirt. (Dr. Lee).

E. Unidentified gunpowder in scrapings.

F. The decedent's head was moved.

G. No blood on suicide weapon.

H. No soil on shoes. (mica flakes)
I. Large semen stain in the decedent's underwear.
J. Blood flowed uphill (video).
K. Excavation of site disputed.
L. Possible blood on handkerchief (Item 4a)
M. Inconsistent vegetation at death scene.
N. Polaroid photos depict decedent's hand in different positions.
O. FBI Lab relied on third generation photographs for their examinations; copies of copies.

TO: BRETT KAVANAUGH 3/22/95

FROM: SA FOIA(b)7 - (C)

SUBJECT: DISCREPANCY LIST

The following list is offered as a comprehensive and itemized outline of all of the noted discrepancies, inconsistencies, and problems that have been identified in the Vincent W. Foster death investigation to date. The outline is broken down into the following areas: U.S. Park Police, Emergency Medical Technicians (EMTs), the White House, Northern Virginia Medical Examiner, Miscellaneous, and Forensic Examinations.

I. U.S. Park Police

A. No gunshot residue samples of the decedent's hands.

B. Lack of complete documentation of the gunshot residues on the left hand.

C. Poorly diagrammed death scene; lack of measurements.

D. No photo log; no documentation regarding who took what photographs, and the total number of photos.

E. Death scene 35mm photos did not develop.

F. No documentation regarding the initial search of the decedent's vehicle at the death scene- no inventory.

G. Photo of an unidentified briefcase next to a U.S.P.P. vehicle.

H. Decedent's pager returned too soon; no records obtained regarding previous pages.

I. Suicide weapon processed with dust prior to other laboratory exams.

J. Inconsistent statements regarding moving and searching the body. (Rolla, Braun, Simonello, Hodakaviec)

K. Inconsistent and poorly documented autopsy.

1. Morrissette's report.
2. No gunshot residue samples.
3. No fingernail clippings/scrapings.
4. No major case prints of decedent (palms, sides and tops of fingers).
5. No photo of left hand.
6. Possible contamination of evidence subsequent to autopsy at M.E. Office.

1- Tuohey
1- Kavanaugh
1- Gillis
1-29D-LR-35063

4. trampled area around death scene.
5. does not see white car occupied.

B. Inconsistencies between Doody and Feist's statements.

C. No initial investigation of the park's "second entrance".

D. No one heard a gunshot.

E. The gun exemplifies a "drop gun".

F. No matching ammo at the decedent's residence.

G. The decedent's grip on the gun was not the simplest nor the easiest to shoot himself in the mouth.

H. The decedent never previously spoke of suicide.

I. The decedent had no particular obsession, "dire predicament", or one thing that would have put him over the edge.

J. The decedent had dealt with stress before.

K. The suicide weapon has never been positively identified as belonging to the decedent.

L. Lisa Foster's initial spontaneous question "was the gun in his mouth?".

M. Five unaccounted for hours between the time the decedent left work and was discovered dead.

N. Lack of blood at death scene.

O. No bullet.

P. No cadaveric spasm causing decedent to clench gun.

Q. The gun did not fly out of the decedent's hand.

R. No chipped teeth noted by M.E.

S. No flashburns inside mouth noted by M.E.

T. The mortician lost the original embalming report and diagram.

U. The decedent's glasses were discovered 13' downslope from his body.

VI. Forensic Examinations

A. Unidentified latent print on note.

B. Unidentified latent print inside grip of suicide weapon.

C. Unidentified blonde head hairs.

D. Unidentified carpet fibers.

E. Unidentified stain on shirt. (shirt being resubmitted to lab)

F. Unidentified gunpowder in scrapings from decedent's shoes and socks, and the paper that they were dried on.

G. The decedent's head was moved.

H. No blood on suicide weapon.

I. No soil on shoes. (mica flakes)

J. Large semen stain in the decedent's underwear.

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett Kavanaugh

Number of Pages: 4 (including this cover sheet)

Message: _____

Memorandum

To : ASSOC. INDEPENDENT COUNSEL BRETT KAVANAUGH 6/22/95

From : SA FOIA(b)7 - (C)

Subject: FOSTER DEATH INVESTIGATION
SUMMARY OF PHYSICAL EVIDENCE

The following is a comprehensive summary of the physical evidence in this case. This summary does not include the items obtained during the search of Ft. Marcy Park on 4/4/94, since none of the items were determined to be relevant to this investigation. Preliminary examination by Dr. Lee indicates the possibility of the presence of blood on the USPP latent lifts from the glasses and revolver, as noted in my memo documenting my meeting with him on 6/9/95. My memo of 6/12/95 identifies the particular locations and amounts of hairs, fibers, and latent prints. Additionally, my memo of 3/2/95, which documents our meeting with the laboratory examiners, contains information regarding the nature of the forensic examinations and some of the conclusions that can be drawn from the results.

I) Death Scene Observations.
A) The decedent was lying face-up on an approximate 45 degree sloped embankment, with his head toward the top of the slope. The location was consistently described to be near the "second cannon".
B) The decedent was wearing a white shirt. Blood stains are only observed on the right shoulder and neck area, and around the right rib cage area.
C) Blood trails are observed on the decedent's face.
D) The decedent's arms were at his sides. The right hand was around the cylinder of a black revolver.
1) right thumb trapped between trigger and inside edge of trigger guard.
2) one blood droplet on right index finger above second joint.
3) apparent gunshot residues along the outside edge of the right index finger, in close proximity to the cylinder gap of the weapon.

1-Tuohey
1-Ewing
1-Lueckenhoff
1-Kavanaugh
1-Gillis
1-Clemente
1-FOIA(b)7 - (C)
1-29D-LR-35063

4) The hammer of the revolver had to be cocked to remove the weapon from the hand (indicates that the revolver was cocked when the thumb was inserted).

5) The decedent's hand was flexible (gun was not tightly gripped).

E) Prescription glasses were collected approximately 13' downslope from the decedent's feet.

F) When the body was rolled, a large pool of blood was observed where the head had been resting.

1) Additionally, a larger area of blood was observed where the decedent's back was in contact with the ground, which coincided with blood stains observed on the back of the decedent's shirt.

2) A gunshot wound was observed at the back of the decedent's head.

G) The area was not searched for blood, other than by sight.

1) No blood was visually seen on surrounding vegetation.

H) The decedent was still wearing his jewelry and pager.

1) The pager had been manually turned off.

2) The decedent's wallet and identification were located in his unlocked vehicle.

a) The wallet contained $292 and various credit cards.

I) The weapon was unloaded at the USPP office.

1) The hammer was down on a fired .38 caliber casing.

2) An unfired .38 cal. bullet was in the next chamber.

a) Colt revolvers rotate clockwise. The unfired bullet was in the next chamber to be rotated into firing position.

3) The serial number from the crane of the revolver cylinder (356555) was traced to the Seattle Hardware Co., Seattle, WA., 9/14/13.

a) The serial number on the frame of the revolver (355055) was traced to the Gus Habich Co., Indianapolis, IN., 12/29/13.

b) Consistent with describing the weapon as an antique or family heirloom.

J. The following items were taken as evidence at the location of the body on 7/20/93:

a) eyeglasses- 13' downslope from the decedent's feet. (Simonello).

b) revolver- from the decedent's right hand (Simonello).

c) Seiko wrist watch- from decedent's left wrist (Rolla). Returned to Cliff Sloan on 7/21/93.

d) Pager- from decedent's right waist area (Rolla). Returned to Cliff Sloan on 7/21/93.

e) Silver ring with large white stone- from decedent's right ring finger (Rolla). Returned to Cliff Sloan on 7/21/93.

f) Gold colored ring with inscription "E.B.B. to V.W.F. 4-20-68" - from decedent's left ring finger (Rolla). Returned to Cliff Sloan on 7/21/93.

K. The following items were taken as evidence from the decedent's vehicle in the Ft. Marcy parking lot:

a) Brown leather wallet containing identification, credit cards, miscellaneous papers, and photos- from decedent's suit jacket pocket (Braun- Rolla). Returned to Cliff Sloan on 7/21/93.

(1) one of the papers in the wallet was a list of psychiatrists.

b) Black suit jacket- from front passenger seat of decedent's vehicle (Braun).

c) Blue silk tie with swans- on top of coat on front passenger seat (Braun).

d) White House Identification- under coat on front passenger seat (Braun).

e) Miscellaneous papers- from glove box, trunk, and door (Braun).

L. Photos.

1. 35mm photos taken by Simonello were underexposed, and did not develop.

2. 5 Polaroid photos of the death scene initialed by Edwards, probably taken by Ferstl.

3. 8 Polaroid photos of the death scene taken by Rolla.

4. 5 Polaroid photos of the decedent's car at the Ft. Marcy parking lot taken by Braun.

M. The following items were taken as evidence from the decedent's right front pants pockets at the Fairfax Hospital Morgue on 7/20/93:

a) one key ring marked "Cook Jeep Sales" (Braun).

b) one key ring marked "Vince's Keys" (Braun). Returned with vehicle on 7/27/93.

II. Autopsy

A. Observations.

1. Cause of death: perforating gunshot wound mouth - head, no other trauma noted.

a. No evidence of abrasions, lacerations, contusions, or bone fractures (other than that associated with the head wound).

b. No evidence of teeth fractures or chipping.

2. Apparent gunpowder residues on both index fingers; more pronounced on right hand.

3. Abundant gunpowder residues on the soft palate of the mouth.

4. Toxicology was negative for alcohol and drugs.

B. The following items were taken as evidence subsequent to the autopsy at the Northern Virginia Medical Examiner's Office on 7/21/93. The items of clothing were placed into one bag and transported to the US Park Police Anacostia Office:

a) white colored, long-sleeved, button-down shirt (Johnson).

b) white colored, short-sleeved t-shirt (Johnson).

c) white colored boxer shorts (Johnson).

d) blue-gray colored pants with black colored belt (Johnson).

e) a pair of black colored socks (Johnson).

f) a pair of black colored dress shoes, size 11M (Johnson).

g) known hairs of Vincent Foster, Jr. (Johnson).

h) known blood of Vincent Foster, Jr. (Johnson).
i) known fingerprints of Vincent Foster, Jr. (Johnson).

The clothing was set out to dry on three pieces of brown wrapping paper, which were layed out on the floor of the USPP photo developing room. On 7/26/93, the items were packaged in separate containers and placed in the USPP evidence locker.

C. Autopsy documentation.

1. Diagrams (Beyer).
2. 5 microscopic slides containing sections of the soft palate, brain, heart, lung, and liver (Beyer).
3. 5 paraffin blocks, 3 of soft palate (Beyer).
4. 13 Polaroid photographs (Beyer).
5. 14 35mm photographs (Beyer).
6. 35 mm photos (Hill).

III. Vehicle search.

A. The following items were obtained from a search of Foster's grey Honda Accord at the USPP impound lot on 7/21/93 by Officer E.J. Smith, and stored at the USPP evidence room:

1. Rand McNally Washington, D.C. map.
2. sunglasses.
3. "Happy Birthday card to Tom".
4. piece of white paper with red writing.
5. box of "The DeLuxe Check Printers, with four checkbooks in the name of Laura Foster.
6. clear plastic envelope with Insurance Identification Card listed to Vincent or Elizabeth Foster, Policy number 10094177-01, exp. 8/6/90.
7. one Sierra Nevada beer bottle (from inside white and green bag).
8. one Miller Lite beer can.
9. empty container of Marlboro Lites cigarettes.
10. one Kaopectate bottle.
11. one Clos Du Bois corkscrew.
12. Contents of front ashtray:
    a. 35 pennies, two quarters, one nickel, a Compton's Foodland disk, a $100 Estados Unidos Mexicanos coin dated 1985.
    b. Chevron credit card.
    c. Texaco credit card.
    d. a guitar pick.

B. 35 mm photos were taken of the vehicle during the search (Smith).

C. The vehicle was processed for latent prints with negative results (Smith).

1. Four of these latent prints were later identified by the FBI Laboratory as being of comparison value.

D. The following items were obtained from the law firm of Sharp & Lankford by SA Russell Bransford on 6/16/94. The items were in the decedent's grey Honda Accord at the time it was released by the USPP. The items were removed from the car by William Kennedy.

The items were subsequently stored at the OIC-DC Office:

1. coffee mug
2. container of jellybeans
3. black eyeglass pouch with Rayban sunglasses
4. green kitchen mitt
5. one pair of brown moccasins
6. one blue audiocassette carryingcase with 12 music tapes
7. two hardcover books:
   a. Speak Up With Confidence, by Jack Valenti
   b. 2,000 Famous Legal Quotations, by M. Frances McNamara
8. Tysons Center directory
9. Potomac Mills directory
10. Eastern U.S. area map
11. one yellow envelope containing papers pertaining to the Honda Accord.
12. one White House envelope, hand addressed in pencil to William Kennedy, containing an Arkansas vehicle registration for a 1992 Lexus 300, with an attached post-it note.

IV) The note.

A. On 7/27/93 at 9:30 pm, numerous pieces of small yellow lined paper were obtained from Bernard Nussbaum by Det. Megby of the USPP.

B. On 7/28/93, the note was reconstructed and photographed (Simonello).

C. On 7/30/93, the note was released to SA Scott Salter, FBI.

D. On 8/5/93, the note was returned to the USPP.

V) On 3/21/94, all of the above items from the death scene, vehicle search, autopsy, and the note were released to the Office of the Independent Counsel (Colombell 302 of 3/21/94). The items were subsequently provided to the FBI Laboratory on 3/24/94.

VI) In December 1994, Sharon Bowman (decedent's sister) provided five .38 caliber rounds that were obtained from the Foster residence in Hope, AK.

VII) Approximately one week after Foster's death, Deborah Gorham located a copy of his life insurance policy in the middle drawer of his desk.

VI) FORENSIC EXAMINATIONS

A. The note.

1. one latent palm print of value was developed, and subsequently positively compared to the known prints of Bernie Nussbaum.
2. the handwriting was positively compared to the known writing of Vincent W. Foster, Jr. by the U.S. Capitol Police and the FBI.
3. one unidentified blue wool fiber.
4. no indented writing.
5. insufficient DNA for exam.

B. The vehicle.
1. four latent prints of value (as identified by the FBI Lab).
2. two latent prints of value from a business card which was part of the miscellaneous papers removed from the car.
a. one of the prints was positively compared to the known prints of Simonello (USPP).
3. one latent fingerprint on a white envelope.
4. four latent fingerprints from a pink envelope.
5. one latent palm print from a greeting card.

C. Revolver.
1. no latent prints on outside.
a. one partial latent fingerprint on underside of grip (unable to compare with decedent' known prints).
2. no blood. *-USPP latent lifts
3. decedent's DNA on muzzle.
4. no alteration of serial number.

D. White, long-sleeved shirt.
1. positive reaction for gunpowder gunshot residue (ATF and FBI).
2. ball shaped gunpowder
3. decedent's blood.
a. the only stains on the shirt are blood and sodium rhodizonate.
4. no semen.
5. no hairs dissimilar to the decedent/suitable for comparison.
6. unidentified fibers (3).
7. no coherent soil.
8. mica particles.

E. Fired cartridge case.
1. fired from the revolver.
2. several pieces of ball smokeless powder.
3. no latent prints.

F. Unfired cartridge.
1. similar to fired cartridge in caliber, manufacturer, and headstamps.
2. contained ball smokeless powder.
3. no latent prints.

G. Eyeglasses.
1. one piece of ball smokeless powder.
2. no blood. (USPP latent lifts).
3. insufficient DNA for exam.
4. no latent prints.

H. Paper that decedent's clothes were set out on to dry at USPP.
1. ball shaped gunpowder.
2. one dissimilar gunpowder particle (perforated disk shaped, from a fired cartridge)

3. no hairs dissimilar to decedent's/suitable for comparison.
4. unidentified fibers (approx. 20).
5. no coherent soil.
6. mica particles.

I. Known blood of the decedent.
1. Trace amounts of trazodone, diazapam/nordiazapam.

J. Known hair of the decedent.
1. No drugs.

K. T-shirt.
1. ball shaped gunpowder
2. decedent's blood.
3. no semen.
4. unidentified head hairs.
5. unidentified fibers (2).
6. no coherent soil.
7. mica particles.

L. Socks and shoes.
1. one dissimilar gunpowder particle (flattened ball shaped from an unfired cartridge).
2. blood of unknown origin on one shoe.
3. no blood on the socks and the other shoe.
4. unidentified head hairs.
5. unidentified fibers (approx. 17 short fibers).
6. no coherent soil.
7. mica particles.

M. Known tissue samples from decedent's soft palate.
1. no unconsumed gunpowder particles- no ball shaped gunpowder.

N. Belt and pants
1. human blood, too limited to identify, on belt.
2. unconfirmed blood on pants.
3. no semen on pants.
4. unidentified head hairs.
5. unidentified fibers (numerous small/short fibers- all on one microscope slide).
6. no coherent soil.
7. no gunpowder residues (ATF & FBI).
7. mica particles.

O. Shorts.
1. unconfirmed human blood.
2. semen (DNA matched to decedent).
3. no hairs dissimilar to decedent's/suitable for comparison.
4. unidentified fiber (1).
5. no coherent soil.
6. mica particles.

P. Jacket.
1. no blood.
2. no semen.
3. no hairs dissimilar to decedent/suitable for comparison.
4. unidentified fibers (8 total from jacket, tie, handkerchief scrapings).
5. no coherent soil.
6. no mica.

Q. Handkerchief.
1. unconfirmed blood.
2. no semen.
3. unidentified fibers (8 total from jacket, tie, handkerchief scrapings).

R. Tie.
1. no blood.
2. no semen.
3. no hairs dissimilar to decedent/suitable for comparison.
4. unidentified fibers (8 total from jacket, tie, handkerchief scrapings).
5. no coherent soil.
6. no mica.

S. Brown wrapping paper, white filter paper, and white wrapping paper from around revolver.
1. no blood.
2. no DNA exam conducted (decedent's DNA on muzzle of revolver).

T. Miscellaneous papers from decedent's car.
1. unidentified DNA on an envelope (flap and stamp).
2. insufficient DNA for exam on other paper items.
3. indented writing ("VU Parking Ticket") on Ty Tippet business card. No indented writing on any other items.

U. Miller Lite beer can.
1. insufficient DNA for exam.

V. Sierra Nevada beer bottle.
1. insufficient DNA for exam.

W. .38 caliber ammunition provided by Sharon Bowman.
1. four rounds are of the same manufacture (Remington) as the rounds found in the revolver.
a. two of these rounds are lead round nosed bullets; the same as the unfired round in the revolver, but manufactured at a different time.
2. one bullet was a lead round nosed cartridge, but made by a different manufacturer.
3. all of these rounds were capable of being fired from the revolver.

May 3, 1995
2:50 pm

From: H. Ewing

To: B. Kavanaugh

re: "Safe House"

1. I was advised on the afternoon of May 2 by .... that the alleged "safe house" was located in Merrywood on the Potomac, a development located 100-200 yards from the back entrance to Fort Marcy Park.

The house was in the name of FNU Wallace, an attorney close to Bill Clinton. Or, the house was jointly in Wallace's and Foster's names.

The caller told me he did not know how good this information was, but wanted to pass it on.

2. I asked the caller where it was physically in relation to Fort Marcy. I told him there was a subdivision west of the Park. He simply repeated that it was 100-200 yards from the back entrance.

I got the impression that the caller was not familiar with the layout of the Park or the surrounding area.

3. The caller called me back at 8:33 am on Wed., May 3, leaving a voice mail: I have some more specifics on the safe house. I called this person back at 12:02 pm and left my name and number.

4. At 2:45 pm this person advised:

The house is on Dogwood Street. It leads to a deadend in a cul-de-sac. It is in Fairfax County.

On the left in the back of the cul-de-sac is a big white two story house. It abuts Fort Marcy Park. This development is about 300 yards from the park.

There is a Larry Wallace, who is a big shot attorney.

Again, this information may not be accurate.

HICKMAN EWING, JR.
ATTORNEY AT LAW
2124 S. GERMANTOWN RD.
GERMANTOWN, TN 38138

Phone: 901-755-2597

Facsimile: 901-755-7609

FACSIMILE TRANSMISSION COVER SHEET

TO: Brett Kavanaugh

OIC - Washington, D.C.

DATE: 5-12-95

FAX#: 202-514-8802

FROM: Hickman Ewing

FAX #: 901-755-7609

RE:

Total number of pages transmitted (including this page): 4

Message:

THE DEATH OF VINCENT FOSTER. WHAT REALLY HAPPENED?

--Jeremiah Films

This video was produced by the same people who produced "The Clinton Chronicles." It begins with a statement to the effect, "The following information is documented and true." Some of the highlights of this video are as follows:

INTRODUCTION

The Citizens for Honest Government presents: "The Death of Vince Foster. What really happened?"

I. PART ONE - THE INCONSISTENCIES

1 - very little blood at scene

2 - Foster's head assumes four different positions after death

3 - no skull fragments found at the scene

4 - gun found in Foster's hand

5 - gun found in wrong hand

6 - Foster's fingerprints not on gun

7 - powder residue suggests Foster did not fire gun

8 - powder on Foster's clothing did not match gun

9 - gun not positively identified as Foster's

10 - fatal bullet never located

11 - no gunshot heard

12 - no dust found on Foster's shoes

Six pieces of evidence which indicate it is likely Foster did not die in the park.

1. Very little blood
2. Four different head positions
3. No skull fragments
4. No bullet
5. No gunshot reported
6. No dust on shoes

Three pieces of evidence which indicate it is more than likely Foster did not fire gun himself.

1. Gun still in hand
2. Gun in wrong hand
3. Untraceable weapon used

II. PART II - THE COVER-UPS

A.

1. Falsified position of the body - a second crime scene created that night

2. White House demanded key evidence, and park police gave it to them. This included papers, etc., given back.

B. Was Foster suicidal?

Initially - "Absolutely not." The secretary said there was nothing unusual. Bill Clinton said there was nothing unusual.

But the Fiske report said that he was depressed, he organized his desk, he paid bills, he was apparently stiff that morning, and he was apparently distracted.

Everyone fell in line that he was depressed.

Hillary Clinton said on April 22, 1994, "No one had a clue. Neither did the people who spent the weekend with him."

Day of death - no suicide indications

1. Drove children to work
2. No final words
3. No final preparations

4. Arrived on time
5. Worked conscientiously
6. Set up future appointments
7. Ate lunch
8. Read the newspaper
9. Checked out a pager
10. Said he would return later
11. Wrote no suicide note

Dr. Beyer gave very inconsistent statements.

Bill Clinton gave conflicting versions of Foster's state of mind.

III. PART III - THE RAID ON FOSTER'S OFFICE

Ending quote by Webb Hubbell, July 20, 1993: "Don't believe a word you hear; it was not a suicide."

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates

FROM: Brett Kavanaugh

CC: Ed Lueckenhoff
Dana Gillis
Russ Bransford

RE: Foster Documents/Office/Note Investigation

DATE: June 15, 1995

The following is a tentative schedule for the Foster documents investigation, including for decisions on possible indictments. This schedule assumes no significant new information is developed in the next three months.

July 7, 1995

-- completion of all grand jury appearances and major interviews.

July 17-28, 1995

-- Senate Hearings (tentative dates).

August 1995

-- attorney and agent evaluation of evidence and of Senate hearings.
-- follow-up interviews if necessary.
-- preparation of internal report/memorandum regarding the investigation and possible indictments.

September 6, 1995

-- circulation to all OIC attorneys of internal report/memorandum, including recommendations regarding possible indictments.

September 7-15, 1995

-- indictment decisions.

[Note: I anticipate that the Foster death investigation will conclude later than the Foster documents investigation, in large part because we still have various ideas and theories to pursue in the Foster death investigation.]

MEMORANDUM

TO: Judge Starr

CC: Mark Tuohey
Hickman Ewing
John Bates
Steve Kubiatowski

FROM: Brett Kavanaugh

RE: DOJ OPR Report on Travel Office

DATE: May 31, 1995

FOSTER

URGENT

Chairman Clinger plans to hold hearings on the Travel Office affair as soon as practicable. He has requested from the Department of Justice the Department's OPR Report on the Travel Office. The Department (Peggy Irving) has contacted me to determine whether we object to release of the OPR report. **THE DEPARTMENT NEEDS AN ANSWER IMMEDIATELY.**

I recommend that we not object to release of the Travel Office report. I see no danger that release of this report would hinder or impede our investigation of Mr. Foster's state of mind. Indeed, I think it possible that congressional inquiry may further illuminate the involvement of Mr. Foster and others, including the First Lady, in the Travel Office affair.

Mr. Fiske had objected to release of the OPR report while his investigation of the Foster death was proceeding. I do not believe that should alter our decision, however. Much of the information regarding Mr. Foster in the OPR Travel Office report is now public by means of the Fiske report and other news articles. Therefore, we are not in an identical situation to Mr. Fiske with respect to the OPR report. In addition, even were that not the case, I would still recommend that we adopt a position different from the one adopted by Mr. Fiske. It seems to me that we need to be cautious in dealing with Congress, and resist Congress only when it "really matters." This seems an especially tangential matter over which to incur the wrath of Congress. If we object to congressional inquiry into any matter in which Mr. Foster was involved, we would object to inquiry into the Travel Office, WACO, gays in the military, etc. In my opinion, that is not a posture that we should adopt.

RECOMMENDATION: I call Peggy Irving and tell her that we do not object to release of the OPR report on the Travel Office.

Please give me an answer today if possible.

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing

FROM: Brett Kavanaugh

RE: Foster Issues

DATE: May 8, 1995

This seems an appropriate time for a few brief thoughts on the Foster investigations.

1. The Foster death investigation can be divided into two related but distinct issues: (1) state of mind; and (2) for lack of a better term, physical evidence (which includes death scene observations, blood, forensic evidence, ballistics, etc.). In my opinion, we have made progress from the FBI/Fiske investigation on Foster's state of mind -- although we have not entirely solved that riddle. I do not believe, however, that we have yet made significant advances on the physical evidence, in large part because the FBI and Mr. Fiske did a fairly thorough job on that aspect of the investigation and seemed to answer the questions that could be answered.

To the extent, therefore, that we write a public report on the physical evidence, such a report is likely to be largely repetitive of the Fiske report. And I have serious doubts about the wisdom of or necessity for a public report on the Foster physical evidence if, as now would be the case, that report does little more than rehash the Fiske report. (If we solve the gun issue, that would be a significant breakthrough, but we have yet to do so.)

In any event, this is something to keep in mind as we continue the Foster death investigation.

2. For the next 6-8 weeks, Chuck Regini and Jeff Greene will continue the investigation/review of the Foster physical evidence and will attempt to complete the factfinding on it. To assist them, I recommend that we retain an independent pathologist; despite all of his qualifications, Dr. Hirsch unfortunately cannot be viewed as truly independent because of his work on the Fiske investigation.

3. During the next 6-8 weeks, I will attempt to complete the factfinding on the Foster office/documents investigation and the Foster state of mind investigation. One major task for me during this period will be to review at the White House the documents from Mr. Foster's office. In addition, I have a number of additional grand jury witnesses on the Foster documents

investigation.

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates

FROM: Brett Kavanaugh

DATE: July 11, 1995

RE: Foster Documents Investigation -- Grand Jury Schedule

As of this date, we have interviewed 42 witnesses in the grand jury on the Foster documents investigation. We thus have completed the grand jury phase of this investigation -- with two exceptions. First, we may interview [redacted] in the grand jury at some point depending on his status in Little Rock investigations. Second, we will have a few questions to ask [redacted] when he appears in the grand jury on White House-Treasury contacts issues.

Absent significant new developments, I plan to circulate a prosecution memorandum by Monday, August 21, if at all possible.

Attached is a list of the grand jury witnesses.

Grand Jury Update -- Foster Documents/Office/Note Investigation
(as of July 11, 1995)

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure

Subjects

	Starr GJ	Fiske GJ
White House (18)		
[redacted]	X	
	(will not be subpoenaed)	
	(will not be subpoenaed)	
	X	
	X	
	(awaiting Bennett's approval)	
	X	X
	X	
	X	
	(will not be subpoenaed)	
	X	
	X	X
	X	
	X	
	(to be scheduled on WH/DOT)	
	X	X
	X	
	X	X
Department of Justice (1)		
[redacted]	X	

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure

Important Witnesses

	Starr GJ	Fiske GJ
White House (11)	X	
	X	
	X	
	X	
	X	
	X	
	X	
	X	
	X	
	X	
	X	
Department of Justice (4)	X	
	X	
	X	
	X	
Park Police (3)	X	
	X	
	X	
FBI (2)	X	
	X	
Secret Service (5)	X	
	X	
	X	
	X	
	X	
Other (4)	X	
	X	
	X	
	(will not be subpoenaed)	

WITHDRAWAL NOTICE

RG: 449 Independent Counsels

Starr/Ray FRC box 2293

NND PROJECT NUMBER: 37918 FOIA CASE NUMBER: 25720

WITHDRAWAL DATE: **03/18/2010**

BOX: 00019 FOLDER: 0 TAB: 5 DOC ID: 31313570

COPIES: 1 PAGES: 8

ACCESS RESTRICTED

The item identified below has been withdrawn from this file:

FOLDER TITLE: Loose papers in Ewing FRC box 2293 #6

DOCUMENT DATE: 07/20/1995 DOCUMENT TYPE: Memorandum

FROM: Kavanaugh

TO: Ewing

SUBJECT: "Draft Foster-related questions for interview of First Lady...""

This document has been withdrawn for the following reason(s):

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand J

WITHDRAWAL NOTICE

WITHDRAWAL NOTICE

RG: 449 Independent Counsels

Starr/Ray FRC box 2293

NND PROJECT NUMBER: 37918 FOIA CASE NUMBER: 25720

WITHDRAWAL DATE: **03/18/2010**

BOX: 00019 FOLDER: 0 TAB: 4 DOC ID: 31313569

COPIES: 1 PAGES: 7

ACCESS RESTRICTED

The item identified below has been withdrawn from this file:

FOLDER TITLE: Loose papers in Ewing FRC box 2293 #6

DOCUMENT DATE: 07/20/1995 DOCUMENT TYPE: Memorandum

FROM: Kavanaugh

TO: Ewing

SUBJECT: "Slight variations from HRC"

This document has been withdrawn for the following reason(s):

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure, Grand J

WITHDRAWAL NOTICE

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hickman Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett Kavanaugh

Number of Pages: 4 (including this cover sheet)

Message: As requested . . .

CONFIDENTIALITY NOTE

c:\faxform rdb

TO: BRETT KAVANAUGH

Revised 4/14/95

FROM: SA FOIA(b)7 - (C)

SUBJECT: DISCREPANCY LIST

The following list is offered as a comprehensive and itemized outline of all of the noted discrepancies, inconsistencies, and problems that have been identified in the Vincent W. Foster death investigation to date. The outline is broken down into the following areas: U.S. Park Police, Emergency Medical Technicians (EMTs), the White House, Northern Virginia Medical Examiner, Miscellaneous, and Forensic Examinations.

I. U.S. Park Police

A. No gunshot residue samples of the decedent's hands.

B. Lack of complete documentation of the gunshot residues on the left hand.

C. Poorly diagrammed death scene; lack of measurements.

D. No photo log; no documentation regarding who took what photographs, and the total number of photos.

E. Death scene 35mm photos did not develop.

F. No documentation regarding the initial search of the decedent's vehicle at the death scene- no inventory.

G. Photo of an unidentified briefcase next to a U.S.P.P. vehicle.

H. Decedent's pager returned too soon; no records obtained regarding previous pages.

I. Suicide weapon processed with dust prior to other laboratory exams.

J. Inconsistent statements regarding moving and searching the body. (Rolla, Braun, Simonello, Hodakaviec)

K. Inconsistent and poorly documented autopsy.

1. Morrissette's report.
2. No gunshot residue samples from hands.
3. No fingernail clippings/scrapings.
4. No major case prints of decedent (palms, sides and tops of fingers).
5. No photo of left hand.
6. Possible contamination of evidence subsequent to autopsy at M.E. Office.
7. Inconsistent statements regarding what was done to the body prior to autopsy.
8. No description of body and clothing prior to autopsy.

1-Starr
1 Tuohey
1- Kavanaugh
1- Gillis
1-29D-LR-35063

L. Possible contamination of evidence at U.S. Park Police facility.

M. Poor interview and documentation of witnesses at death scene (Doody and Feist).

N. Photo of an unidentified white male wearing plainclothes at death scene.

O. Inconsistent statements regarding vehicle doors being locked/unlocked. (Braun, Rolla, Hodakievic, Simonello, Gavin)

P. All photographs not produced pursuant to initial subpoena.

Q. Inadequate and incomplete metal detector search by the USPP. (Operators had no prior experience or training)

II. Inconsistent statements and observations of Fairfax County Fire and Rescue personnel.

A. Wound on neck (Arthur: .45 cal. bullet hole.)

B. Gun under thigh.

C. Wound on upper right front of skull (Gonzales)>

D. Briefcase in vehicle.

E. Unidentified person in woods (Hall).

F. Vehicle doors locked.

G Death scene photos do not accurately depict scene.

H. Two unidentified white males walking from death scene.

I. Color of gun was silver.

J. Type of gun was semiautomatic pistol (Arthur).

K. Statements of initial paramedics at scene regarding their actions are inconsistent with Fairfax County paramedic protocols.

L. Report coded as a homicide (Ashford).

III. Medical Examiner

A. X-rays

1. Autopsy report indicates x-rays were taken.

2. Morrissette's report indicates Beyer told him x-rays were taken.

B. All individuals present at autopsy not indicated on autopsy report.

C. No photographs of decedent's left hand.

D. Inconsistent statements regarding removal of decedent's tongue and palate. (see I.7)

E. Inconsistent "on-scene" times reported for Dr. Haut; 7:40 pm and 7:15.

F. Stomach contents; no definitive digestion time, or positive identification.

IV. White House

A. Foster's office unsecured until 7/21/93, approximately 10:10 a.m.

B. Confidential trash bag removed and replaced.

C. Nussbaum enters office; removes small photo.

D. Pond rearranges papers on Foster's coffee table.

E. Exclusive initial review of documents by Nussbaum.

F.Torn note found one week later in briefcase previously searched by Nussbaum.

G. Note not released to investigators until the following week; a day after it was discovered.

V. Miscellaneous
A. CW's inconsistencies.
1. positioning of decedent's hands.
2. no gun.
3. winecoolers and briefcase in vehicle.
4. trampled area around death scene.
5. does not see white car occupied.
B. Inconsistencies between Doody and Feist's statements.
C. No initial investigation of the park's "second entrance".
D. No one heard a gunshot.
E. The gun exemplifies a "drop gun".
F. No matching ammo at the decedent's residence.
G. The decedent's grip on the gun was not the simplest nor the easiest to shoot himself in the mouth.
H. The decedent never previously spoke of suicide.
I. The decedent had no particular obsession, "dire predicament", or one thing that would have put him over the edge.
J. The decedent had dealt with stress before.
K. The suicide weapon has never been positively identified as belonging to the decedent.
L. Lisa Foster's initial spontaneous question "was the gun in his mouth?".
M. Five unaccounted for hours between the time the decedent left work and was discovered dead.
N. Lack of blood at death scene.
O. No bullet.
P. No cadaveric spasm causing decedent to clench gun.
Q. The gun did not fly out of the decedent's hand.
R. No chipped teeth noted by M.E.
S. No flashburns inside mouth noted by M.E.
T. The mortician lost the original embalming report and diagram.
U. The decedent's glasses were discovered 13' downslope from his body.
V. Body neatly laid out; "as if it was in a coffin".

VI. Forensic Examinations
A. Unidentified latent print on note.
B. Unidentified latent print inside grip of suicide weapon.
C. Unidentified blonde head hairs.
D. Unidentified carpet fibers.
E. Unidentified stain on shirt. (shirt being resubmitted to lab)
F. Unidentified gunpowder in scrapings from decedent's shoes and socks, and the paper that they were dried on.
G. The decedent's head was moved.
H. No blood on suicide weapon.
I. No soil on shoes. (mica flakes)
J. Large semen stain in the decedent's underwear.
K. Blood flowed uphill (video).
L. Excavation of site disputed.

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: 5/19/95

TO: Hick

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Chuck

Number of Pages: 2 (including this cover sheet)

Message: _____

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates
Dana Gillis
Russ Bransford
FOIA(b)7 - (C)

FROM: Brett Kavanaugh

CC: Any St. Eve

RE: Foster Grand Jury Schedule for Week of May 22, 1995

DATE: May 19, 1995

The following individuals will appear before the grand jury in Washington during the week of May 22:

[redacted]

In addition, Dana, Russ, and I will begin the review of documents from Vincent Foster's office on Wednesday, May 24, at the White House Old Executive Office Building. I cannot provide a reliable estimate of how many hours, days, or even weeks the review will take.

FOIA(b)3 - Rule 6(e), Federal Rules of Criminal Procedure

FOIA(b)7 - (C)

5/19/95

From: [redacted]

To: Mark
Hick
Brett
Dana

re: Homicide Consultants

Due to the continued concerns and questions regarding whether we have done everything possible in the Foster death investigation, specifically with regards to the physical evidence, a possible recommendation would be to obtain the services of a panel of "outside" homicide experts/consultants. The consultants would primarily be used to review all of the interviews and physical evidence to identify any potential investigative leads or forensic examinations that we may have overlooked. Additionally, the consultants could be asked to formulate a conclusion as to whether the evidence overwhelmingly indicates suicide, and whether we have been able to conclusively rule out homicide. Also, if it is still an issue, the consultants could address the findings and conclusions in the Western Journalism Center report of 4/27/95.

I would recommend a panel of at least three consultants for the review. The following is a list of experienced, well-respected homicide consultants:

Henry Lee
Vernon Geberth
Ronald Holmes
Dr. James Fox, Northeatern University, Criminology Dept.
Robert Hazelwood
Vincent DiMaio

I am familiar with all of the above individuals from their various articles and books about death investigations, and forensic techniques in death investigations. Their teachings and theories are the most modern, and consistent with "real-life" death investigations, that I am familiar with. I can obtain additional names from Behavioral Sciences, if necessary.

[redacted]

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates
Dana Gillis
Russ Bransford
[redacted]

FROM: Brett Kavanaugh

CC: Any St. Eve

RE: Foster Grand Jury Schedule for Week of May 22, 1995

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TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Nick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett Kavanaugh

Number of Pages: 15 (including this cover sheet)

Message: Here are some of the VWF Travel Office notes + papers, incl. all references to HRC

1ST discussion - attempt to reconstruct
go to see re HC, enterprise liab. viability possibly
Q - when will analysis be finished (HC)

~~To the effect what's going on w the IVL off thing~~
~~Are you on top of it~~

DK whether brought up segment or wrongdoing
or both | or she brought up segment and I brought up wrongdoing | or she brought up guid topics and I brought up ~~2 segments~~ wrongdoing | or just wrongdoing

What's going on? Are you on top of it?
Trying to determine if there is actual wrongdoing

Assigned to WK

~~guid impatience (wrong word)~~

guid frustration - I responded just as heard about it yesterday
(prob made me more at ease w auditors and frustrated w auditors

Q did HT say anything?

2d conv

H Care?
Whats going on
will see outside auditors - let's see what's there
guid frustration w segment diff
I understand - understaffed
(thought more of a combination of segment concern, HC resolution problems
guid frustration, prob aggravated by
grief

2 conversations w/ HRC on Thurs

1st after late lunch
go to see her re med malpractice issue
- could be on viability of enterprise liability
(was conducting analysis of proposed reforms)

Q - how tvl office come up?
Eg, do you know anything re, any problems w tvl office
or ever heard something about "

told her had some (sgt?) info, assigned to WK

Q - anyone else present
don't recall
When SS in hall & door open I go in
sometimes other persons present, sometimes not

2d conv

also re malpractice study
(possibly re alternative study) on enterprise liability - dc lobbying w/ ...

mentioned auditor plan

Q - personal vs telephone?
Q - when? where?
who called whom?

Friday

in discussion w/ DW mid to late afternoon
pass on Ellen / McL meeting
+ discussion w/ Ellen in afternoon that DW would decide how to respond to results of mvn and when
- believes DW had brief update on audit from PT, which is serious
suggest, in light of HRC inquiry previous day, DW might want to update her on audit results

(try to conf. call but lose him)

[by this time what is status of mvn report?
by 3 ... discrepancy]

CKS

F 000111

In discussion w/ MM, PT FDW on Thurs afternoon

&/or w/ P.T, DW Thurs nite

&/or w/ " " Fri

or PT Sat am

could have discussed said observation that HRC

generally appeared less than satisfied with

timeliness of decision-making, i.e closure

Never discussed w/ anyone anything proposed HT

would directly or indirectly benefit, nor was a possibility

in my mind given his disclaimed WOD explanation

What are theories of complaint?

1. Wrongful termination* —
   How can there be a right to term. w/o cause?
   Maybe terminating w/o cause while asserting it is for cause (cf. talking pts) — believed Dale was terminated on management basis; incompatible + downsize office (memo to track any down to 3)

2. Slander, particularly by Eller
   (Contrary to advice, + no party)

3. Attempting to benefit friends?
   a) H.T.? — contrary to his rep.
   b) CC? — not know she a cousin, no reason to assume she would get any increase in pay

* No choice but to terminate Dale
  can't continue to let him handle money, run office given findings

4. Misuse of FBI?
   they deny
   HR no role

363-3020

Rowland Pl

at 34th - becomes Reno @ Porter

Rowland only to Rt

2d on left

WH packet

3321

Coordination —

BWN

? respond to future

defend management decision

thereby defend DOE role whatever is

was in fact or might have been

misperceived to be

A) ~~Harry~~ Darnell memo —

people's

Bob Bennett

John Culver, Hunt f

Bill Taylor, Zuckerman (Cranston)

Q-assignment by HT

Offense strategy Hill GAO

Avoid forcing DOJ

BWN Guidance

Privileged
in Prep for Litigation

1. Authority to hire
   independent contractor
   procurement
   SGE

2. Reporting

3. Internal ethics
   - collateral decisions, eg PIC resignation timing

4. Privileges
   A. Pre release; waiver
   B. Post. release

5. Communications by joint defense
   - application to Bernie seeking for WH

6. Witnesses by virtue of participation in mgment review

* 7 Personnel decisions

8 Attendance at WH interviews by FBI

9 Accumulation of add'l evidence
   eg [redacted] HT tapes
   News tvl office
   news file

10 Offense
   Hill strategy
   '88 invn
   request to Archives

11 Communications w/ top 2

12 Orrton FOIA # none Id: 70105362 Page 8
   vs whistleblower [redacted]

13. Does everyone who edited report become a witness
   - existence of drafts

14. Difficulty of operating
   prep w/ [redacted] 3-4 ws in office

Privileged
re anticipated litigation

6/30/3

Podesta mtg in my office:

Watkins says he never talked to HRC before Friday evening, had received prior info about her interest from me

MMc is vague on memory when he talked to her but (DW or MMc?) believes she first mentioned it to MM shortly before the mtg w/ MM, DW & VF on Thurs afternoon.

I told John that after a late lunch on Thurs I spoke w/ HRC - was primarily working on medical malpractice project at time and could have been in discussion re same. She was aware of some assertions of impropriety in the office and wanted to know what was being done about it. - I related I had given to Kennedy or our security officer

I related I had a later discussion on Thurs (evening?) also may have included health care [illegible] advised her [illegible] auditors were being used and probably told her they would

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Bret Kavanaugh

Number of Pages: 8 (including this cover sheet)

Message: FYI : Page 3 certainly gives me some pause.

CONFIDENTIALITY NOTE

c:\faxform rdb

OIC-302 (Rev. 8-19-94)

OFFICE OF THE INDEPENDENT COUNSEL

Date of transcription 6/29/95

KYLE ERIC CHADWICK was interviewed in a conference room in the offices of the Office of the Independent Counsel (OIC), 1001 Pennsylvania Avenue, N.W., Suite 480 North, Washington, D.C. (WDC). After being advised of the official identity of the interviewing agent and the nature of the interview, CHADWICK provided the following information:

In late April or early May of 1993, while CHADWICK was a first year law student at Stanford Law School in California, he heard about an opportunity to serve as an unpaid intern in the White House Counsel's Office (WHCO) in WDC. CHADWICK knew that Associate White House Counsel CHERYL MILLS had attended Stanford Law School, and he faxed a copy of his resume to her at the White House. Because CHADWICK could not afford to travel to WDC to be interviewed for an internship position, he was interviewed over the telephone by MILLS and Associate White House Counsel BETH NOLAN. There was a two to three week interlude between CHADWICK's interview and his receipt of an offer of an internship.

CHADWICK arrived in WDC in early June, possibly during the first week of June, to begin his internship at the White House. CHADWICK does not recall the exact date when he began his internship. The summer was divided into two internship sessions, and there were five to six interns working in the WHCO in each of the two sessions. MILLS was generally the supervisor over the WHCO interns. While the interns were designated as working for specific people on the WHCO staff, the interns rotated roles and worked for a number of people during their internships. The interns were given fairly discrete legal questions to work on. They would typically be asked to write memoranda answering specific questions posed by members of the WHCO staff. Some of the interns were also given the opportunity to research policy decisions.

Some of CHADWICK's work involved photocopying of statutes which were relevant to matters under consideration by WHCO staff. The assignments given to interns were generally

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Investigation on 6/29/95 at Washington, D.C. File # 29D-OIC-LR-35063

by SA RUSSELL T. BRANSFORD RTB:rtb Date dictated 6/29/95

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Continuation of OIC-302 of KYLE ERIC CHADWICK, On 6/29/95, Page 2

channeled through MILLS to ensure that the workloads assigned to each of the interns were fairly equal. Each of the interns was given a telephone and a desk at which to work. CHADWICK's desk was in an area resembling a reception area in the Old Executive Office Building (OEOB). The area in which his desk was located was next door to the suite where NOLAN and Associate White House Counsel WILLIAM H. KENNEDY III had their offices. CHADWICK did not perform any vetting work for administration nominees.

CHADWICK served at the White House for eight weeks. His first four weeks were spent working for MILLS, the next two were spent working for NOLAN, and CHADWICK worked his last two weeks for Deputy White House Counsel VINCENT W. FOSTER, Jr. FOSTER died during CHADWICK's second week working for FOSTER. CHADWICK's last day of work at the White House was the Friday following FOSTER's death, i.e., July 23, 1993.

When CHADWICK first arrived at the White House, there was an orientation meeting for the WHCO interns conducted by FOSTER and White House Counsel BERNARD W. NUSSBAUM. There was a marked contrast in the personalities of NUSSBAUM and FOSTER. NUSSBAUM was talkative and gestured quite a bit as he spoke. FOSTER was very tightly controlled and had the appearance of a highly successful president of a small town bank. FOSTER also had an air of real propriety, and he told the interns that most of the matters on which he worked at the WHCO were of such a nature that he could not even discuss them with his wife.

CHADWICK only spoke with FOSTER in person once during the two weeks of CHADWICK's assignment to FOSTER. This conversation occurred early in CHADWICK's first week working for FOSTER, and it occurred in FOSTER's office in the West Wing of the White House. CHADWICK had tried to telephone FOSTER on CHADWICK's first day working for FOSTER to obtain his work assignments, but CHADWICK was unable to reach FOSTER. CHADWICK believes he may have then met with FOSTER on Tuesday of that week (July 13, 1993). FOSTER told CHADWICK that he had some health care-related work that he wanted CHADWICK to perform. This work involved finding sources of information and locating and making copies of state statutes which were relevant to health care issues. FOSTER held out a few newspaper clippings which related to health care as an example of what he had in mind. FOSTER was eating lunch in his office during this conversation, and CHADWICK only spent approximately five minutes or a little more with

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Continuation of OIC-302 of KYLE ERIC CHADWICK, On 6/29/95, Page 3

FOSTER. FOSTER seemed intent on CHADWICK comprehending what it was that FOSTER wanted CHADWICK to do. This was the only occasion when CHADWICK spoke with FOSTER in FOSTER's office. There were other occasions when CHADWICK might encounter FOSTER in a hallway, but on such occasions CHADWICK and FOSTER would just exchange greetings.

FOSTER's physical appearance during this conversation seemed about the same as CHADWICK recalled it having been during the orientation meeting. CHADWICK does not recall observing any changes in FOSTER's personality or physical appearance during the time that CHADWICK knew FOSTER.

CHADWICK usually had a difficult time reaching FOSTER by telephone because FOSTER was so busy. When CHADWICK completed an assignment for FOSTER, CHADWICK would usually send the completed product to FOSTER via inter-office mail or CHADWICK would place the work product in an envelope and leave it with a guard at the West Wing.

On the morning of July 20, 1993, CHADWICK called FOSTER regarding the project on which CHADWICK was working, which involved the photocopying of statutes. CHADWICK was unsuccessful in reaching FOSTER so he left a message asking FOSTER to call him. CHADWICK recalls receiving a telephone message slip which indicated that FOSTER had returned CHADWICK's call at approximately 12:40 p.m., at a time when CHADWICK must have been away from his desk. CHADWICK called FOSTER back and was put through to FOSTER. FOSTER said that he wanted a copy of the complete statute which CHADWICK had located rather than just the portion FOSTER had earlier requested. FOSTER commented in words to the effect that, It seems like a good statute, don't you think? CHADWICK did not know how to respond to this question since he has rarely attempted to characterize a statute. CHADWICK felt at the time that FOSTER seemed "distracted" since FOSTER had asked a question which seemed so out of character for him. FOSTER was usually very businesslike and direct in his conversations with CHADWICK, and FOSTER did not discuss personal matters with CHADWICK or ask for CHADWICK's opinions.

CHADWICK does not recall any other details of this telephone conversation with FOSTER. FOSTER did not say anything else in the conversation which CHADWICK regarded as remarkable or memorable. CHADWICK does not recall FOSTER's voice or speech

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Continuation of OIC-302 of KYLE ERIC CHADWICK, On 6/29/95, Page 4

sounding any different than usual.

The statute about which FOSTER had asked for CHADWICK's opinion was a Florida statute relating to people waiving their right to sue for tort after suffering certain types of injuries. The statute had relevance to both health care issues and to tort reform.

FOSTER also seemed to be distracted on one other occasion when FOSTER asked CHADWICK to obtain a copy of a book written by a Harvard University professor, whom CHADWICK believes to have been PAUL WEILER. The book related to health care issues. When CHADWICK inquired about obtaining a copy of the book for FOSTER, he learned that a copy had already been sent to the WHCO. CHADWICK believes FOSTER forgot that the WHCO was already in receipt of the book.

CHADWICK did not have personal contact with FOSTER at all on July 20, 1993, and he did not observe FOSTER at all on that day. The office space in which CHADWICK was located was on the first floor and south side of the OEOB. Because of the location of CHADWICK's office, CHADWICK would not have been able to observe FOSTER leaving the West Wing of the White House.

Several days after FOSTER's death, CHADWICK went to lunch with MILLS in the White House mess. This lunch meeting was on the day the FOSTER note was released to the media, but the note had not yet been released at the time of the meeting. MILLS did not offer any insights into FOSTER's death other than to say that FOSTER had been under a lot of pressure.

CHADWICK did not travel to Little Rock with other White House staff members, and he did not attend FOSTER's funeral. CHADWICK knows of no information or events which should have warned White House officials that FOSTER might take his own life.

There were two male interns who worked for FOSTER during the early part of the internship period. GEORGE CANNON was one of these males, but CHADWICK is unable to recall the name of the other intern.

(At this point in the interview, CHADWICK was asked about a number of former WHCO interns by name.) CHADWICK furnished the following information:

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JONATHAN KOPP was possibly a full-time employee of the WHCO and may have been attending law school at Georgetown University at night. KOPP was already serving at the WHCO prior to the arrival of the WHCO interns, and he had possibly been there during the entire spring of 1993. KOPP guided the WHCO interns around the White House on their first day there.

MATTHEW FOGELSON would have worked for FOSTER at some point. CHADWICK believes FOGELSON was attending law school at New York University.

URSULA HALL was a female who attended the North Texas School of Law.

DANIEL RAPPORT was a student at Yale University.

DANA HYDE had been a student at Hastings College of Law prior to becoming a WHCO intern. CHADWICK had met HYDE once before when she was working for the presidential campaign of Governor BILL CLINTON. HYDE spoke of possibly transferring to attend law school at either Georgetown University or George Washington University. CHADWICK does not know if she actually transferred.

There was one other intern but CHADWICK is unable to recall the name of this person. CHADWICK believes this intern attended law school at either Vanderbilt University or possibly the University of Arkansas.

On further reflection by CHADWICK, DANA HYDE may have been one of the interns who served in the second eight week internship session during the summer of 1993.

GEORGE CANNON and the unknown male worked for FOSTER the first two weeks of the internship period. It is possible that DANIEL RAPPORT worked for FOSTER during the second two week block of the first summer session. CHADWICK cannot recall who worked for FOSTER the third two week block of the internship period. There was no inherited work which was passed on from, for example, FOSTER's intern in the third block to the intern in the fourth block (CHADWICK). The fact that CHADWICK tried to contact FOSTER on CHADWICK's first day of being assigned to FOSTER reflects that CHADWICK was attempting to get his work assignments.

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Continuation of OIC-302 of KYLE ERIC CHADWICK, On 6/29/95, Page 6

On July 21, 1993, CHADWICK learned of FOSTER's death the preceding night. CHADWICK was living with his brother in Rockville, Maryland at the time. At approximately 8:00 a.m., CHADWICK was getting ready for work and listening to National Public Radio when he heard the hourly summary of the top news stories. The top story mentioned the death of the Deputy White House Counsel. CHADWICK had not received notification of FOSTER's death from anyone at the White House either that morning or the night before.

Once CHADWICK arrived at the White House that morning, there was still never a formal announcement of FOSTER's death. It was as if it was assumed that everyone knew of FOSTER's death. The full-time attorneys on the WHCO staff had a meeting that day in a conference room in the OEOB. CHADWICK does not know if this meeting occurred in the morning or afternoon. The interns and the detailee attorneys from other agencies who were serving on the WHCO staff were not invited to attend this meeting. As the full-time WHCO attorneys left the room following the meeting, they were very quiet and appeared grief-stricken. CHADWICK does not recall specifically who attended this meeting, but he does not recall observing anyone leaving the meeting who was not an attorney or at least a member of the WHCO staff. CHADWICK does not recall CRAIG LIVINGSTONE attending this meeting.

CHADWICK had very little contact with LIVINGSTONE. LIVINGSTONE addressed the interns on their first day at the White House and cautioned them about proper handling of documents. CHADWICK would occasionally see LIVINGSTONE in passing, such as in the halls. CHADWICK has never spoken with LIVINGSTONE about LIVINGSTONE's activities following FOSTER's death.

CHADWICK did not attend the address by President CLINTON to White House employees, and he does not recall being invited to attend it, although he did hear about it after it had occurred.

CHADWICK cannot recall the name of an unpaid woman who worked at a desk immediately outside MILLS's office. This woman spoke about her interest in obtaining full-time work at the White House, but CHADWICK doubts that she would have been hired because she had a poor attitude.

JENNIFER MILLER was an assistant to Associate White

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29D-OIC-LR-35063

Continuation of OIC-302 of KYLE ERIC CHADWICK, On 6/29/95, Page 7

House Counsel RON KLAIN. MILLER had just finished her first year of law school at Stanford. Currently, MILLER may be taking some time off from her law school studies to participate in the CLINTON presidential campaign.

Neither KLAIN nor Associate White House Counsel CLIFF SLOAN had receptionists working for them.

CHADWICK has been unable to locate the written telephone message slip which notified CHADWICK of the return call from FOSTER on July 20, 1993. He had retained the slip for some time but he was unable to find it prior to the instant interview. Without viewing the slip, CHADWICK cannot recall with certainty what time FOSTER returned CHADWICK's call, but it was no more than five minutes either before or after 12:40 p.m. CHADWICK knows of one more place where this message slip may be, and he will advise the interviewing agent if he locates the slip.

CHADWICK has no knowledge or reason to believe that FOSTER's death was anything other than a suicide.

CHADWICK is not currently employed since he is studying to take the bar examination. A background investigation is currently being conducted on CHADWICK because he will be going to work at the United States Department of Justice in the Office of Legal Counsel.

Based on observation and interview, CHADWICK is described as follows:

Name:	KYLE ERIC CHADWICK
Sex:	Male
Race:	White
Date of Birth:	
Place of Birth:	
Social Security Account Number:	
Residence:	
Home Telephone:	

FOIA(b)6
FOIA(b)7 - (C)

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates

CC: Ed Lueckenhoff
Dana Gillis
[redacted] FOIA(b)7 - (C)

FROM: Brett Kavanaugh

RE: Foster Death Investigation

DATE: May 15, 1995

The following are the steps that Mark, Hickman, John, and I discussed today as possibilities for our continuing investigation of the physical evidence (as contrasted to state of mind).

1. Fingerprint on Gun

We are currently attempting to obtain Mr. Foster Sr.'s fingerprints from the military records center. If that proves fruitless, we may attempt to find his fingerprints from the Foster home in Hope. (If the fingerprint on the underside of the grip matched Mr. Foster Sr., that obviously would be a very significant step in our investigation.)

2. Carpet Fibers

We may obtain carpet fibers from various sources and attempt to match them to the fibers found on Foster. The possible sources are (a) his car; (b) the White House; and (c) his house in Georgetown.

3. Search of Park for Bullet

We may search the entire park for the bullet.

4. Stains on Shirt

The FBI lab is currently testing Foster's shirt to determine what if any material other than blood was present on the shirt.

5. Palm Print on Note (more relevant to Foster documents investigation)

We may try to match the palm print on the note to Foster's palm print. To do so, we would need to find a palm print from Foster. That would not be easy, but we can consult the lab and/or experts on the possibilities in this regard.

If we could not obtain a Foster palm print or if the prints did not match, we might obtain palm prints from various other persons in logical order: (1) the Park Police officers who handled the note; (2) Neuwirth, Gorham, Pond, Tripp, and Nussbaum; and (3) Williams, Castleton, and Thomasson.

May 3, 1995
2:50 pm

From: H. Ewing

To: B. Kavanaugh

re: "Safe House"

1. I was advised on the afternoon of May 2 by .... that the alleged "safe house" was located in Merrywood on the Potomac, a development located 100-200 yards from the back entrance to Fort Marcy Park.

The house was in the name of FNU Wallace, an attorney close to Bill Clinton. Or, the house was jointly in Wallace's and Foster's names.

The caller told me he did not know how good this information was, but wanted to pass it on.

2. I asked the caller where it was physically in relation to Fort Marcy. I told him there was a subdivision west of the Park. He simply repeated that it was 100-200 yards from the back entrance.

I got the impression that the caller was not familiar with the layout of the Park or the surrounding area.

3. The caller called me back at 8:33 am on Wed., May 3, leaving a voice mail: I have some more specifics on the safe house. I called this person back at 12:02 pm and left my name and number.

4. At 2:45 pm this person advised:

The house is on Dogwood Street. It leads to a deadend in a cul-de-sac. It is in Fairfax County.

On the left in the back of the cul-de-sac is a big white two story house. It abuts Fort Marcy Park. This development is about 300 yards from the park.

There is a Larry Wallace, who is a big shot attorney.

Again, this information may not be accurate.

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick

Company Name: _____

Fax Number: BK Telephone Number: _____

FROM: _____

Number of Pages: _____ (including this cover sheet)

Message: _____

CONFIDENTIALITY NOTE

Hick:

Just a reminder that we should get the letter out to Miguel if that has not already been done. Thanks.

Brett

Office of the Independent Counsel

Two Financial Centre
10825 Financial Centre Parkway, Suite 134
Little Rock, Arkansas 72211
(501) 221-8700
Fax (501) 221-8707

10-10-95 Tue. 0825 - laptop

Brett K. –

✓ ⊙ Ruddy – 60 minutes; Klinger, Hamilton, Forsthill, Ruddy

✓ ⊙ Pittsburgh

✓ ⊙ Availability – Thu/Fri – FMP

✓ ⊙ Patterson/Perry/Dickey/Tucker – <Clemente/Copeland> Villa
Check TC interview w/ Perry.

<⊙ Edwards> <Gronas – Ewing>

✓ ⊙ Miguel --- I will

9-21-95

4:30pm Brett, KS, JE
LR

⊙ Cannon I - CR "digging at wrong cannon" -
KS - are we searching in response to CR theory? No

⊙ Plant FBI expert... retired CR plant theory -

⊙ Lee - soil testing -
poss. gunpowder in the soil -
skull fragments collected at the time - in debris at scene -
microscopic... not all

⊙ Lee - "gunpowder & skull fragments good as bullet -
found at park..."

⊙ report off "high probability area" -
if go through that area & nthg found... evaluate again...
Graham doesn't want to give up anytime soon.

→ ⊙ Shaheen memo
→ ⊙ Foster notes

HRC perceived as being involved...

⊙ Global presentation -
Shiff - (R-NM) - who not interview Scalise, Ruddy, Pritchard -
- Miguel Rodriguez Thornton (has tried to call MR...)
- direct him to Dash...
I understand the intent to [illegible] but it is to more appropriate for him to comm w/ Prof Dash. - asked LSD to become involved...

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OFFICE OF THE INDEPENDENT COUNSEL

1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D. C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett K.

Number of Pages: 2 (including this cover sheet)

Message:

Ken called and wants a letter like this to be sent from L.R. no later than Monday

October 2, 1995

Miguel Rodriguez
United States Attorney's Office
Sacramento, California
Suite 1550
95814 555 Capitol Mall

Dear Miguel:

I am writing to invite you to provide me or anyone else in this Office with any facts, analyses, theories, or the like that you have concerning the Foster death or any other matter under investigation by this Office. As you know, we have been continuing a thorough investigation of the death for many months now. As we do so, we continue to be interested in any insights you may have.

Please contact me at 501-221-8705. If I do not answer, leave a message on my voice mail or with a secretary, and I will return your call promptly.

I hope all is well at the United States Attorney's Office, and I look forward to hearing from you.

Sincerely yours,

Hickman Ewing, Jr.
Deputy Independent Counsel

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Bill Duffey
Hickman Ewing
John Bates

FROM: Brett Kavanaugh

RE: Foster Investigations

DATE: March 4, 1995

At Friday's meeting in Washington, decisions were made regarding certain aspects of the Foster death investigation. I will summarize those decisions and then list other points for discussion at our next team meeting.

Decisions

1. The Foster state of mind investigation necessarily must be a balance of thoroughness against reasonableness. Striking that balance, Ken concluded that it would be inappropriate at this juncture to issue a subpoena to the White House for "all documents to, from, or referring or relating to Vincent W. Foster, Jr." Such a subpoena remains a future option, however.

2. The goal of the Foster death investigation is to attempt to determine to as high a degree of certainty as is reasonably possible whether Foster's death was a homicide or a suicide. One factor to consider in making that determination is Foster's state of mind prior to his death. A troubled state of mind would be probative of suicide; a healthy state of mind would be probative of homicide. Of course, a particular state of mind is not definitive proof of suicide or homicide, but it nonetheless is a standard factor to weigh in death investigations.

With that in mind, the Travel Office is an important issue. It is well documented that the Travel Office concerned Foster a great deal. The episode seems to have bothered him in two different ways. First, he was angry and upset at the press, the FBI, and the White House for the manner in which they portrayed the events surrounding the firing of the Travel Office employees and the subsequent reprimands of various White House officials. Second, he appears to have been concerned about the possibility of congressional hearings on the Travel Office.

With respect to Foster's concern about potential congressional hearings, it is incumbent upon us to determine the precise nature of his concern about the potential hearings. Foster's

brother-in-law Beryl Anthony has speculated that there might have been facts about the Travel Office that were not publicly known and that Foster did not want to reveal to Congress and the public. For that reason, it is necessary that we carefully examine all of the facts surrounding the firings of the Travel Office employees.

At this point, however, it is important to note that we are not investigating the Travel Office for the purpose of determining whether any individual inside or outside the White House violated any federal criminal law in connection with the firing of Travel Office employees. Of course, if we discover credible evidence of criminal wrongdoing with respect to the Travel Office firings during the course of the Foster investigation, we might initiate such an investigation. If so, we would immediately inform the Public Integrity Section because of their pending case against Billy Dale, which might have to be suspended under 28 U.S.C. § 597. We also would apply for an expansion of jurisdiction.

In light of the above, it would be appropriate at this juncture to issue a subpoena to the White House for (1) all documents to or from Foster referring or relating to the Travel Office; (2) all documents that both were within Foster's office on July 20, 1993, and refer or relate to the Travel Office; and (3) all documents referring or relating both to Vincent W. Foster and to the Travel Office.

For next team meeting

1. (Foster death) Given the above discussion, we should discuss whether it would be appropriate to issue a subpoena to the White House for all documents referring or relating to the Travel Office affair. Alternatively, we perhaps could issue a subpoena for all H. Clinton, Kennedy, Watkins, Thomasson, Livingstone, and McLarty documents referring or relating to the Travel Office.

2. (Foster death) Because Vince Foster apparently consulted Jim Hamilton, Jim Lyons, and Susan Thomases about the Travel Office in the week prior to his death, we should discuss whether to request a waiver of attorney-client privilege from the executor of Foster's estate (John Sloan).

3. (Foster documents and Foster death) We should discuss whether to subpoena the White House for all documents that were within Vince Foster's office, on his computer, within his secretary's office space, on his secretary's computer, or in the Counsel's safe on July 20, 1993. If we do not issue such a subpoena, we implicitly will have accepted the Nussbaum view of privilege and relevance as to Foster's office. If the White House objects to such a subpoena -- as I am sure it will -- we may want to offer a compromise whereby they would collect all such documents and I would review them. But we need to review them all -- regardless of the sensitivity of such documents.

4. (Foster documents and Foster death) We should discuss whether to issue a

subpoena or request to Jim Hamilton and Lisa Foster for all documents that were within Vince Foster's office, on his computer, within his secretary's office space, on his secretary's computer, or in the Counsel's safe on July 20, 1993.

5. (Foster documents) We should discuss whether to subpoena from the White House all e-mail, calendars, diaries, and message logs for the following people for the period July 15-July 30, 1993: Kennedy, Lindsey, McLarty, Burton, Williams, Gergen, Thomasson, Livingstone, Scott, Neuwirth, Sloan, Nussbaum, Watkins, Quinn, Kennedy, Mills, Cerda, Nolan, Gearan, Klain.

6. (Foster death) We should obtain or review Foster's diary and any and all of Foster's calendars. We should also inquire about whether he used e-mail. Some of these documents have previously been reviewed by the FBI, but I would like to examine them. (White House, Lisa Foster, or Hamilton in possession).

7. (Foster death) We should discuss whether to issue subpoenas to Foster's mother, Lisa Foster, Foster's children, Foster's siblings, and Foster's friends for documents that might shed light on Foster's state of mind or their perceptions of Foster's state of mind (e.g., letters from Foster, letters to each other before or after Foster's death, notes, personal diaries, etc.). I would be uneasy issuing such subpoenas, but I would be more uneasy making definitive conclusions about Foster's state of mind without reviewing these relevant documents.

TELECOPY COVER SHEET

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W., Suite 490N
Washington, D.C. 20004
telephone (202) 514-8688 facsimile (202) 514-8802

Date: _____

TO: Hick Ewing and Judge Starr

Company Name: _____

Fax Number: _____ Telephone Number: _____

FROM: Brett Kavanaugh

Number of Pages: 3 (including this cover sheet)

Message: _____

CONFIDENTIALITY NOTE

c:\faxform rdb

FOIA(b)7 - (C)

FOIA(b)7 - (C)
FOIA(b)6

MEMORANDUM

TO: Judge Starr
Mark Tuohey
Hickman Ewing
John Bates
Ed Lueckenhoff
[redacted]

FROM: Brett Kavanaugh

RE: Summary of Foster Meeting on 6-15-95

DATE: June 16, 1995

We discussed the following at our meeting on Thursday, June 15.

1. We will search the park. Ed and [redacted] will coordinate this plan with the FBI lab people and Henry Lee. There is a very high chance that the bullet now is in the same place that it landed on July 20, 1993. That being the case, our attitude should be to do whatever is feasible to find the bullet -- whether that includes searching beyond the park or searching trees. If we find the bullet, that would help to prove place of death, which is an important issue.

2. We will attempt to determine whether a Foster family fingerprint is on the inside of the gun. We may perform a fingerprint search of the Foster home in Hope to obtain prints. In addition, Ed and [redacted] agreed to think and consult FBI fingerprint experts about other ways to obtain prints of Foster's father. I encourage Ed and [redacted] to consult with the very best fingerprint people in the Bureau to resolve this crucial issue. (We have been using an FBI agent named Hupp; the lack of clarity of his fingerprint reports frankly gives me less than full confidence that he is one of the best Bureau fingerprint examiners.)

3. We agreed to have the IRS perform a full financial analysis of Foster. Ed will take the lead in coordinating this with the IRS. [redacted] and I will ensure that we gather all existing financial information about Foster for the IRS.

4. We agreed to track down all of Foster's foreign travel. It should not be difficult to obtain immediate information regarding all of Foster's foreign travel. Ed and [redacted] will coordinate this step.

5. We will investigate an alleged Swiss bank account that was in Foster's name. Ed and [redacted] will consult with Mark in coordinating this investigatory step.

6. [redacted]

FOIA(b)7 - (C)
FOIA(b)6

in an investigation of this sort. At our meeting, however, this was more theory and speculation than a proposed investigatory step. Indeed, no one suggested any concrete steps to pursue in this regard.

[redacted] For obvious reasons, that is a delicate issue, one we should discuss in detail before that interview occurs.

Summary of My Views at this Stage

At this point, I am satisfied that Foster was sufficiently discouraged or depressed to commit suicide. (Of course, that does not establish that he did in fact commit suicide.) I base my conclusion on the fact that Foster was found with a list of three psychiatrists in his wallet, the fact that Foster obtained a prescription on July 19 for an anti-depressant, and the many witness interviews describing his state of mind in the days and weeks preceding his death.

As to exactly what fact or facts were causing Foster to be discouraged or depressed, we have some answers, but there may well be more than we have learned at this point. I would be very interested to hear suggestions from any of you about concrete investigatory steps that we could pursue to discover other possible sources of Foster's discouragement or depression. (A full financial analysis was one such good idea; as noted above, we will pursue that suggestion.)

As to the physical evidence, there are several steps that we and Dr. Lee are currently pursuing -- some of which are discussed above. If we establish (1) that the gun was a Foster gun and (2) that the shot was fired in the park, then I think we can be satisfied beyond a reasonable doubt that Foster committed suicide in Fort Marcy Park. These two issues are therefore crucial to the bottom line, and I think we should devote extraordinary efforts to resolving them.

6-15-95 At WDC

KS, MT, HE, JB, BK
EL, CR

① Henry Lee – CT

② Will bring in another pathologist expert

- Memorial Day – MTG
- Evid. to him.

② Scene – any reasonable practicable ave re: bullet?
- Aberdeen – military – projected trajectory ...

② Gun
- partial print on inside of gun
- STL records – no prints of VF, Sr.
- prints at Hope home

② Carpet Fibers

① Blonde Hairs
- Lisa, DT hair strands

① Eyeglasses

FOIA# none (URTS 16333) docid: 70105370 Page 1

(KS) "as thorough as reasonably possible"

- poss. homicide/suicide of highest ranking official
- Fisk
- Rodriguez
- AIM, Ruby, et al.
- "age of Oliver Stone"

- Can't be myopic; go abt case blindly
- The extra mile & then some.

- convey "a spirit of open-mindedness" ...
- genuine, fervent, passionate objectivity

- going to county [cp. Bdy Dir. ZBM] - did everything that was reasonable.

(EL)

MISSION

(1) (A) 70% suicide possibility

defend suicide position

[JB - doesn't it depend on whr. 55%/45%...]

(OR)

(B) present both sides - don't draw conclusions -

Agree w/ "thorough" vs. "non-thorough" -

(2) Extraneous Issues?

Theories - 1) fed up w/ life - suicide

2) Killed elsewhere - [or suicide elsewhere] - moved to park

3) met someone at Park - staged suicide.

State of Mind

vs.

motive

Why? . If depressed - why?

. If murdered - why?

. Severe financial problems - ?

Complete financial analysis

Rebut -

"if you had just - - - - "

3 inconsistencies - now 13

"regular tsar of Babel out there"

C.P. Proposed CFR -

cmts

EIS -

cmts

Unanswered Q's -

KS - "The WSJ counts w/ the cognoscenti in the country"

"charged relationship" - love vs. unwanted spouse - -

stren - geographic bachelors - -

BK - "fact hungry"

CIA - Cray Computer -
Systematics
Intelligence Community
In part - INSLAW
5th Column -
VF + 4 -

massad → $ → this account

→ IRS Agent - Financial
Do it!

Corby - FBI - + others > Not big on searching porn

TO: BRETT KAVANAUGH

Revised 5/30/95

FROM: SA FOIA(b)7 - (C)

SUBJECT: DISCREPANCY LIST

The following list is offered as a comprehensive and itemized outline of all of the noted discrepancies, inconsistencies, and problems that have been identified in the Vincent W. Foster death investigation to date. The outline is broken down into the following areas: U.S. Park Police, Emergency Medical Technicians (EMTs), the White House, Northern Virginia Medical Examiner, Miscellaneous, and Forensic Examinations.

I. U.S. Park Police

A. No gunshot residue samples of the decedent's hands.

B. Lack of complete documentation of the gunshot residues on the left hand.

C. Poorly diagrammed death scene; lack of measurements.

D. No photo log; no documentation regarding who took what photographs, and the total number of photos.

E. Death scene 35mm photos did not develop.

F. No documentation regarding the initial search of the decedent's vehicle at the death scene- no inventory.

G. Photo of an unidentified briefcase next to a U.S.P.P. vehicle.

H. Decedent's pager returned too soon; no records obtained regarding previous pages.

I. Suicide weapon processed with dust prior to other laboratory exams.

J. Inconsistent statements regarding moving and searching the body. (Rolla, Braun, Simonello, Hodakaviec)

K. Inconsistent and poorly documented autopsy.

1. Morrissette's report.

2. No gunshot residue samples from hands.

3. No fingernail clippings/scrapings.

4. No major case prints of decedent (palms, sides and tops of fingers).

5. No photo of left hand.

6. Possible contamination of evidence subsequent to autopsy at M.E. Office.

7. Inconsistent statements regarding what was done to the body prior to autopsy.

8. No description of body and clothing prior to autopsy.

1- Tuohey
1- Kavanaugh
1- Gillis
1-Greene
1 FOIA(b)7 - (C)
(1)-29D-LR-35063

29D-LR-OIC-35063 SUB 17

SEARCHED
SERIALIZED
JUN 12 1995
FBI

L. Possible contamination of evidence at U.S. Park Police facility.

M. Poor interview and documentation of witnesses at death scene (Doody and Feist).

N. Photo of an unidentified white male wearing plainclothes at death scene.

O. Inconsistent statements regarding vehicle doors being locked/unlocked. (Braun, Rolla, Hodakievic, Simonello, Gavin)

P. All photographs not produced pursuant to initial subpoena.

Q. Inadequate and incomplete metal detector search by the USPP. (Operators had no prior experience or training)

II. Inconsistent statements and observations of Fairfax County Fire and Rescue personnel.

A. Wound on neck (Arthur: .45 cal. bullet hole.)

B. Gun under thigh.

C. Wound on upper right front of skull (Gonzales)>

D. Briefcase in vehicle.

E. Unidentified person in woods (Hall).

F. Vehicle doors locked.

G Death scene photos do not accurately depict scene.

H. Two unidentified white males walking from death scene.

I. Color of gun was silver.

J. Type of gun was semiautomatic pistol (Arthur).

K. Statements of initial paramedics at scene regarding their actions are inconsistent with Fairfax County paramedic protocols.

L. Report coded as a homicide (Ashford).

III. Medical Examiner

A. X-rays

1. Autopsy report indicates x-rays were taken.

2. Morrissette's report indicates Beyer told him x-rays were taken.

B. All individuals present at autopsy not indicated on autopsy report.

C. No photographs of decedent's left hand.

D. Inconsistent statements regarding removal of decedent's tongue and palate. (see I.7)

E. Inconsistent "on-scene" times reported for Dr. Haut; 7:40 pm and 7:15.

F. Stomach contents; no definitive digestion time, or positive identification.

IV. White House

A. Foster's office unsecured until 7/21/93, approximately 10:10 a.m.

1. Patsy Thomasson, Maggie Williams, Bernie Nussbaum search Foster's office.

B. Confidential trash bag removed and replaced.

C. Nussbaum enters office; removes small photo.

D. Pond rearranges papers on Foster's coffee table.

E. Exclusive initial review of documents by Nussbaum.

F.Torn note found one week later in briefcase previously searched by Nussbaum.

G. Note not released to investigators until the following week; a day after it was discovered.

V. Miscellaneous
A. CW's inconsistencies.
1. positioning of decedent's hands.
2. no gun.
3. winecoolers and briefcase in vehicle.
4. trampled area around death scene.
5. does not see white car occupied.
B. Inconsistencies between Doody and Feist's statements.
C. No initial investigation of the park's "second entrance".
D. No one heard a gunshot.
E. The gun exemplifies a "drop gun".
F. No matching ammo at the decedent's residence.
G. The decedent's grip on the gun was not the simplest nor the easiest to shoot himself in the mouth.
H. The decedent never previously spoke of suicide.
I. The decedent had no particular obsession, "dire predicament", or one thing that would have put him over the edge.
J. The decedent had dealt with stress before.
K. The suicide weapon has never been positively identified as belonging to the decedent.
L. Lisa Foster's initial spontaneous question "was the gun in his mouth?".
M. Five unaccounted for hours between the time the decedent left work and was discovered dead.
N. Lack of blood at death scene.
O. No bullet.
P. No cadaveric spasm causing decedent to clench gun.
Q. The gun did not fly out of the decedent's hand.
R. No chipped teeth noted by M.E.
S. No flashburns inside mouth noted by M.E.
T. The mortician lost the original embalming report and diagram.
U. The decedent's glasses were discovered 13' downslope from his body.
V. Body neatly laid out; "as if it was in a coffin".
W. Fairfax Hospital Laboratory Supervisor statement re-gunshot wound to middle of head.

VI. Forensic Examinations
A. Unidentified latent print on note.
B. Unidentified latent print inside grip of suicide weapon.
C. Unidentified blonde head hairs.
D. Unidentified carpet fibers.
E. Unidentified stain on shirt. (shirt being resubmitted to lab)
F. Unidentified gunpowder in scrapings from decedent's shoes and socks, and the paper that they were dried on.
G. The decedent's head was moved.

H. No blood on suicide weapon.
I. No soil on shoes. (mica flakes)
J. Large semen stain in the decedent's underwear.
K. Blood flowed uphill (video).
L. Excavation of site disputed.
M. Helen Dickey telephone call to Roger Perry.
N. Inconsistent vegetation at death scene.
O. Committed suicide at an unfamiliar location.
P. No suicide note.
Q. No previous mention of suicidal intent.
R. Ate lunch prior to committing suicide.
S. Jeff McGaughey's (intern) statements are inconsistent with Officer Watson's (they were together at death scene).

Memorandum **Office of the Independent Counsel**

To : AC BRETT KAVANAUGH Date 7/10/96

From : SA JAMES T. CLEMENTE

Subject: FBI LAB REPORT ADDENDUM

After meeting with DR. HENRY LEE and representatives of the OIC, the FBI Laboratory agreed to issue an addendum to their previous lab report (dated May 9, 1994) concerning soil and fiber evidence found on the shoes and clothing VINCENT W. FOSTER, JR. This addendum details the prior findings of the FBI Lab with greater specificity. In a criminal case, this kind of specificity is usually provided through the testimony of FBI scientists when the evidence is presented at trial. The FBI Lab has provided this information at this time to assist the OIC in making its report on FOSTER'S death.

The following is a summary of the attached addendum:

-In its original examination of FOSTER'S dress shirt, t-shirt, boxer shorts, suit pants, belt, socks, shoes and the paper these items had been wrapped in, the FBI Lab found trace amounts of loose, unconsolidated soil.

-These trace amounts of loose, unconsolidated soil do not amount to "coherent soil," which is soil that is held together as part of the same mass.

-Only "coherent soil" can be used to make a soil comparison because it is reasonable to conclude that soil that is held together as part of the same mass, originated from the same source or location. Conversely, loose, unconsolidated soil can not reasonably be said to have originated from a single source or location.

-When the sample of loose, unconsolidated soil is limited to trace amounts, additional uncertainty is introduced into the determination of source or origin of the sample.

-Mica was present in the trace amounts of loose, unconsolidated soil found on or with the above items.

-This soil could have originated from the micaceous soil found at Fort Marcy Park, however, since the sample is small and not "coherent" no definitive source determination can be made.

ITEM	CARPET FIBERS FOUND
Q4 - Suit jacket Q5 - Neck tie	-1 pale gray delustered trilobal fiber
Q8 - Dress shirt	-1 gray delustered trilobal fiber -1 blue delustered trilobal fiber
Q9 - T-shirt	-No carpet fibers
Q10- Boxer shorts	-1 white lustrous trilobal fiber
Q11- Suit pants & belt	-Several tan delustered trilobal fibers -1 gray/green delustered trilobal fiber -1 greenish delustered round fiber
Q12- Black sock (w/ red and green)	-1 white trilobal fiber
Q13- Black sock (w/ gold toe)	-No carpet fibers
Q14- Left shoe	-No carpet fibers
Q15- Right shoe	-1 white trilobal fiber
Q31- 2 Brown paper sheets	-1 white trilobal fiber -1 red delustered trilobal fiber

In summary the following carpet fibers were found:

-1 pale gray delustered trilobal fiber
-1 gray delustered trilobal fiber
-1 gray/green delustered trilobal fiber
-1 greenish delustered round fiber
-1 red delustered trilobal fiber
-1 white lustrous trilobal fiber
-3 white trilobal fibers
-1 blue delustered trilobal fiber
-Several tan delustered trilobal fibers
-[10 + several] total carpet fibers of nine different colors and types were found.

*No forensically significant number of one type of carpet fiber was found.

Memorandum **Office of the Independent Counsel**

To: Judge Starr
All Attorneys

Date: 8/15/98

From: Brett M. Kavanaugh BK

Subject: Slack for the President?

After reflecting this evening, I am strongly opposed to giving the President any "break" in the questioning regarding the details of the Lewinsky relationship -- unless before his questioning on Monday, he either (i) resigns or (ii) confesses perjury and issues a public apology to you. I have tried hard to bend over backwards and to be fair to him and to think of all reasonable defenses to his pattern of behavior. In the end, I am convinced that there really are none. The idea of going easy on him at the questioning is thus abhorrent to me.

What has especially convinced me of the appropriateness of obtaining his "full and complete" testimony regarding the precise details of the relationship are the sheer number of his wrongful acts. The President has disgraced his Office, the legal system, and the American people by having sex with a 22-year-old intern and turning her life into a shambles -- callous and disgusting behavior that has somehow gotten lost in the shuffle. He has committed perjury (at least) in the Jones case. He has turned the Secret Service upside down. He has required the urgent attention of the courts and the Supreme Court for frivolous privilege claims -- all to cover up his oral sex from an intern. He has lied to his aides. He has lied to the American people. He has tried to disgrace you and this Office with a sustained propaganda campaign that would make Nixon blush.

He should be forced to account for all of that and to defend his actions. It may not be our job to impose sanctions on him, but it is our job to make his pattern of revolting behavior clear -- piece by painful piece -- on Monday. I am mindful of the need for respect for the Office of the President. But in my view, given what we know, the interests of the Office of the President would be best served by our gathering the full facts regarding the actions of this President so that the Congress can decide whether the interests of the Presidency would be best served by having a new President. More to the point: Aren't we failing to fulfill our duty to the American people if we willingly "conspire" with the President in an effort to conceal the true nature of his acts?

* * *

In light of all of that, I suggest at least some questions along the following lines (I leave

the best phrasing to others).

Did you tell Monica Lewinsky that she should deny the nature of the relationship that you and she had?

If Monica Lewinsky says that you agreed to lie about your relationship with her, would she be lying?

Would Monica Lewinsky be lying if she said that you told her after her name appeared on the witness list: "You could always say you were coming to see Betty or that you were bringing me letters"?

If Monica Lewinsky says that you inserted a cigar into her vagina while you were in the Oval Office area, would she be lying?

If Monica Lewinsky says that you had phone sex with her on approximately 15 occasions, would she be lying?

If Monica Lewinsky says that on several occasions in the Oval Office area, you used your fingers to stimulate her vagina and bring her to orgasm, would she be lying?

If Monica Lewinsky says that she gave you oral sex on nine occasions in the Oval Office area, would she be lying?

If Monica Lewinsky says that you ejaculated into her mouth on two occasions in the Oval Office area, would she be lying?

If Monica Lewinsky says that on several occasions you had her give her oral sex, made her stop, and then ejaculated into the sink in the bathroom off the Oval Office, would she be lying?

If Monica Lewinsky says that you masturbated into a trashcan in your secretary's office, would she by lying?